Brooklyn Journal of International Law

Volume 33 | Issue 2 Article 9

2008

Are Securities Regulators Prepared for a Truly Transnational Exchange?

Sara M. Saylor

ARE SECURITIES REGULATORS PREPARED FOR A TRULY TRANSNATIONAL EXCHANGE?

INTRODUCTION

On April 4, 2007, NYSE Euronext Inc., the holding company of NYSE Group Inc. ("NYSE") and Euronext N.V. ("Euronext"), commenced trading as the "world's largest and most liquid exchange group."[1] The combination of NYSE and Euronext "marks a notable step in the continuing globalization of the world's capital markets."[2] On June 1, 2006, NYSE and Euronext, two separate publicly held companies at the time, signed an agreement to combine the two securities trading exchanges in a "merger of equals" resulting in the creation of the first trans-Atlantic merger of its kind and the world's first global exchange.[3] The proposed combination was approved by Euronext shareholders on December 19, 2006 and by NYSE shareholders on December 20, 2006.[4] Today, NYSE Euronext Inc. is a U.S. holding company with U.S. headquarters in New York and international headquarters in Paris.[5] The company operates six cash equities exchanges in five countries and six derivatives exchanges in six countries, and it represents a combined $30.3 trillion total market capitalization of listed companies with approximately $139 billion in average daily trading.[6]

Financial markets, such as stock exchanges or equity exchanges,[7] are a place where people come together to trade money for a chance to earn more money.[8] Exchanges bring together investors, who have funds and

---

1. NYSE Euronext, NYSE Euronext At-a-Glance, http://www.nyse.com/pdfs/NYSE_Euronext_pk.pdf (last visited Jan. 9, 2008).

2. Press Release, U.S. Securities and Exchange Commission [SEC], Euronext Regulators Sign Regulatory Cooperation Arrangement (Jan. 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-8.htm.

3. Press Release, NYSE Group Inc., NYSE Group and Euronext N.V. Agree to a Merger of Equals (June 1, 2006), *available at* http://www.nyse.com/about/publication/1145959806931.html.

4. For discussion on Euronext shareholder approval, see *U.S.-Europe Exchange One Step Closer: The All-But-Sure Merger of the NYSE and European Bourses Will Streamline Operations and Lower Transaction Costs*, BUS. WK. ONLINE, Dec. 20, 2006. For discussion on NYSE shareholder approval, see *Big Board Holders Back Euronext Deal*, N.Y. TIMES, Dec. 21, 2006, at C6.

5. NYSE Euronext At-a-Glance, *supra* note 1.

6. *Id.*

7. An "exchange" is defined in section 3(a)(1) of the Securities Exchange Act of 1934. 15 U.S.C. § 78(c) (2006).

8. J. William Hicks, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 1:1 (West Group, 2006). Stock markets are "important part or our lives." Norman S. Poser,

seek a favorable return on these funds through a contribution of capital to a business in exchange for an equity interest conferring ownership and a right to receive profits, and the businesses that seek such capital.[9] Some goals of equity market participants are efficiency and improving the allocation of resources, and the regulation of markets is essential to these goals.[10] Through the promotion of investor confidence, the regulation of securities increases efficiency and confers benefits on market participants, including the reduction of transaction costs and enhanced liquidity.[11] Empirical evidence suggests that strong securities laws "encourage economic development."[12] The "law matters" in protecting the integrity and prosperity of securities markets and exchanges because the strength of legal protection will determine companies' access to external finance.[13]

Historically, securities regulators have worked to promote market efficiency within their own nation state. Stock exchanges themselves have made an essential contribution to regulation by providing "orderly financial markets."[14] Domestic governmental organizations have also played a pivotal role in regulating securities markets through applying comprehensive networks of regulations and safeguards that ensure the integrity of the markets and financial systems. Due to high communication and

---

The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation, 22 U. PA. J. INT'L ECON. L. 497, 497 (2001).

9. Hicks, *supra* note 8 § 1:2.

10. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713 (2006). ("[T]he ultimate goal of securities regulation is to attain efficient financial markets and thereby improve the allocation of resources in the economy.").

11. *Id.* at 715–716. *See also* American Bar Association, Special Study Group of the Committee on Federal Regulation of Securities, *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW 1487, 1496–1497 (2002) [hereinafter ABA Report].

