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The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance

James A. Fanto
Brooklyn Law School, james.fanto@brooklaw.edu

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*James A. Fanto**

I. INTRODUCTION

U.S. corporate law scholars have recently recognized that, even in developed Western countries, there have been different solutions to the classic agency problem,[1] arguably the primary focus of corporate law that governs the relationship between owners and managers in the large public corporations which are so important in the world economy.[2] Scholars have also acknowledged that these solutions, which

* Associate Professor of Law, Brooklyn Law School. B.A., Univ. of Notre Dame; M.A., Ph.D., Univ. of Michigan; J.D., Univ. of Pennsylvania. I thank Jill Fisch, Roberta Karmel, Edmund Kitch, Bailey Kuklin, Arthur Pinto, Norman Poser, and Spencer Waller for reviewing an earlier draft of this Article; Amy Cagin and Elias Tzavelis (both Brooklyn Law School, class of 1996) for their research assistance; and Dean Joan Wexler and Brooklyn Law School for a summer stipend that supported my research and writing. The Article is dedicated to the memory of Joseph Roslanowick (1959-1995), who was a U.S. lawyer in Paris, and a friend.

[1] The problem arises from the separation of ownership and control in large public corporations. Corporations need large amounts of capital, which numerous, dispersed investors help to supply, to compete in expanded national and international markets. Because investors generally have few funds committed to any one enterprise, they do not find it cost efficient to monitor management. Since management's interests are different from those of shareholders, management may use its control of an enterprise to pursue its own goals at the expense of shareholder owners. The problem for shareholders is how to minimize management's self-interested behavior. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 78-82 (Transaction Publishers, Murray L. Weidenbaum & Mark Jensen, int., reprinted 1991); John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 838 (1994). *See also infra* subpart IIB1.

[2] *See, e.g.*, Ian Ayres & Peter Cramton, *Relational Investing and Agency Theory*, 15 CARDOZO L. REV. 1033, 1036 (1994) (citing OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS

fall under the general heading of corporate governance,[3] do not arise solely from the evolution of some fundamental economic order or logic, but are shaped by social, political and, more generally, cultural forces, often unique to a particular country.[4] In their studies they

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OF CAPITALISM 298-325 (1985)) (arguing that the goal of corporate law is to establish rules that align the interests of managers with those of shareholders in the most cost-efficient manner).

[3] According to Professor Mark J. Roe, U.S. corporate governance is simply "the relationship among a firm's shareholders, its board of directors, and its senior managers." *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE vii (1994). In other countries, additional constituencies may be involved in corporate governance. *See, e.g., infra* subpart IVA.

[4] The foremost U.S. advocate of this position is Professor Roe, who explains the development of U.S. corporate governance from a political perspective. *See* ROE, *supra* note 3, at ix ("American corporate structures are in considerable part the result of political decisions, many long forgotten, about the organization of financial intermediaries."). *See also* Mark J. Roe, *A Political Theory of American Corporate Finance,* 91 COLUM. L. REV. 10 (1991). According to Professor Roe, economic developments led to the rise of the large public corporation, with dispersed shareholders and professional managers. How a particular country responds to this phenomenon to produce a corporate governance "equilibrium" or solution characteristic of that country depends upon numerous ideological, political and historical – in sum, "cultural" – factors, in addition to economic forces. *See* ROE, *supra* note 3, at 24-25.

Many studies of comparative and foreign corporate governance highlight the historical and cultural nature of solutions to the corporate agency problem. *See, e.g.,* Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation,* 92 MICH. L. REV. 1997 (1994); Richard M. Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective,* 57 BROOK. L. REV. 1 (1991) (discussing corporate governance in Germany); James A. Fanto, *The Transformation of French Corporate Governance and United States Institutional Investors,* 21 BROOK. J. INT'L L. 1 (1995) (discussing French corporate governance); Ronald J. Gilson & Reinier Kraakman, *Investment Companies as Guardian Shareholders: The Place of MSIC in the Corporate Governance Debate,* 45 STAN. L. REV. 985 (1993) (discussing Swedish institutional investor monitoring); Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization,* 102 YALE L.J. 871 (1993) (discussing structure of Japanese corporate governance); Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States,* 102 YALE L.J. 1927 (1993) (comparing corporate governance in listed countries). *But see* Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States,* 48 STAN. L. REV. 73 (1996) (arguing that U.S. corporate governance studies "romanticize" foreign corporate governance and overlook the weakness of foreign systems); J. Mark Ramseyer, *Columbian Cartel Launches Bid for Japanese Firms,* 102 YALE L.J. 2005 (1993) (questioning the value of studies in comparative corporate governance, given the relative unimportance of governance as opposed to capital and product market competition in a firm's success); Roberta Romano, *A Cautionary Note on Drawing Lessons From Comparative Corporate Law,* 102 YALE L.J. 2021 (1993) (similar skepticism about the importance of corporate governance for increasing shareholder value).

Non-U.S. academics and writers have also examined their own, and other, corporate governance systems. *See, e.g.,* JONATHAN P. CHARKHAM, KEEPING GOOD COMPANY: A STUDY OF CORPORATE GOVERNANCE IN FIVE COUNTRIES 248-343 (1994) (discussing U.K. corporate governance and, among other things, reforms proposed by Cadbury Committee); CONFERENCE ON INSTITUTIONAL INVESTORS (Theodor Baums ed., 1992) (collecting essays on the role of institutional investors in different jurisdictions); CONTEMPORARY ISSUES IN CORPORATE GOVERNANCE (D.D. Prentice & P.R.J. Holland eds., 1993) (collecting essays on corporate governance topics); EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONI-

have thus emphasized cultural differences and historical influences in the emergence of corporate governance systems.[5] Culture means here the conceptual framework whereby individuals, generally citizens of the same country, make sense of and justify the world, including their actions and those of others.[6]

This development in corporate law scholarship makes sense because of the important phenomenon of globalization or internationalization of securities markets, investments and of corporate finance.[7]

ZATION (Richard M. Buxbaum *et al.* eds., 1991) (reviewing worldwide harmonization and capital market developments); EUROPEAN TAKEOVERS – LAW AND PRACTICE (Klaus J. Hopt & Eddy Wymeersch eds., 1992) (looking at different European corporate governance systems with a focus upon takeovers); 4 RICHARD M. BUXBAUM AND KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE, in INTEGRATION THROUGH LAW (1988) (Reviewing harmonization of business law). Many non-U.S. academics and writers have emphasized the cultural complexity of corporate governance. *See, e.g.*, Olivier Pastré, *Le gouvernment d'entreprise: questions de méthodes et enjeux théoriques*, 31 REV. ÉCON. FIN. 15, 18-19 (1994); Jean-Marie Thiveaud, *De la gouvernance des grandes sociétés: un incessant différend dans l'espace et le temps*, 31 REV. ÉCON. FIN. 243, 256 (1994).

[5] The dominant U.S. paradigm for corporate law scholarship is based upon law and economics. *See* Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 916 (1992) ("By all accounts, the integration of economics and finance theory into corporate law during the late 1970s and early 1980s brought it to the forefront of quality legal scholarship generally."). Some economists have recently explored the historicity, and even economic irrationality, of certain economic outcomes. *See, e.g.*, Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 362 (1994) ("History demonstrates that ideas, ideologies, myths, dogmas, and prejudices matter; and an understanding of the way they evolve is necessary for further progress in developing a framework to understand societal change."); Richard R. Nelson, Recent Evolutionary Theorizing About Economic Change, paper presented at the Columbia University School of Law Center for Law and Economic Studies Workshops, Fall 1994-1995, on "Path Dependency and the Evolution of Economic Practice and Institutions" (unpublished manuscript, on file with the author) (describing evolutionary theorizing in economics). *See generally* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996).

[6] The anthropologist Clifford Geertz has explained culture as follows:

> No matter how much one trains one's attention on the supposedly hard facts of social existence, who owns the means of production, who has the guns, the dossiers, or the newspapers, the supposedly soft facts of that existence, what do people imagine human life to be all about, how do they think one ought to live, what grounds belief, legitimizes punishment, sustains hope, or accounts for loss, crowd in to disturb simple pictures of might, desire, calculation, and interest.

CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 43 (1995). *See also* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 89 (1973) ("it denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.").

[7] *See, e.g.*, Richard C. Breeden, *The Globalization of Law and Business in the 1990's*, 28 WAKE FOREST L. REV. 509, 513 (1993) ("Capital will be king in the global economy. Those who have the capital to invest will seek to maximize their returns without regard for national boundaries or loyalties."); Joseph A. Grundfest, *Internationalization of the World's Securities Markets: Economic Causes and Regulatory Consequences*, 4 J. FIN. SERVICES RES. 349, 350 (1990) ("[T]he evidence shows that international investment activity has grown tremendously over the past dec-

U.S. investors, both institutional and retail, are investing in securities of foreign companies, whether in the U.S. markets or abroad.[8] Both U.S. and foreign world-class public companies, competing vigorously with one another in world product markets,[9] similarly compete for capital and financing flexibility in world financial markets.[10] United States legal academics who follow developments in business, as well as in corporate and financial law, thus encounter, among other non-U.S. phenomena, foreign companies and their governance.[11]

Because of the internationalization of markets, all corporate governance systems may not survive. Either one system may "make sense" and thus prevail in the developing global capital market, or, since cultural differences are slow to disappear, numerous systems may continue to co-exist and to interact in the foreseeable future.[12]

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ade, and there is reason to believe that international trading will continue to expand vigorously in the future."); Joel Seligman, *Another* Unspecial *Study: The SEC's* Market 2000 *Report and Competitive Developments in the United States Capital Markets,* 50 BUS. LAW. 485, 492 (1995) ("A second principal market dynamic in market regulation is internationalization."). For early, but significant, work on this subject, see Carl T. Bodolus, *The Internationalization of the Securities Markets,* 29 BUS. LAW. 107 (March 1974); Manuel F. Cohen, *Toward An International Securities Market,* 5 LAW & POL'Y INT'L BUS. 357 (1973).

8 U.S. institutional investors, which category includes pension funds, whether private or public, insurance companies, mutual funds and bank collective trust funds, are clearly making significant offshore investments, *See, e.g.,* Fanto, *supra* note 4, at 10-15 & accompanying notes, as are retail investors, either through these institutional investors or individually. *See* Seligman, *supra* note 7, at 491-95 (describing the increase in the number of retail investors and speculating whether, given improvements in technology, retail investors can easily invest directly offshore). United States investors, whether retail or institutional, may purchase and hold foreign shares directly in the foreign market or indirectly in the United States through shares, evidenced by American or Global Depositary Receipts ("ADRs" or "GDRs") that represent an interest in the underlying foreign securities. *See generally* Joseph Velli, *American Depositary Receipts: An Overview,* 17 FORDHAM INT'L L.J. S38 (1994). A sign of the importance of foreign shares to *all* U.S. investors is that Morningstar, a private company providing information on mutual funds and shares, covers investments in ADRs. *See* MORNINGSTAR, DECISION-MAKING TOOLS FOR BETTER INVESTING 30-31 (1995).

9 *See, e.g.,* Klaus Schwab & Claude Smadja, *Power and Policy: The New Economic World Order,* 72 HARV. BUS. REV. 40, 41 (Nov.-Dec. 1994) ("Corporations and countries must now compete not only against rivals in their own league but also against a continual stream of newcomers, while at the same time playing catch-up with competitors claiming to have made the latest break-throughs.").

10 *See, e.g.,* Ramseyer, *supra* note 4, at 2006 (arguing that, unless a company has the flexibility to offer securities in different markets, it will be disadvantaged in global product competition).

11 Since casebooks generally tend to reflect "settled" concepts in a field, that globalization has found its way into casebooks underscores its importance. *See, e.g.,* HAL S. SCOTT & PHILIP A. WELLONS, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION (2d ed., 1995) (including chapters on internationalization of U.S. securities markets and securities markets in the European Union and Japan).

12 Another way of putting the issue is to ask whether, in the developing global market, corporate governance systems are "converging". *See, e.g.,* Buxbaum, *supra* note 4, at 21-22. *See*

Under any view on the evolution of worldwide corporate governance, however, scholars must understand existing corporate governance systems as cultural products. If these systems are viewed as evolving towards a single model, it is useful to comprehend the cultural factors that either hinder or help a particular country's system move towards that model. If different corporate governance systems survive, their cultural origins should be examined and understood all the more. There is also an increased practical need to comprehend these systems since many U.S. investors are under legal obligations to take seriously foreign corporate governance.[13]

U.S. investment and financial communities, and legal academics, must therefore understand foreign corporate governance as a complex cultural product.[14] They should also realize that an outsider may find

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also Fanto, *supra* note 4, at 71-74 (discussing possible directions in the transformation of French corporate governance); Julian Franks & Colin Mayer, *Capital Markets and Corporate Control: A Study of France, Germany and the UK, in* 10 ECON. POL'Y 189, 215 n.8 (Apr. 1990) (arguing that there is no clear merit to one country's solution to the agency problem over another); Macey & Miller, *supra* note 4, at 107-108 (describing obstacles to convergence in Germany, Japan and the United States); ROE, *supra* note 3, at 222-25 (questioning whether German, Japanese and U.S. corporate governance are in fact evolving towards a single model); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 136-37 (1993) (pointing out that market conditions supporting corporate governance solutions in certain jurisdictions may be disappearing). *Cf.* Paul David, *Heroes, Herds and Hysteresis in Technological History: Thomas Edison and 'The Battle of the Systems' Reconsidered,* 1 INDUS. & CORP. CHANGE 129, 139 (1992) (describing how the triumph and the endurance of a particular technology may be due not so much to its efficiency, as to the institutional advantage of being the first technology to be established).

13 *See, e.g.,* Department of Labor Pension and Welfare Benefits Administration Interpretive Bulletin, 59 Fed. Reg. 38,860, 38,861 (1994) (stating that plan officials have the same fiduciary responsibility to vote proxies in foreign companies as they do with respect to U.S. corporations: "[I]t is the Department's view that the same principles apply. Namely, plan fiduciaries have a responsibility to vote proxies on issues that may affect the value of the [foreign] shares in the plan's portfolio.").

14 This statement in fact includes an assumption: that corporate governance affects the profitability of companies and thus the economic life of the country in which companies are located. *See, e.g.,* ROE, *supra* note 3, at ix ("But although poor governance did not spark failure, better governance might have snuffed out the fire when it was a spark and not a conflagration. Economic and technological change set up the problem, but corporate governance – how and whether those at the top of the firm reacted – influenced whether the firms succeeded despite the challenge."); Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting,* 94 COLUM. L. REV. 124 n.1 (1994) ("Corporate governance matters, however, because management matters."); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems,* 48 J. FIN. 831, 847 (1993) ("In industry after industry with excess capacity, managers fail to recognize that they themselves must downsize; instead they leave the exit to others while they continue to invest. When all managers behave this way, exit is significantly delayed at substantial cost of real resources to society."); W. Carl Kester & Timothy A. Luehrman, *Rehabilitating the Leveraged Buyout,* 73 HARV. BUS. REV. 119, 128 (May-June 1995) ("The first lesson may be obvious, but it bears repeating: How a company is governed matters."); Andrei Shleifer & Robert W. Vishny, A Survey of Corporate Governance, Center for Research in Security Prices, The University of Chicago Graduate School of Business 13 (Sept.

cultural differences, characteristics and pressures often difficult to understand and sometimes even to recognize as differences. Foreign corporate governance is complexly determined by the pressures of a given historical context, and thus requires a special effort for an outsider to comprehend.[15] A foreign system is not unknowable, but knowledge of it requires a different effort than an uncritical application of one's own conceptual and cultural perspective, which will highlight only issues of concern to that perspective, but of little importance to the foreign system. Understanding a foreign corporate governance system involves an effort to embrace the perspective of and to enter into a dialogue with those living in the other system.[16]

This Article examines how well the mandatory disclosure system established under U.S. securities laws and regulations leads foreign companies to provide U.S. investors with a useful *cultural* account of foreign corporate governance. The federal securities laws, and rules and regulations of the Securities and Exchange Commission (SEC), make corporate governance a required subject of disclosure for certain foreign companies, generally those publicly selling their securities to U.S. investors or listing their securities on U.S. securities exchanges or exchange equivalents.[17] This disclosure, moreover, is the only legally, as opposed to market, mandated public discussion of the topic in the United States, and liability under the same securities laws is designed to ensure its accuracy.[18] It is thus appropriate to ask whether SEC mandatory disclosure is sensitive to cultural differences in corporate governance.

1995) (unpublished paper on file with the author) (refuting arguments downplaying importance of corporate governance).

15 Determinism here should not conjure up simple notions of cause and effect, but multiple pressures interacting and reacting in complex ways. *See, e.g.,* ROE, *supra* note 3, at 207 ("The fact that law and regulation is a multidimensional drama, with real (and perceived) goals of preventing abuse or stabilizing institutions as one of the dimensions, takes nothing away from the claim that politics, ideology, and interest groups are key to another dimension of that lawmaking."). *Cf.,* Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation,* 93 MICH. L. REV. 649, 653 (1995) ("the contextualist approach attempts a more ambitious description of the legal – meaning statutory, rule, and agency interpretation – historical, and empirical framework of specific problems").

16 *See, e.g.,* GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 6, at 13 ("We are seeking, in the widened sense of the term in which it encompasses very much more than talk, to converse with them, a matter a great deal more difficult, and not only with strangers, than is commonly recognized."). It is important here neither to exaggerate, nor to downplay, the problems of cross-cultural communication about foreign corporate governance. *See infra* subpart IVB.

17 *See infra* subpart IIA.

18 *See infra* subpart IIA.

The history of SEC mandatory disclosure of foreign corporate governance shows that this system has led foreign companies to provide U.S. investors with little meaningful information about their governance. A product of U.S. culture, the U.S. disclosure system was designed to identify corporate governance information that is significant from a U.S. perspective. This history reveals that, guided by statute and unwilling to adapt this perspective to foreign contexts, the SEC always believed that the only relevant corporate governance information, even on foreign companies, was that identified by the U.S. mandatory disclosure requirements. It thus took the position that foreign companies should generally meet the same disclosure requirements on corporate governance as U.S. companies.

Despite the SEC's belief and avowed position, as mandatory disclosure evolved, foreign companies have not had to provide the same corporate governance information as U.S. companies. They have been required, in fact, to supply U.S. investors with the barest of an outline of this information. History shows that several interrelated reasons determined this outcome: early SEC accommodations with foreign companies that endured, primarily because of inertia; the SEC's acknowledgement of the jurisdictional and other legal problems of regulating foreign companies and its concern to preserve U.S. markets for foreign securities; special interest pressures; and the agency's efforts to maintain its importance in U.S. and international securities regulation.[19] This outcome did not also mean that the SEC finally learned to be sensitive to cultural differences in foreign corpo-

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19 Public choice theory and bureaucratic organization theory help explain the importance of special interests and of SEC efforts at self-preservation in this history. For representative works on these theories as applied to the SEC, *see, e.g.*, JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 24-27 (1991) (general description of theories); SUSAN M. PHILLIPS & J. RICHARD ZECHER, THE SEC AND THE PUBLIC INTEREST 22-24 (1981) (examination of SEC regulations from public choice perspective); Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation,* 47 WASH. & LEE L. REV. 527, 528 (1990) ("Public choice theory posits that far from seeking any independent conception of the 'public good,' regulators simply and rationally seek to maximize their own level of external support, and thus frequently allocate wealth (in the form of regulatory subsidies and/or restraints on competition) to those groups that bid the highest in terms of such support."); Donald C. Langevoort, *supra* note 5, at 888 (describing public choice and bureaucratic dominance theories). *See also* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty,* 15 CARDOZO L. REV. 909, 913 (1994) (arguing from a public choice perspective that the SEC is manufacturing reasons for its continued existence); Jonathan R. Macey, *A Rejoinder,* 16 CARDOZO L. REV. 1765, 1789-90 (1995) (same). *But see* Langevoort, *supra* note 19, at 532-39 (describing alternative accounts to pure public choice explanation of SEC behavior); David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey,* 16 CARDOZO L. REV. 1765 (1995) (same). In a major criticism of the SEC's administration of the mandatory disclosure system, Homer Kripke highlighted the social and agency self-preserva-

rate governance and understood the importance of designing disclosure requirements that would elicit a meaningful understanding of foreign corporate governance for U.S. investors. Rather, the SEC maintained its belief in the primacy of the U.S. disclosure system while accepting, for the above reasons, a minimal corporate governance disclosure for foreign companies. United States investors simply had to find corporate governance information on these companies elsewhere.

The SEC is at a crossroads: it could acknowledge what it has in fact already done by taking the additional step of eliminating the few remaining disclosure requirements on corporate governance for foreign companies, or it could amend the mandatory disclosure system to enhance cross-cultural communication on this subject. The Article argues that the SEC should now take the latter road. Even if fully applied to foreign companies, the U.S. disclosure system may well miss or obscure information that is significant in a foreign corporate governance context. United States investors need not only corporate governance information about foreign companies but also a conceptual framework that will help them understand this information. The Article thus proposes that the SEC impose an open-ended disclosure requirement on foreign companies to make them provide U.S. investors with both culturally significant corporate governance information and the relevant conceptual framework. The SEC disclosure system must make foreign companies translate for U.S. investors cultural differences in corporate governance.

As background to the history of SEC disclosure on foreign corporate governance, Part II of the Article first outlines the basic structure of SEC mandatory disclosure. It next describes, in general terms, the interrelationship between the disclosure system and the U.S. solution to the corporate agency problem. With reference to two major accounts of U.S. corporate governance, this Part explains that the opposition between strong managers and relatively powerless owners in

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tion reasons for SEC behavior. *See* HOMER KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 2-7, 13-20, 37-47 (1979).

Sociological literature emphasizes how professionals, and groups thereof, attempt to maximize the demand for their expertise and skills. *See, e.g.*, YVES DEZALAY, MARCHANDS DE DROIT: LA RESTRUCTURATION DE L'ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT (1992); Yves Dezalay, Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena, Faculty of Law Library, University of Toronto (Jan. 27, 1995) (unpublished paper, on file with the author); Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995).

U.S. corporate governance is a product of U.S. culture. It then suggests that the SEC disclosure framework on corporate governance, which is a product of the same culture, is closely interconnected with, and designed to address problems related to this power sructure. The disclosure system compels companies to give U.S. shareholders "facts" that are relevant in a governance world where managers can exploit their position at the expense of dispersed shareholders. Although the system does not encourage companies to explain these "facts", U.S. investors, familiar with U.S. corporate governance because of their own cultural background, can interpret the information appropriately.

Part III first shows that, for some thirty years after passage of the Securities Act of 1933 (Securities Act)[20] and the Securities Exchange Act of 1934 (Exchange Act),[21] the SEC paid little attention to disclosure requirements for foreign companies and particularly those relating to their governance. It generally treated foreign companies like U.S. companies, with several significant exceptions. This SEC approach made sense because at that time few foreign companies either offered or listed their equity securities in the United States.

Next, Part III discusses how the SEC squarely faced foreign issuer disclosure and increased U.S. trading in foreign securities when the 1964 amendments to the U.S. securities laws, through Section 12(g),[22] potentially brought a new group of foreign companies, those traded in the over-the-counter markets, within Exchange Act reporting requirements. While modestly increasing corporate governance disclosure for listed foreign issuers, the SEC exempted from U.S. reporting obligations this new group of foreign issuers by promulgating a rule that required them to file with the SEC information they otherwise disclosed in their home countries. Yet, in the discussions preceding adoption of the exemption, the SEC always affirmed that its disclosure framework, and implicitly U.S. corporate governance, were the models to which all countries and companies should aspire. In other words, the SEC did not offer foreign issuers the exemption because of its realization that corporate governance systems were different and thus demanded a different kind of disclosure. As Part III also explains, this episode identifies both the policy and pragmatic reasons, as well as other factors, such as interest group pressure and the SEC's desire to maintain its own importance, that determined the exemp-

20 15 U.S.C. §§ 77a-77bbbb (1994).
21 15 U.S.C. §§ 78a-78kk (1994).
22 *See* 15 U.S.C. §78*l* (1988).

tion, and that would continue to influence SEC policy on foreign corporate governance disclosure.

In addition, Part III considers an aggressive SEC attempt in the late 1970s to extend to foreign companies registering their securities under the Exchange Act nearly the full U.S. disclosure framework through a new reporting Form 20-F, and thus detailed corporate governance disclosure based upon the U.S. corporate governance perspective. The SEC justified its proposal on public interest grounds because of increased U.S. trading in foreign securities. It ultimately backed away from the proposal, however, at least as to foreign corporate governance disclosure, again because of special interest pressure, because of its desire to maintain its role in U.S. and world capital market regulation, and because of a real concern that foreign issuers could raise capital from U.S. investors outside U.S. securities markets. The resistance to its proposal did force the SEC to acknowledge differences between U.S. and foreign corporate governance. Yet it did not cause the SEC to shed its belief in the evolutionary primacy of the U.S. model and thus to consider designing an innovative disclosure framework to elicit information on foreign corporate governance. The SEC simply allowed foreign companies to use a skeletal outline of the disclosure framework for U.S. companies on corporate governance, which meant that foreign companies disclosed little – and no *meaningful* – information on this subject.

Finally, Part III shows that in the years following adoption of Form 20-F, the SEC had frequent occasion to revisit, and took significant actions pertaining to foreign company disclosure. This same period also saw considerable U.S. and foreign attention to and activity in corporate governance in which the SEC participated, generally by addressing corporate governance disclosure in U.S. companies. The SEC, however, never reconsidered its accommodations with foreign companies on their corporate governance disclosure, partly because, on foreign company disclosure matters, the SEC and its important securities industry constituencies directed their attention elsewhere. Yet studies on corporate governance should have suggested to the SEC that its foreign corporate governance disclosure requirements were serving no purpose and, if anything, allowing foreign companies to give U.S. investors misleading information.

Part IV of this Article proposes an SEC disclosure requirement (rather than an amendment to the federal securities laws) that would compel a foreign company better to communicate to U.S. investors the cultural particularities of its corporate governance against the

background of its country's corporate governance system. Part IV argues that, in promulgating the requirement, the SEC should abandon a view that it has never been able fully to put into practice, but to which it still subscribes: that the only "correct" corporate governance disclosure is that which comes from the application of full U.S. disclosure requirements. Because these requirements are a U.S. cultural product, they generally cannot highlight significant corporate governance information in other cultures and may well generate information that misleads U.S. investors. Since what U.S. investors need most of all is an explanation of any information provided about a foreign company's governance, reliance upon home country disclosure, which presumes that an investor understands a particular foreign culture, is also an inadequate model for reform.

Part IV thus proposes an open-ended disclosure requirement that would demand from a foreign issuer not so much a list of specific corporate governance information, but rather a cross-cultural explanation of the information provided. A foreign company would thus provide U.S. investors with an understanding of its management, shareholder rights, controlling parties or any other corporate governance information relevant to that company and country. The SEC could also implement the proposal by reinterpreting existing disclosure requirements for foreign companies. Part IV emphasizes that the success of the proposed reform depends upon the efforts of SEC staff and members of the practicing securities bar in effecting this cross-cultural communication on corporate governance.

Part IV next discusses several objections that arise from the current evolution of worldwide corporate governance and that could weigh against any change to the *status quo* of SEC foreign corporate governance disclosure. If, in the internationalization of markets, corporate governance and disclosure in most developed countries increasingly resemble U.S. corporate governance and SEC disclosure, the SEC has no reason to be concerned about disclosure of cultural specificities that are in fact disappearing. The SEC may also not have to revisit foreign corporate governance disclosure because no market problem exists: U.S. investors, whether institutional or retail, have access to other, better sources of information on foreign corporate governance. Large institutional investors have their global proxy services; all investors receive the benefits of technology that increasingly gives them access to significant amounts of information about foreign companies. If, moreover, a foreign market is efficient in at least a semi-strong sense, U.S. investors can rely upon the market price of a for-

eign company's securities which should reflect corporate governance information about the company. There is also the continuing policy concern that, if the SEC places an increased disclosure burden upon foreign companies, they will be further discouraged from entering U.S. capital markets.

Finally, Part IV argues that these objections, while important and necessary to examine and to continue to review, do not *now* undercut the need for reform of the SEC's disclosure requirements on foreign corporate governance. It is not *yet* possible to assert with confidence that the United States (or some new "international") model of corporate governance is triumphing throughout the developed world, that alternative sources provide U.S. investors with an adequate cultural understanding of foreign corporate governance or that market price communicates subtleties of corporate governance. Although foreign companies and U.S. market participants, such as investment banks, that have traditionally opposed enhanced disclosure burdens may resist increasing disclosure for foreign companies, some companies may find in the flexible proposal a possible competitive advantage. Part IV acknowledges, however, that, because of globalization of securities markets and investments, worldwide corporate governance continues to change, as do the nature of securities markets and investor access to information about this subject. Like many SEC regulations, therefore, the suggested reform is provisional and subject to future market developments.

II. SEC Mandatory Disclosure

A. The Structure of Mandatory Disclosure

United States securities laws and SEC rules and regulations impose disclosure obligations upon companies whose securities are offered, sold or traded in the U.S. public securities markets.[23] Under the Securities Act, which in general deals with the initial public offering and sale of securities by a company (commonly referred to as an "issuer"),[24] no public offer of securities can be made unless a registration statement as to such securities, which contains the selling document or "prospectus", has been filed with the SEC, and no public sale

23 See Cox, *supra* note 19, at 243-75, 697-716, 886-99; Richard W. Jennings, et al., Securities Regulation: Cases and Materials 151-249 (1992); 2 Louis Loss & Joel Seligman, Securities Regulation 599-620 (1993).

24 *See* 15 U.S.C. § 77b(4) (1988).

can be confirmed unless the SEC declares the registration statement effective.[25]

The Securities Act does not specify in detail the information a company must include in a registration statement. It refers to two schedules in the Act, one of which (Schedule A) identifies information and documents that should be included in, or attached to, a registration statement filed by an issuer that is not a foreign government or government-affiliated entity.[26] In addition, the Securities Act gives the SEC broad rule-making power regarding the content and filing of registration statements.[27] The disclosure requirements of the Securities Act are thus only the tip of the iceberg. The SEC has promulgated numerous, detailed rules and forms concerning the manner of filing and format of registration statements.[28]

The Exchange Act, which is generally understood to regulate securities markets,[29] also requires companies to disclose information. Section 12 of that Act specifies that any issuer either listing a security on a national securities exchange or having a certain asset size and number of shareholders must register its securities.[30] Issuers subject to Section 12's registration requirements must also file periodic and other reports with the SEC pursuant to Section 13.[31] Once again, de-

25 *See* 15 U.S.C. §§ 77e(a), (b) (1988). There are exemptions to the registration requirement for certain kinds of securities and securities offerings. *See* 15 U.S.C. § 77c (1988) (listing exempt securities, such as government securities); § 77d (specifying transactions exempted from the registration requirements, such as the classic "private placement" or secondary sale).

26 *See* 15 U.S.C. § 77g(a) (1988).

27 *See id.* The Exchange Act designated a new agency, the SEC, in place of the Federal Trade Commission, to have jurisdiction over the federal securities laws. *See* 15 U.S.C. § 78d (1988). *See also* Cox, *supra* note 19, at 21.

28 *See* 17 C.F.R. §§ 230.100-494 (1995) (rules for filing and content of registration statement); 17 C.F.R. §§ 229.10-915 (1995) (rules governing filing of forms); 17 C.F.R. §§ 232.10-903 (1995) (rules governing electronic filings). The major registration forms for public offerings by a U.S. issuer are the "S" forms (*e.g.*, S-1, S-2, S-3, S-4, S-8). Their respective use depends upon the kind of offering and security offered, as well as the issuer's status as a reporting issuer under the Exchange Act. *See* 17 C.F.R. §§ 239.11-.13 (1995) (eligibility requirements); Forms Under the Securities Act of 1933, *reprinted in* 2 Fed. Sec. L. Rep. (CCH) ¶¶ 7121-26 (S-1), ¶¶ 7141-46 (S-2), ¶¶ 7151-55 (S-3), ¶¶ 7161-65 (S-4), ¶¶ 7197-201 (S-8). *See generally* 2 Loss & Seligman, *supra* note 23, at 599-620. The SEC has promulgated different forms for foreign private issuers. *See infra* subpart IIID.

29 *See, e.g.*, Cox, *supra* note 19, at 15-21; 1 Loss & Seligman, *supra* note 23, at 228.

30 *See* 15 U.S.C. §§ 78*l*(a),(b) & (g) (1988). Section 12(g) (as modified by Rule 12g-1, 17 C.F.R. § 240.12g-1 (1995)) requires registration for an issuer that, on the last day of a fiscal year, has more than $5 million in assets and 500 shareholders of record. It thus reaches securities traded other than on a registered securities exchange, such as those quoted on the National Association of Securities Dealers Automated Quotations ("NASDAQ") system. *See generally* Cox, *supra* note 19, at 701-05; 2 Loss & Seligman, *supra* note 23, at 599-620.

31 *See* 15 U.S.C. §§ 78m(a),(b) (1988).

tailed SEC rules and forms provide guidance on the content and manner of filing of Exchange Act registration statements and reports.[32] Moreover, the Exchange Act disclosure requirements are now "integrated" with those under the Securities Act.[33]

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[32] Section 12(b) lists the general disclosure requirements of the Exchange Act registration statement. *See* 15 U.S.C. § 78*l*(b) (1988). Section 13(a) requires the SEC to promulgate forms for reporting purposes. *See* 15 U.S.C. § 78m(a) (1988). Detailed SEC rules and forms supplement these somewhat sketchy statutory requirements. *See* 17 C.F.R. §§ 240.12b-1 to 240.12h-4, (registration), §§ 240.13a-1 to 240.13b2-2 (reports), §§ 240.15d-1 to 240.15d-21 (reports for issuers having made public offerings) (1995). As in the case of Securities Act forms, the SEC has promulgated separate forms for U.S. issuers (*e.g.*, Forms 10 and 10-K) and for non-U.S. issuers (Form 20-F). *See* 17 C.F.R. § 249.240f (1995) (eligibility requirements); Forms under the Securities Exchange Act of 1934, *reprinted in* 5 Fed. Sec. L. Rep. (CCH) ¶¶ 27,301-02 (Form 10), ¶¶ 31,101-02 (Form 10-K), ¶¶ 29,701-27 (Form 20-F). *See generally* 2 LOSS & SELIGMAN, *supra* note 23, at 743-806 (discussing foreign private issuers). *See infra* subparts IIIC & IIID.

[33] Although much of the information required for Securities Act and Exchange Act disclosure is similar, for historical reasons and given the different purposes of the two Acts, the disclosure requirements were not "integrated" until the 1980s. *See* Milton H. Cohen, *"Truth in Securities" Revisited,* 79 HARV. L. REV. 1340, 1341-1342 (1968) (explaining historical reasons for different disclosure requirements). *See generally* VICTOR BRUDNEY & WILLIAM BRATTON, CASES AND MATERIALS ON CORPORATE FINANCE B-7 to B-10 (4th ed. 1993) (explaining the development of integrated disclosure); Seligman, *supra* note 15, at 683-92 (same). As a result of integration, an issuer publicly selling securities may be able to use abbreviated Securities Act disclosure forms and incorporate by reference information provided in prior Exchange Act filings. *See* Adoption of Integrated Disclosure System, Securities Act Release No. 6383, 47 Fed. Reg. 11,380 (Mar. 3, 1982) (for description of system and forms). There is also an integrated disclosure system for foreign companies. *See infra* subpart IIID. The SEC is now considering whether registration under the two Acts can be even further integrated by registering companies as opposed to securities. *See generally* John C. Coffee, *Re-Engineering Corporate Disclosure: The Coming Debate Over Company Registration,* 52 WASH. & LEE L. REV. 1143, 1155-72 (1995); Gerald S. Backman & Stephen E. Kim, *From Disclosure to Registration,* 5 BUS. LAW TODAY 53 (Jan.-Feb. 1996). United States Securities and Exchange Comm'n, Report of the Advisory Committee on the Capital Formation and Regulatory Process (1996).

The theoretical justification for integration came from the efficient capital market hypothesis ("ECMH"). In one of the seminal legal articles on market efficiency, Professors Gordon and Kornhauser define the term as follows:

> The efficient market hypothesis defines the best estimate of the financial returns of each security. Thus, a good estimate should take into account all available information about future prices. Prices are "efficient" in two senses: (1) the current price of a security best predicts its future price and (2) the prevailing price immediately assimilates new information provided to the market. As a consequence, no trader can earn (financial) arbitrage profits in an efficient market because no one can identify (except by chance) securities which are under- or overvalued.

See Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research,* 60 N.Y.U. L. REV. 761, 770 (1985). As Professors Gilson and Kraakman explained in a 1984 statement that still holds true today, "the [Efficient Capital Markets Hypothesis] is now *the* context in which serious discussion of the regulation of financial markets takes place." *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency,* 70 VA. L. REV. 549, 550 (1984). Efficiency may be empirically broken down into "weak", "semi-strong" and "strong" forms, depending upon the kind of information (*e.g.*, private, public or some combination of both) that the market "processes" into stock prices. *See id.* at 555-56. As Professors Gilson and Kraakman also caution, these categories are rough, empirical ones;

Issuers are subject to still other Exchange Act disclosure requirements. Section 14(a) requires issuers to comply with the SEC's rules and regulations governing solicitation of proxies.[34] Issuers generally seek proxies from, or the consent to cast the votes of, shareholders for the transaction of business at an annual meeting. Under the proxy rules, if an issuer requests proxies from shareholders, it must provide them with an annual report.[35] The Exchange Act also indirectly mandates disclosure through the rules of registered securities exchanges[36] and securities associations.[37] These rules generally require ongoing disclosure of information on companies whose securities are listed on an exchange or traded through the facilities of an association.[38]

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determining the actual efficiency of a market requires a focus upon the market mechanisms whereby information is processed into securities prices. *See id.* at 557.

If information in one of an issuer's SEC filings is reflected in market price, it makes no sense, and is burdensome and costly, to have the issuer repeat that information in another filing. *See generally* Langevoort, *supra* note 5, at 876-89 (discussing SEC's use of "semi-strong" version of the ECMH, *i.e.*, the market price reflects only public information available about a company, to justify the integrated disclosure system). For discussion of the ECMH in disclosure of foreign corporate governance information, see *infra* subpart IVB.

34 *See* 15 U.S.C. § 78n(a) (1988).

35 *See* 17 C.F.R. § 240.14a-3(d) (1995) (permitting integration of Form 10-K and this annual report).

Management and affiliates of an issuer also have disclosure obligations. Under Section 16(a) of the Exchange Act, officers, directors and beneficial holders of more than 10% of any class of an equity security of any company registered under Section 12 of the Exchange Act must file reports on their securities holdings in such company. *See* 15 U.S.C. § 78p(a) (1988). (Section 16 was extended to 10% holders by the 1964 amendments to the Exchange Act, *see* Pub. L. No. 88-467, § 8, 78 Stat. 565, *amending* Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p(a) (1964) (codified at 15 U.S.C. § 78p(a) (1988)). Detailed rules govern the manner and content of this disclosure. *See* 17 C.F.R. §§ 240.16a-1 to 240.16a-10 (1995). Disclosure is also required of persons whose acquisitions of any class of a registered equity security give them over five percent of that class. *See* 15 U.S.C. § 78m(d) (1988). *See also* 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1995). This subsection was added to the Exchange Act by the Williams Act, *see* Act of July 29, 1968, 82 Stat. 456, which regulates acquisitions and tender offers of shares of companies whose securities are registered under the Exchange Act. *See generally* JENNINGS, *supra* note 23, at 659-662.

36 *See* 15 U.S.C. § 78f (1988 & Supp. V 1993) (exchange registration); 15 U.S.C. § 78c(a)(1) (1988) (defining exchange). The largest U.S. exchanges are the New York Stock Exchange and the American Stock Exchange.

37 *See* 15 U.S.C. § 78*o*-5 (1988 & Supp. V 1993) (registration of securities associations). Only one association is registered under this provision, the National Association of Securities Dealers (the "NASD"). The NASD operates the NASDAQ system whereby market makers list bid/ask (*i.e.*, buy/sell) quotations for securities. As a result of a recent reorganization, the NASD now operates the NASDAQ through a subsidiary, the Nasdaq Stock Market, Inc. *See* United States Security and Exchange Comm'n, Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Market, Securities Exchange Release No. 34-37542, at 5 (1996).

38 *See, e.g.*, NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 202.05, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,520 (1995); [1996] Am. Stock Ex. Guide (CCH) § 401, ¶ 23,124A; NA-

SEC disclosure requirements thus compel a company raising capital in U.S. securities markets to provide information on a continuous basis to investors. Legal penalties assessed against parties failing to meet SEC disclosure obligations give information disclosed pursuant to SEC requirements a special status.[39] At a minimum, they ensure that issuers and others involved in a securities offering or listing take the disclosure seriously.[40]

B. U.S. Corporate Governance in Mandatory Disclosure

1. U.S. Corporate Governance

Two works, written sixty years apart, show that cultural forces created the U.S. corporate governance outcome and shaped solutions to its problems. According to Adolf A. Berle and Gardiner C. Means in their classic *The Modern Corporation and Private Property* and Mark J. Roe in his *Strong Managers, Weak Owners*,[41] technological

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TIONAL ASSOCIATION OF SECURITIES DEALERS INC. MANUAL, Schedule D., NASD Manual (CCH) ¶ 1802-72 (1995). *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 689-90 (1984) (explaining that such rules allow companies to provide a uniform disclosure to investors without incurring the costs of designing a disclosure framework). *See also infra* subpart IIID.

Whenever a company lists stock on a U.S. exchange or an automated quotation system of a registered securities association, it must comply with the listing standards and rules established by the organization. The compliance is an important part of the regulatory structure of the Exchange Act, in which Congress envisioned that exchanges and similar organizations (in SEC parlance "self-regulatory organizations") would supervise their participants, subject to SEC oversight. *See generally* COX, *supra* note 19, at 1188-93.

39 See COX, *supra* note 19, at 611-77, 717-822, 866-72 (insider penalties), 891-97 (penalties for proxy violations); 6 LOSS & SELIGMAN, *supra* note 23, at 2769-86 (general review of disclosure obligations and liability provisions under the Securities and Exchange Acts). Securities exchanges and associations can also sanction companies for failure to comply with disclosure obligations, with the ultimate sanction being delisting. *See* 4 LOSS & SELIGMAN, *supra* note 23, at 1897-1902 (involuntary delisting), 1905-06 (suspension of trading).

40 *See* Easterbrook & Fischel, *supra* note 38, at 679, 685 (arguing that mandatory disclosure with antifraud deterrent, if imposed in a cost-efficient way, may reduce a company's cost of capital, benefit investors' total return, and enable companies to reveal information without worrying about competitive harm from disclosure); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 52-53 (1983) ("By reducing the perceived risk of corporate securities, compulsory disclosure would tend to reduce the risk premia that issuers selling new securities would have to pay, thus increasing the funds available for economic growth."). *But see, e.g.*, Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 770-773 (1996) (arguing that the threat of liability actually hinders disclosure because firms understandably say as little as possible in SEC-filed documents so as to minimize their liability exposure); Macey, *supra* note 19, at 1783-85 (arguing that SEC mandatory disclosure is useless because high quality firms always have an incentive to disclose information to distinguish themselves from bad quality firms, and that high costs of meeting SEC disclosure requirements favor established firms at the expense of start-up ventures).

41 *See* BERLE & MEANS, *supra* note 1; ROE, *supra* note 3. Since U.S. corporate governance is a complex cultural product, literature on it comes from a number of disciplines, including law,

developments made possible large, complex economic tasks (such as the construction and operation of railroads) in a growing, increasingly industrialized United States in the middle of the nineteenth century. Businesses needed to attain a critical size to accomplish these tasks in national, as opposed to intrastate, markets.[42] Small regional businesses designed for local work with limited financial resources and management expertise were unsuitable for these new economic challenges.

Because the large enterprises most likely to flourish in these economic circumstances had capital requirements that local financing could not easily meet, they eventually turned to U.S. capital market investors.[43] Since these capital providers were geographically dispersed, numerous, and with small investments relative to a firm's overall capital, they would not have the same relation to, and control of, a firm as would owners of a small business. The complexity of the business and operations of these firms also demanded a technical and managerial expertise that professional or specialized training could give and that an owner/manager of a small business generally did not have. A new professionally-trained management class that acquired this expertise thus received enhanced status and control, while its new owners occupied a clearly secondary position.[44]

With some variations, this historical account could be given for other developed countries.[45] Where accounts diverge is in the corpo-

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finance, economics and management. *See, e.g.*, John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance As a Multi-Player Game*, 78 GEO. L.J. 1495 (1990) (perspective of law and economics); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831 (1993) (perspective from finance expert); John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003 (1993) (perspective from public policy expert).

42 *See* BERLE & MEANS, *supra* note 1, at 3-46; ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 146-47 (1977); ROE, *supra* note 3, at 2-8. *See also* BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 194-96 (1978) (discussing development of engineering schools and careers of engineers in new national corporate enterprises); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGIC ANALYSIS 122-24 (1977) (same).

43 *See* CHANDLER, *supra* note 1, at 146-47. Evidence shows that large firms now generate their funds primarily from retained earnings. *See generally* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 324-27 (4th ed. 1991). Such funds could be regarded as further (re)investments by a company's capital market investors. *Id.* at 324.

44 *See* BERLE & MEANS, *supra* note 1, at 3-140; CHANDLER, *supra* note 42, at 170 (describing the growth of managerial power); ROE, *supra* note 3, at 2-7.

45 *See* ROE, *supra* note 3, at 149, 198. The variations would depend upon the history of a country's technological developments, the size of its markets and the growth in the size of firms. *See* CHANDLER, *supra* note 42, at 499 ("Smaller and slower growing domestic markets in Western Europe and Japan lessened the interest of manufacturers in adopting new mass production

rate governance outcome. The U.S. outcome is, to use Professor Roe's words in his recent book, the situation of "strong managers, weak owners."[46] Dispersed capital market investors generally exercise little control over enterprises, which management dominate with their direct involvement with operations, their expertise and their access to information.

According to Professor Roe, the key to understanding U.S. corporate governance as a cultural product is to comprehend the complex forces that generated and maintained it. The forces include the powerful ideological component of populism with its suspicion of, and hostility to, concentrations of economic power, particularly in financial institutions.[47] United States populism helped to cause and to maintain a fragmentation of financial institutions and a separation of them from commercial enterprises. This result eliminated an alternative corporate governance outcome which developed in other countries where financial institutions hold large stakes in corporations and mediate the relation between dispersed investors and managers.[48]

As Professor Roe has also shown, other complex cultural forces, ranging from the economic to the political, determined a corporate governance "outcome", where managers were powerful and owners weak.[49] Interest groups, such as locally-based financial institutions and their regulators, benefitted from, and thus came to have a stake in, the outcome.[50] Federalist doctrines of government policy empha-

techniques and also reduced the incentive to build large marketing and purchasing organizations. In Britain and France producers continued to rely on middlemen to handle their more traditional wares, which in turn were produced in a more traditional craft fashion. Where large, integrated enterprises did appear, they remained small enough to be managed at the top by a small number of owners.").

46 *See* ROE, *supra* note 3 (title).

47 *See id.* at 28-36.

48 For Professor Roe, the role of financial institutions is critical to the corporate governance outcome. Either a country develops strong financial institutions that control management, or it does not. *See* ROE, *supra* note 3, at 277. *See also* Macey & Miller, *supra* note 4, at 77-81 (arguing that banks are particularly ill-suited to act as monitors for shareholders because of their focus upon protecting their loans to companies). An emphasis upon financial institutions, however, may obscure important features of other corporate governance systems that rely upon family or government control of corporations. *See infra* subpart IVA. *See also* CHANDLER, *supra* note 42, at 205 (describing historical importance of State enterprises in Europe).

49 As in all cultural discussions, particularly of a country as large and diverse as the United States, it is hazardous to make generalizations. *See generally* PIERRE BOURDIEU, LA DISTINCTION: CRITIQUE SOCIALE DU JUGEMENT 271-91 (1979) (discussing how, in a specific cultural setting, there are always groups (and subgroups) in active contests for supremacy). *See also* Pastré, *supra* note 4, at 24. While "reducing" the U.S. corporate governance outcome to several causes and groups, therefore, Professor Roe rightly stresses that a complex interrelation of these forces and groups, as well as other factors, produced it.

50 *See* ROE, *supra* note 3, at 42-45.

sized local, rather than national, control over economic life. By their actions and writings, public interest lawyers and thinkers often convinced politicians and ordinary citizens that large financial institutions were inimical to them.[51]

These cultural forces also enabled (and enable) specific strategies (and make impossible, or difficult, others) to address problems arising from the corporate governance outcome.[52] For example, executive compensation understandably became of concern in U.S. corporate governance where, because of their power, managers could exploit their position by giving themselves large benefits at shareholder expense.[53] Certain legal and business strategies have been taken, with varying degrees of success, to limit compensation abuses, or to use compensation instrumentally to better align management and shareholder interests.[54] In another cultural setting, executive compensation might not even be a problem if, under a different corporate governance outcome, a strong counterparty checks managers' power.[55]

2. *SEC Mandatory Disclosure and Corporate Governance*

The history of the Securities Act and the Exchange Act reveals that the cultural forces influencing the shape of U.S. corporate gov-

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51 *See id.* at 36-42, 45-48. *Cf.* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 131-57 (1995) (discussing intellectual and social background of legal supporters of New Deal's hostility to business).

52 *See* ROE, *supra* note 3, at 7-8 (describing standard U.S. solutions to agency problems: *e.g.*, outside directors, hostile takeovers, proxy battles, fiduciary duties placed upon directors and managers).

53 *See generally* WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 705-09 (7th ed. 1995) (describing current debates on executive compensation); GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES 241-52 (1991).

54 *See, e.g.*, Executive Compensation Disclosure, Securities Act Release No. 6962, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,056 (Nov. 12, 1992) (describing new SEC disclosure of executive compensation for U.S. public companies); James Heard, *Executive Compensation: Perspective of the Institutional Investor*, 63 U. CINN. L. REV. 749 (1995) (president of institutional investor advisory service describes activities of institutional investors aimed at reducing executive compensation abuses).

55 *See, e.g.*, CRYSTAL, *supra* note 53, at 204-23 (discussing compensation of non-U.S. executives); Pastré, *supra* note 4, at 32 (pointing out that the issue of executive compensation has not yet been significant in France). If, however, non-U.S. corporate governance systems "converge" towards a U.S. model, this issue may become more important abroad. *See, e.g.*, *Executive Pay; Random numbers*, ECONOMIST, June 3, 1995, at 62 (discussing heightened overseas focus on executive compensation, particularly in Britain [whose corporate governance system most closely resembles that in the U.S.]); Andrew Jack, *Lyonnaise des Eaux breaks ground over pay disclosure*, FIN. TIMES, June 30, 1995, at 21 (discussing how French company "breaks rank" with market custom by increasing disclosure about executive compensation).

ernance also led to mandatory disclosure.[56] Both Acts were part of a Congressional reaction to the Stock Market Crash of 1929 and both were fueled by a populist hostility to Wall Street and to the financial institutions of the day. Commercial and investment banks were understood to have encouraged speculation in worthless securities and to have manipulated securities trading for their benefit, at investors' expense.[57] Accompanying this populist distrust of financial institutions was a progressive, intellectual movement that was influential in the Roosevelt administration and Congress and that condemned the misuse of financial power.[58]

These populist and progressive forces also focused upon problems and abuses of U.S. corporate governance, some of which were related to financial institution involvement with commerce.[59]

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56 How, for the over 60 years of its existence, SEC disclosure interacted with, and responded to the particular problems in, U.S. corporate governance and what would be a cultural explanation of each episode of this interaction are beyond the scope of this Article. A *cultural* discussion of the relation of individual SEC initiatives to corporate governance requires identification and analysis of numerous relevant cultural forces (*e.g.*, interest group, ideological, bureaucratic, and political pressures). *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (1982). For specific examples of such analyses from political science and public choice perspectives, see ANNE M. KHADEMIAN, THE SEC AND CAPITAL MARKET REGULATION: THE POLITICS OF EXPERTISE (1992); PHILLIPS & ZECHER, *supra* note 19 (discussing, among other things, forces at work in disclosure, fixed commissions and market structure); Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. ILL. L. REV. 315 (discussing cultural forces involved in formation of national market system). *See also infra* Part III.

In a recent article, Professor Paul Mahoney argues that the historical origins of the securities laws demonstrate that they were designed to address management agency problems. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995). The agency problems he identifies in his analysis, however, are limited to the "start-up" or promoter phase of the formation of a corporation. *See id.* at 1052-54. In my view, the historical evidence shows that the securities laws had a broader focus on the agency problems arising from management abuse beyond the promoter setting. Yet, Professor Mahoney's emphasis upon corporate agency issues in SEC disclosure supports the general argument of this subsection.

57 *See* SELIGMAN, *supra* note 56, at 1-38 (describing reaction to Pecora Hearings of 1932-34 investigating abuses on Wall Street and in banks).

58 *See id.* at 39-72 (discussing the progressive orientation of the Roosevelt administration in securities matters and the figures in its "Brain Trust", such as Adolf Berle and Felix Frankfurter, influential in the design of the securities laws).

59 As noted above, Professor Berle was an important intellectual source of inspiration for the design of the securities laws, and his work on the U.S. corporate governance situation was specifically cited in Congressional hearings. *See, e.g.*, CONG. REC. 2917, *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, item 11, 175 (1983). *See also id.* at 2918, at 176 ("We have, on the one hand, 18,000,000 passive citizens having no actual contact with their companies; on the other hand, a few hundred powerful managers directing and controlling the destinies of the companies and the physical properties which they own.") (remarks of Mr. Rayburn referring to Professor Berle's work). *See also* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 3-5

Executives and directors of large public corporations, aided by investment and commercial banks, were seen to have used their dominant position to profit at shareholders' expense. With the help of financial institutions, management was shown to have manipulated information and trading activity to raise stock prices and then sell securities at these inflated prices. Management also received "gifts" from investment banks in the form of favorable prices for new issues in other companies, with the expectation that they would return the favor by giving banks or their securities affiliates the securities offering business of their companies.[60]

Some progressives saw the enactment of securities laws as an opportunity not only to address these problems of corporate governance, but also to change altogether its U.S. form.[61] Because they viewed the

(1934), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, item 18, at 3-5 (J.S. Ellenberger & Ellen P. Mahar, 1973). *Cf.* ROE, *supra* note 3, at 31-33 (observing that, in the debates on the federal securities laws, the hostility to large concentrations of financial power in the combined investment/commercial banks of the time indirectly maintained the U.S. corporate governance outcome, but that the actual limitations on U.S. financial institutions (which reduced their corporate governance role) came from banking regulation, such as the Glass-Steagall Act).

60 *See* SELIGMAN, *supra* note 56, at 33-35, 42-44, 87-88 (giving examples of management abuses in the sale of securities); Mahoney, *supra* note 56, at 1068-73 (describing promoters' abuses as provoking Congressional action); Seligman, *supra* note 40, at 45-46 & notes accompanying text. *See also* CONG. REC., *supra* note 59, at 2918, at 176 ("Today we are forced to recognize that the hired managers of great corporations are not as wise, not as conservative, and sometimes are not as trustworthy as millions of American investors have been persuaded to believe.") (remarks of Mr. Rayburn). *Cf.* Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions,* 40 U. MIAMI L. REV. 671, 691-97 (1986) (describing the manipulative practices used by pool operators before 1934); Steven Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act,* 42 STAN. L. REV. 385, 419-24 (1990) (referring to abuses of corporate officers in "pool" operations).

61 *See* SELIGMAN, *supra* note 56, at 52 (observing that Roosevelt considered the securities bill as a "'regulation of corporations'"); at 71-72 (describing disappointment of reformers, such as then Professor William O. Douglas, with the failure of the Securities Act directly to address the corporate governance situation); at 87 (describing reaction to initial bill for Exchange Act as federalizing corporate law); at 205-10 (describing New Deal failure to put through legislation on corporate governance). *See also* REPORT TO SECRETARY OF COMMERCE OF COMM. ON STOCK EXCHANGE REGULATION ("Roper Report"), 73d Cong., 2d Sess. 4 (Comm. Print 1934), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, item 16, at 4 (J.S. Ellenberger & Ellen P. Mahar, 1973) ("Your committee realizes that, perhaps, the most effective way to deal with certain evils connected with manipulation of stock by directors and officers, issue of stock to insiders for inadequate consideration, incomplete publicity of corporate accounts and similar problems is by the requirement of Federal incorporation for corporations engaged in interstate commerce."). The desire of "progressives" directly to address corporate governance other than by disclosure did not end with the New Deal. *See generally* ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 139-86 (1982); SELIGMAN, *supra* note 56, at 534-51 (describing efforts in the 1970s to address abuses of corporate management by a possible federal corporation law). Despite such efforts, corporate governance has always re-

legal reform of the U.S. corporate governance outcome – strong managers, weak owners – as a major purpose of these laws, the resulting emphasis upon mandatory disclosure in the Securities Act and Exchange Act, as opposed to substantive regulation of the management/shareholder relationship, disappointed them. This legislative background emphasizes that the disclosure framework is inseparable from U.S. corporate governance. While state corporate law was recognized then (as now) as primarily governing corporate governance and its problems, the new federal laws were to play an indirect role in this area.[62] By forcing management to disclose information about themselves and their operation of companies, the disclosure framework would dissuade management from the kinds of overreaching and abuse characteristic of the pre-Crash years and would enhance shareholder monitoring of management.[63]

The specific disclosure items mandated by the Securities Act and the Exchange Act thus make sense with respect to the U.S. corporate governance outcome of "strong managers, weak owners".[64] The relevant provisions of Schedule A of the Securities Act[65] focus on obvious

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mained "officially" at the periphery of SEC mandatory disclosure. *See* SELIGMAN, *supra* note 56, at 534.

62 *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 47-48 (1959) (discussing reference in Conference Report to fiduciary duties of officers and directors). *See id.* at 35 ("We were particularly anxious through the imposition of adequate civil liabilities to assure the performance by corporate directors and officers of their fiduciary obligations . . ."). Critics of the securities laws saw them as giving the new SEC "indeterminable power . . . over all corporations in the country," particularly through the disclosure requirements. *See* H.R. REP. NO. 1383, *supra* note 59, at 30-31 (minority views of Representative Schuyler Merritt). *But see* Santa Fe Industries v. Green, 430 U.S. 462, 479 (1977) (holding that federal securities laws should not be read to "overlap" and interfere with state corporate law).

63 *See* H.R. REP. NO. 1383, *supra* note 59, at 11 (the disclosure framework undermines "[d]elayed, inaccurate, and misleading reports [that] are the tools of . . . the recreant corporate official who speculate[s] on inside information"); Mahoney, *supra* note 56, at 1077-81 (discussing how securities laws addressed promoters' abuses of pre-Crash years).