12. John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1828 (2002) ("[S]trong laws protecting minority investors are a precondition to financial development.").

13. *Id.* at 1829. The more confidence investors have in the market and in the exchange, the more likely they are to provide capital to invest in the companies. *See generally id.*; ABA Report, *supra* note 11. The United States began to recognize and take seriously the need for financial disclosure by listed companies after the stock market crash of 1929 when, with access only to limited financial disclosure requirements, investor confidence was not maintained and companies lost significant access to external capital. *See* ABA Report, *supra* note 11, at 1499.

14. Paris Europlace, Lachmann Report, Summary and Conclusion (Oct. 4, 2006), *available at* http://www.paris-europlace.net/files/report_lachmann.pdf [hereinafter Lachmann Report].

technology costs, trading has remained relatively national, and laws governing these trades have remained within each country's jurisdiction.[15] This, however, is becoming increasingly problematic as capital flow through stock exchanges is "no longer limited by national boundaries"[16] and exchanges become more global, functioning on an international level.

Because the future of stock exchanges and the markets that they operate is "inseparably linked"[17] and inevitably cross-border, securities regulation should try to meet this new market structure and become, in a way, cross-border itself. As the cost of communication and the movement of information is falling, the barriers that kept stock exchanges national are eroding.[18] Additionally, stock exchanges are demutualizing and converting from not-for-profit to for-profit corporations.[19] The public shareholder-owner of the stock exchange is interested in maximizing profits through efficient operations, and this seems to suggest a movement towards consolidation of stock markets in order to direct pools of capital to the most efficient and productive uses.[20]

Once stock exchanges operate across nations, companies listed on these exchanges will trade across nations, and the current nationalistic structure of regulating these companies and trades will no longer suffice. The question then becomes who should regulate. Stock exchanges themselves could utilize listing requirements and other rules governing all participants, but self-regulation is no longer a viable option because demutualization has caused an inherent conflict of interest between owners and customers. The national regulators could come to a consensus and harmonize regulations, but converging national regulations is plagued by conflicting legal systems. Therefore, in the face of a new cross-border model for stock exchange operation, the international community should find a new model for international securities regulation.

Part I of this Note discusses the details of the merger between NYSE and Euronext and argues that, while the current plan is to maintain separately regulated platforms within each jurisdiction, there is an impending need for further harmonization between the European Union and the United States securities regulatory agencies. Part II explores the possibility of allowing future cross-border exchanges to self-regulate and identifies the problems inherent in such self-regulation. Part III will discuss the

---

15. *See infra* text accompanying notes 61–93.
16. Poser, *supra* note 8, at 498.
17. Lachmann Report, *supra* note 14.
18. *See infra* text accompanying notes 61–93.
19. *See id*.
20. Poser, *supra* note 8, at 499.

current attempts at harmonization, cooperation between the regulatory authorities in the European Union and the United States, and the underlying difficulties and inadequacies of harmonization between these jurisdictions due to each legal system. Finally, Part IV will suggest an alternative approach that proposes the creation of a cross-border organization better equipped to handle the international evolution of stock markets.

I. GLOBALIZATION OF STOCK EXCHANGES

NYSE Euronext Inc. is the holding company recently created through the merger of NYSE Group Inc. and Euronext N.V., two operators of long-standing stock exchange platforms.[21] NYSE Group Inc.[22] operates the New York Stock Exchange, the largest existing cash equities exchange.[23] It is a publicly held for-profit enterprise with headquarters in New York City, but it is regulated by the United States government and services the entire United States as "the leader in providing the best prices and lowest trading costs."[24] The NYSE has traded in auction format[25] since 1985 but has recently adopted a new hybrid market model that "integrates the best aspects of the auction market with automated trading [so that] customers receive the broadest choice of trade execution preferences."[26] In this hybrid market, specialists[27] and brokers[28] deal with or-

---

21. NYSE Euronext At-a-Glance, *supra* note 1.

22. NYSE Group Inc. also operates the NYSE Arca, but for the purposes of this Note, focus is limited to the New York Stock Exchange. NYSE Group Inc. was formed in 2006 through the merger between New York Stock Exchange Inc. and Acrchipelago Holdings. The New York Stock Exchange Inc. was previously a not-for-profit entity. However, NYSE was created as a for-profit publicly-traded company. *See generally* Press Release, NYSE Group Inc., New York Stock Exchange/Archipelago Holdings Merger Complete (Mar. 7, 2006) *available at* http://www.nyse.com/press/114172984519.html.