64 *All* U.S. corporate disclosure may in fact be about corporate governance. Because a major problem for "weak owners" is lack of information, not only about egregious management opportunism, but also about management's conduct of the business, *any* disclosure addresses this informational deficiency and thus has a corporate governance import. As markets become more sophisticated and as blatant agency abuse (such as the promoter abuses of the 1920s) become less common, some of the most important agency monitoring arguably occurs through enhancement of the accuracy of disclosed information about business operations and financial results. I thus disagree with Professor Mahoney's too marked contrast between the "agency" and "accuracy enhancement" purposes of disclosure. *See* Mahoney, *supra* note 56, at 1111. All disclosed information serves several purposes, although certain disclosures, more than others, specifically address the manager/owner relationship, as narrowly defined.

65 James Landis observed that, although the "core" of the later SEC registration statement lay in Schedule A, the Schedule did not receive much attention from Congress, but was the

areas of management abuse. In addition to demanding identification of officers and directors, disclosure items require discussion of management compensation, stockholding, special contracts with the issuer and relationships with underwriters.[66] An issuer must also identify for shareholders the basic rights attaching to its shares and any limitations upon these rights that could be used further to increase management power.[67]

Section 12(b) of the Exchange Act requires similar information about management and shareholder rights as that demanded by the Securities Act's Schedule A.[68] Section 16's disclosure requirement pertaining to securities trading by officers, directors and 10% holders, and requiring the disgorgement of their short-swing profits, were specifically designed to counter management abuses in trading securi-

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product of collaboration between the drafters of the Act and Wall Street lawyers. *See* Landis, *supra* note 62, at 40-41. *See also* SELIGMAN, *supra* note 56, at 64-65 (describing debates among drafters whether to have Schedules included in the Act at all). This is additional evidence that any aspect of U.S. corporate governance, as in any cultural product, is never a simple application of a "unified" view shared by all participants, but is itself the outcome of a struggle (or compromise) between opposing views and interests. *See supra* note 49. In 1933, therefore, management (through its lawyers) had input into the extent of management disclosure required under Schedule A.

66 *See* 15 U.S.C. § 77a *et seq.* (1994) Schedule A (4) (identity of management), (7) (securities holdings of management, underwriters and beneficial owners), (14) (excessive remuneration for management), (19) (net proceeds from past securities offerings), (22) (management transactions with issuer), (24) (any material management contracts with the issuer). Other provisions in Schedule A also touch indirectly on management abuses: *e.g.*, price of securities offered to public and manner of determination (item 16), commission or discounts given to underwriters (item 17). *See also* Mahoney, *supra* note 56, at 1071-86. An issuer must also provide information on major stockholders (defined as a holder of more than 10% of any class of an issuer's stock), *see* 15 U.S.C. § 77aa at (6), which would be important in a U.S. corporation, given their ability to influence management. *See* ROE, *supra* note 3, at 172 (observing how, in the U.S., large shareholders are rare and thus influential). *But see* David Woodruff, *Kerkorian Keeps 'Em Guessing*, BUS. WK., Sept. 18, 1995, at 50 (describing recent, but only partly successful, pressure upon Chrysler Corporation by investor Kirk Kerkorian holding a 13.6% stake in the company).

67 *See* 15 U.S.C. § 77aa. (1994) Schedule A (9) (description of voting rights, any conversion or preference rights and dividend rights). Although conversion and preference rights are more typical of preference shares and are a form of contractual control of both management and overreaching by common stockholders, *see generally* BRUDNEY & BRATTON, *supra* note 33, at 338-43, dividend rights are a classic means of controlling management by ensuring that management returns the profits of the venture to stockholders. *See id.* at 561-570. *See also* 15 U.S.C. § 77aa (1994) Schedule A (30) - (32) (requiring the public filing of documents, such as the certificate of incorporation and by-laws, that would typically enumerate these rights).

68 *See* 15 U.S.C. § 781(b)(1)(B) (rights pertaining to securities), (D) (information about management), (E) (compensation), (F) (bonus arrangements), (G) (management and service contracts), (2) (copies of certificate of incorporation, by-laws, trust indentures or corresponding documents and underwriting agreements) (1994).

ties.[69] And in its rules for Exchange Act annual reports and proxies,[70] the SEC made companies disclose management information comparable to that required under other SEC disclosure provisions.[71]

The traditional justification for mandatory disclosure, that it addresses the weak bargaining position of U.S. shareholders in large, publicly-owned companies,[72] also demonstrates the relationship between disclosure and corporate governance. Small investors are individually unable, given the costs of bargaining, to compel issuers to provide information to them. Without such information, investors have difficulty in monitoring management as well as making an informed decision, whether to purchase, hold or sell shares. By traditionally emphasizing disclosure of historical information – rather than potentially speculative, forward-looking data (*i.e.,* what management has done, as opposed to what it promises to do) – in its interpretation of statutory disclosure requirements, the SEC also supported the "agency" focus of disclosure.[73]

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69 *See* 15 U.S.C. § 78p (1994). The legislative history shows that this section was designed to address abuses of management/agents in trading on inside information and in rigging securities prices. *See* Roper Report, *supra* note 61, at 18; S. REP. No. 792, 73d Cong., 2d Sess. 9 (1934), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, item 17, at 9 (J.S. Ellenberger & Ellen P. Mahar, 1973).

70 *See supra* text accompanying notes 29-35. Federal proxy regulation was specifically designed to address management abuses in the manipulation of proxy machinery at shareholder expenses. *See* S. REP. No. 792, *supra* note 69, at 12. *See generally* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation,* 46 VAND. L. REV. 1129, 1173-91 (1993) (reviewing legislative history of Section 14(a) for indications that Congress intended SEC proxy regulation to do more than regulate corporate governance through disclosure).

71 *See* Securities Exchange Act Release No. 1823, 1938 SEC LEXIS 678 (Aug. 11, 1938) (describing first major revision to proxy rules); Securities Exchange Act Release No. 3347, 7 Fed. Reg. 10,653 (Dec. 18, 1942) (dealing with revision of proxy rules adding annual report requirement, management compensation disclosure, etc.); SELIGMAN, *supra* note 56, at 238 (describing company resistance to the 1942 proxy rule amendments).

72 *See generally* BRUDNEY & BRATTON, *supra* note 33, at B-10 to B-13; COX, *supra* note 19, at 14-19; Seligman, *supra* note 60, at 9.

73 *See, e.g.,* JENNINGS, *supra* note 23, at 204 ("Historically, the SEC took a 'just the facts, ma'am' approach to disclosure and discouraged the inclusion of forward-looking information."); Kitch, *supra* note 40, at 777 (discussing traditional SEC focus upon historical facts and its views on, and rules pertaining to, projections); Mahoney, *supra* note 56, at 1084-86.

Criticism of the "paternalism" of this approach, together with the recognition of the importance of prospective information in enabling market professionals better to establish prices of securities, led to a reconceptualization of disclosure purposes, which the SEC has, to an extent, accepted. With its theoretical basis in the ECMH, this perspective argues for public disclosure of as much future-oriented and other "soft" information as possible so that market professionals could adjust the stock price of companies on a fully informed basis. Public investors benefit, even if they are unaware of the speculative information, because they can rely upon the market price of the securities. *See generally supra* note 33. *See, e.g.,* BRUDNEY & BRATTON, *supra* note 33, at B-12 to B-15; JENNINGS, *supra* note 23, at 204-12. *See also* Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft*

It is also important to emphasize that a U.S. investor, as a member of the culture producing U.S. corporate governance and the SEC disclosure framework, could understand the information that a company disclosed. The disclosure requirements demand that a company provide the specific information described above; there is no requirement, however, that facts about management and shareholder rights be linked together in a coherent explanation of a company's corporate governance that includes references to the general background of U.S. corporate governance. Yet the information does not have much meaning unless it is placed in a conceptual or explanatory framework or context. While many have made this point, Stanley Fish has stated it persistently and eloquently. As he explains:

> communication occurs within situations and that to be in a situation is already to be in possession of (or to be possessed by) a structure of assumptions, of practices understood to be relevant in relation to purposes

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Information: Old Problems, Changing Views, 46 MAR. L. REV. 1114 (1987); Langevoort, *supra* note 5, at 876-881 (describing SEC acceptance of ECMH); Richard A. Rosen, *Liability for "Soft Information": New Developments and Emerging Trends,* 23 SEC. REG. L. J. 3 (1995); Seligman, *supra* note 15, at 694-96 (explaining recent SEC emphasis in disclosure of "soft", evaluative information). The recently-passed Private Securities Litigation Reform Act of 1995 grants companies a safe-harbor from Securities Act and Exchange Act liability for "forward-looking statements." *See* Title I, §102, H.R. Rep. 104-369; Joint Explanatory Statement of the Committee of Conference ("The Conference Committee has adopted a statutory 'safe harbor' to enhance market efficiency by encouraging companies to disclose forward-looking information.").

Some question whether the SEC, the courts and Congress have gone overboard in their acceptance of the ECMH, particularly when other finance theories have questioned some of ECMH's assumptions. *See generally* BRUDNEY & BRATTON, *supra* note 33, at 128-47; JENNINGS, *supra* note 23, at 209-28; Lawrence Cunningham, *Capital Market Theory, Mandatory Disclosure, and Price Discovery,* 51 WASH. & LEE L. REV. 843, 854-59 (1994) (describing "chaos theory" and its implications for mandatory disclosure); Langevoort, *supra* note 5, at 866-72 (describing noise theory).

Despite the more sophisticated approach and understanding of disclosure, the SEC has not neglected its traditional disclosure emphasis upon providing information that a typical retail investor can understand. Although a recent trend in this direction may have a clear political origin, *i.e.,* an SEC chairman (Arthur Levitt) appointed by a Democratic president (William Clinton), the SEC has placed renewed focus upon this historical mission. *See* Proposed Amendments to Rules and Forms, Securities Act Release No. 7212, 60 Fed. Reg. 47,844 (Sept. 14, 1995) (proposal dealing with simplified mutual fund prospectuses); Jeffrey M. Laderman, *The Prospectus Tries Plain Speaking,* BUS. WK., Aug. 14, 1995, at 72 (describing SEC-encouraged and -approved program to deliver simplified, "plain speaking" mutual fund prospectuses). *See also* Arthur Levitt, Chairman, Securities and Exchange Commission, Address at the National Press Club Luncheon (Oct. 13, 1994) ("Instead of working exclusively through the industry, we are now working at grassroots, by listening to the needs of the investors and doing our best to educate them, working from the bottom up."); UNITED STATES SECURITIES AND EXCHANGE COMM'N, REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION 3 (1996) (arguing for more readable SEC disclosure documents); <http: //www.sec.gov>. (SEC web site providing investors with basic information on securities markets and SEC activity).

and goals that are already in place; and it is within the assumption of these purposes and goals that any utterance is *immediately* heard.[74]

SEC disclosure has traditionally discouraged a company from providing investors with an explanatory framework (it is "just the facts").[75] Corporate governance information, with or without a supplied explanation, is likely to have a coherent meaning for a U.S. investor because he or she will have the appropriate conceptual framework (or language) to make sense of it. Since a U.S. investor is within the same culture that produced U.S. corporate governance, its problems and the SEC's disclosure system as a response to these problems, the U.S. investor[76] is likely to find disclosed corporate governance information to be of immediate significance: this is the kind of information that he or she would expect to be highlighted because it "makes sense" in terms of his or her understanding of corporate governance.

To take a somewhat exaggerated example, assume that under Item 403 of Regulation S-K (which details disclosure requirements for U.S. companies),[77] a U.S. issuer reveals that no beneficial owners of more than 5% of such issuer's securities exist. Suppose further that

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74 *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 318 (1980) (emphasis in original). *See also* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 26 (1989) ("the self [is] always and already constrained by the contexts of practice (interpretive communities) that confer on it a shape and a direction"); JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 129 (1995) ("I have thus defined the concept of the 'Background' as the set of nonintentional or preintentional capacities that enable states of function.").

75 *See supra* note 73. The "materiality" qualification to disclosure could compel a company to give some explanation to the "facts" presented. *See, e.g.*, 15 U.S.C. § 77k (1994); 17 C.F.R. § 230.408 (1995) ("In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."). Even this qualification generally requires the inclusion of other facts, rather than an explanation of information already presented. *See infra* subpart IVA. *But see* McMahon & Co. v. Wherehouse Entertainment, Inc., 900 F.2d 576, 579 (2d Cir. 1990), *cert. denied*, 501 U.S. 1249 (1991) (holding that "the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers") (citation omitted).

76 As Stanley Fish has often observed, *see* FISH, DOING WHAT COMES NATURALLY, *supra* note 74, at 31-32, cultures are not monolithic. *See also* GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 6, at 13 (cautioning us carefully to observe differences even between ourselves and those closest to us). Some U.S. residents and investors could not make sense of the corporate governance "facts" given by a U.S. company (*i.e.*, corporations, finance and investments, foreign or domestic, would be an unknown world to them). The reference to a U.S. cultural understanding, however, at least describes what a U.S. investor with a basic familiarity with U.S. securities markets would understand about corporate governance in U.S. companies.

77 *See* 17 C.F.R. § 229.403(a) (1995) (requiring disclosure of beneficial owners of more than five percent of any class of the registrant's voting securities).

pursuant to Item 401's disclosure requirement on directors and executive officers,[78] the company shows that its management and directors have occupied these positions for some time. Additional disclosure under Item 202, which is a description of shareholder rights,[79] states that the board is classified and that the issuer has a charter provision making change-of-control difficult. Discussion of executive compensation under Item 402[80] reveals high executive compensation in relation to peer issuers, as well as some insider participation in compensation decisions. Further disclosure of the dividend policy under Item 201[81] points to excessive retention of funds by management and reinvestment in negative net present value schemes.[82] No general discussion in a disclosure statement would explain to an investor that this information suggests a classic case of management opportunism in the U.S. context of dispersed shareholders. Aware of the risk of such opportunism because of his or her cultural background and provided with the relevant corporate governance information by the disclosure, however, a U.S. investor could arrive at a meaningful conclusion about the existence and risks of management opportunism in this case.[83]

If SEC disclosure is so closely related to U.S. corporate governance and if corporate governance is so culturally determined, what happens when the disclosure framework is imposed upon foreign com-

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78 *See* 17 C.F.R. §§ 229.401(a), (b) (1995) (disclosure of information about directors and officers, including periods in which they have served in such positions).

79 *See* 17 C.F.R. §§ 229.202(a)(1)(vi), (a)(5) (1995). *See* ROBERT C. CLARK, CORPORATE LAW 780-81 (1986) (on classification); RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 731-794 (1995) (describing defensive tactics to ward off hostile offers).

80 *See* 17 C.F.R. § 229.402 (1995) (detailing disclosure on executive and director compensation and manner of compensation decision).

81 *See* 17 C.F.R. § 229.201(c) (1995) (requiring disclosure on dividends for past years).

82 *See* BREALEY & MYERS, *supra* note 43, at 73-75 (basics of present value investing). *Cf.* Jensen, *supra* note 41, at 847-48 (describing difficulties for management to bring itself to exit unprofitable businesses).

83 Professor Mahoney is thus right to assert that U.S. corporate governance information is straightforward for a company to disclose and for an investor to understand. *See* Mahoney, *supra* note 56, at 1094. However, his assertion needs to be qualified by the observation that it applies only to *U.S.* companies and investors (or to those in countries, such as the United Kingdom, with similar corporate governance), not *necessarily* to all foreign companies disclosing their corporate governance information to U.S. investors. *See infra* subpart IVA. The above textual example about management and director misbehavior "signalled" through disclosure is somewhat exaggerated, but not entirely far off from many real examples of abuse in U.S. corporations. *See, e.g.*, Diana B. Henriques, *Ties That Bind: His Directors, Her Charity*, N.Y. TIMES, Mar. 21, 1995, at D1 (describing such abuse in Morrison Knudsen Corp.); Joan E. Rigdon & Joan S. Lublin, *Call to Duty: Why Morrison Board Fired Agee*, WALL ST. J., Feb. 13, 1995, at B1 (same).

panies entering U.S. capital markets? Has the SEC, as administrator of U.S. securities laws, adjusted the inevitable U.S. cultural orientation of SEC disclosure requirements so that foreign issuers meaningfully disclose their corporate governance attributes to U.S. investors, who will not have the necessary cultural background to make sense of them? Answers to these questions require a review of the history of SEC disclosure of foreign corporate governance.

III. The Evolution of SEC Mandatory Disclosure of Foreign Corporate Governance

A. Early SEC Accommodations to Foreign Companies

In the Securities Act and the Exchange Act, Congress did not single out for special treatment foreign issuers or their securities, except for debt securities issued by foreign governments.[84] Abuses in sales and trading of foreign securities (particularly foreign government securities), many of which had proved to be worthless following the 1929 Stock Market Crash, ensured that Congress did not exempt them from the securities laws.[85] In the years immediately following passage of the Acts, the SEC made some accommodations to its rules, forms and practice for foreign private issuers, without spending much time or effort in considering their special situation. The lack of SEC

84 The Securities Act included a special disclosure Schedule B for securities issued by a foreign government or a political subdivision thereof. *See* 15 U.S.C. § 77aa (1994) Schedule B. The only other reference to foreign issuers in the Securities Act is in Section 6(a), which provided that a foreign issuer would need an authorized representative in the U.S. to sign the registration statement. *See* 15 U.S.C. § 77f(a) (1988 & Supp. IV 1992). This Article does not consider SEC treatment of foreign government securities.

85 *See Securities Act: Hearings on S. 875 Before the Comm. on Banking and Currency,* 73d Cong., 1st Sess., 89 (1933) (observing that sales of foreign private securities would be treated the same as sales of U.S. domestic securities); *Federal Securities Act: Hearings on H.R. 4314 Before the Comm. on Interstate and Foreign Commerce,* 73d Cong., 1st Sess., 86-87, 127 (1933) (discussing amount of worthless securities of foreign private issuers and foreign government issuers sold in U.S. from World War I to 1933); H.R. Conf. Rep. 152, 73d Cong., 1st Sess., 20-23 (1933), *reprinted in* 1 Federal Securities Laws: Legislative History 1933-1982, Item 17, at 271-74 (1983) (representing Title II of the bill that would have established a Corporation of Foreign Security Holders which would negotiate with foreign governments that had defaulted on their bonds); Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. 125-50 (1934), *reprinted in* 2 Federal Securities Laws: Legislative History 1933-82, item 76, at 1387-1412 (1983) (detailing abuses in sales of foreign bonds). *See also* Landis, *supra* note 62, at 42; Seligman, *supra* note 56, at 68-70 (describing the attempt to add Title II to bill); Seligman, *supra* note 61, at 24-27 (describing abuses in the selling of foreign securities, particularly foreign government bonds, during the years preceding enactment of the securities laws and the legislative response to such abuses); Richard A. Stephens, *Reevaluation of Disclosure Requirements for Foreign Issuers: Securities Act of 1933,* 45 Geo. Wash. L. Rev. 135, 139 n.12 (1977) (describing abuses in foreign securities offerings).

attention made sense because few foreign securities were then sold or traded in the United States.[86] Yet even in these early days of regulation, the SEC acknowledged – without making much of its observation – that differences existed in U.S. and foreign corporate governance.

A foreign private issuer publicly offering its securities into the United States was required to use the form for registering securities applicable to U.S. companies.[87] From early in its administrative life the SEC interpreted the Securities Act broadly to give it the power to adapt statutory disclosure requirements to the circumstances of particular companies or classes of companies.[88] The SEC made a few practical accommodations to foreign private issuers pursuant to this power. One accommodation specifically concerned corporate governance as defined by the U.S. perspective. Because the SEC realized that companies in many foreign countries kept executive compensation secret, the SEC permitted foreign private issuers to disclose aggregate compensation amounts for management and directors, instead of the specific compensation of individual executives and directors that Schedule A and the Securities Act form required.[89]

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86 *See* 2 LOSS & SELIGMAN, *supra* note 23, at 760-62 (quoting address of former SEC Chairman Garrett on early U.S. trading of foreign securities in the United States); John R. Stevenson, *Legal Aspects of the Public Offering of Foreign Securities in the United States Market*, 28 GEO. WASH. L. REV. 194, 194-95 & n.5 (1959) (describing small amount of foreign securities sold in United States between enactment of securities laws and 1954). *See also* Exchange Act Release No. 660, 1936 SEC LEXIS 204, at *1-*2 (May 8, 1936) (pointing out that, in 1936, U.S. trading in foreign securities was concentrated in foreign debt ($800 million), as opposed to equity ($70 million), securities).

87 *See, e.g.*, Notice of Proposed Amendment to Form S-1 Regarding Rights Offerings By Certain Foreign Private Issuers, Securities Act Release No. 3735, 1956 SEC LEXIS 151, at *1 (Dec. 21, 1956) ("Form S-1 . . . is the principal form used for the registration of securities of commercial and industrial companies under the Securities Act of 1933."). Some thought was given to designing offering forms for foreign private issuers, but no action was taken because of the small number of such issuers offering securities into the U.S. *See* Stephens *supra* note 85, at 145 n.55.

88 Under Section 7 of the Act, the SEC could waive a disclosure requirement "if [the SEC] finds that the requirement of such information or document is inapplicable to such class [of issuers] and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement." 15 U.S.C. § 77g(a) (1994). *See* Stephens, *supra* note 85, at 144-45 (discussing the SEC's construction of this provision to allow the SEC to waive Schedule A requirements for certain classes of issuers).

89 *See* Bodolus, *supra* note 7, at 112 (first Chief of SEC's Office of International Corporate Finance explained the historical accommodations to foreign issuers under the Securities Act by observing that "[u]nder the Securities Act, proceeding on a case-by-case basis, we do accept less prospectus disclosures in such areas as management remuneration."); Stephens, *supra* note 85, at 159-61 (describing early accommodation to foreign issuers on disclosure requirements). Item (14) of Schedule A requires disclosure of compensation of directors and officers (the latter to be named if the compensation exceeds $25,000). 15 U.S.C. § 77aa (1994) Schedule A. Securities Act Form S-1, which supplanted the SEC's early basic Securities Act registration forms, *see*

The SEC also accommodated foreign issuers in Exchange Act registration and reporting. In adopting special registration and annual report forms for the different categories of foreign issuers and securities,[90] the SEC noted that "[i]n view of the disparity between the laws and practices existing in the several countries it was necessary to introduce greater flexibility in the requirements."[91] The major difference between these forms and those used by U.S. companies on corporate governance matters was that, as in the Securities Act context, foreign issuers could give aggregate management compensation amounts. Foreign issuers also did not have to provide information on the stockholding of executives and directors, although Section 12(b)(1)(D) and Exchange Act forms applicable to U.S. issuers specifically required such disclosure.[92]

Securities Act Release No. 2887, 1942 SEC LEXIS 44, at *3-*4 (Dec. 18, 1942), initially translated these requirements into disclosure of the compensation of individual directors and of the three highest paid executive officers if an individual's compensation exceeded $20,000 (a threshold gradually adjusted upwards). *See* Amendments to Form S-1, Securities Act Release No. 3323, 1948 SEC LEXIS 383, at *2-*3 (Dec. 17, 1948). The SEC gave similar accommodation (*i.e.,* aggregate disclosure) to foreign issuers on their disclosure of shareholdings of officers, directors and 10% shareholders. *See* Stephens, *supra* note 85, at 161-62.

From an early date, the SEC required special disclosures from foreign companies, but not on corporate governance matters. *See id.* at 140 and accompanying notes, 162-64 (describing SEC rules requiring information on foreign country risks). *See infra* notes 227-28.

90 The SEC promulgated three registration forms for foreign private issuers (which at the time meant issuers from countries other than Cuba and those located in North America) that listed their securities on a registered U.S. stock exchange: Form 19 for the then equivalent of ADRs; Form 20 for securities other than bonds; and Form 21 for bonds. *See* Exchange Act Release No. 445, 1935 SEC LEXIS 463, at *1 (Dec. 20, 1935). The SEC prescribed comparable annual report Forms 19-K, 20-K and 21-K. *See id. See also* Exchange Act Release No. 660, 1936 SEC LEXIS 204, at *1 (May 8, 1936) (describing expiration of temporary exemption from registration to foreign issuers following adoption of forms); Exchange Act Release No. 1058, 1937 SEC LEXIS 304, at *1 (Feb. 10, 1937) (similar expiration for exemption from annual report requirement).

91 *See* Exchange Act Release Nos. 323-325 (Class B), 1935 SEC LEXIS 316, at *1 (July 15, 1935).

92 *See* Registration Forms for Foreign Issuers, Exchange Act Release No. 7747, 30 Fed. Reg. 14,743, 14,745 (Nov. 16, 1965) (requiring, in proposed combination of Forms 20 and 21, no disclosure of management and director shareholdings). U.S. issuers used Form 10 for registration and Form 10-K for annual reports. Both of these forms provided more detailed information on executive compensation than did the foreign reporting forms, as well as information on aggregate management and director stockholding. *See* Exchange Act Release No. 445 (Class B), 1935 SEC LEXIS 464, at *3-*4 (Dec. 20, 1935); Notice of Proposed Revision of Form 10, Exchange Act Release No. 4224, 1949 SEC LEXIS 51, at *26-*30 (Mar. 11, 1949); Notice of Proposed Revision of Form 10-K, Exchange Act Release No. 4223, 1949 SEC LEXIS 50, at *11-*17 (Mar. 11, 1949). *See generally* Richard A. Stephens, *Reevaluation of Disclosure Requirements for Foreign Issuers: Securities Exchange Act of 1934,* 45 GEO. WASH. L. REV. 494, 519-22 (1977) (discussing history of differences between Exchange Act disclosure for foreign and U.S. companies).

In addition, the SEC made what would prove to be an important accommodation to foreign issuers on two major Exchange Act provisions relating to corporate governance: it exempted them from the proxy rules of Section 14(a) and the insider reporting requirements of Section 16.[93] It justified this exemption primarily on the ground that few foreign corporations in fact listed their stock on U.S. exchanges. In its view, applying the proxy and insider trading requirements to foreign issuers would thus have limited effect.[94] The SEC also alluded to difficult jurisdictional and enforcement problems that would arise if it attempted to apply to foreign companies these rules dealing with the conduct of a firm's management and governance.[95] The SEC would highlight these problems in its later consideration of foreign issuer disclosure.

B. 1964 Exchange Act Amendments and Section 12(g)

The SEC revisited Exchange Act disclosure obligations of foreign companies in connection with its rulemaking pursuant to the 1964 amendments to that Act. Among other things, the amendments added Section 12(g),[96] which required Exchange Act registration for

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93 The exemption, placed first in Rule AN18, stated that "[s]ecurities for which the filing of applications on Form 18, 19, 20 or 21 is authorized shall be exempt from the operation of Sections 14(a) and 16." Exchange Act Release No. 412 (Class A), 1935 SEC LEXIS 422, at *1 (Nov. 6, 1935). *See also* Exchange Act Release No. 412 (Class B), 1935 SEC LEXIS 423, at *1 (Nov. 6, 1935) (describing temporary exemption prior to promulgation of Rule).

94 *See* Exchange Act Release No. 412, 1935 SEC LEXIS 423, at *1 (Nov. 6, 1935). In an interesting, but cryptic remark, the SEC observed that the insider rules would have limited effect if applied to foreign companies because the primary market for the foreign securities would be outside the United States. *See id.* The harm Congress intended to address through Section 16 would arise, however, from insider trading in the issuer's securities, whether done within or without the United States. The SEC may have simply realized that, for jurisdictional reasons, it would be difficult to enforce application of Section 16 to officers and directors of foreign companies. *See* Richard M. Buxbaum, *Securities Regulation and the Foreign Issuer Exemption: A Study in the Process of Accommodating Foreign Interests,* 54 CORN. L. REV. 358, 369-78 (1969) (discussing potential problems of imposing Sections 14 and 16 on foreign issuers). The SEC did observe that the proxy rules would apply to a foreign issuer if "the consent or authorization [sought by a foreign issuer] makes any important change in the security and if remuneration is paid in connection with the solicitation of such consent." *See* Exchange Act Release No. 412 (Class B), *supra* note 93, at *1.

Foreign issuers were thus unaffected by amendments to proxy rules concerning specific issuer disclosure on corporate governance matters. *See* Exchange Act Release No. 1823, *supra* note 71, at *20-*22 (disclosure as to election of directors and executive compensation plans); Exchange Act Release No. 3347, *supra* note 71.

95 *See* Stephens, *supra* note 92, at 497-503 (describing potential jurisdictional problems of applying Sections 14(a) and 16 to foreign companies).

96 *See* Act of Aug. 20, 1964, Pub. L. No. 88-467, § 3(c)(1), 78 Stat. 565, *amending* Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78*l* (1964) (now codified at 15 U.S.C. § 78*l*(g)(1) (1994)). Section 12(g)(1) required an issuer to register its securities if such issuer had assets exceeding

companies whose securities traded in the U.S. over-the-counter markets.[97] Congress was concerned that the subsection might adversely affect existing U.S. markets for securities of unregistered foreign issuers and upset relations with these issuers and their home countries by extending SEC jurisdiction to foreign companies that had not taken the affirmative steps of either listing or publicly offering their securities in the U.S. It thus empowered the SEC to exempt foreign issuers from Section 12(g)'s registration requirements.[98]

In several releases following the 1964 amendments, the SEC made proposals on disclosure by foreign private issuers.[99] For foreign issuers that publicly offered securities in the United States and/or listed their securities on a registered U.S. stock exchange, it proposed

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$1,000,000 and if its securities were held of record by more than 500 persons. In 1986, the SEC raised the Section 12(g) asset limit to $5,000,000. *See* Rule 12g-1, Final Rules, Exchange Act Release No. 23406, 51 Fed. Reg. 25,360 (July 14, 1986).

97 Securities trading in an over-the-counter market does not benefit from the facilities of an organized exchange where a specialist supervises a market between buyers and sellers. In the over-the-counter market, dealers hold themselves out as willing to make a market in certain securities and publish their quotations. *See generally* Cox, *supra* note 19, at 6-8. At the time of passage of Section 12(g), securities quoted on the NASDAQ system were considered not to be listed. *See infra* note 193.

98 *See* 15 U.S.C. § 78*l*(g)(3) (1994) (providing for "such exemption [if it] is in the public interest and is consistent with the protection of investors"); Notice of Proposed Amendments, Exchange Act Release No. 7746, 30 Fed. Reg. 14,737, 14,738 (Nov. 16, 1965) (describing exemption); Temporary Exemption for Foreign Issuers, Securities Exchange Act Release No. 7427, 1964 SEC LEXIS 173 (Sept. 15, 1964) (granting temporary exemption from reporting requirement until Nov. 30, 1965 pending promulgation of rule); Extension of Temporary Exemption for Foreign Issuers, Securities Exchange Act Release No. 7867, 1966 SEC LEXIS 684 (Apr. 21, 1966) (extending exemption until Nov. 30, 1966). *See also* 2 Loss & Seligman, *supra* note 23, at 776 n.77 (describing initial Senate bill that would have exempted all foreign securities, unless the SEC, by rule or regulation, provided otherwise – an approach favored by the SEC); Martin E. Goldman & J. L. Magrino, *Foreign Issuers and Section 12(g) of the Securities Exchange Act of 1934,* 23 Bus. Law. 135, 135-36 (1967) (describing history of exemption); Richard M. Philips & Morgan Shipman, *An Analysis of the Securities Act Amendments of 1964,* 1964 Duke L.J. 706, 755; Stephens, *supra* note 92, at 508 - 09 n.354 (describing legislative history). For a description of the growth of U.S. markets (both organized and over-the-counter) in foreign securities prior to the 1964 amendments, see Nathaniel Samuels, *The Investment Banking Background of Issuing and Marketing Foreign Securities in the United States, in* International Finance and Investment 411, 412-418 (John F. McDaniels ed., 1964).

99 *See* Exchange Act Release No. 7746, *supra* note 98; Exchange Act Release No. 7747, *supra* note 92; Exchange Act Release No. 7748, 30 Fed. Reg. 14,745 (Nov. 16, 1965); Exchange Act Release No. 7749, 30 Fed. Reg. 14,747 (Nov. 16, 1965). The SEC reported that, in preparing the proposals, it studied U.S. trading markets for foreign securities, disclosure obligations of companies in foreign countries and U.S. disclosure practices of such companies. *See* Exchange Act Release No. 7746, *supra* note 98, at 14,738. The study does not appear ever to have been published. *See* Buxbaum, *supra* note 94, at 374-75 (objecting to "private" nature of rule-making process leading up to the proposals).

revised forms for Exchange Act registration and annual reporting.[100] For foreign companies brought under the Exchange Act by Section 12(g), it offered those having *de minimis* U.S. contacts an outright exemption[101] and others a registration form that required them to provide the SEC only with information that they made public abroad.[102] The SEC also proposed narrowing its exemption to the proxy and insider trading rules for foreign issuers.[103] Although not the major focus

100 The SEC proposed to combine the existing Form 20 (registration of equity) and Form 21 (registration of debt) into a revised Form 20 that would be used for registration of either kind of security. *See* Exchange Act Release No. 7747, *supra* note 92, at 14,743. *See also* Exchange Act Release No. 7748, *supra* note 99, at 14,745-46 (proposing a revised Form 20-K to replace annual reporting Forms 20-K and 21-K).

The SEC also proposed an interim reporting form for reporting foreign issuers (except North American, Cuban and Philippine issuers), which were exempt from the requirement of filing interim reports. Because, according to the SEC, more foreign countries were requiring interim reporting, it proposed an interim report for foreign issuers. *See* Exchange Act Release No. 7749, *supra* note 99, at 14,747-48 (foreign issuer would provide in a Form 6-K interim report information that an issuer (i) is required to make public in its country of domicile, (ii) filed or made public with a foreign exchange, or (iii) distributed to its security holders).

101 The SEC proposed Rule 12g3-2, which would exempt from Exchange Act registration any foreign issuer (other than a North American or Cuban issuer) that, while meeting the asset and shareholder tests, in fact had fewer than 300 holders of record resident in the U.S. *See* Exchange Act Release No. 7746, *supra* note 98, at 14,739. It would also exempt all American Depositary Shares from Section 12(g), *see id,* because the underlying foreign securities would be either subject to or exempted from registration.

102 *See* Exchange Act Release No. 7747, *supra* note 92, at 14,743 (explaining that a foreign issuer must provide the SEC with information it made public in its home country, filed with a local stock exchange or distributed to its security holders). Under the proposal, these foreign private issuers would not have to file an annual report, but would have to furnish a year-end balance sheet, profit and loss statement, description of business and an outline of rights of security holders, if their home country filings did not include such information. *See* Exchange Act Release No. 7746, *supra* note 98, at 14,738. The SEC also proposed requiring U.S. brokers and market makers to police compliance with this new registration requirement by foreign issuers whose securities traded in the over-the-counter market. *See id.* at 14,740 (describing proposed Rule 15c1-10 requiring brokers to disclose to their customers the identity of foreign issuers failing to register under Section 12(g), and Rule 17a-10 requiring market makers in securities of unregistered foreign issuers to furnish information to investors on these issuers).

103 *See* Exchange Act Release No. 7746, *supra* note 98, at 14,738-39. The SEC had earlier proposed to amend Rule 3a12-3, which was the successor to Rule AN18. In Exchange Act Release No. 6912, 1962 SEC LEXIS 32 (Oct. 11, 1962), the SEC wished to exclude from the proxy and insider trading exemption foreign companies that had significant U.S. operations or a majority of U.S. directors. This proposal was withdrawn by Exchange Act Release No. 7517, 30 Fed. Reg. 1,010 (Jan. 22, 1965).

The SEC's 1965 proposal to narrow the rule was an attempt to bring within SEC jurisdiction foreign companies and actions having significant U.S. contacts. Under the proposal, foreign private issuers would no longer have a blanket exemption from Sections 14 and 16 of the Exchange Act. Some foreign companies deemed to be U.S. companies would lose the exemption altogether. *See* Exchange Act Release No. 7746, *supra* note 98, at 14,740 (exemption would not apply if either 50% of foreign issuer's voting securities were held by U.S. residents or it conducted its principal business in the United States.). A foreign private issuer would also lose the proxy exemption if it did anything more in the United States than distribute to its U.S. security

of any of the proposals,[104] foreign corporate governance disclosure was implicated in all of them. More importantly, the proposals and the reaction to them displayed policies and concerns that the SEC would increasingly use in designing its foreign corporate governance disclosure, as well as the force of the special interests and pressures that pushed the SEC to minimize any disclosure burden on foreign companies.

In the Release on new Exchange Act Forms 20 and 20-K, the SEC explicitly addressed foreign corporate governance by proposing to add to existing disclosure of the aggregate compensation of directors and officers disclosure of their aggregate pension benefits and options.[105] The SEC explained that it had traditionally been deferential to foreign companies on management disclosure issues because of its recognition that foreign issuers had different disclosure regimes abroad.[106] By this deference, the SEC could have been signalling its sensitivity to cultural differences in other countries and thus its recognition of different corporate governance, *e.g.,* that detailed discussion of compensation might not matter where management/agents were less powerful than they were in the United States.

Other SEC remarks suggest a different reading of the SEC's position: the SEC believed that the only appropriate corporate governance disclosure was U.S. disclosure and, implicitly, that the only important corporate governance information pertaining to foreign companies was that susceptible of being identified by the U.S. disclosure framework. According to the SEC, its study of foreign markets and corporations showed to its satisfaction that foreign countries were increasingly adopting disclosure systems similar to the one in the United States.[107] It thus felt justified in requiring more disclosure from foreign private issuers on management compensation matters, without yet equalizing foreign and U.S. company disclosure.[108] The

holders a notice of the shareholder meeting and a name of a provider of proxy forms, or have its depositary bank do more than request voting instructions from shareholders. *See id.* at 14,739. The SEC thought that the proposal would not hinder these general methods of communication between foreign issuers and their U.S. shareholders. *See id.*

104 In fact, the SEC's primary attention in the proposals was to disclosure of business and financial information, *see* Exchange Act Release No. 7746, *supra* note 98, at 14,738, not of "qualitative" management information, an approach that would come to characterize the SEC's view of foreign company disclosure. *See infra* subpart IIIC.

105 *See* Exchange Act Release No. 7747, *supra* note 92, at 14,743.

106 *See id.*

107 *See id.*

108 *See id.* ("The trend toward greater disclosure abroad has led some countries to require some form of disclosure as to the benefits conferred upon management, and the Commission now believes that it is both desirable and feasible to require certain information in this connec-

SEC implied that it was an agent in the evolution of other countries' systems towards U.S. disclosure and corporate governance.[109]

The SEC's confidence in the inevitability, and thus the superiority, of U.S. disclosure and corporate governance also characterized its proposal on registration of foreign companies under Section 12(g). Since the proposal would have permitted certain foreign issuers basically to use home country disclosure for Exchange Act purposes, it again appeared to demonstrate the SEC's sensitivity to cultural differences. Although the pertinent part of new Form 20 to be used by Section 12(g) foreign companies required little specific disclosure on any subject, and no disclosure on corporate governance, the SEC suggested, however, that in the not too distant future disclosure comparable to that required under U.S. law would be required for foreign companies under the laws of their home countries. The SEC justified its proposal because of "the continuing improvement in the reporting of financial and economic information by foreign issuers" in their home countries and the likelihood that this "improvement w[ould] continue".[110] The SEC left unposed and unanswered an obvious question: if foreign disclosure became identical to U.S. disclosure, what would be the purpose of imposing SEC disclosure requirements on foreign companies?

If the SEC's U.S. cultural perspective made it ready to pass quickly over differences in foreign corporate governance and disclosure systems, one could well ask why, in its proposals, the SEC did not simply insist upon complete U.S. style disclosure for all foreign companies, including the new class of foreign issuers whose securities were traded in the U.S. over-the-counter markets. The SEC's approach in fact made sense from a pragmatic perspective. Because U.S. investors had increased their trading in foreign securities, for the first time in its history the SEC had seriously to confront the U.S. situation of foreign issuers, as well as at least to look at their home country corporate governance and disclosure systems. Confronted with a new situation, the SEC took a cautious position. Since it concluded that the foreign systems were generally evolving towards a U.S. model, it justifiably proposed minor adjustments to its Exchange Act registration and dis-

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tion with foreign registrants. At the same time, the Commission recognizes that most foreign issuers do not make such disclosures in their own countries as to individual directors and officers.").

109 *Id.* (explaining that it "encourag[ed] this improvement" in foreign disclosure). *See also* Exchange Act Release No. 7748, *supra* note 99, at 14,746 (similar expression of SEC views on new Form 20-K).

110 *See* Exchange Act Release No. 7747, *supra* note 92, at 14,743.

closure requirements for reporting foreign companies and a relatively light disclosure burden for the major new category of foreign issuers falling under its jurisdiction because of Section 12(g).

The SEC also had intellectual and doctrinal justifications for its pragmatism – justifications that it would develop in later amendments to its foreign corporate governance disclosure. These reasons help to explain its light treatment of Section 12(g) foreign companies. In the releases, the SEC suggested that SEC disclosure should not be the same for foreign issuers that, through no activity of their own, found their securities traded in the United States as for foreign issuers that had made a U.S. public offering or listing.[111] This distinction between voluntary and involuntary entry into U.S. capital markets drew support from legal considerations of jurisdiction and comity.[112] The SEC might well question its basis for jurisdiction, and the appropriateness for comity reasons of its asserting jurisdiction, over a foreign person that had few U.S. market contacts. These justifications also supported the SEC's unwillingness to extend full U.S. corporate governance disclosure to foreign issuers that *had* sought U.S. capital markets. Because, as we have seen, U.S. corporate governance disclosure is directly related to, and has an indirect effect upon, the corporate governance of firms subject to the disclosure system, the SEC might well hesitate before placing the full corporate governance disclosure burden on a foreign issuer (for example, through application to that issuer of Section 16), and it might be reluctant to be perceived by foreign governments as interfering in the "internal affairs" of their corporations.

To this pragmatic and doctrinal account of the SEC's rulemaking one needs to add the additional complexity of interest group pressure that led to the SEC's accommodation with foreign issuers and to its

111 *See id.* (pointing out that such issuers had not "sought the American capital market"). *But see* Edward F. Greene, *et al., Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets,* 50 BUS. LAW. 413, 426 (1995) (arguing that the difference does not make sense because it places in the involuntary category issuers that sell securities in the United States through private placements or that sponsor an ADR program). Later SEC releases on foreign company disclosure repeat, like a refrain, the reference to improvement in foreign disclosure and to the concept of voluntary vs. involuntary entry into U.S. markets. *Cf.* Langevoort, *supra* note 19, at 533 (observing that SEC rhetoric has instrumental force in SEC bureaucracy, as it is used there to justify new SEC proposals by demonstrating that they agree with traditional SEC policies).

112 *See, e.g.,* Stephens, *supra* note 92, at 498 (discussing legal considerations applying to extension of U.S. disclosure obligations to foreign issuers); COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE 1964 AMENDMENTS TO THE SECURITIES ACT OF 1934 AND THE PROPOSED SECURITIES AND EXCHANGE COMMISSION RULES – INT'L LAW ASPECTS, 21 REC. A.B.C.N.Y. 240, 244-52 (1966) [hereinafter NYC BAR ASS'N].

accompanying failure to contemplate a disclosure design that might compel foreign issuers to explain their corporate governance to U.S. investors.[113] By the 1964 amendments, certain parties had an interest in minimal disclosure burdens on foreign issuers. These parties included foreign issuers and authorities in their home countries that opposed any U.S. intrusion into the regulation of their corporations and markets.[114] Investment banks and other market professionals that provided markets for foreign securities and had financial relationships with foreign issuers, as well as the commercial banks involved in the depositary programs, also opposed major reforms to foreign company disclosure that could injure existing markets in foreign securities and drive business offshore.[115] Other opponents were members of the securities bar who represented such issuers, banks and market profes-

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113 *See* Stephens, *supra* note 92, at 497 n.291, 498-499 & notes accompanying text, 508-09 n.354 (alluding to this pressure).

114 *See* 2 Loss & Seligman, *supra* note 23, at 779 (describing British and Canadian governments' objections to proposed registration of foreign companies that had neither listed nor offered their securities in the United States). *See generally* Buxbaum, *supra* note 94, at 362, 375 and notes accompanying text; Goldman & Magrino, *supra* note 98, at 137. Foreign issuers not previously subject to Exchange Act jurisdiction would object to the additional burden of compliance as well as the added risk of Exchange Act liability. Admittedly, the proposed disclosure requirements of registration for "involuntary" Section 12(g) companies were minimal and, pursuant to Instruction E of Form 20, in their provision of information the companies were exempt from Exchange Act liability. *See* Exchange Act Release No. 7747, *supra* note 92, at 14,743. Yet failure to register would subject the companies to civil and criminal sanctions, and registration would also mean that, because the companies would be under the SEC's jurisdiction, the SEC could later decide to remove the exemption, *e.g.*, to increase the information requirements and to impose liability upon these foreign issuers. *See, e.g.*, NYC Bar Ass'n, *supra* note 112, at 244 (articulating this point). The logic of the SEC's position – that disclosure regimes would improve abroad – could argue for a later expansion of SEC jurisdiction over these companies (*i.e.*, that such foreign companies would in the future be in a better position to meet the disclosure requirements for U.S. companies).

Much opposition came from North American and Cuban issuers that were ineligible for the special minimal disclosure requirements of proposed Form 20. *See* Exchange Act Release No. 7746, *supra* note 98, at 14,738. *Cf.* Stephens, *supra* note 92, at 497 n.291.

115 *See* Buxbaum, *supra* note 94, at 375 (referring to opposition of American dealers in foreign securities); Stephens, *supra* note 92, at 508-09 n.354 (citing reactions of investment banks and Investment Bankers Associations to the proposals). *But see* Seligman, *supra* note 56, at 312 (observing that the New York Stock Exchange favored imposing additional burdens upon foreign securities traded in the over-the-counter markets, which would enhance attractiveness of exchange listing for these securities). As Professors Gilson and Kraakman have explained, professional traders would generally support the extension of mandatory disclosure to more companies because they would no longer themselves have to gather and verify information about such companies. *See supra* note 33, at 639-40. Because, however, the proposals also required broker-dealers to monitor foreign company compliance with Section 12(g), these professionals had a countervailing incentive to reduce their own regulatory burden and thus to oppose the proposals.

sionals and who had a financial interest in the outcome.[116] Since, from the public choice perspective, the SEC had a political need to maintain an outside constituency that would validate its own importance and guarantee its own survival as a market regulator, it had to be particularly sensitive to the warnings of U.S. market professionals and the securities bar that excessive regulation would injure existing U.S. markets for foreign securities.[117]

The final rules, which were not adopted for over a year and a half after the proposals,[118] confirm the force of the SEC's cultural confidence, its doctrinal concerns, and interest group pressure in limiting disclosure burdens on foreign issuers. While the minimal increase in disclosure about management compensation in the revised Forms 20 and 20-K remained as proposed,[119] the rules relating to Section 12(g) registration and the proxy and insider trading rule exemption were scaled back to forms that have remained basically unchanged to this day.[120] As the SEC explained, further examination of foreign disclosure regimes following the proposals had convinced it to exempt outright from Section 12(g) registration foreign issuers that did not meet the basic exemption criterion (*i.e.,* have fewer than 300 U.S. share-

116 While the securities bar opposed the SEC's rule-making under Section 12(g), *see, e.g.,* NYC BAR ASS'N, *supra* note 112; Stephens, *supra* note 92, at 497 n.291, 502 n.319, it was likely to come out ahead under any outcome (*i.e.,* it would either do the new registration work or benefit from other foreign company and investment banking business).

117 *Cf.* Adoption of Rules Relating to Foreign Securities, Exchange Act Release No. 8066, 32 Fed. Reg. 7,845, 7,846 (Apr. 28, 1967) ("The Commission also consulted with representatives of American brokers, dealers, financial analysts, the principal banks issuing American Depositary Receipts (ADR's) and other persons who are interested in foreign securities, and received recommendations from interested domestic and foreign groups."); SELIGMAN, *supra* note 56, at 311-23 (describing effort by SEC to line up Congressional support for a bill for securities law amendments).

118 *See* Exchange Act Release No. 8066, *supra* note 117; Exchange Act Release No. 8067, 32 Fed. Reg. 7,853 (Apr. 28, 1967); Exchange Act Release No. 8068, 32 Fed. Reg. 7,851 (Apr. 28, 1967); Exchange Act Release No. 8069, 32 Fed. Reg. 7,853 (Apr. 28, 1967). Amended Rule 3a12-3, however, was adopted one year earlier. *See* Adoption of Amendment to Rule 3a12-3, Exchange Act Release No. 7868, 31 Fed. Reg. 6,705 (Apr. 21, 1966).

119 *See* Exchange Act Release No. 8067, *supra* note 118, at 7,847; Exchange Act Release No. 8068, *supra* note 118, at 7,851. Because foreign issuers most affected by these rule changes, *i.e.,* foreign companies with securities listed on U.S. exchanges, had already made similar management compensation disclosure in their Securities Act filings, *see* sources cited *supra* note 89, para 1, they would not have considered the same disclosure in the Exchange Act context to be particularly burdensome.

120 *See* 17 C.F.R. § 240.3a12-3 (1995); 17 C.F.R. § 240.12g3-2 (1995). *See also* Greene, *supra* note 111, at 428-29 (observing that, although more foreign securities are sold and traded in the United States because of increased use of private placements and ADR facilities, the SEC has never revisited Rule 12g3-2).

holders).[121] To receive the exemption, these issuers only had to furnish the SEC with information required under the laws of their home countries.[122] With little explicit justification, the SEC allowed its exemption from the proxy and insider trading rules to remain broad.[123]

C. Foreign Company Disclosure on Form 20-F

The SEC returned to foreign corporate governance disclosure in 1976. This particular action was part of an overall SEC interest in corporate governance inspired by governance scandals involving U.S. public companies in the 1970s and generally entailing illegal payments

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121 According to the SEC, following the proposals it had consulted with interested groups and asked foreign issuers to document disclosure requirements in their home jurisdictions. On the basis of this research, the SEC observed "the continuing improvement in the quality of the information now being made public by foreign issuers, together with the improvement which may reasonably be expected to result from recent changes and current proposals for change in relevant requirements . . . ." *See* Exchange Act Release No. 8066, *supra* note 117, at 7,846.

122 Rule 12g3-2(b) provided that an issuer falling within Exchange Act jurisdiction because of Section 12(g) shall be exempt if it (or a government agency of its country) furnishes the SEC whatever information the issuer "(a) has made public pursuant to the law of the country of its domicile or in which it is incorporated or organized, (b) has filed with a stock exchange on which its securities are traded and which was made public by such exchange, or (c) has distributed to its security holders." *Id.* at 7,848. The final rule, unlike the proposed rule, provided no requirement of minimum information. As a way of further lightening the disclosure burden, the Rule required the provision of only certain information falling in the above categories, including U.S. defined corporate governance facts, *i.e.*, "changes in management or control; the granting of options or the payment of other remuneration to directors or officers; transactions with directors, officers or principal security holders; and any other information about which investors ought reasonably to be informed," *see id.* at 7,846; Rule 12g3-2(b) (3); *see also* Exchange Act Release No. 8069, *supra* note 118, at 7,853 (with similar language), but again only if a company disclosed such information in the home country. The Rule continued to exempt a foreign issuer with fewer than 300 holders resident in the United States. *See* Rule 12g3-2(a)(1). The influence of investment banks upon the SEC was revealed in the latter's decision not to adopt rules requiring broker-dealers to monitor foreign issuer compliance with the Rule. *See* Exchange Act Release No. 8066, *supra* note 117, at 7,846 (warning brokers to pay attention to an SEC list on complying Section 12(g) foreign issuers in recommending foreign securities to their clients and promising to monitor foreign issuer compliance with Section 12(g)).

123 In Exchange Act Release No. 7868, *supra* note 118, issued before the final releases on the Section 12(g) exemptions, the SEC finalized a new Rule 3a12-3(b), which excluded from the historic proxy rule and insider trading exemption only a company where both 50% of its outstanding securities were held by U.S. residents and either its business was principally conducted in the United States or 50% of its directors were U.S. residents. The adopted Rule also returned to the former Rule's language of a blanket, rather than piecemeal, exemption from Sections 14 and 16. The SEC justified this retreat by observing that, as of the Release's date, it had not yet decided how to treat foreign issuers for Section 12(g) purposes. *See id.* at 6,705. However, it did not revisit (and substantially change) the rule either following final adoption of Rule 12g3-2 or since that time. *See* 17 C.F.R. § 240.3a12-3 (1995) (only applicable provisions of Section 14 from which a foreign issuer is not exempted are those dealing with tender offers). *See* Stephens, *supra* note 92, at 493-95 (describing the contradictions in the SEC's final Rule 3a12-3 release).

and bribes.[124] Just as, because of the scandals, the SEC addressed corporate governance disclosure in U.S. companies, it also undertook to reform foreign corporate governance disclosure. The more specific catalyst for the SEC action on foreign companies was a study of foreign disclosure systems by the newly created SEC Office of International Corporate Finance, which was established in January 1973 to deal with, among other things, issues arising from the selling and trading of foreign securities in the United States.[125]

The SEC did not take advantage of this renewed consideration of foreign issuers to understand the differences between corporate governance and disclosure systems in foreign countries and those in the United States. Still fixed in its U.S. perspective, the SEC measured all foreign systems of governance and disclosure by its own standards and generally found them wanting, although it acknowledged that they were gradually evolving toward the U.S. model. On the basis of its study, the SEC proposed that Exchange Act disclosure requirements for a foreign company voluntarily seeking U.S. capital markets should now *closely* resemble those required for a U.S. company.

For a number of reasons, however, the SEC substantially modified this proposal and accepted an accommodation with foreign issuers that, at least on foreign corporate governance, required little U.S.-style disclosure. The SEC came to realize that the doctrinal basis for enhanced corporate governance disclosure for foreign companies was

124 SEC debate and Congressional inquiry in the 1970s focused on failures in director oversight that resulted in illegal use of corporate funds. *See* SELIGMAN, *supra* note 56, at 534-51. This activity led to passage of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified in 15 U.S.C. §§ 78a-78ff), which prohibited Exchange Act reporting companies from engaging in foreign bribery and required such companies to improve their internal auditing controls. At this time, the SEC attempted to improve corporate governance disclosure for U.S. companies. *See, e.g.,* Exchange Act Release No. 11079, 39 Fed. Reg. 40,766, 40,768 (Oct. 31, 1974) (amending Rule 14a-3 on proxy solicitation to require more information in annual reports); Exchange Act Release No. 11641, 1975 SEC LEXIS 850 (Sept. 10, 1975) (amending Form 10-Q to improve disclosure therein); Exchange Act Release No. 13346, 1977 SEC LEXIS 2252 (Mar. 9, 1977) (approving NYSE rule change requiring listed companies to have an audit committee composed solely of outside directors); Exchange Act Release No. 15384, 43 Fed. Reg. 58,522 (Dec. 6, 1978) (amending proxy forms to require increased information about director nominees). *See generally* KARMEL, *supra* note 61, at 139-86.

125 *See* Securities Act Release No. 5355, 1973 SEC LEXIS 2127 (Jan. 11, 1973). The first director of the Office explained that it conducted a study of overseas securities markets in order to provide a basis for "our present and future policies regarding foreign issuers and foreign participation in the United States markets and our market structure." *See* Bodolus, *supra* note 7, at 108. *See also* Cohen, *supra* note 7, at 371-72 (explaining that the Office has "also been assigned the task of developing rules and regulations designed to *encourage* and *facilitate* offerings either originating abroad or intended to be sold abroad.") (emphasis in original). The establishment of the Office was itself important evidence of the then growing internationalization of the securities markets.

not free of doubt.[126] While not the substantive regulation of corporate governance desired by the drafters of the federal securities laws and early SEC chairmen, like William O. Douglas, SEC disclosure had an indirect effect on a company's governance. Yet judicial interpretation of the securities laws, particularly the 1977 U.S. Supreme Court decision in *Santa Fe Industries Inc. v. Green* which checked the SEC's reforms on corporate governance disclosure,[127] reaffirmed the traditional primacy of state corporate law in corporate governance. More specifically, as already seen in the Section 12(g) rule-making, disclosure requirements were particularly sensitive in the foreign context where the SEC could be seen to be interfering with the "internal affairs" of foreign firms and thus with the laws of foreign sovereigns. Although courts had held that a U.S. listing of a foreign security established subject matter jurisdiction over foreign parties for anti-fraud purposes,[128] the SEC had some doubts how far it could legally extend its jurisdiction without interfering with international law or laws of other nations.

The SEC also backed away from its proposal because of its concern about preserving U.S. securities markets from international competition. The late 1960s and early 1970s had revealed, through the spectacular growth of the Eurobond market, that there was a strong offshore alternative to U.S. capital markets where foreign issuers could attract U.S. investors. The SEC could simply no longer take for granted the worldwide dominance of the U.S. securities markets that it regulated.[129] Because the SEC's existence depended upon the continued profitability of these markets and their participants, it responded to its constituencies (*i.e.*, investment bankers and securities

126 I owe the following observations to Professor Roberta Karmel, who was an SEC Commissioner at the time of the proposal.

127 430 U.S. 462, 479 (1977) (holding that Section 10(b) of the Exchange Act did not regulate violations of a state law fiduciary duty, absent a disclosure problem, and declining to "federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden").

128 *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *rev'd on other grounds on rehearing en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (discussing the effects of foreign transactions in American securities); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (highlighting fraudulent conduct occurring in the U.S.); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (same). *See generally* Cox, *supra* note 19, at 1333-70; Jennings, *supra* note 23, at 1573.

129 *See, e.g.*, Cohen, *supra* note 7, at 372-75 (describing the growth of the Eurobond market, *i.e.*, where U.S. and foreign companies raised debt financing in Europe through issuances in dollar-denominated securities, a market whose growth was stimulated by the imposition of an Interest Equalization Tax on foreign borrowers in the United States and U.S. restrictions on foreign investment by U.S. multinationals (which caused them to raise funds abroad through their non-U.S. subsidiaries)).

lawyers) when they supported the foreign issuers' contention that the SEC's proposal would drive them offshore and injure U.S. markets.[130] This SEC response also dovetailed nicely with a public interest rationale, for, by acceding to this pressure, the SEC helped maintain for U.S. investors a U.S. market in foreign securities. Moreover, in arriving at an accommodation with foreign issuers that called for only minimal corporate governance disclosure, the SEC contributed to its own self-preservation by ensuring that it would have an important voice in *international*, as well as national, disclosure debates.[131] The history of this proposal on foreign corporate governance thus reveals a complex context of SEC doctrinal deliberation, interest group pressure, SEC concern to justify its existence, and genuine public interest motivations by SEC personnel.

In 1976, the SEC asked for public comment on the desirability of modifying Forms 20 and 20-K to require disclosure similar to that for U.S. issuers.[132] It gave a neutral justification for the request: "[t]he theory has been advanced that amendments of this nature might not only make more meaningful the information available to investors concerning foreign issuers, but also improve the domestic market for foreign securities and thereby facilitate the free flow of capital among nations."[133] In the SEC's view, increased disclosure about foreign companies should give investors more and better information, and this should result in lower costs of capital for foreign issuers and a better U.S. market for foreign securities. Moreover, that Forms 20 and 20-K required "substantially less information" from foreign companies than what domestic companies supplied on recently amended Forms 10 and 10-K could also justify significant amendments to the foreign issuer reporting forms.[134]

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130 *Cf.* Langevoort, *supra* note 5, at 888 and notes accompanying text (describing SEC's "signalling" to constituencies); Macey, *Agency Obsolescence, supra* note 19, at 912-21 (describing strategies taken by an agency threatened with obsolescence).