23. *NYSE Group Roles Out Options Trading Platform*, 13 NYSE GROUP NEWSLETTER 7 Dec. 2006, *available at* http://www.nyse.com/about/publication/newsletter.html. *See also* Press Release, NYSE Group Inc., *supra* note 3.

24. NYSE, A Guide to the NYSE Marketplace 5 (2d ed. 2006), *available at* http://www.nyse.com/pdfs/nyse_bluebook.pdf [hereinafter NYSE Guide].

25. Trades were made in person on an auction floor where professionals interacted with quotes and orders to obtain the best price possible for their customers. *See generally* NYSE Group Inc., Glossary, http://www.nyse.com/glossary/1042235996520.html (last visited Jan. 13, 2008).

26. NYSE Group Inc., *NYSE Hybrid Market FAQ* (2006), *available at* http://www.nyse.com/pdfs/hybridfaqs.pdf.

27. A specialist in the NYSE is a "member of the NYSE who is responsible for maintaining a fair and orderly market in the stocks they are allocated. At all times, specialists must put their customers' interests above their own." NYSE Guide, *supra* note 24, at 9.

ders both electronically and in person to create more efficient trade-execution quality.[29]

Euronext N.V. is a public limited liability company organized under the laws of the Netherlands.[30] It provides exchange platforms for regulated stock and derivatives in Belgium, France, the Netherlands, Portugal, and the United Kingdom[31] and has taken steps in recent years towards providing users with a single market.[32] The company was formed in 2000 as the first truly cross-border exchange and in 2004 it successfully integrated its markets through a harmonized IT platform that created an efficient, cost effective, and highly liquid cross-border exchange.[33] Each market participant now has a single point of access to trading since the exchanges run on an entirely electronic trading system.[34]

A. The Merger

Before NYSE Euronext Inc. was created, when the merger was simply a proposition, NYSE and Euronext gave many reasons why the merger would be in both companies' best interests. In the words of NYSE CEO John A. Thain, "In today's marketplace, it's not enough to simply be a leader in the United States. It's not enough simply to be the champion in Europe. It really is important to be a global competitor."[35] The merger is the manifestation of the strategic vision shared by NYSE and Euronext for "further market consolidation, greater diversity of product offerings, and a much better ability to reach investors and issuers around the world."[36] The end result was to be a combination of "NYSE's global

---

28. A broker is an "agent who handles the public's orders to buy and sell securities, commodities, or other property." Brokers may be employed independently or by a brokerage house. *Id.* at 8.

29. NYSE Group Inc., *Hybrid Market Training Program* (Sept. 2006), *available at* http://www.nyse.com/pdfs/hm_booklet.pdf. The NYSE Group conducted a survey that showed that 400 listed-company executives consider trade-execution quality to be the most important consideration in choosing a listing venue. *Id. See also* NYSE Guide, *supra* note 24, at 9.

30. NYSE Euronext Inc., Registration Statement (Form S-4), at 6 (Sept. 21, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1368007/000104746906011989/a2173235zf1_s-4.pdf (last visited Jan. 13, 2008) [hereinafter Form S-4].

31. Only derivatives in the U.K., Press Release, NYSE Group Inc., *supra* note 3.

32. *Id.*

33. *Id.*; *see also* Euronext, Euronext Activities (on file with author).

34. Euronext, Euronext Activities (on file with author).

35. *NYSE Group and Euronext Announce Merger*, 13 NYSE GROUP NEWSLETTER 3, June 2006, *available at* http://www.nyse.com/about/publication/1145959806931.html [hereinafter NYSE Group Newsletter].

36. *Id.* (quoting NYSE Group Inc. Chairman Marshall N. Carter).

brand and leading cash marketplace with Euronext's international, cross-border, and diversified product range, technology and integration skills" to form a winning global platform.[37]

On September 21, 2006, NYSE Euronext Inc. submitted a form[38] to the United States Securities and Exchange Commission ("SEC") that laid out many of the technical details of the merger.[39] The SEC declared the form effective on November 27, 2006.[40] As discussed in the form, NYSE Euronext Inc. is a United States holding company that fully owns both the NYSE and Euronext; however, the NYSE and Euronext remain separate subsidiaries of NYSE Euronext Inc.[41] The merger extends Euronext's new technology integration techniques across the Atlantic, and NYSE Euronext Inc. now operates on a single IT system[42] to allow for more efficient securities trading.