131 As an agency subject to political pressures, the SEC also felt the increasing force of a deregulatory political philosophy and heightened concerns about U.S. competition that were manifested at the end of the 1970s during the last years of the Carter administration. *Cf.* KARMEL, *supra* note 61, at 184-86.

132 *See* Means of Imposing Disclosure by Certain Foreign Private Issuers, Exchange Act Release No. 13056, 41 Fed. Reg. 36,992 (Dec. 10, 1976).

133 *Id.* This rhetoric may also have signalled to the SEC's constituencies that the SEC had not yet taken a firm position on the issues raised in the Release.

134 *Id.* (also observing that enhanced disclosure by foreign companies would redress any competitive disadvantages suffered by U.S. issuers in U.S. capital markets because of the latters' disclosure burdens). *See, e.g.*, Notice of Adoption of Amendments to Registration Forms S-1 and S-2 under the Securities Act of 1933 and to Forms 10, 10-K and 10-Q, Securities Exchange

In the request for comment, the SEC showed little desire to understand cultural differences in disclosure and governance and to adapt its disclosure framework to them. Rather, the SEC suggested that "better" disclosure for foreign companies meant U.S. disclosure, regardless of the foreign country. Instead of considering that its disclosure framework might not elicit for U.S. investors meaningful information about the culturally sensitive area of foreign corporate governance, the SEC simply emphasized that U.S. issuers made greater disclosure than did foreign issuers on corporate governance issues, as defined by the U.S. perspective.[135] The SEC exhibited some sensitivity to foreign issuers in requesting comment on "the desirability, feasibility, and potential impact of such measures on the United States domestic markets for foreign securities, including the reaction of foreign issuers, organizations, and governments to any possibly increased disclosure burdens" and the "ability of foreign issuers presently to comply with substantially the same annual reporting requirements imposed on domestic issuers".[136] Yet the SEC's policy concern that "such [increased disclosure] requirements would result in foreign issuers not using our markets,"[137] and not a desire better to understand, and thus to produce useful disclosure of, foreign differences, primarily motivated this attention to foreign issuers.

In its proposal to replace Exchange Act Forms 20 and 20-K with new Form 20-F,[138] the SEC also exhibited its confidence in the universality of U.S. disclosure and corporate governance and its blindness to the importance of cultural differences in these matters. It was aware that customs and laws on disclosure were different abroad. In dutifully summarizing the comments that it had received on its earlier concept release, for example, the SEC cited objections to enhanced foreign company disclosure based upon these differences, including an intriguing comment that information produced by some U.S. disclosure requirements would not be "meaningful" for a foreign com-

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Act Release No. 10180, 173 SEC LEXIS 2865, at *3 (June 1, 1973) (improving disclosure on issuer's business and management).

135 *See* Exchange Act Release No. 13056, *supra* note 132, at 36,992 (citing the Form 10 and 10-K requirements that U.S. issuers discuss security holdings by directors and officers, family relationships between officers and directors, legal actions pertaining to them, their interest in corporate transactions and individual director and management compensation data).

136 *Id.*

137 *Id.*

138 *See* Foreign Private Issuers, Exchange Act Release No. 14,128, 42 Fed. Reg. 58,684 (Nov. 2, 1977) (to be codified at 17 C.F.R. part 240).

pany.[139] Rather than considering an alternative disclosure framework to the choices between little or no foreign company disclosure, and disclosure equivalent to full U.S. standards, the SEC opted for the latter approach in its proposal. It pointed out that the same reasoning used in its Section 12(g) rulemaking justified this selection: since foreign disclosure standards were improving, increased disclosure would not be burdensome for foreign companies, and, in any event, it would push foreign companies (and, implicitly, foreign market authorities) in the "right" direction.[140]

A resurgence of a traditional public interest activism in the SEC reminiscent of the New Deal SEC, which corporate governance abuses had inspired, reinforced the SEC's focus on the primacy of U.S. disclosure and corporate governance. Although in its request for comment the SEC "signalled" its neutrality to interested parties, in its rule proposal the SEC took a position openly adverse to its constituencies.[141] It explicitly identified the many commentators to its earlier release who had disagreed with additional disclosure burdens upon foreign companies as "special interests" whose "economic interests" "may not coincide with those of public investors."[142] The SEC's "primary mandate" was not to accommodate these parties, but to protect public investors by giving them adequate disclosure on foreign securities.[143] By proposing to make disclosure for foreign companies the same as that for U.S. companies, the SEC thus sought to encourage these investors to purchase foreign securities, which would break the hold of sophisticated and professional investors on such investment

139 *See id.* at 58,686 ("Generally, these comments expressed the view that certain of the subject disclosure requirements should not be applied in present form to foreign companies either because the resulting disclosures would not be *meaningful* or would be inappropriate or impracticable to provide under foreign business practice, laws or customs.") (emphasis added).

140 *Id.* at 58,687 ("improvements [in foreign disclosure] have continued and *should* continue in the future") (emphasis added).

141 One can only speculate as to the reasons for this shift from benign "signalling" to overt opposition to interest groups. Between the time of the original request for comment and the proposal came the election of a Democratic President (Carter) and his appointment of a new SEC chairman. The election may have emboldened activists on the SEC staff to return to a favorite subject: corporate governance reform.

142 Exchange Act Release No. 14128, *supra* note 138, at 58,685. The SEC clearly identified these special interests:

> Although the majority of written comments received were opposed to or critical of the tentative proposals, relatively few comment letters reflected the views of interested parties other than foreign issuers, stock exchanges and broker-dealers who would be most directly affected thereby. The Commission notes in this connection that economic self-interest in maintaining the status quo is not necessarily consistent with the interests of investors in full and fair disclosure.

Id.

143 *Id.* at 58,687.

opportunities.[144] So concerned was the SEC to provide a disclosure framework whereby U.S. investors would receive adequate information about foreign companies, that in the Release it did not stop to consider that the U.S. disclosure framework might be a poor tool for the task.

The SEC acknowledged in passing the complex doctrinal and policy reasons that had led to the existing situation of minimal foreign disclosure: the jurisdictional problems of enforcing U.S. disclosure standards on foreign companies and, indirectly, of affecting their governance; the comity concern over interference with national sovereignties; and finally, but significantly, the fear of injuring U.S. markets for foreign securities.[145] Observing that "internationalization of the world's capital markets" meant that more foreign securities were finding, or would find, their way to U.S. investors,[146] the SEC explained that it had to protect U.S. investors by equalizing foreign company and U.S. disclosure.[147]

With its U.S. perspective of addressing the problem of management power over dispersed shareholders, the SEC thus proposed a new Form 20-F that demanded considerably more U.S.-style corporate governance information than Forms 20 and 20-K had required. While the existing forms simply asked for an identification of the company or government controlling the issuer,[148] the proposed form required disclosure of more "control" information.[149] The proposed

144 *See id.*

145 *Id.*

146 *See id.* (noting that the repeal of the Interest Equalization Tax meant that more foreign issuers would come directly to the U.S. capital markets).

147 *See id.* at 58,687 and note 6 (discussing improvements to U.S. company disclosure and possible competitive harm to U.S. companies from lesser disclosure burdens on foreign companies). The SEC's allusion to possible harm to U.S. companies was puzzling. If increased disclosure resulted in lower costs of capital for a foreign issuer (*i.e.*, investors would no longer demand a higher return for undisclosed risks), foreign companies, not U.S. companies, would be at a competitive disadvantage because of their lesser disclosure obligations. *See id.* at 58,686.

148 *See* Forms, Securities Exchange Act of 1934, 32 Fed. Reg. 7,853, 7,854 (1967) (to be codified at 17 C.F.R. Sec. 249.221).

149 A foreign issuer would have to identify, to the extent practical, (i) all owners of more than five percent of any class of voting securities, (ii) the total holdings of the securities of the issuer, or of any of its parents or subsidiaries, by all directors and management and (iii) any "arrangements" that might result in changes of control. *See* Exchange Act Release No. 14128, Proposed Form 20-F, Item 5, *supra* note 138, at 58,697. Since a foreign issuer might have difficulty identifying its five percent shareholders because many foreign shares were held in bearer form, the SEC permitted a foreign issuer to identify such holders "to the extent practicable". *See also id.* (requiring a company to "[d]escribe any arrangements, known to the registrant, including any pledge by any person of securities of the registrant or any of its parents, the operation of which may at a subsequent date result in a change in control of the registrant"); *id.* Item 4 (requiring the foreign company to explain, by list or diagram, the structure of the corporate group (*i.e.*,

form, mirroring the requirements for U.S. companies, also demanded such information about each director and officer as (i) age, (ii) term of office, (iii) any "arrangement or understanding" pursuant to which the officer or director had obtained the position, (iv) family relations with other officers and directors and (v) a description of the director's experience and competence.[150] Under the proposed form, a foreign issuer had to disclose certain legal events concerning a director or officer, including criminal convictions and proceedings, bankruptcy of the person or related businesses and any violation of securities, banking or insurance law, if they were material to an evaluation of the person's "ability and integrity".[151] Finally, proposed Form 20-F required that a foreign issuer give information about director and officer compensation, direct or indirect, that was more extensive than the aggregate remuneration information required by Forms 20 and 20-K.[152]

The SEC also proposed increasing the information that shareholders would receive as to rights and interests pertaining to their shares, which again made sense from the U.S. corporate governance perspective that stressed the need to address the powerlessness of dispersed capital markets investors. A foreign issuer would thus disclose to investors any sales of unregistered securities occurring during the

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parents and subsidiaries of which it was a part). These disclosure items were all borrowed from Forms 10 and 10-K. *See* Stephens, *supra* note 92, at 520 n.421.

150 *See* Exchange Act Release 14128, *supra* note 138, at 58,697 (adding to existing Forms 20 and 20-K's disclosure of the name, address and position of the individual directors and officers).

151 *See id.*

152 If a foreign issuer disclosed compensation information as to each individual director receiving over $40,000, and the three highest paid officers in the foreign jurisdiction, it had to do so in the Form 20-F. *See id.* at 58,698. If the company made no such disclosure in the foreign jurisdiction, it could continue to give only aggregate compensation for such individuals, as well as aggregate compensation for all directors and officers as a group. A similar breakdown was required for pension or retirement benefits. *See id.* at 58,699. *See also* Item 8 (requiring a description of any consideration the foreign issuer received for granting the options to directors and executives and the market value of the security on the day of the grant); *id.* at 58,699-700, Item 9 (requiring disclosure of any "material" interest by a director, officer, five percent shareholder, or relative thereof, in any recent (*i.e.*, within the last three years) transactions with the issuer, any indebtedness (over $10,000) to the issuer by any such party and any transaction by any such party with a pension, savings, retirement or similar plan provided by the issuer); *id.* at 58,700, Item 10 (requiring disclosure of material proceedings to which any director, officer, five percent holder or any associate of such is named or has a material interest); *id.* at 58,702, Item 18 (requiring disclosure of insurance or indemnification provisions for a director or officer (to be used only when Form 20-F served as an annual report or when an issuer had not otherwise provided this information in previous interim filings)). *See generally* Stephens, *supra* note 92, at 520 n.421.

three years prior to the filing,[153] as well as any legal possibility that terms of registered capital stock could be modified other than by a majority vote of shareholders.[154] Furthermore, shareholders would learn if the foreign company had modified shareholder rights, if it had increased or decreased share capital (and details pertaining thereto), or if it had submitted any matter to the vote of security holders.[155]

Form 20-F did not go forward as proposed. It took over two years for the final rules and forms to be adopted,[156] and they represented a significant reduction in the proposed corporate governance disclosure requirements for foreign companies. Although based upon the U.S. disclosure framework, foreign company disclosure on this subject was substantially less than that required of a U.S. issuer. Can-

153 *See* Exchange Act Release No. 14128, *supra* note 138, at 58,701, Item 12 (requiring disclosure of details of the sale, such as price, identity of underwriters, their commission and the Securities Act exemption under which issuer made the sales).

154 *Id.* Item 13(b).

155 *Id.* at 58,702-703 Items 19, 21, 22. *See also id.* at 58,702, Item 20 (requiring disclosure of defaults upon senior securities, to be used when Form 20-F served as an annual report and when an issuer had not otherwise disclosed the information in a Form 6-K); *id.* at 58,704-705 (requiring the attachment of more exhibits than had Forms 20 and 20-K). In addition, the SEC proposed to revise interim reporting Form 6-K to require foreign issuers to provide translations or English summaries of any information disclosed therein and to integrate disclosure therein with disclosure in Form 20-F. *See id.* at 58,690.

The SEC also wished to clarify that the longstanding exemption of foreign issuers from Exchange Act Sections 14 and 16 in Rule 3a-12 (last amended in 1966) did not apply to provisions added to Section 14 by the Williams Act. *See* Exchange Act Release No. 14128, *supra* note 138, at 58,691 (referring to Williams Act Amendments to the Exchange Act, Pub. L. No. 90-439, 82 Stat. 454-457 (codified as amended at 15 U.S.C. §§ 77m(d), (e), §§ 78n(d), (e), (f) (1994)). According to the SEC, the pertinent Section 14 provisions "are as important to those United States investors who invest in securities of foreign issuers as to those who invest in the securities of domestic issuers, as well as to the issuers of such foreign securities." *Id.* In clarifying that tender offer regulation applied to all shareholders holding Exchange Act registered securities, the SEC was acknowledging a recent Court case, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 23 (1977), where the Court had held that the main purpose of the Williams Act was the protection of investors. Whereas the Williams Act made sense in U.S. corporate governance, where the tender offer (*i.e.*, market for corporate control) was an important management disciplining device, its applicability to *all* foreign companies, where different relations between management/shareholders might exist, was questionable. The SEC's proposal, which was adopted as proposed, proved to have the unintended effect of causing foreign companies to exclude U.S. shareholders from foreign tender offers. *See* International Tender and Exchange Offers, Securities Act Release No. 6897, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,803 (June 14, 1991) (permitting a foreign issuer to follow home jurisdiction rules in proceeding with a tender offer to U.S. security holders, provided that fewer than 10% of the target class are U.S. holders, and proposing a special F-form for de minimis exchange offers). *See generally* Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers,* 87 Nw. U. L. Rev. 523 (1993).

156 *See* Rules, Registration and Annual Report Form For Foreign Private Issuers, Exchange Act Release No. 34-16371, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,363 at 82,548 (Nov. 29, 1979).

didly admitting that it had met almost uniform opposition to its proposal to equalize the disclosure burdens for U.S. and foreign issuers,[157] the SEC spoke in the final release in rhetoric that, rather than affirming the confidence of an agency defending small investors over special interests, expressed a solicitude for the latter.[158]

Despite the opposition to its proposal, the SEC did not abandon its own confidence in the "correctness" of U.S. corporate governance and disclosure. It made an accommodation to foreign companies but did not – nor was it really urged to – modify in any novel way its disclosure framework when applying it to foreign companies and cultures. The SEC did not take up the alternative of completely deferring to foreign disclosure standards, nor, more importantly, did it consider designing a disclosure framework that might be open and flexible in communicating differences in foreign companies' governance, although the comment process brought these differences to the forefront.[159] The SEC appeared to expect that, in time, with evolution in disclosure abroad and because of efforts in international organizations, disclosure standards and corporate governance worldwide would mirror the superior U.S. forms.

Although presented with an opportunity to examine critically its belief in the primacy of U.S. corporate governance and disclosure, the SEC made a pragmatic, rather than theoretical, response to the market and legal situation. Upon the basis of comments from market participants and further reflection, it simply acknowledged changing market conditions that undermined its proposal. As it observed, since securities markets had become increasingly international, U.S. investors purchased securities of companies that had different disclosure and other business customs. As a result of this internationalization, not only national authorities, like the SEC, but also supranational or-

157 *See id.* at 82,549-50.

158 *See id.* at 82,549 (emphasizing "its traditionally flexible approach and attitude in administering the disclosure requirements for foreign issuers").

159 *See id.* at 82,548 ("At the same time, the Commission recognizes that there are differences in various national laws and businesses and accounting customs which the Commission should take into account when assessing disclosure requirements for foreign issuers."). The SEC was aware of the alternative of deferring to home country disclosure requirements. *See id.* at 82,550 ("Some of the commentators suggested alternative approaches as: reciprocal or country-of-origin treatment . . . "). Because, as will be seen below, the SEC adopted a skeletal framework of disclosure on corporate governance matters that, in some cases, was based upon foreign disclosure standards, arguably the SEC was implicitly accepting this alternative. There is, however, no suggestion in the rulemaking that this was the reason for the SEC's approach, as opposed to the others discussed below.

ganizations were examining disclosure standards.[160] Rather than insisting upon its own disclosure framework, the SEC wanted to contribute to these international efforts and to take account of this international market situation.[161] The SEC's concerns about the legal basis for the effects of its regulation on corporate governance in foreign companies, described earlier, also supported a modification of its proposal.

Other remarks in the final release also demonstrate that, despite its recognition of the existence of national differences in governance and disclosure, the SEC never questioned its cultural perspective and generally focused its attention upon protecting its constituencies.[162] Opposition to its rule proposal made the SEC aware that the proposal potentially threatened the economic well-being of certain U.S. market participants. From a public choice perspective, the SEC pragmatically modified its proposal to respond to the needs and wishes of these important constituencies. United States capital markets no longer dominated the world of investment, as the Euromarket had proved. Foreign issuers, reluctant to have any increased disclosure burden placed upon them, could remain offshore, and interested U.S. investors could follow them there.[163] United States market participants (as well as the foreign issuers themselves) that financially benefitted from U.S. markets for foreign securities brought this message home to the SEC. These groups primarily included the organized marketplaces, such as the U.S. stock exchanges, and the investment banks that specialized in offerings and trading of foreign securities.[164] They also

160 *See id.* at 82,548 ("The world capital markets are becoming increasingly international in nature. Not only the Commission, but the other organizations discussed below [the Organization for Economic Cooperation and Development, the European Economic Community, and the United Nations Commission on Transnational Corporation] are today concerned with the examination and reevaluation of the general systems of securities regulation in international markets.").

161 *See id.*

162 *Cf.* Dezalay, *supra* note 19, at 2 (suggesting that one should not accept uncritically a statement of purpose by a group or State (or impliedly a State agency)); Dezalay & Garth, *supra* note 19, at 32 (same).

163 *See* Exchange Act Release No. 16371, *supra* note 156, at 82,549 ("The foreign private issuer commentators, with one exception, generally were opposed, in whole or part, to the proposed Form 20-F. A number indicated that they would be compelled to re-evaluate their participation in the United States capital markets in terms of their own benefits and costs if the proposals were adopted.").

164 *See id.* at 82,549-50 ("The remaining non-issuer commentators, with several exceptions, also were opposed to the proposals. Their major objections included the following: . . . the perceived reluctance and/or refusal of foreign issuers to comply with the proposals if adopted and the consequent impairment of the United States capital market for foreign securities, the international flow of capital and investment opportunities for United States investors . . . .").

numbered the Wall Street securities lawyers who represented both investment banks and the foreign issuers and whose legal business might be adversely affected by a decline in U.S. markets for foreign securities.[165]

From a survival perspective, moreover, the SEC's accommodation to foreign companies on corporate governance disclosure was a good tactical move, particularly if the SEC became the dominant voice in international deliberations and negotiations over disclosure and corporate governance standards. A serious economic injury to U.S. investment banks, to other participants in the U.S. capital markets and to the securities bar, all of which provided the agency with employees and its members and staff with sources of future employment,[166] would harm the agency as well. By accommodating foreign issuers with a reduced disclosure framework, yet one subject to constant interpretation and reevaluation, the SEC maintained its primary role in the U.S. dialogue over disclosure. It also turned the existence of other national disclosure frameworks and the movement towards international disclosure standards to its benefit. For in its position as regulator of the U.S. capital markets, it would be the chief U.S. representative in international bodies developing these standards, as well as in negotiations with individual countries.[167]

See also 2 LOSS & SELIGMAN, *supra* note 23, at 776-785; 4 LOSS & SELIGMAN, *supra* note 23, at 1809. As U.S. investment banks increasingly expand their operations offshore, a question arises as to whether they care any longer about U.S. regulation of foreign companies, or whether that mantle has been assumed by those whose business is limited to the U.S., *e.g.,* U.S. securities exchanges and investment banks lacking an international presence. *See, e.g., The Americans are Coming,* OTHER PEOPLE'S MONEY, special supplement to ECONOMIST, Apr. 15, 1995, at 23-25 (describing global expansion of U.S. investment banks).

165 U.S. securities lawyers had (and have) a financial interest in maintaining the importance of U.S. capital markets, where their expertise is necessary, and/or in making U.S. law the centerpiece of international capital market activity. *See infra* note 246.

166 *See, e.g.,* Jeffrey Taylor, *Quinn Joins Top Officials Leaving SEC,* WALL ST. J., Jan. 31, 1996, at C1 (describing departure of head of Division of Corporation Finance to become partner in Wall Street law firm).

167 *See* Exchange Act Release No. 16371, *supra* note 156, at 82,549 ("The Commission has reviewed and been influenced by the standards proposed or adopted by these organizations and believes its present action is broadly consistent therewith. The Commission will continue to encourage and participate to the extent practical with the work of these organizations."). In the years following promulgation of Form 20-F, the SEC actively participated in negotiations with foreign market authorities and in international organizations, such as the International Organization of Securities Commissions ("IOSCO"), attempting to harmonize disclosure. *See infra* note 201; INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, ANNUAL REPORT 1992, app. 1 (1992) (listing SEC as member in this voluntary association of approximately 90 members, the majority of which are national securities regulatory agencies, and describing the organization's purpose as developing international cooperation in the regulation of securities transactions); Richard M. Kosnik, *Comments on "Barriers to Foreign Issuer Entry into the U.S.*

As a result of the opposition and its own reconsideration, therefore, in the final Form 20-F, the SEC replaced fullblown U.S.-style corporate governance disclosure requirements for foreign issuers with a "bare bones" disclosure outline. With respect to control, the SEC required the foreign issuer to disclose only persons holding more than 10% (instead of the proposed 5%) of a class of voting securities and only if the company's shares were in registered, as opposed to bearer, form.[168] As for disclosure benefits, observing that the proposed disclosure had been found "inconsistent with the requirements of many foreign jurisdictions and international guidelines" and that it had received much criticism on this aspect of its proposal, the SEC returned to the few disclosure requirements of Forms 20 and 20-K.[169] In the final release, moreover, the SEC demanded disclosure on management conflicts of interest in certain transactions only if a foreign com-

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Markets," 24 LAW & POL'Y INT'L BUS. 1237, 1253 (1993) (describing SEC participation in IOSCO's harmonization efforts). An active SEC in international fora would benefit its U.S. constituencies, particularly securities lawyers, whose legal expertise on disclosure might come to have an international value. *Cf.* Dezalay, *supra* note 19, at 2 ("The generalization of the north-American model of the lawyer as privileged operator of a 'regulatory process' defined in juridicial terms is one of the stakes - and one of the supporting elements - in a process of 'globalisation' which is also a battle for global domination."). Not surprisingly, therefore, prominent U.S. securities lawyers are active, side by side with SEC personnel, in these fora.

168 *See* Exchange Act Release No. 16371, *supra* note 156, at 82,551 (also requiring disclosure of the shareholdings of directors and officers as a group and any known arrangements for a change in control). Final Form 20-F did not require a company to give an organizational diagram of itself, its parents and subsidiaries.

169 *See id.* at 82,550-551. The revised item required the foreign issuer to give information about each director and officer's term of office, "arrangement or understanding" pursuant to which the office had been obtained and family relations with other directors and officers. *See* Form 20-F, Forms Under the Exchange Act of 1934, *reprinted in* 5 Fed. Sec. L. Rep. (CCH) ¶ 29,721, at 21,748 (June 8, 1988). It abandoned, however, the requirement of a somewhat extensive discussion of a director's or officer's business background and legal proceedings. *See* Exchange Act Release No. 16371, *supra* note 156, at 82,551. In a curious footnote, the SEC noted that the information it had sought was "most relevant in proxy solicitations," but that Rule 3a12-3 exempted foreign companies from the proxy rules. *See id.* at 82,551 n.13. This was hardly a convincing justification, because a main reason for the proxy rule exemption (*i.e.*, few foreign issuers listed in the U.S.) was no longer valid.

On compensation matters, the SEC abandoned its effort to single out the highest paid directors or officers and instead returned to the aggregate compensation approach of Forms 20 and 20-K. *See id.* at 82,551. *See also* Disclosure of Management Renumeration by Certain Foreign Private Issuers, Securities Act Release No. 6157, 44 Fed. Reg. 70,131 (Jan. 7, 1980) (to be codified at 17 C.F.R. pt. 231) (adopting guide for preparing Securities Act disclosure statements that formally allowed what the SEC staff had previously permitted informally – aggregate compensation disclosure, and abandoning proposal, *see* Disclosure of Management Renumeration by Certain Foreign Private Issuers, Securities Act Release No. 5880, 44 Fed. Reg. 58,676 (Nov. 2, 1977) (to be codified at 17 C.F.R. pt. 231), to have foreign issuers disclose compensation of highest paid executives).

pany disclosed such information under foreign law.[170] The SEC abandoned other corporate governance-related items without much explanation.[171]

In its final Form 20-F, the SEC did take a few limited steps (besides those mentioned above) in improving disclosure related to foreign corporate governance, again from the U.S. corporate governance perspective. In particular, it retained certain proposals pertaining to foreign issuer disclosure of shareholder rights.[172] As in the earlier Rule 12g3-2 compromise, the SEC's accommodation to foreign issuers on corporate governance disclosure in Form 20-F would remain essentially unchanged to this day.

D. Recent SEC Initiatives on Foreign Companies

Several reasons explain why the SEC has not revisited its accommodations with foreign issuers on corporate governance disclosure. Inertia provides one explanation: a compromise, once reached, is likely to be left undisturbed unless one of the concerned parties later finds itself at a disadvantage. From a public choice perspective, the interest groups identified above, investment banks, foreign issuers and their respective securities counsel, had little desire to reopen an issue the outcome of which was favorable to them. Rather, they spent their time and effort on other disclosure matters, such as financial statement disclosure, that in their view hindered the development of U.S. markets for foreign securities.[173] Given the influence and agenda-set-

170 *See* Exchange Act Release No. 16371, *supra* note 156, at 82,552. *See* 2 Loss & Seligman, *supra* note 23, at 769 (observing that "these [disclosure] requirements significantly compromise the more demanding conflict of interest requirements" imposed on U.S. companies) (text accompanying note 59).

171 *See* Exchange Act Release No. 16371, *supra* note 156, at 82,552 (with the SEC stating that "[t]he following proposed items have not been adopted because the information they would have required was largely irrelevant to United States investors in foreign securities, disclosed elsewhere in the Form 20-F or because of other reasons . . . ."). These items included indemnification of directors and officers, recent sales of unregistered securities, increases and decreases in outstanding securities, and submission of matters to a vote of security holders.

172 *See id.* at 82,552 (describing acceptance of proposals on description of securities and description of material changes in the terms of registered securities). The SEC also maintained, although in somewhat altered form, a proposal to make interim information from foreign issuers more accessible to U.S. shareholders. *See id.* at 82,553 (describing the requirement that Form 6-K materials needed English translation or English summaries only if information was distributed to securityholders or consisted of material press releases).

173 *See, e.g.*, Securities Act Release No. 7029, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,252 (Nov. 3, 1993) (proposal); Securities Act Release No. 7053, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,331 (Apr. 19, 1994) (adoption) (allowing foreign issuers eligible to use Form F-3 to have a cash-flow statement prepared in accordance with International Accounting Standards). The literature on accounting standards is extensive. *See, e.g.*, Symposium, *Enter-*

ting ability of these groups with the SEC and with international securities organizations, the SEC's attention to disclosure reflected their focus. From a bureaucratic importance and survival perspective, moreover, the SEC enhanced its own importance by taking an active role in international efforts to harmonize financial statement disclosure, and not by revisiting the closed question of foreign corporate governance disclosure.

The SEC also had practical and jurisprudential reasons for its inactivity on this subject. The SEC's resources are limited, and it has concentrated them on issues, such as financial statement disclosure, that it may believe are of greater importance to investors.[174] By addressing disclosure in financial statements and related areas, such as management's analysis of financial statements, the SEC could be seen to have treated in an economical, but indirect, manner corporate governance: the SEC provided investors with the necessary and sufficient information to determine whether management was properly operating a company. In addition, since, as shown above, corporate governance is bound up with the internal affairs of a corporation, since for historical and legal reasons the SEC never obtained direct jurisdiction over this subject matter, and since jurisdictional and comity concerns kept the SEC from interfering with foreign corporate governance,[175] the SEC took the reasonable legal position of not reopening this potentially messy can of worms.

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ing the U.S. Securities Markets: Opportunities and Risks for Foreign Companies, 17 FORDHAM INT'L L.J. S1 (1994) (articles of Richard Kosnik, Pat McConnell, M. Elizabeth Rader concerning SEC and foreign accounting standards); Michael A. Schneider, Note, *Foreign Listings and the Preeminence of U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301 (1994). *See also* Greene, *supra* note 111, at 438-41 (focusing almost entirely on issues related to financial statement disclosure). In their argument that the SEC should defer, for foreign company disclosure, to home country standards, Greene advocates a position calculated to appeal to the SEC, because he conditions deference on the efficiency of a foreign market (a concept that in its uncritical form (which they use) is accepted by the SEC, *see* Langevoort, *supra* note 5, at 873-89), on minimal home country disclosure standards, for which Form 20-F is a model, and on minimal market standards established by international organizations. *See* Greene, *supra* note 111, at 439, 441. Is it any surprise that Edward Greene, a former SEC general counsel and Director of the Division of Corporation Finance, would recognize which chords would have the most resonance with SEC staff?

174 *See* Use of Abbreviated Financial Statements in Documents Delivered to Investors Pursuant to the Securities Act of 1933 and Securities Exchange Act of 1934, Securities Act Release No. 7183, [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,634 (June 27, 1995) (proposing, among other things, to streamline financial statements in annual reports and SEC filings "so as to make the reports more readable and useful to the general shareholder body", particularly in "their voting decision" for directors). If the SEC's current goal is to produce more readable and thus more meaningful disclosure documents, might this not also argue for a better discussion of such "soft" matters as corporate governance, particularly *foreign* corporate governance?

175 *See supra* text accompanying notes 126-128.

It is surprising, however, that the SEC never revisited foreign corporate governance disclosure, except occasionally and briefly to confirm its position. Corporate governance as defined to refer to the agency relationship between management and owners is after all *itself* a specific topic of disclosure under both the Securities Act and Exchange Act.[176] It is thus not a subject that, under its statutory mandate, the SEC should ignore or fail to reconsider. In its earlier pronouncements, moreover, the SEC had suggested that its position was provisional: it understood foreign disclosure regimes to be evolving and implied that it would have to revisit *all* disclosure matters in the future. While, as discussed below, the SEC had numerous opportunities to reconsider foreign corporate governance disclosure in the years after 1979, particularly in light of increased internationalization of securities markets, it failed to examine whether any evolution had occurred either in foreign corporate governance disclosure or on the general subject of foreign corporate governance. Yet, paradoxically, this SEC inaction occurred at a time of growing worldwide awareness and analysis of differences in corporate governance and even renewed SEC recognition of the importance of corporate governance disclosure.

Had the SEC seriously looked at foreign corporate governance disclosure after 1979, it still may not have recognized that cultural differences in foreign countries demanded a different disclosure (or disclosures) to produce meaningful communication to U.S. investors. All signs, in fact, suggest that the opposite would have occurred: *i.e.,* that the SEC remained confident in the primacy of U.S. disclosure and corporate governance. If, for the reasons discussed earlier, it could not impose its U.S. centered views upon foreign issuers, it could at least promote them indirectly through its participation in international securities market associations. Yet a serious reconsideration of foreign corporate governance disclosure by the SEC might at least have compelled it momentarily to shed its cultural blinders because scholarly and other reflection had increasingly emphasized cultural differences in corporate governance systems.[177]

The most important SEC initiative on foreign issuer disclosure since 1979 was the development of an integrated disclosure system for foreign issuers. The catalyst for this action was the SEC's adoption of integrated disclosure for U.S. issuers, which had involved an extensive reconsideration of, and revisions and reproposals to, Securities Act

176 *See* Mahoney, *supra* note 56, at 1092-93 (arguing that it is *the* main subject of disclosure).
177 *See supra* note 5.

and Exchange Act forms and specific disclosure requirements.[178] The SEC had asked whether it should extend integration to foreign issuers and how this extension should be effected.[179] In a release issued before final adoption of the U.S. integrated disclosure system, the SEC proposed both revisions to Form 20-F, and, for the first time, specific "integrated" Securities Act Forms F-1, F-2 and F-3, tailored to the needs of foreign issuers.[180]

The rhetoric of this proposal, so different from the righteousness of the Form 20-F proposal, showed that the SEC intended to reinforce, and not to upset, its accommodations with foreign issuers, the investment banks, and the securities bar. Thus, the SEC did not even raise the issue of corporate governance disclosure for foreign companies. Acknowledging its legislative mandate to treat foreign private issuers in the same manner as U.S. issuers in disclosure matters, and the public interest goal of giving investors the "same type of basic

178 *See supra* note 33. As the SEC explained its goal in integration, "[t]he Commission's integration program involves a comprehensive evaluation of the disclosure policies and procedures underlying the Securities Act of 1933 and the Securities Exchange Act of 1934 with a view toward integrating the information systems under those Acts so that investors and the marketplace are provided meaningful, nonduplicative information periodically and when securities are sold to the public, while the costs of compliance for public companies are decreased." *See* Comprehensive Revision to System for Registration of Securities Offerings, Securities Act Release No. 6235, 45 Fed. Reg. 63,693, 63,693-94 (Sept. 2, 1980) (to be codified at 17 C.F.R. pt. 230). Securities lawyers and SEC study groups had for years pushed integration. *See id.* at n.5, n.12 (citing REPORT AND RECOMMENDATIONS TO THE SECURITIES AND EXCHANGE COMMISSION FROM THE DISCLOSURE POLICY STUDY, DISCLOSURE TO INVESTORS, A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE 1933 AND 1934 ACTS (March 1969) (the "Wheat Report")); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., THE REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION (Comm. Print 1977). The integration project involved over two years of SEC effort. *See, e.g.,* Integration of Securities Act Disclosure System, Securities Act Release No. 6231, 45 Fed. Reg. 63,630 (Sept. 2, 1980) (to be codified at 17 C.F.R. pt. 239) (describing integration proposal and amendments to Form 10-K); Comprehensive Revision to System for Registration of Securities Offerings, Securities Act Release No. 6331, 46 Fed. Reg. 41,902 (Aug. 6, 1981) (to be codified at 17 C.F.R. pt. 239) (reproposal for integrated disclosure forms); Securities Act Release No. 6383, *supra* note 33 (adoption of integrated disclosure forms, as well as system of continuous offering or "shelf" registration).

179 *See* Securities Act Release No. 6235, *supra* note 178, at 63,708 (observing that "[t]he diversity of foreign disclosure standards and the major departure from the Commission's traditional policy such a system would represent [*e.g.,* having separate Securities Act forms for foreign issuers] make design of any such system especially difficult.") (footnote omitted).

180 *See* Integrated Disclosure System for Foreign Private Issuers, Securities Act Release No. 6360, 46 Fed. Reg. 58,511 (Nov. 20, 1981) (to be codified at 17 C.F.R. pt. 210). In general, Form F-1 was the residual form to be used for all foreign private issuers. Only foreign issuers that had been Exchange Act reporting issuers for at least three years could use Forms F-2 and F-3, which allowed incorporation of a foreign issuer's primary Exchange Act filing, the Form 20-F. Use of either of these forms depended upon the kind of securities offering the foreign issuer proposed. *See id.* at 58,517-18 (chart explaining usage).

information" about foreign companies as they received from U.S. companies,[181] the SEC nevertheless emphasized the phenomenon that had caused it to back away from its ambitious Form 20-F proposal: that excessive disclosure burdens upon foreign private issuers might keep them from using U.S. capital markets. Understandably, the SEC gave the argument a public interest slant: if foreign companies stayed offshore, U.S. retail investors would either be denied the opportunity to invest in them or would be thrown to the mercies of foreign disclosure systems.[182] Again understandably, the SEC made no reference to the obvious consequence of driving away foreign issuers – harm to its investment banking and securities bar constituencies and to its own importance.

As the SEC explained, the balancing of the two public interest policies, investors' need for information and their need for investment opportunities, led to its "principle of voluntarism", which it presented as such a fundamental SEC policy that the SEC omitted mention of the principle's relatively recent historical origin.[183] It would impose disclosure requirements comparable to those applied to U.S. companies on only those foreign companies that had sought U.S. markets through a listing or public offering; other foreign companies would receive the flexible disclosure treatment of Rule 12g3-2. Even for the foreign "voluntary" entrants to these markets, the SEC would create additional separate forms for Securities Act purposes as it had for Ex-

181 *See id.* at 58,512. The SEC highlighted developments in international disclosure standards, which it supported, and observed that "in many cases the disparity between the accounting and disclosure practices of the United States and many other countries is narrowing." *Id.* It repeated its evolutionary belief that, in time, foreign countries would develop the same disclosure regime as the U.S. *See id.* at 58,519. *See also* Greene, *supra* note 111, at 418-24 (arguing – understandably given the authors' "interested" position as Wall Street securities lawyers – that the proposal was not so accommodating to foreign issuers because of its emphasis upon disclosure of business segments and financial statement reconciliation to U.S. GAAP).

182 *See* Securities Act Release No. 6360, *supra* note 180, at 58,513 (discussing loss of foreign investment opportunities for U.S. investors); *id.* at 58,519 (observing that "discouraging registration [of foreign companies] may not be in the public interest because the disclosure in the foreign market may be less than that required in filings with the Commission even with the proposed accommodations.").

183 *See id.* at 58,512 ("Much of the complexity in this area is caused by two principles the Commission adopted *in its early years.* First, a distinction is made between foreign issuers that voluntarily enter the United States securities markets and those companies whose securities are traded in the United States without any significant voluntary acts or encouragement by the issuer.") (emphasis added); *id.* at 58,513-14 (" . . . the Commission regularly has sought to balance the competing policy interests underlying each interpretation using a principle of voluntarism. According to that principle, the more voluntary steps a foreign company has taken to enter the United States capital markets, the degree of regulation and amount of disclosure more closely approach the degree of regulation of domestic registrants.").

change Act reporting so that it would have the flexibility to respond to "their distinctive problems".[184]

In the proposed Securities Act forms for foreign issuers, the primary description of a foreign company and its business would come from an amended Exchange Act Form 20-F, which would either accompany a prospectus or be incorporated by reference therein, or whose items would serve as a model for the prospectus description of the company and business.[185] The proposed major amendments to Form 20-F all dealt with the financial statements and disclosure items requiring a summary of or commentary on these statements.[186] The SEC proposed no change to its earlier accommodations on corporate governance disclosure. When the new Securities Act forms were finally adopted a year later, the corporate governance disclosure items remained expectedly untouched.[187]

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184 *See id.* at 58,513, 58,519 (explaining "that separate forms for foreign registrants are consistent with the practice under the Exchange Act and will meet the concerns of foreign issuers that their distinctive problems will continue to receive specific Commission attention in connection with any future amendments to general disclosure requirements.").

185 Form F-3 would thus incorporate the Form 20-F by reference; use of Form F-2 would involve delivery of the Form 20-F with the prospectus; and the Form F-1 would essentially require a reproduction of the Form 20-F in the prospectus. *See id.* at 58,524-30. The specific offering information (*e.g.*, determination of offering price, use of proceeds) would come pursuant to Regulation S-K requirements and would thus generally be the same for domestic and foreign issuers.

186 *See id.* at 58,514-15 (proposing (i) to amend the Management's Discussion and Analysis (which was essentially a commentary on the financial situation of a company) in line with a recently expanded version of the same for domestic companies and (ii) to clarify when a foreign issuer could use foreign financial statements reconciled to U.S. GAAP, and when full U.S. GAAP disclosure was needed).

187 *See* Foreign Issues Integrated Disclosure System, Securities Act Release No. 6437, 14 SEC. REG. & L. REP. 2099 (Nov. 19, 1982). As the SEC observed, the response from interested groups – "foreign registrants, foreign and domestic stock exchanges, foreign and domestic accounting firms, securities firms, law firms, bar associations, accounting associations, and others" – was overwhelmingly favorable. *See id.* at 2100. Commentators simply pushed the SEC to be even more accommodating to foreign issuers. The SEC responded by revising its traditional distinction between North American and other foreign issuers to allow Mexican issuers ways to use the foreign forms and Canadian issuers initially to use them before having to switch to the forms for U.S. issuers. *See id.*

Similarly, when the SEC proposed, and adopted, a special form, S-4, for registering securities offered in an exchange offer, a business combination (often in a merger context) or similar transaction, it designed a comparable form, Form F-4, for foreign issuers. *See* Business Combination Transactions, Securities Act Release Nos. 6535, and 6535A [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,628 (May 9, 1984) (proposal); Business Combination Transactions, Securities Act Release No. 6579, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,419 (Apr. 23, 1985) (adoption). The Form for domestic issuers required corporate governance disclosure (*i.e.*, management and shareholder rights information) equivalent to what the proxy rules would demand; Form F-4, by contrast, simply required information identical to the skeletal corporate governance information in Form 20-F. *See* Securities Act Release No. 6579, *supra*, at 62,081. Because the Form F-4

The SEC similarly reaffirmed its position on foreign corporate governance in the context of stock exchange and securities association listing standards. In 1986, the major U.S. stock exchanges, the New York Stock Exchange (NYSE) and the American Stock Exchange (Amex), as well as the NASD on behalf of the NASDAQ, submitted rule changes that would exempt foreign companies from, among other things, the exchanges' corporate governance practices. Under the exemptions, if eligible foreign companies followed corporate governance practices consistent with the laws of their home country, they would be exempt from the exchanges' rules on this subject.[188] According to the exchanges, important foreign companies were reluctant to list their securities on the exchanges because the corporate governance practices and related reporting standards for a listed company were in some cases inconsistent with laws and practices in their home countries.[189]

The SEC approved the rule changes at the very time when it was attempting (ultimately unsuccessfully) to use its influence over exchanges to address corporate governance abuses by U.S. companies.[190] Its major justification for approving the exemptions was that

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could be used for proxy purposes, however, the SEC required even foreign issuers to meet certain U.S. proxy requirements (*e.g.*, explain availability of dissenters' rights) when they used the new Form in this way.

188 *See* Self Regulating Organizations, Exchange Act Release No. 23469, 51 Fed. Reg. 27,618 (July 25, 1986) (NYSE); Self Regulating Organizations, Exchange Act Release No. 23064, 51 Fed. Reg. 11,125 (Mar. 25, 1986) (Amex); Self Regulating Organizations, Exchange Act Release No. 22506, 50 Fed. Reg. 41,769 (Oct. 4, 1985) (NASD). The proposals also dealt with interim reporting requirements imposed by the exchanges on foreign companies. Regulation by exchanges and securities associations included rules on listed companies' corporate governance practices. *See, e.g.*, NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 3 (1995) ("Corporate Responsibility"); Part 1. Original Listing Requirements, [1996] Am. Stock Ex. Guide (CCH) ¶¶ 10,001-10,046; Part 7. Shareholders Meetings, Approval and Voting of Proxies, [1996] Am. Stock Ex. Guide (CCH) ¶¶ 10,191-10,206; Arts. II, VII, X, NATIONAL ASSOCIATION OF SECURITIES DEALERS INC. MANUAL, NASD Manuel (CCH) ¶¶ 1121-24, 1231-36 (1995). *See supra* note 38. para. 1.

189 *See, e.g.*, Exchange Act Release No. 23469, *supra* note 188, at 27,619 n.4 (citing foreign issuer problems with NYSE rules (i) requiring quarterly reports, (ii) barring dual class capitalizations with varying votes per share and votes based upon length of holding stock, (iii) specifying quorum requirements for shareholder votes, and (iv) demanding audit committees, independent directors, classification of a company's board of directors). *See also id.* at 27,619 (arguing that the rule change would enhance trading in foreign securities, that it would improve competition among the exchanges and, significantly, that the proposed rules were consistent with the SEC's "special" treatment of foreign issuers on governance matters, particularly the proxy rule exemption). The NASD had no corporate governance requirements for the NASDAQ, but proposed to adopt such standards for national market system securities that were quoted on the NASDAQ. *See* Exchange Act Release No. 22506, *supra* note 188, at 41,770.

190 *See* Self Regulating Organizations, Exchange Act Release No. 24634, 52 Fed. Reg. 24,230, 24,232 n.13 (June 23, 1987) (observing that it was considering a NYSE proposal to modify the

investors would not be hurt, because the typical world class foreign companies eligible for the exemptions were followed by analysts and otherwise subject to exchange and SEC disclosure requirements.[191] It also observed that the exemptions enhanced the competitiveness of U.S. exchanges in attracting foreign issuers, since foreign issuers would not necessarily alter their governance structures to develop a U.S. secondary market for their securities.[192] Once again, therefore, the SEC responded to the need of its constituencies, the U.S. stock exchanges and their investment banking members, to develop a U.S. market for foreign securities. As in the case of Rule 12g3-2, the SEC simply left foreign corporate governance issues arising from listing standards to foreign practice.[193]

It is not an overstatement to say that the greatest amount of SEC activity on international securities matters has occurred during the last

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one share, one vote listing requirement at the same time as it was reviewing the proposed rule changes on foreign issuers). *See generally* COX, *supra* note 19, at 918-20; 4 LOSS & SELIGMAN, *supra* note 23, at 1837-56 (general discussion of the one share, one vote controversy). *See also* Business Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) (invalidating the SEC's Rule 19c-4, which barred securities exchanges and associations from listing low-vote stock, because, in its view, the SEC had overstepped its statutory authority by attempting to interfere directly with corporate governance (as opposed to disclosure) matters).

191 *See* Exchange Act Release No. 24634, *supra* note 190, at 24,232. The reliance upon disclosure requirements for foreign issuers is curious because, as the SEC recognized, "federal securities laws traditionally have accorded different treatment to foreign issuers regarding periodic reporting and other requirements due, in part, to recognition of the differing legal requirements and practices which are applicable to such issuers." *Id.* at 24,233. *See also id.* at 24,231 (also justifying approval of rule change because the NASDAQ, in operating without any corporate governance requirements for foreign companies, had benefitted competitively at the expense of registered securities exchanges by attracting more foreign issuer listings).

192 *See id.* at 24,233. *See also id.* at 24,231 (noting that U.S. investors could easily invest in foreign markets); *id.* at 24,233 (repeating argument that U.S. investors would be better protected by investing in foreign securities through U.S. exchanges).

193 The SEC was less accommodating to foreign issuers when it extended the applicability of Section 12 of the Exchange Act to foreign companies quoted on the NASDAQ system because of the growing similarity of that system to securities exchanges. *See* Foreign Securities, Securities Act Release No. 6433, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,272 at 85,460 (Oct. 28, 1982) (noting that such foreign companies were now considered to have "voluntarily" sought U.S. capital markets); Foreign Securities, Securities Act Release No. 6,493, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,435, at 86,294-96 (Oct. 6, 1983). *See generally* Note, *Requiring Foreign Issuers Listed on NASDAQ to Register: Investor Protection at What Cost?*, 4 WIS. INT'L L. J. 86 (1984). Although the SEC encountered opposition from industry groups contending that the rule change would drive foreign issuers offshore, not all SEC constituencies opposed it: registered U.S. stock exchanges, which were then losing volume to NASDAQ, stood to gain if the disclosure burdens upon foreign issuers were the same both in the securities exchanges and on the NASDAQ. *Cf.* Self Regulatory Organizations, Exchange Act Release No. 34956, 59 Fed. Reg. 59,808 (Nov. 9, 1994) (amendment 1 and 2 to proposed rule restricting the quotation of foreign securities on an OTC Bulletin Board Service to those registered under Section 12, thereby excluding companies exempt from registration under Rule 12g3-2).

decade. Major rule initiatives have introduced exemptions for resales of foreign securities into the U.S.,[194] safe harbors for offshore distributions,[195] regulation of foreign tender offers,[196] a multijurisdictional disclosure system with Canada,[197] as well as refinements to the offering forms for foreign private issuers.[198] The SEC has completed a lengthy and important study of foreign markets,[199] issued policy statements on internationalization,[200] and has continued to develop its relationships with foreign securities regulators and to participate in international

194 *See* Resale of Restricted Securities, Securities Act Release No. 6862, 55 Fed. Reg. 17,933 (Apr. 30, 1990) (to be codified at 17 C.F.R. pt. 200) (release adopting Rule 144A that provides exemption for resales of securities to "qualified institutional buyers"); Resale of Restricted Securities, Securities Act Release No. 6839, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,427 at 80,220-32 (July 11, 1989) (reproposal); Resale of Restricted Securities, Securities Act Release No. 6806, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,335 (Oct. 25, 1988) (proposal).

195 *See* Offshore Offers and Sales, Securities Act Release No. 6863, 55 Fed. Reg. 18,306 (May 2, 1990) (to be codified at 17 C.F.R. pt. 200) (final adoption of Regulation S governing offshore offerings and resales).

196 *See* International Tender and Exchange Offers, Securities Act Release No. 6897, *supra* note 155; Concept Release on Multinational Tender and Exchange Offers, Securities Exchange Act Release No. 28,093, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,606 (June 6, 1990).

197 *See* Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,812 (July 1, 1991) (permitting, among other things, certain Canadian issuers to make offerings in the U.S. pursuant to Canadian disclosure standards).

198 *See, e.g.*, Simplification of Registration and Reporting Requirements for Foreign Companies: Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Research Reports, Securities Act Release No. 7053 [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,331 (Apr. 19, 1994) (expanding companies that could use Form F-3). The SEC has also continued to examine the role of ADRs in the U.S. markets, *see* American Depositary Receipts, Securities Act Release No. 6894, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,740 (May 23, 1991) (concept release on ADRs); *see also* American Depositary Receipts, Securities Act Release No. 6438, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,300 at 85,548-49 (Nov. 19, 1982) (proposal); American Depositary Receipts, Securities Act Release No. 6459, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,329 (Mar. 18, 1983) (adoption of Form F-6 for ADRs); 2 Loss & SELIGMAN, *supra* note 23, at 774 n.71 (describing history of SEC treatment of American Certificates, which includes ADRs), and it has promulgated an exemptive rule pertaining to foreign broker-dealers' communications with U.S. investors, *see* 17 C.F.R. § 240.15a-6 (1995). *See generally* 3D HAROLD S. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 15.13 (1995); EDWARD F. GREENE, ET AL., U.S. REGULATION OF INTERNATIONAL SECURITIES §§ 2.01-2.04 (1993).

199 *See* REPORT OF THE STAFF OF THE U.S. SECURITIES AND EXCHANGE COMM'N TO THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS AND THE HOUSE COMM. ON ENERGY AND COMMERCE, INTERNATIONALIZATION OF THE SECURITIES MARKETS, at VII-4 (1987). *See also* DIVISION OF MARKET REGULATION, UNITED STATES SECURITIES AND EXCHANGE COMM'N, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS (Jan. 1994) (discussing in passing foreign markets).

200 *See* UNITED STATES SECURITIES AND EXCHANGE COMM'N, REGULATION OF INTERNATIONAL SECURITIES MARKETS (Nov. 1988).

organizations.[201] Amid all of this activity and reflection, however, it has never revisited, or even questioned, the accommodation that it reached with foreign issuers, whether "voluntary" or involuntary participants in the U.S. capital markets, on corporate governance disclosure. And it has maintained this position precisely when, as in so many periods throughout recent U.S. history, corporate governance has become an issue of considerable legal and even political debate, and when the SEC has taken positions in this debate, *including* on corporate governance disclosure.[202]

Given all of this recent SEC activity on foreign companies and internationalization in general, it is not possible that the SEC has simply overlooked foreign corporate governance disclosure, although, for the reasons given above, other subjects have occupied the SEC's attention. When the SEC has considered the issue, it has noted the continued differences between U.S. and foreign disclosure on corporate governance and has even alluded to differences in the underlying corporate governance systems.[203] Rather than using these occasions as

201 *See generally* JENNINGS, *supra* note 23, at 1566-72 (describing Memoranda of Understanding ("MOUs") between the SEC and various foreign market authorities that generally deal with the sharing of information in enforcement matters); Peter E. Millspaugh, *Global Securities Trading: The Question of a Watchdog,* 26 GEO. WASH. J. INT'L L. & ECON. 355, 363-66 & notes accompanying text (1992) (describing MOUs and SEC activity in international organizations, including IOSCO); Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities,* 31 HARV. INT'L L.J. 185, 192-93 (1990) (discussing international efforts to harmonize disclosure standards, including the work of IOSCO, of which the SEC is a member); INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS, COMPARATIVE ANALYSIS OF DISCLOSURE REGIMES (1991) (noting that Linda Quinn, Director of the Division of Corporation Finance, was the chairman of the working party that put together this comparative analysis of disclosure in fourteen countries); Arthur Levitt, Toward A New Global Partnership: Integrity, Stability, and Opportunity, Remarks at the International Organization of Securities Commissions 1993 Annual Conference (Oct. 26, 1993) (copy on file with author) (SEC chairmen discusses SEC's past and future work with IOSCO); Richard Breeden, Speech given at the XVII IOSCO Annual Conference (Oct. 27, 1992) (copy on file with author) (SEC chairman discusses his work as first Chairman of IOSCO's Technical Committee). *See also supra* note 167.

202 Whether one thinks that the SEC is justified in entering the corporate governance debate, *see* Macey, *Administrative Agency Obsolescence and Interest Group Pressure, supra* note 19, at 943-45, it has done so. *See, e.g.,* Securities Act Release No. 6962, *supra* note 54 (revising disclosure on executive compensation, but specifically excluding foreign private issuers); Regulation of Communication Among Securityholders, Exchange Act Release No. 30,849, 57 Fed. Reg. 29,564 (June 24, 1992) (to be codified at 17 C.F.R pt. 240) (amending proxy rules to enhance communication among shareholders). *See generally* Coffee, *supra* note 1.

203 *See, e.g.,* Securities Act Release No. 6568, [1984-1985 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 83,743 (Feb. 28, 1985) (concept release on the possibility of harmonizing disclosure in three jurisdictions (U.S., U.K. and Canada) with similar legal traditions, using either (i) a reciprocal approach or (ii) the adoption of a common disclosure format). The SEC observed that there were significant differences with respect to "disclosure of management's business experience, remuneration, and its beneficial ownership of securities of the issuer" in the three countries and that one major difficulty of using the "common prospectus" approach was "the

an opportunity to rethink its position, the SEC has reaffirmed and almost celebrated its accommodations with foreign issuers on corporate governance disclosure.[204] It has not entertained the possibility that a culturally sensitive and meaningful way of disclosing foreign corporate governance differences to U.S. investors might exist; it has not reflected further upon the continued evolution (or lack thereof) of foreign corporate governance systems and home country disclosure; and it has not reconsidered its position on foreign corporate governance disclosure in light of this evolution, if any evolution has occurred.

IV. A Proposal for Reform of SEC Foreign Corporate Governance Disclosure

A. The Proposal

The above cultural history has set forth the origins of SEC disclosure requirements on foreign corporate governance where, in Rule 12g3-2 companies, the SEC has left an explanation of foreign corporate governance to home country disclosure, *whether or not such disclosure actually deals with corporate governance*, and, in Securities Act and Exchange Act reporting companies, a skeletal corporate governance disclosure framework based upon the U.S. perspective provides U.S. investors with little information. The SEC has in essence all but relegated U.S. investors to the explanations of foreign corporate governance provided either in the home countries or elsewhere.

This Subpart argues for a reform of this situation where SEC disclosure requirements do not compel foreign companies to provide U.S. investors with culturally meaningful information about their cor-

difficulties associated with reaching agreement with the participating countries on disclosure standards". *Id.* at 87,322-23. In its 1987 study of internationalization of the Securities Markets, the SEC devoted a chapter to disclosure standards in major foreign markets and, in that chapter, pointed to differences in disclosure on corporate governance between the U.S. and such foreign markets. *See, e.g.,* Division of Market Regulations, U.S. Securities and Exchange Comm'n, *supra* note 199, at III-84 (discussing disclosure requirements under European Information Directive); *see also* U.S. Securities and Exchange Comm'n, *supra* note 200, at 2 ("In seeking solutions to common problems, securities regulators should be sensitive to cultural differences and national sovereignty concerns."); Comparative Analysis of Disclosure Regimes, *supra* note 201, at 6 (noting that, on disclosure concerning management in fourteen countries, "[t]here is little commonality in disclosures on this topic beyond the basic requirements that directors and officers be identified").

204 *See, e.g.,* Simplifications of Registration and Reporting Requirements for Foreign Companies, Securities Act Release No. 7053, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,331, at 85,203-04 (Apr. 19, 1994) (in expanding the number of foreign private issuers eligible to use short-form and shelf registration, the SEC observed how accommodating it had traditionally been for such issuers, particularly highlighting the exemption from proxy rules and insider stock reports, as well as the lessened management disclosure in Exchange Act filings).

porate governance. An amendment to SEC disclosure requirements is needed to enhance cross-cultural communications on this subject. This Subpart first suggests that any reform should occur by SEC rule-making and not through additional legislation. It next briefly explains why reform should not involve either an increased application to foreign issuers of current disclosure requirements on corporate governance for U.S. companies or a deference to home country disclosure standards. It then offers a proposal for reform: the imposition of an "open-ended" disclosure requirement on foreign companies that compels them to explain their corporate governance. This Subpart shows, through a few examples, how this requirement would result in the provision of more culturally meaningful information than the present disclosure requirements generate.[205]

SEC rule-making, rather than Congressional legislation, can best accomplish this reform to foreign corporate governance disclosure. From a pragmatic perspective, absent some cataclysm in financial markets, Congress is now unlikely, as a political matter, to increase disclosure burdens upon *any* class of issuers.[206] The reform, moreover, is well-suited for SEC rule-making. As noted earlier, in the federal securities laws Congress established issuer disclosure, which includes corporate governance disclosure, and it envisioned that, by its rules and regulations, the SEC would "flesh out" the statutory disclosure requirements and apply them to different kinds of issuers.[207] It is therefore within the SEC's jurisdiction to redesign disclosure on corporate governance for foreign issuers. Although SEC rule-making produced the current unsatisfactory situation, the SEC should have the first opportunity to remedy it. As explained below, the disclosure requirement proposed herein also makes use of SEC resources and administrative flexibility.

In undertaking the reform, the SEC should not use the current corporate governance disclosure requirements for U.S. companies as a model for foreign issuer disclosure, as it did in the original Form 20-F proposal. Because of the cultural origins of both corporate governance and disclosure systems, the SEC must abandon its tenaciously-held view that U.S. corporate governance and disclosure are the ends to which all foreign systems are evolving. As this Article has shown, U.S. mandatory disclosure makes sense in terms of, and in fact plays a

205 I expect to explore this proposal in another paper on corporate governance and SEC disclosure.

206 *See infra* note 235.

207 *See* discussion *supra* subpart IIA.

role in, U.S. corporate governance. It is unlikely, however, to lead to the production of culturally meaningful information when applied to a foreign issuer operating in a different corporate governance system.

A U.S. investor is not necessarily harmed when SEC disclosure requirements do not force a U.S. issuer to provide him or her with an explanation of its disclosed corporate governance "facts", for the investor possesses the appropriate conceptual framework to understand them. The same would not necessarily be true if full U.S. disclosure requirements on corporate governance were applied to a foreign issuer. The U.S. disclosure system may, or may not, reveal information that is significant for the corporate governance of such issuer and its home country. Because the SEC disclosure system would not require the foreign company to explain its corporate governance information in terms comprehensible to a U.S. investor, that investor has little choice but – and is in fact invited – to apply the same conceptual framework to these facts as he or she would apply to corporate governance information about a U.S. company. This application would produce meaningful communication if the corporate governance of the company and country at issue were the same, or had considerable overlap with, that of a typical U.S. company. But this sameness or overlap of corporate governance in different countries is questionable because of the cultural origin of these systems.[208]

Application of full U.S. corporate governance disclosure requirements to foreign issuers might even make the present situation worse. A disclosure statement that presented corporate governance information of no particular significance to a foreign issuer and its home country and left the U.S. investor to interpret such information in accordance with his or her U.S. conceptual apparatus violates the most basic rule of U.S. securities laws and regulation: that an issuer disclose all material information and not omit any information necessary to make the disclosed information not materially misleading.[209] This materiality requirement, so central in the SEC disclosure framework, thus argues against the traditional U.S. centered SEC approach of imposing full U.S. corporate governance disclosure on foreign issuers.

A few examples clarify this fundamental problem of applying U.S. disclosure standards on corporate governance outside the context of U.S. companies. Another constituency besides management and shareholders may have a significant role or influence in a given coun-

208 *See supra* note 4. *But see infra* subpart IVB.
209 *See supra* note 75.

try's and company's corporate governance system. World-class French public companies, for example, have a special relationship with the French State, which is often their former direct or indirect controlling owner, even if the State no longer has any significant ownership in them.[210] While the State establishes and maintains this relationship in many and often subtle ways, one method is through the formation of a management elite whose members have received training in State schools, spent much of their professional lives in the State bureaucracy and who are thus inclined to be receptive to State pressures and policies (often indirect) regarding their companies.[211]

Some of these companies have, in SEC terms, "voluntarily" sought U.S. capital markets by making U.S. public offerings and exchange listings.[212] Given the skeletal U.S. disclosure requirements on corporate governance applied to these companies, their disclosure statements say little about the relationship between their governance and the State. They generally describe the companies' relationship to the French State as an historical (or soon to be historical) matter, *i.e.*, a subject of nationalization and privatization, and not at all an issue of corporate governance.[213] Yet even a full application of U.S. corporate governance disclosure requirements would not compel a company to

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210 *See, e.g.*, Fanto, *supra* note 4, at 29-37.

211 *See id.* at 36-37. *See generally* MICHEL BAUER, LES 200: COMMENT DEVIENT-ON UN GRAND PATRON? 123-97 (1987) (discussing the State path to an executive career); *The Soft-Shoe Shuffle*, ECONOMIST, Special Supp. Nov. 25, 1995, at 14-15.

212 This group includes French companies privatized in the most recent round of French privatization that began in 1993, such as the Société Nationale d'Elf Acquitaine and Rhône-Poulenc S.A. *See* Fanto, *supra* note 4, at 49-56.

213 For example, in Item 4 of Rhône-Poulenc's 1994 Form 20-F ("Control of the Company"), there is a short paragraph about the control of the company by the French State prior to privatization. RHÔNE-POULENC, FORM 20-F 51 (1994) [hereinafter RHÔNE-POULENC]. Item 10, which describes management and directors, similarly refers, as a historical matter, to the domination of the board by the French State prior to privatization. *Id.* at 96. An investor might note that, as of the end of 1994, the French State still owned, directly or indirectly, approximately 12% of Rhône-Poulenc's share capital and could conclude from this that the French State had a continuing influence on the company. These figures do not convey the pervasiveness of this influence, partly due to management/State relations. And, in any event, the disclosure document states that the French State no longer controls the company. *See id.* at 51.

In some cases, the French State has maintained an overt role in the corporate governance of a privatized company. It not only has an approximately 13% indirect shareholding of the Société Nationale d'Elf Acquitaine, but also a "golden share" (*action spécifique*) permitted under the French privatization legislation that basically allows the French State to approve any change of control of the company or sale of its significant subsidiaries. *See* SOCIÉTÉ NATIONALE ELF ACQUITAINE, PROSPECTUS 16-17 (1994). *See generally* ALICE PEZARD, DROIT DES MARCHÉS MONÉTAIRE ET BOURSIER 386-89 (1994); Fanto, *supra* note 4, at 57-58. As a company gets further from its privatization, any discussion of the State relationship drops from SEC disclosure documents, except for a reference to the "fact" of continuing direct or indirect State shareholdings. *See, e.g.*, ALCATEL ALSTHOM, FORM 20-F 24 (1994).

reveal or to explain this kind of State influence. It would only reinforce the impression that the disclosure framework now conveys to a U.S. investor: that corporate governance is the same in France as in the United States.

Another example of French corporate governance information that current "bare bones" disclosure requirements do not require a company to explain and that full U.S. disclosure would also not reveal involves the corporate governance role of certain significant shareholders. The French privatization legislation permits the Minister of the Economy to sell a significant block of a company's stock to a group of institutional shareholders in a private placement (which may accompany the public offering of the company's shares). With their prior stockholding, members of the group can collectively hold 20-40% of the existing share capital of a company as a result of this transaction.[214] These members, which are bound together by a shareholders' agreement, are generally other French companies, often financial institutions, some of which themselves have the target company as a shareholder.

Although in France there is disagreement over the purpose of the cross-shareholding arrangement, known as a "*noyau dur*", there is little dispute about its effect: to insulate management from market discipline.[215] The formal agreements between these shareholders generally expire after a few years, yet evidence suggests that the groups persist informally following this expiration.[216] While in SEC disclosure documents companies with a *noyau dur* have described the presence of these groups in the companies' capital, they have not explained sufficiently the purposes of the arrangements.[217] Application

214 *See* Fanto, *supra* note 4, at 59-67.

215 *See* FRANÇOIS MORIN & CLAUDE DUPUY, LE COEUR FINANCIER EUROPÉEN 46-54 (1993); François Morin, *La Privatisation de la BNP et la formation d'un nouveau pôle financier*, 28 REVUE ÉCONOMIQUE ET FINANCIERE 121, 126-31 (1994); Fanto, *supra* note 4, at 59-67. *Cf.* OLIVIER PASTRÉ, LES NOUVEAUX PILIERS DE LA FINANCE 101-31 (1992).

216 *See* Fanto, *supra* note 4, at 64 n.201

217 The descriptions of these cross-shareholdings, while occasionally detailed, are often models of obscurity. For example, in its Securities Act prospectus Rhône-Poulenc explained that the "stable shareholders" were "assuring the cohesion and stability of the shareholder base of the Company." *See* RHÔNE-POULENC, PROSPECTUS 18 (1993). In its Form 20-F, the company expanded upon this description, but failed to clarify what purpose the shareholding arrangement served:

> The *protocole* [shareholder agreement between members of the *noyau dur*] is not a voting agreement and, as described above, none of the terms of the protocole address the subject of voting. The *protocole* was transmitted to the Conseil des Bourses de Valeurs, the self-regulatory organization that has general regulatory authority over French stock exchanges, and it issued an opinion that the contractual arrangement among the Stable Shareholders established by the *protocole* does not in and of itself constitute an *action en concert* or the

of full U.S.-style corporate governance disclosure would not change this situation: it might cause a French issuer to list more "facts" about the shareholding group, but not to provide an explanation of the group's role in corporate governance.[218] Designed as they are to elicit specific factual information from an issuer, SEC disclosure requirements would not lead to production of a coherent account of a corporate governance phenomenon that has no U.S. equivalent.

Because, therefore, application of full U.S. disclosure requirements on corporate governance would generate information significant only in the U.S. cultural context (and perhaps in some related foreign circumstances) and would still not provide the necessary explanation of foreign corporate governance information, these requirements cannot serve as a basis for reform. Trying to compose an exhaustive list of corporate governance information from present disclosure requirements, moreover, would produce an unwieldy format and would, in any event, be fruitless because, given corporate governance differences, no list would ever be complete. The cultural specificity of corporate governance ensures that it would be difficult, at least for now, to find one set of disclosure requirements that would cause foreign issuers from numerous countries to identify and to explain in a meaningful way their corporate governance.[219]

Relying upon corporate governance disclosure made under the laws of the home country of a foreign issuer would provide no better basis for reform than using the full U.S. model. Even if, under foreign disclosure rules, a foreign issuer revealed considerable information about its corporate governance, this information would be both a

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taking of action together by a group under French law. Although each of the seven stable Shareholders has a representative on the Company's Board of Directors (See "Item 10: Directors and Officers of Registrant") [out of 15 member board], the Company is not aware of any agreement among these representatives to take action together as a group. It is the Company's view that the Stable Shareholders do not control the Company.

RHÔNE-POULENC, *supra* note 213, at 52-53. An investor is left with numerous questions: what, one wonders, is the import *in U.S. terms* of the above determination by the French market authorities? why do the stable shareholders have so many board seats? what is the difference between "cohesion" and "control"?

218 For example, full application of Item 401 of Regulation S-K, 17 C.F.R. § 229.401 (1996), might generate a better description of interconnections between board members and of the experience of board members and executives, while the requirements of Item 404 concerning related transactions, 17 C.F.R. § 229.401 (1996), might cause a French issuer to describe transactions between members of the shareholder group and the company (but only if such members surpassed the 5% ownership threshold).

219 International standards developed by international advisory groups have not been satisfactory from the perspective of explaining cultural differences or of identifying one set of disclosure requirements that meaningfully communicates corporate governance information in all contexts. *See* discussion *infra* subpart IVB.

product of a foreign culture and addressed to members of that culture.[220] These individuals would be well positioned to make sense of the disclosed information because they had the appropriate background, *i.e.,* possession of the language, knowledge of customs and practices. They would be able to do what is most difficult in interpretation: to add other information and a conceptual framework to the disclosed facts to make those facts meaningful. To return to one of the earlier examples, a French investor would understand the importance for a company's governance (*i.e.,* susceptibility to State influence) of the State background of its major executives and directors.

The U.S. investor would first need a good translation of the foreign-disclosed information. Even more importantly, he or she would also need a "conceptual" translation that would supply the minimal background information and explanatory framework necessary to make the disclosed information meaningful. This kind of translation is particularly important if the foreign disclosure system, like U.S. disclosure requirements, legally compels a company to reveal only discrete facts about its governance. As anyone who has ever tried to translate a document from a foreign language knows, a literal word-by-word, or even sentence-by-sentence, translation of a foreign document will at best confuse a U.S. investor and at worst produce nonsense. The SEC itself has recognized that, even in countries whose cultures most resemble that of the United States and that have similar disclosure frameworks, significant differences lie behind apparent similarities,[221] which reaffirms Clifford Geertz's point about the strangeness of the familiar. A U.S. investor, in short, relies upon home country disclosure on corporate governance at his or her peril.

The above remarks therefore point to a novel SEC disclosure format on foreign corporate governance. The proposal is an "open-ended" requirement that a foreign issuer explain for U.S. investors in language and terms understandable to them its own corporate governance in the context of corporate governance of its home country. The proposed disclosure requirement would try to elicit meaningful expla-

220 Available evidence suggests that other developed countries have disclosure frameworks that cause their companies to reveal less, not more, corporate governance information. *Cf.* INTERNATIONALIZATION OF THE SECURITIES MARKETS, *supra* note 199, at II-11 to II-24; Merritt Fox, The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities 45 n.100 (Feb. 28, 1996) (unpublished paper, on file with author). This evidence is not neutral, because it accepts the primacy of the U.S. model of corporate governance. To my knowledge, no country has yet produced a disclosure framework specifically designed to help communicate information to foreign investors.

221 *See supra* note 203.

nation of such "soft" information as customs, practices and trends in a country's corporate governance as they pertain to a particular foreign company. Under the proposal, a foreign issuer would have to keep the U.S. investor from applying a ready *U.S.* explanation to the corporate governance facts that it discloses. A U.S. investor should understand that corporate governance facts appearing to be the same in foreign corporate governance may have a considerably different meaning. The SEC should not expect the foreign issuer to supply a general treatise on its country's and its own corporate governance so much as a focused explanation of significant features of a company's governance accompanied by the necessary background account of a foreign governance system.

As an example of the kind of disclosure this requirement should elicit, it is useful to return to the previous examples on corporate governance in large French public companies. Because of the relationship between the French State and these companies that partly arises from the State-oriented background of company management, a French company should describe and justify its selection of management. If, as has often recently been the case, top executives come from a State professional background and education, the company should discuss this selection as part of a cultural practice by French companies. The company should also justify its selection process not only by stating the qualities and abilities of particular executives, but also by explaining what benefits in general individuals with this background (as opposed to those with other experience) are thought to bring to the company or companies. This discussion should also lead to a frank analysis of the relationship between the company and the State that arises because of this executive background and that other practical and cultural factors (*i.e.,* some remaining direct or indirect State ownership) enhance. If a French company selected its top executives in a different manner, *e.g.,* from progression up the corporate ladder, it could distinguish its selection process against this standard and explain the competitive benefits of its distinction.[222]

222 *See* BAUER, *supra* note 211, at 51-120, 201-37 (describing other ways of reaching the summit of executive power in France: being a member of the family controlling a company and, more rarely, working up the firm ladder). There is some evidence that the path of firm experience, prevalent in Anglo-Saxon countries, is beginning to take hold in France. *See, e.g., The Eminence Grise of French Business,* ECONOMIST, May. 6, 1995, at 70 (suggesting that traditional system of French management selection may not survive in global marketplace). Given the number of scandals in large French public companies involving executives who came from a State background, a French company might gain a market competitive advantage by distinguishing its executive selection process. *See, e.g., The Mighty Fall,* ECONOMIST, Jan. 6, 1996, at 38; Stewart Toy, *Under Suspicion: Le Tout Business Elite,* BUS. WK., Jan. 22, 1996, at 58.

Similarly, under this requirement French public companies would have to explain better than they now do the effects and purposes of the stable shareholder networks. It is not enough for a French company, as the Rhône-Poulenc SEC disclosure documents demonstrate, to make a cryptic reference to an opinion by a French market authority (which appears to be a literal translation without any other explanation) and to provide an equally elliptical reference to the "stability" and "cohesion" of shareholders.[223] As noted earlier, French economists and finance specialists differ about the purposes of these networks. Management in a particular French company may not understand all the possible effects of the networks, but it knows more than what its SEC filings currently disclose and, most importantly, why *it* favors the stable shareholder structure.

The networks may, for example, be part of a provisional cooperative solution by the French State and management of newly privatized companies to protect these companies from the hostile takeovers that would occur if non-French institutional investors come to dominate a company's capital, a solution that will not be needed once French institutional investors (*i.e.,* mutual funds, pension funds) become larger and can make greater investments in these companies.[224] Company management should not be able to offer this explanation in private conversations, but not in disclosure documents. They should clearly explain why, and for whose benefit, the company should be protected in this way against a hostile takeover (or other forms of market discipline) and why French institutional investors would likely be more passive than foreign investors. In other words, if the networks constitute a technique, partly designed by the French State, to keep French companies under French ownership (or at least away from the control of international, *i.e.,* Anglo-Saxon, investors), U.S. investors should understand this purpose and possible effect.[225]

To elicit such explanations requires a modification to Form 20-F's items on control of the issuer, management and description of securities. The modification could take several forms, one of which would be to insert a proposed disclosure requirement, as follows, in one of the above items:

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223 *See supra* note 217.

224 *See* Fanto, *supra* note 4, at 63-65; PASTRE, *supra* note 215, at 121-26. *Cf. A Summer of Tumbrils,* ECONOMIST, July 1, 1995, at 51 (discussing purposes and problems of interlocking shareholdings in French big business).

225 Disclosure on the French stable shareholder network would thus be related to a discussion of the subtle connections between the State and company management.

> The registrant shall describe and discuss those distinctive or special characteristics of the registrant's corporate governance practices that are unlikely to be known or understood by U.S. investors and that could materially affect the registrant's operations and future financial performance. The registrant should provide enough background material on general corporate governance practices and related matters in the foreign country in which registrant is organized so that a U.S. investor unfamiliar with such country will be able to understand the registrant's discussion of its corporate governance practices. Examples of characteristics that might be discussed include registrant's selection of directors and executive officers, including the educational and professional background it desires in such directors and officers, the role of different categories of shareholders in registrant's governance, and the role of constituencies other than shareholders (such as the government of the foreign country in which registrant is organized) in registrant's governance, whether or not such constituencies have a direct or indirect ownership interest in registrant. The purpose of the description and discussion shall be to provide investors with an understanding of registrant's corporate governance practices against the background of corporate governance in registrant's country of organization and, if appropriate, the material differences between these practices, their purposes and effects and those typical of U.S. registrants with which U.S. investors are likely familiar.[226]

The SEC would provide an explanatory commentary for this modification, which the rule-making notice and comment procedure would further refine.

Another form of the proposal would be for the SEC simply to adopt a different interpretation of current disclosure requirements. Item 1 of Form 20-F on description of business demands that an issuer provide a general discussion of "material country risks" that could affect the issuer's business.[227] Similarly, management's discussion and analysis of its financial condition and results of operation in Item 9 requires a discussion of "any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by U.S. nationals."[228] In an interpretive release, the SEC

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226 This proposal is modeled upon other Form 20-F disclosure items mandating an explanation by a foreign issuer of its country and business risks. *See infra* text accompanying notes 227-28.

227 *See* Form 20-F, Item 1(b) Forms Under the Exchange Act of 1934, *reprinted in* 5 Fed. Sec. L. Rep. (CCH) ¶ 29,721, at 21,748 (June 8, 1988) ("The registrant shall briefly describe any material country risks which are unlikely to be known or anticipated by investors and could materially affect the registrant's operations."). *See* Stephens, *supra* note 85, at 140 and notes accompanying text (explaining that this provision was meant to encourage issuers to discuss potential uncertainties arising from a U.S. investment in a foreign company).

228 *See* Form 20-F, Item 9, Instruction 10, *supra* note 169, at 21,753.

could explain that, henceforth, these provisions demand an explanation by a foreign issuer of its corporate governance practices. The SEC would then offer issuers guidance as to the kind of disclosure that is consistent with the above suggestions.

This reform to current SEC disclosure on foreign corporate governance also demands a new kind of effort from both the SEC staff and practicing securities lawyers. To the extent it focuses on the issue at all, the staff must cease insisting that all disclosure on corporate governance resemble U.S. disclosure and should become sensitive to, and require from foreign issuers an adequate explanation of, differences in foreign corporate governance. In fact, the SEC staff is particularly well situated and well-suited to make the proposal successful. They review disclosure statements from many different foreign issuers; trained as lawyers, they understand the general subject of corporate governance; and, as nonspecialists on corporate governance in foreign countries, they can demand, in their review of foreign issuer disclosure statements, explanations that make sense *in U.S. terms.*[229]

A reform of foreign corporate governance disclosure will also require more from practicing securities lawyers. These lawyers can enhance cross-cultural communication on corporate governance, not just because of their training and resources. Wall Street law firms often have offices in major foreign countries or, at the very least, their business frequently takes their lawyers abroad. Some major law firms have foreign lawyers as partners and associates who could aid in the process of translating the culturally unique aspects of a foreign corporate governance system.[230] And, whether they work for a foreign issuer or an investment bank advising the issuer about a U.S. listing or offering, these lawyers generally have close contact with the company and its executives. Whenever the disclosure process is now done well, the good results emerge from a dialogue between lawyers, investment

229 Because foreign issuers desiring to make an initial public offering in the U.S. generally have numerous disclosure problems (particularly on accounting), they and their counsel often make contact with the SEC early in the U.S. capital-raising process. At such time, the staff could begin to explore with a foreign issuer what would constitute in its case adequate corporate governance disclosure. The SEC could also develop specialists on corporate governance for a specific country, and these specialists might spend some time with their regulatory counterparts in that country in order to familiarize themselves with corporate governance developments and issues there. As explained above, *see supra* note 73, moreover, the proposed disclosure requirement is consistent with the SEC's recent emphasis on clearly understandable disclosure of "soft" information.

230 *See, e.g.,* William B. Matteson, *Building an International Practice*, 23 INT'L BUS. L. 516-20 (1995) (discussing the international practice of a large Wall Street firm); *see generally Globalisation of the Legal Profession,* 23 INT'L BUS. L. 502-48 (1995) (issue devoted to the subject).

bankers and company officials with the result that they translate information about a foreign company into a framework and language that U.S. investors can understand.[231]

Because of the skeletal SEC disclosure requirements on foreign corporate governance, there is no incentive or need now for securities lawyers involved in a U.S. securities offering or listing to produce any meaningful communication on this subject.[232] If a different disclosure standard were adopted, practicing lawyers would be challenged to aid in a cross-cultural communication on one matter about which they should have considerable expertise, as opposed to so many other subjects of disclosure such as business descriptions and financial statements, about which lawyers can claim, by training and even through practice, no special knowledge. For all they (and their law professors) try, most lawyers are neither accountants nor financial economists; their expertise lies in the law. Performing this disclosure task well would also demand from them considerable intellect and cultural sensitivity. Although challenges exist in securities law work, most practitioners (in their candid, as opposed to recruiting, moments) would admit that too much time is spent on the routine, often stultifying tasks of managing a paper-intensive process.[233]

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231 The above comments are based not upon an exhaustive review of prospectuses, but upon the author's approximately five years of experience, in this country and in Europe, helping foreign company officials and investment bankers write offering and listing documents for SEC purposes.

232 This is not to say that such communication does not occasionally occur. *See, e.g.,* Stevenson, *supra* note 86, at 206-07 (discussing the difficulty of explaining foreign corporate governance differences in SEC prospectuses).

233 The purpose of the proposed modification to SEC disclosure on foreign corporate governance is not to give more employment to lawyers (although these days, as some of us law professors know all too well, many young lawyers could use more, and better, employment), or to further the global "hegemony" (to turn Edward Greene's word back against him) of Wall Street securities lawyers and the SEC staff. If the proposal makes sense for other reasons, it may also ameliorate securities practice in a small way.

For legal and practical reasons, the above reform does not reach corporate governance disclosure by foreign companies that can use the Rule 12g3-2(b) exemption. The jurisdictional and comity concerns that, some thirty years ago, weighed against the SEC's extending mandatory disclosure to these companies have only been reinforced in a world of international securities markets. Any reform to corporate governance disclosure from such companies would likely have to await a major change to mandatory disclosure. *See, e.g.,* Greene, *supra* note 111, at 443-44 (discussing abolition of Rule 12g3-2 in favor of significant deference to foreign disclosure standards for foreign companies "voluntarily" entering U.S. markets).

That U.S. investors purchasing securities of such exempt companies (which are increasingly numerous) will thus continue to rely upon home country disclosure for foreign corporate governance information may be an acceptable state of affairs. The growth in the use of Rule 12g3-2(b) primarily arises from companies making placements under Rule 144A to qualified institutional investors. *See id.* at 417, 425. Because these investors are all very large institutions that prefer to make securities purchases outside the mandatory disclosure system and that have the economic

B. A Response to Some Objections

The proposed reform to foreign corporate governance disclosure admittedly runs counter to some current thinking about mandatory disclosure and foreign companies. For varying reasons that have been raised in the past (*i.e.*, concern about alienating foreign issuers, improvements in foreign disclosure systems), there is increasing support for U.S. deference to home country disclosure standards.[234] From a practical perspective, the political tide is running against any increase in disclosure burdens upon issuers.[235] Even more importantly, any proposal for reform is perilous in the current market environment: the globalization of investments, securities markets and market participants, and the technological developments affecting markets, are so transforming the functioning and understanding of these markets, as well as the rationale for disclosure, that one must formulate a reform cautiously, lest one find that the reasons justifying it already swept away. It is worthwhile, then, to consider and to answer several objections to the proposed reform, many of which are related to globalization and technology. Although I now find these objections (which might be seen as alternatives to the proposal) not entirely satisfactory and thus see continued reason for the reform despite them, I recognize that, in the evolving market and technological situation, they (and others) could in time carry more weight.

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power to negotiate for desired disclosure (or to obtain it elsewhere), the SEC need not necessarily be concerned about the kind of foreign corporate governance disclosure they are receiving. Any reform in SEC mandatory foreign corporate governance disclosure, moreover, will likely have an impact upon disclosure in Rule 144A placements because disclosure documents in such transactions are generally modelled upon SEC disclosure documents. *See, e.g.*, RENAULT, OFFERING CIRCULAR (1994) (offering circular used in Renault's Rule 144A offering that, for all practical purposes, looks like an SEC prospectus – including in its discussion of corporate governance).

234 *See, e.g.*, Fox, *supra* note 220, at 4-5 (arguing that a company's disclosure in all capital markets should be determined by home country standards); Greene, *supra* note 111, at 438-43.

235 *See* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, tit. 1, §106, 110 Stat. 3416, 3424 (1996) (amending securities laws to require commission, when engaged in rulemaking, also to consider "whether the action will promote efficiency, competition, and capital formation"). *See Id.* tit. 5, § 509 at 3449 (requiring commission to prepare within one year a report "on progress in the development of international accounting standards and the outlook for successful completion of a set of international standards that would be acceptable to the commission for offerings and listings by foreign corporations in the United States markets"). REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION, *supra* note 73 (making recommendations aimed at, among other things, the simplification and readability of disclosure). *See also* Michael Schroeder, *Guess Who's Gunning for the SEC,* BUS. WK., Aug. 14, 1995, at 40 (describing Republican attacks on SEC). The one possible exception is in disclosure on complex financial products or derivatives.

It could be contended that, while a focus upon the uniqueness of specific corporate governance systems and an understanding of them as cultural products were once worthy goals, the SEC's minimal disclosure of foreign corporate governance turns out now to make perfect sense. Not only, one might argue, are there large areas of overlap between corporate governance systems, but also, because of increasing globalization and internationalization of the securities markets, these areas of overlap will inevitably expand.[236] Capital market financing is gradually replacing other forms of corporate finance in many countries throughout the world. This kind of financing invariably brings with it U.S.-style corporate governance (*i.e.,* strong managers, weak owners), and such corporate governance demands U.S.-style disclosure as a response to its problems. In time, so the argument goes, foreign countries will adopt disclosure about management and shareholder rights not so different from what the SEC now requires of U.S. companies. Then either foreign companies could easily comply with U.S. disclosure requirements, or – what amounts to the same thing – U.S. investors will be able to rely upon home country disclosure, which will be identical to U.S. disclosure.

This objection is basically an assertion of a standard economic argument about the evolutionary emergence of an economic form (here a corporate governance structure) particularly well-suited to existing circumstances.[237] And, given the current transformation of international securities markets, it has a considerable intuitive appeal. It is possible, for example, to suggest from existing evidence that French corporate governance is progressing, albeit in fits and starts, towards a U.S.-style system because French capitalism, despite such phenomena as the *noyaux durs,* is beginning to resemble a capitalism of dispersed shareholders. Supporting evidence would include not only the improvement in French capital markets and a gradual transformation in the shareholder base of large French public companies (*i.e.,* from State and State-controlled financial institutions to unaffiliated institutions and retail investors),[238] but also French corporate governance initiatives advocating reforms (such as disclosure of executive compensation) that make sense in U.S. corporate governance

236 *See* Ramseyer, *supra* note 4, at 2006 (providing an example of this objection). *Cf.* ROE, *supra* note 3, at 198 ("Perhaps finance fragments anyway as a nation advances economically. This kind of statement is difficult to disprove, since those with this view can always assert that the natural economic fragmentation is just around the corner.").

237 *See generally* ROE, *supra* note 3, at 3-8.

238 *See* COMMISSION DES OPÉRATIONS DE BOURSE, 27 ÉME RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 112-16 (1994); Fanto, *supra* note 4, at 41-49.

terms.[239] In recent years, moreover, the primary French market regulator, the Commission des Opérations de Bourse (COB), has gained increasing powers and expertise over French capital markets, with one of its goals being the improvement of disclosure or transparency – a goal that makes sense in a world of dispersed shareholders.[240] French corporate finance, corporate governance and disclosure may all become indistinguishable from similar U.S. phenomena.

This objection, moreover, does not depend upon the triumph of a U.S. model of corporate governance. Globalization may create a new "world" corporate governance that, while similar to, may not be the same as, U.S. corporate governance. This new form may reflect the emergence, and perhaps dominance, of an international capital market institutional investor that seeks specific relationships with companies and that requires certain disclosure of them.[241] If this international governance and investor exists, national market authorities should be focusing on them, rather than on reforming their disclosure of differences in other national corporate governance systems, which may soon be obsolete. The SEC's major initiatives exempting sales of securities to large institutional investors or transactions in which such investors generally participate from disclosure requirements would be the appropriate kind of regulation in this context.[242]

Efforts to harmonize disclosure schemes, or even corporate governance, whether on a regional or international level, may also be seen as attempts to respond to the needs of these new international investors. From this article's perspective, such harmonization is generally unsatisfactory because it ignores cultural differences. It either reflects a model adapted from the most politically powerful or astute country involved in the harmonization effort or it is so general as to be useless in disclosing in a meaningful way significant information in any

239 CONSEIL NATIONAL DU PATRONAT FRANÇAIS, ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES, THE BOARD OF DIRECTORS OF LISTED COMPANIES IN FRANCE (July 10, 1995) (committee of executives of major French companies proposes reforms to board structure in France); COMMISSION DES OPÉRATIONS DE BOURSE, *supra* note 238, at 85-89 (setting out recommendations for corporate governance reform in France).

240 *See* Fanto, *supra* note 4, at 43-44.

241 *Cf.* Coffee, *supra* note 33, at 1182-85 (discussing the relationship of institutional investors with issuers).

242 *See supra* notes 194-195. Arguably, Rule 144A and Regulation S exempt from SEC regulation global securities offerings and trading among companies and large institutional investors. *See generally* Sara Hanks, *Rule 144A: Another Cabbage in the Chop Suey*, 24 GEO. WASH. J. INT'L L. & ECON. 305, 321-31 (1990) (discussing the SEC's reasoning in accommodating large institutional investors).

national setting.[243] By contrast, harmonization of disclosure has considerable appeal if it constitutes an international effort to respond to the needs of a new kind of *trans*national institutional investor.

Because it is not clear how this complex situation will play out, it is difficult to say *now* with confidence that the U.S. model of corporate governance and disclosure will prevail in the developed world.[244] As the case of France suggests, evidence points in two directions: the adoption of the U.S. model *and* the emergence of a new form of French corporate governance distinct from U.S. corporate governance. Professor Roe cautions that even U.S. corporate governance may be changing, partly in response to foreign pressures.[245] Even if the U.S. model is transforming foreign corporate governance systems, moreover, this phenomenon is not just the adaptation of the most suitable form to given market circumstances, but also a complex cultural process involving local parties whose interests lie in promoting a U.S. model of governance and disclosure.[246] This process brings with it fur-

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243 *Cf.* Dezalay, Between the State, Law and Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Area, *supra* note 19, at 17-19 (discussion of the formation of an international field); Fox, *supra* note 220, at 41 (arguing that harmonization is unlikely to work since there is an economically optimal level of disclosure in each country); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust,* 42 U. KAN. L. REV. 557, 590 (1994) (criticizing the formalist strain in harmonization efforts). On harmonization in securities laws, see, *e.g.,* Warren, *supra* note 201, at 190-93; *Bean Counters, Unite!,* ECONOMIST, June 10, 1995, at 67-68 (discussing development of international accounting standards). As an example of the minimal disclosure that has emerged from harmonization, *see* Council Directive of Mar. 5, 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, No. L 66 OFF. J. EUR. COMM. 21, 30-31 (1979) (describing very minimal disclosure on corporate governance matters).

244 *See* ROE, *supra* note 3, at 198-99 (discussing failure of German and Japanese corporate governance yet to evolve toward U.S. market capitalism).

245 *See id.* at 223, 275-81. *See also* Fanto, *supra* note 4, at 1-6 (referring to changes in U.S. corporate governance with the rise of U.S. institutional investors as a new possible check upon management power); Macey & Miller, *supra* note 4, at 107-11 (arguing that U.S. financial institutions, even if laws are changed to allow them to own large stakes in enterprises, will likely never be a factor in U.S. corporate governance, given the advanced development of U.S. capital markets). *Cf.* Kester & Luehrman, *supra* note 14 (discussing corporate governance in LBO firms that differs from standard U.S. model).

246 *See* Dezalay, *supra* note 19, at 1-4; Dezalay & Garth, *supra* note 19, at 61-62. *See generally* DEZALAY, *supra* note 19, at 119-61. Adoption of U.S.-style corporate governance in a particular country would thus be a complex process that might be occasioned by pressure from international organizations (where the SEC and U.S. lawyers would be significantly represented), by the influence of U.S. groups, such as institutional investors and U.S. lawyers through their offices and business, and by domestic forces, such as foreign lawyers and investment bankers with U.S. training, who would find it in their interest (*i.e.,* because their expertise would be valued) to support U.S.-style changes to governance and disclosure. *Cf.* Dezalay & Garth, *supra* note 19, at 40-41 ("As is true for the entire field of business law, the Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the Continental model of legal artisans and corporatist control over the profession.") (citation omitted); Fanto, *supra* note

ther complications, including the possibility of a failure for the U.S. model that owes more to social struggles than economic logic.[247]

Although in its strongest form this objection to the reform constitutes a recognition of the complex process of convergence (or nonconvergence) of corporate governance systems, it does not support remaining with the *status quo* of SEC disclosure requirements on foreign corporate governance. While the new international institutional investors exist, they do not yet dominate world or national markets.[248] Although these new investors may have different relationships with corporations and disclosure needs, national market authorities still have to focus their disclosure requirements upon the prevailing national investors, which are both institutional and retail. And, as noted above, harmonization of disclosure frameworks is unlikely to help *these* investors in understanding foreign corporate governance. That the role of the institutional investor in international corporate governance is evolving, however, supports reform at the SEC (rather than in Congress), which can continue to adapt its regulations to changing market circumstances.

Another objection to reform is that the SEC should not modify its disclosure requirements for foreign issuers, because no market problem exists. If information about foreign corporate governance is

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4, at 67-74 (discussing U.S. institutional investors in France); MICHEL ALBERT, CAPITALISME CONTRE CAPITALISME 12-20 (1991) (arguing against the importation into France of U.S. market capitalism in favor of a corporate governance system more similar to that in Germany, partly because of the disfavorable "social" results of U.S. capitalism).

247 For example, French corporate governance may now be a subject of discussion and analysis in France because, given scandals regarding executives and current market circumstances, there is some perception that the traditional corporate governance form no longer "works" adequately. *Cf.* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 169 (Richard Nice, trans., 1977) ("It is when the social world loses its character as a natural phenomenon that the question of the natural or conventional character (*phusei* or *nomo*) of social facts can be raised.") (footnote omitted); Pastré, *supra* note 4, at 19 ("C'est quand les tensions se font plus vives que les contradictions d'un système de pouvoir apparaissent au grand jour et appellent les réformes.").

248 *See, e.g.*, Jun-Koo Kang and Rene M. Stulz, Why is there a Home Bias? An Analysis of Foreign Portfolio Equity Ownership in Japan (Dec. 7-9, 1995) (unpublished paper, presented at New York Stock Exchange Conference on Recent Developments in International Equity Markets, on file with author) (discussing why, despite economic theories to the contrary, domestic investors invest the overwhelming part of their assets in domestic securities); *Stay-At-Home Shareholders,* ECONOMIST, Feb. 17, 1996, at 75. *But see* CAROLYN K. BRANCATO, 1 THE BRANCATO REPORT ON INSTITUTIONAL INVESTMENT: PATTERNS OF INSTUTITUIONAL INVESTMENT & CONTROL IN THE USA, 58-67 (Sept. 1994) (describing increase in holdings of foreign equities by U.S. institutional shareholders); James L. Cochrane, James E. Shapiro & Jean E. Tobin, Foreign Equities and U.S. Investors: Breaking Down the Barriers Separating Supply and Demand, New York Stock Exchange Working Paper 95-04, 3-6 (1995) (unpublished paper on file with author) (pointing out that U.S. investors' holdings of foreign equity have doubled (from 3% to 5.5%) in the last five years).

readily available to U.S. investors outside SEC disclosure, there is no problem for the SEC to address. If, as Judge Easterbrook and Professor Fischel have argued, the value of mandatory disclosure lies in its "standardization" (*i.e.*, it is the lowest cost solution to the production of readily ascertainable facts about companies for investors), the "open-ended" disclosure suggested by the proposal does not belong in mandatory disclosure and is best (*i.e.*, less costly for all) left to other sources.[249] In fact, given the ever-present possibility that the SEC may maximize its own importance in promulgating regulations, it would be inappropriate to recommend that the SEC focus upon problems in foreign corporate governance disclosure, which, if other sources of information exist, would generate needless social costs and little benefit to investors.[250] The absence of a problem may rather suggest that the SEC take the final step of complete deference to home country disclosure for foreign companies that make a public offering or listing in the United States, as it did for Section 12(g) foreign companies. To modify Edward Greene's terms, "hegemony" (now written, on corporate governance matters at least, with a small "h") would give way to "*D*eference" to foreign disclosure.[251]

U.S. investors have access to considerable information about and explanations of foreign corporate governance. In recent years, organizations, generally known as global proxy firms, have come into existence specifically to help large U.S. institutional investors manage their overseas investments.[252] These firms fill a market and legal need: institutional investors make foreign investments and recent legal changes compel them to pay increasing attention to the corporate gov-

249 *See* Easterbrook & Fischel, *supra* note 38, at 700-07.

250 *See* Macey, *Adminimistrative Agency Obsolescence and Interest Group Formation, supra* note 19, at 921-27 (pointing out that the SEC seizes any chance to manufacture a crisis to continue to justify its existence).

251 *See* Greene, *supra* note 111, at 413 (title). *See also id.* at 434-44 (arguing for greater deference to home country disclosure in the listed or public offering cases, and an accompanying restriction on the use of Rule 12g3-2(b)). Although this "quid pro quo" to the SEC (you allow deference to foreign disclosure standards and we'll give up reliance upon Rule 12g3-2) has a surface logic, it amounts to making the situation for listed companies identical to the "hands-off" SEC approach for Rule 12g3-2(b) companies. In other words, if deference to home country disclosure becomes the norm for listed companies, why would any foreign company have recourse to the Rule?

252 The firms do not so much help institutional investors decide whether to make, or to hold onto, an investment as they help investors understand the corporate governance environment in foreign countries and the way for them to exercise their shareholder rights. The major firms include the Investor Responsibility Resource Center, Institutional Shareholder Services, Inc. and Global Proxy Services Corporation. *See generally* Fanto, *supra* note 4, at 26-28 (describing the firms and the services they provide).

ernance of their portfolio foreign companies.[253] Through personal meetings with foreign companies and from foreign country sources, these firms gather more information than any disclosure statement based upon "bare bones" SEC corporate governance disclosure requirements could present.[254] The firms also produce corporate governance information in a readable form and from a critical perspective, pointing to problems in companies and countries.[255] This presentation contrasts with the typical SEC disclosure statement, which, as seen above, rarely provides a meaningful discussion of an issuer's corporate governance practices.

Although only the largest of institutional investors use the global proxy services, other investors indirectly benefit from them if, as is often the case, they make investments through these financial intermediaries.[256] All investors, moreover, have access to considerable information about foreign companies and their governance from the financial press,[257] which increasingly covers these subjects, and from technological resources. An investor with a computer and modem can access information on foreign companies throughout the world, and

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253 *See supra* note 13.

254 For example, Institutional Investor Services uses as a French contact, Franklin Global Research, an organization run by Sophie L'Hélias, a bilingual lawyer and investment banker with training both in France and the U.S. She is thus particularly well-suited to understand French corporate governance and to explain it to U.S. investors. In an SEC public offering and private placements, U.S. institutional investors do have the advantage of "road shows" and "one on one" meetings with major officers of foreign companies and, from such meetings and presentations, can obtain a better knowledge of the company's corporate governance. *See* 1 LOSS & SELIGMAN, *supra* note 23, at 337. Yet the global proxy firms ensure that these meetings, or their equivalent, occur on an ongoing basis.

255 *See, e.g.*, Howard D. Sherman, *Corporate Governance Changes Make Inroads in Europe*, 10 ISSUE ALERT 1, 3-5, 12-14 (Sept. 1995) (discussing corporate governance developments in various European countries); INSTITUTIONAL SHAREHOLDER SERVICES, INC., PROXY '95: THE GLOBAL PARADIGM: THE ISS ANNUAL PROXY CONFERENCE (1995) (binder including materials on U.S. and foreign corporate governance); INSTITUTIONAL SHAREHOLDER SERVICES, INC., PROXY ISSUES '96: THE ANNUAL ISS PROXY CONFERENCE (1996) (binder including corporate governance "snapshots" of numerous foreign countries); INSTITUTIONAL SHAREHOLDER SERVICES, INC., ISS SPECIAL REPORT: GLOBAL PROXY REVIEW SECOND QUARTER 1995 (1995) (review of corporate governance issues worldwide).

256 *See* Seligman, *supra* note 7, at 489 n.22, 490 n.33, and 491 n.34 (citing statistics given in CAROLYN KAY BRANCATO & PATRICK A. GAUGHAN, INSTITUTIONAL INVESTORS AND CAPITAL MARKETS 8 (Sept. 1991); NYSE SHAREOWNERSHIP 10 (1990) pointing to the dominance of large institutional investors as investment vehicles for retail and smaller institutional investors); THE BRANCATO REPORT, *supra* note 248, at 10-11 (describing steady increase in institutional investors' share of U.S. equity market).

257 For example, the financial press has covered in some detail and sophistication corporate governance developments in France. *See, e.g., France's Boardroom Revolution*, WALL ST. J., Oct. 17, 1995, at A20; Andrew Jack, *Monarchs, not Gurus*, FIN. TIMES, Aug. 18, 1995, at 9.

this information will become only more available in the future.[258] Any enterprising investor with a minimum of computer literacy would be able greatly to supplement SEC disclosure documents when gathering information about corporate governance in a particular foreign company.

Although it may be useful for an individual investor to have direct access to information about foreign companies and for institutional investors to employ the global proxy services, these sources of information may not be *that* significant for any investment decision in a foreign security. If foreign securities markets are efficient in at least a semi-strong sense, the market price of a given foreign company's stock should reflect all relevant publicly available company information, including information about its corporate governance.[259] An investor thus need only determine whether the company's shares are trading in an efficient foreign market and the extent of the efficiency.[260] From the efficient market perspective, any increase in SEC

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258 To take an example that is indicative of technological developments, there is considerable relevant corporate governance information on foreign companies in an electronic service such as LEXIS/NEXIS (*e.g.*, Company, World News files). There an investor can retrieve general information about companies, analysts' reports on companies and individual industries, as well as legal and news documents dealing with foreign corporate governance. *See also* MORNINGSTAR, *supra* note 8, at 30-31 (discussion of service on ADRs); Seligman, *supra* note 7, at 495 ("To what extent does computer technology on a twenty-four hour basis facilitate institutional and individual cross-border trading?"). *See generally* REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION, *supra* note 73, at 26-27 (describing investor access to foreign company information through new technological resources); Donald C. Langevoort, *Information Technology and the Structure of Securities Regulation,* 98 HARV. L. REV. 747, 757-59 (1985); Macey & Miller, *supra* note 4, at 98 (explaining that technological advances have brought information about capital raisers and their assets to more investors and have thus eliminated a traditional source of banking strength as providers and evaluators of company information); Lewis D. Solomon & Louise Corso, *The Impact of Technology on the Trading of Securities: The Emerging Global Market and the Implications for Regulation,* 24 J. MARSHALL L. REV. 299 (1991) (general discussion of influence of technology upon securities trading).

259 *See* sources cited *supra* note 38, para 2.

260 An analysis of the efficiency of a given foreign market as to corporate governance information would require establishing a typology of the kinds of corporate governance information that is available and of the market mechanisms (*e.g.*, professional traders) processing this information. *See, e.g.*, Gilson & Kraakman, *supra* note 33, at 590 (presenting a chart listing mechanisms and the kinds of distribution of information through them).

Available empirical evidence suggests that major foreign markets are efficient in at least some sense of the term. *See* William J. Baumol & Burton G. Malkiel, *Redundant Regulation of Foreign Security Trading and U.S. Competitiveness,* in MODERNIZING U.S. SECURITIES REGULATION: ECONOMIC AND LEGAL PERSPECTIVES 39, 50 (Kenneth Lehn & Robert W. Kamphuis eds., 1992); Franklin R. Edwards, *SEC Requirements For Trading of Foreign Securities on U.S. Exchanges,* in MODERNIZING U.S. SECURITIES REGULATION: ECONOMIC AND LEGAL PERSPECTIVES, *supra* at 57, 64-66. *But see* Carol Frost, Are Global Equity Markets Efficient? What are the Implications for Securities Regulation? Outline of paper presented at New York Stock Exchange Conference on Recent Developments in International Equity Markets (Dec. 7-9, 1995)

disclosure on foreign corporate governance could well be costly and irrelevant.[261]

The above sources of information all increase a U.S. investor's knowledge of foreign corporate governance, but they are not without problems. Although the global proxy services provide detailed, often culturally sensitive, information, they also reflect the U.S. orientation towards corporate governance of their generally U.S. clients. This orientation may well shape their view of a foreign situation and cause them to miss some cultural subtleties of a given foreign corporate governance situation. Moreover, rather than being neutral reporters of a foreign context, these global proxy services and their clients are often actors within this foreign context: in a given country, they are likely (albeit with local supporters) to push for development of a U.S.-style corporate governance over other alternatives.[262] This is not to suggest that their U.S. perspective so blinds members of these firms that they fail to effect cross-cultural communication on corporate governance. Any investor (and any corporate legal scholar) would profit from their description of a specific foreign situation. In light of the role of the global proxy services in the transformation of corporate governance and their limited availability, however, they only supplement, but do not replace, SEC mandatory disclosure for U.S. investors.

(on file with author) (pointing out the lack of data establishing foreign market and global market efficiency). If, therefore, a particular foreign company, or even country, has corporate governance problems, the company or country should be appropriately penalized by its market price or an overall market discount. Advocates of SEC deference to home country disclosure standards for foreign companies have seized upon this data. *See, e.g.,* Greene, *supra* note 111, at 437. The U.S. investor may have to consider certain risks (*e.g.,* exchange rate risk) that would not be factored into the home country stock price, but there are techniques to limit these risks. *See generally* BREALEY & MYERS, *supra* note 43, at 867-70.

261 *See, e.g.,* Macey, *Agency Obsolescence, supra* note 19, at 928 (pointing to the lack of need for any additional company disclosure). From a market-based approach, one should simply accept what, in various markets, market participants have determined to be an optimal disclosure on corporate governance matters (*i.e.,* where they have concluded that increased disclosure does not produce any corresponding benefit). *See* Fox, *supra* note 220, at 32-34 (contending that fully diversified U.S. investors are unlikely to be adversely affected by purchasing securities in efficient foreign markets because such diversification will eliminate unsystematic risks in the portfolio associated with companies' corporate governance practices).

262 Both U.S. institutional investors and the global proxy services have tried to be sensitive to the complexities of local foreign corporate governance in their "activism" abroad. *See, e.g.,* Howard Sherman, *Commentary,* 21 BROOK. J. INT'L L. 79, 81 (1995). These investors and the services, however, are increasingly willing to intervene directly in a foreign situation and to promote U.S. ideals of governance and disclosure. *See, e.g.,* Institutional Shareholder Services Staff Report, *CALPERS Shifts Focus of Activism Efforts,* 10 ISSUE ALERT 9 (Sept. 1995) (discussing CALPERS increasing foreign activism); Michael R. Sesit, *Calpers Voice May Be Heard Outside U.S.,* WALL ST. J., Mar. 19, 1996, at C1 (discussing CALPERS' targeting of corporate governance reform in Japan, Britain, Germany and France).

Nearly any investor can access seemingly unlimited information about foreign companies and their governance, particularly through new technological resources. Yet the gathering of this information requires time and some computer expertise, and an investor with a limited investment will generally not find it worth his or her while to make the effort. More importantly, the information is generally not in the most meaningful form and is thus not readily understandable without other research and explanations of the foreign situation and of its critical differences with U.S. corporate governance. This state of affairs may improve as finance journalists and other information providers perform more cultural translation for U.S. investors. For now, however, information on the governance of a particular foreign company that these technological sources can supply is no substitute for meaningful SEC disclosure, which has the additional virtue of coming directly from a company that will be sanctioned by legal penalties for misleading statements.

Finally, it may be at least open to question how efficient are foreign securities markets and how well stock prices in these markets reflect corporate governance information. The U.S. has a distinct kind of corporate governance of dispersed shareholders that is related to and inseparable from its efficient capital markets and the role of disclosure in maintaining this efficiency.[263] It appears contradictory to assert that in other countries where corporate governance takes a different form than "strong managers, weak owners" (*i.e.*, where it involves the domination of companies by large financial institutions, families or other kinds of concentrated shareholders and where capital markets and capital market investors are thus significantly less important in corporate finance), stock market prices reflect corporate governance information as "efficiently" as they do in the United States. If, more generally, corporate governance is a complex cultural product, one should hesitate before assuming that stock market price can readily reflect not only this subject, but also the peculiar variations from the national "model" found in a company's governance and any ongoing transformations in a company's and a country's governance system.[264]

263 *See* Shleifer & Vishny, *supra* note 14, at 54-57 (explaining that concentrated ownership is generally incompatible with liquid capital markets).

264 This argument would suggest that, in many foreign situations, corporate governance in general and differences in company's corporate governance practices would be imperfectly reflected in securities prices. Accordingly, portfolio diversification would have little effect in eliminating for investors risks associated with these practices. *But see* Fox, *supra* note 220, at 32-33 (suggesting that markets are efficient as to this information and that diversification can eliminate

These alternative sources of foreign corporate governance information, particularly foreign market efficiency, do not therefore render SEC mandatory disclosure on this subject (if reformed in line with the proposal) superfluous any more than the great amount of information generally available on companies would call for a complete replacement of SEC mandatory disclosure. Like other phenomena connected to the globalization and modernization of securities markets, such as the possible world transformation of corporate governance and the rise of the international institutional investor, however, these alternative sources of foreign corporate governance information also bear watching and need to be revisited. And they thus support an SEC, not a Congressional, reform to foreign corporate governance disclosure.

Finally and significantly, there is an objection based upon a practical concern that, as discussed earlier, has influenced SEC policies on foreign company disclosure in general and foreign corporate governance in particular: an additional disclosure burden may prevent foreign companies, particularly world-class companies, from entering organized U.S. capital markets. If foreign companies are remaining aloof from U.S. markets because of SEC insistence upon U.S. accounting standards, and if U.S. investors are increasing their holdings of foreign company securities, the last thing needed is another peculiar U.S. disclosure requirement. U.S. investors will take their foreign company business overseas or to the less regulated U.S. over-the-counter markets at the expense of U.S. stock exchanges and to the detriment of the investors themselves who will lose the benefits conferred by exchange trading.[265] Related to this concern is the argument that, even if the proposal did not further alienate foreign issuers, it would induce foreign issuers to provide formulaic or opaque statements so common in SEC disclosure documents, which, produced in this context, would defeat the whole purpose of the reform.[266]

Foreign issuers, investment banks, and law firms (at the formers' behest) are likely to oppose, for inertia reasons alone, any increase in

such risks). The proposed reform may in fact enhance market efficiency on foreign corporate governance by providing professional traders with a meaningful and reliable source of information on this subject. *Cf.* Gilson & Kraakman, *supra* note 33, at 569-72.

265 For an eloquent statement of this position, *see* Cochrane et al., *supra* note 248. *See also* James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58 (1994). Given that the author and his colleagues are all executives of the New York Stock Exchange, which stands to lose if U.S. investment in foreign securities goes offshore or to less regulated markets, their position is understandable.

266 *See generally* Kitch, *supra* note 40, at 763.

U.S. disclosure obligations. It is debatable, however, how strong their resistance to the proposal would be and whether the reform would injure foreign issuers' interest in using U.S. capital markets. The kind of "cross-cultural" disclosure on corporate governance envisioned by the proposal is familiar to foreign companies, even if they now produce it informally. Because of an increase in non-domestic shareholders, particularly U.S. investors, in foreign companies' equity capital, executives of these companies find themselves explaining to certain outside investors their corporate governance arrangements, and their countries' corporate governance in general.[267] Foreign companies would, therefore, simply have to make formal and systematic what they have undertaken to do informally and episodically. Unlike U.S. accounting disclosure requirements, moreover, the "open-ended" corporate governance disclosure requirement of the proposal would neither impose upon foreign issuers a strict U.S. disclosure format nor force foreign issuers to undertake a lengthy and costly restatement of existing information in accordance with a U.S. model. As described above, rather than placing foreign companies into a disclosure straightjacket and, thereby, pushing them towards a U.S.-style corporate governance, the goal would be to induce foreign companies to provide meaningful disclosure on cultural differences.

The extent of foreign issuer hostility, therefore, should not be a foregone conclusion. Foreign issuers may not react to the proposal in a uniform manner and, if they do not, neither would investment banks. The traditional costs associated with disclosure (*i.e.*, costs related to revealing confidential information to competitors) would be low because this disclosure would not touch on the issuer's direct business strategies. Some companies, and even countries, could perceive that they would receive a competitive advantage in the U.S. capital markets from a disclosure requirement enabling them to emphasize their governance practices. U.S. investors might, for example, insist upon purchasing at an additional discount securities of a French company that took its management from the State bureaucracy and did not convincingly explain its reasons for this manner of management selection (a discount that would not necessarily be reflected in the market price in the home market). A French company that selected

267 *See* Fanto, *supra* note 4, at 70 (discussing meetings between institutional investors and French company executives). This past October, the Global Proxy Services Corporation, a global proxy firm based in Boston, and the Caisse des Dépôts et des Consignations, a French State-owned financial institution, sponsored meetings between U.S. institutional investors and French company executives. Telephone Interview with Joseph C.F. Lufkin, Director of Global Proxy Services, Inc. (Sept. 1995).

its management in another manner (*i.e.*, up through the company's ranks or from an industry competitor) and that in its disclosure thereof distinguished itself from the French national "norm" might receive a more favorable reception from U.S. investors (*i.e.*, investors would pay a higher price for the company's securities). This is not to say that U.S. investors would reward only those companies that duplicated U.S. governance practices. The example should only suggest that competitive advantages and disadvantages could accrue to companies depending upon their corporate governance disclosure.

Company competition over disclosure might also reduce the possibility that, if the proposal were adopted, foreign companies would produce formulaic, terse and ultimately meaningless corporate governance disclosure. In its informal, and often extensive, review of initial foreign issuer disclosure statements, the SEC could emphasize to foreign issuers, their investment banks and securities counsel that they should all make efforts to comply with this new disclosure requirement. To address the liability fears that tend to discourage disclosure, moreover, the SEC might well consider initially granting foreign issuers a safe harbor from Securities Act and Exchange Act liability for any disclosure made pursuant to this new requirement, as has been done for the provision of other soft information.[268] There is no reason why, through a combination of monitoring, encouragement and safe-harbors, the SEC may not elicit from foreign issuers meaningful disclosure of their corporate governance practices.

V. Conclusion

Corporate governance has become a critical subject for corporate law scholars and for the general business community throughout the developed and even the developing world. In numerous countries, debates have occurred and are occurring about a country's corporate governance, its advantages and disadvantages with respect to other systems, and about its possible transformation. The attention is not surprising. As product market competition becomes increasingly international and intense, corporations, which are vital to a country's economic welfare, are subject to continuous scrutiny to see how well their performance compares to that of firms in other countries. A

268 *See supra* note 73, para 2. Professor Kitch suggested to me that SEC staff, with the help of securities lawyers as well as market authorities in home countries, might develop standard descriptions of corporate governance in many countries. Companies could then compare their governance to these standards. Interview with Professor Edmund W. Kitch (May 10, 1996).

given corporate governance system may benefit companies and their home country in the competition.

This Article has shown that corporate governance is a highly culturally determined phenomenon. Although there are similarities between corporate governance systems, as there are between economies, there are important differences that owe much to a country's stage of economic development, its politics and its history. Given the complex cultural origins of a specific corporate governance system, an outsider's understanding of the system also requires a special effort so that he or she recognizes both the differences and the similarities with one's own system.

Because the SEC mandatory disclosure system compels foreign companies entering the U.S. public markets to provide corporate governance information about themselves to U.S. investors, this Article has asked how well this system elicits from such companies meaningful information about cultural differences in corporate governance. It has shown that, for complex historical reasons such as jurisdictional concerns, policies designed to preserve U.S. securities markets, special interest pressure and agency self-enhancement, SEC mandatory disclosure does not now encourage foreign issuers to explain adequately and meaningfully their corporate governance practices to U.S. investors. The system in fact requires the production of little foreign corporate governance information.

The Article proposes a reform to address this situation: an "open-ended" disclosure requirement that foreign issuers explain their corporate governance practices against the background of their country's corporate governance system. The success of the proposed reform depends upon the efforts of lawyers, both those in the SEC reviewing disclosure statements and advising foreign issuers about disclosure, and members of the practicing securities bar helping their clients prepare the statements. Because, in the globalization of securities markets, other sources than mandatory disclosure produce much information about foreign corporate governance, and because these markets and corporate governance worldwide continue to change, the reform, like many SEC rules, would be provisional.

The recognition of corporate governance and disclosure as complex cultural products, which led to the identification of the problem in current SEC mandatory disclosure on foreign corporate governance in the first place, also supports the proposal. It could well be argued that, in light of the SEC's own receptivity to special interest pressures and its tendency to safeguard its own importance, any imaginative re-

form to disclosure should minimize future SEC involvement. An appreciation of SEC disclosure as itself complexly ingrained in U.S. culture suggests, however, that it is unlikely to vanish tomorrow and that it is worthwhile *now* to ameliorate it. Although special interests and even SEC self-interest would affect and could even sidetrack any reform, these pressures will never tell the whole story. Understanding any situation as culturally complex means realizing that the decisions of individuals (including regulators) cannot be explained solely on the basis of their personal, group or institutional self-interest.[269]

269 *See generally* Langevoort, *SEC as a Bureaucracy, supra* note 19, at 529 (explaining that an agency's action reflects the influence of different groups, different bureaucratic interests and power centers, strategic use of rhetoric and some efforts to address what its members perceive to be the public interest).