One of the largest concerns voiced about this merger focused on regulatory issues. Although NYSE Euronext Inc. operates on a single IT system, the exchanges operate as separate platforms.[43] This means that regulation remains within each jurisdiction: European markets continue to be regulated by their existing regulators, and the SEC regulates U.S. markets.[44] "The structure has been designed to make sure that the [SEC] continues to regulate the U.S. exchanges, and the college of regulators that currently operates in Europe . . . will continue to regulate those European exchanges."[45]

A large part of this pre-merger regulatory concern was centered on the application of the Sarbanes-Oxley Act ("Sarbanes-Oxley") to listed com-

37. *Id.* (quoting Euronext N.V. CEO Jean-François Théodore).

38. NYSE Group Inc submitted Form S-4, a registration statement filed with the SEC to register additional securities for an offering connected with the merger. NYSE Group filed this form for approval to issue shares of NYSE Euronext to the current shareholders of NYSE Group Inc. The SEC made the formal approval on Nov. 27, 2007. When the merger was complete, one share of NYSE Group Inc. was replaced with one share of NYSE Euronext, and NYSE Group was brought under the new holding company NYSE Euronext Inc. Euronext N.V. was brought under the holding group through an exchange offer whereby shares of Euronext N.V. were replaced with shares of NYSE Euronext Inc. or cash, depending on the election of the shareholder. *See generally* Form S-4, *supra* note 30.

39. Form S-4, *supra* note 30.

40. *NYSE Group and Euronext Shareholders to Vote on Merger*, 13 NYSE GROUP NEWSLETTER 7 Dec. 2006, http://www.nyse.com/about/publication/1164799108211.html.

41. Form S-4, *supra* note 30.

42. NYSE Group Newsletter, *supra* note 35.

43. *Id.*

44. *Id.*

45. Kip Betz, "No Regulatory 'Leakage' Created by NYSE-Euronext Deal, Thain Says," 38 SECURITIES REGULATIONS & LAW (BNA) 1110, June 26, 2006.

panies.[46] The concern is that if Euronext were considered an exchange operated in the United States, all companies listed on Euronext would become subject to Sarbanes-Oxley and companies would incur significantly higher costs in order to comply with Sarbanes-Oxley.[47] Nevertheless, Securities and Exchange Commissioner Annette Nazareth declared prior to the merger that because the exchanges would remain separate platforms, U.S. regulation would not reach companies that remain not listed on the U.S. platform, and specifically announced that "Sarbanes-Oxley would not apply to any market not registered in the U.S., nor would it apply to companies listed on that non-U.S. market."[48] Expecting the success of the merger, a professor of securities law at the Fordham School of Law in New York was of the opinion that the proposed merger would not create a regulatory problem.[49] In the words of House Financial Services Chairman Michael Oxley (R-Ohio), "It's important to note that the merger will not undermine Sarbanes-Oxley protections for investors in U.S.-listed firms, and those protections will remain the same."[50] European Union Internal Market Commissioner Charlie McCreevy also declared that "consolidation of exchanges should not lead to regulatory spill-over."[51]

On the other hand, there was significant resistance to the NYSE Euronext merger, most of which was from the European Union and especially from European politicians.[52] Even Commissioner McCreevy, who

46. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. *See infra* text accompanying notes 113–132.

47. The Sarbanes-Oxley Act of 2002 was the United States' legislative reaction to corporate scandals of the 1990s and was meant to heighten regulatory standards over corporate governance, accounting, and disclosure. Sarbanes-Oxley's main focus was to increase disclosure by regulated companies to increase investor confidence and thereby increase the strength of the United States financial markets. After Sarbanes-Oxley was enacted, compliance was gradually implemented according to compliance dates imposed by the SEC. *See generally* Irwin H. Steinhorn & William M. Lewis, *Corporate Compliance Under the Regulations Implementing Sarbanes-Oxley*, 60 CONSUMER FIN. L.Q. REP. 30 (Spring, 2006).

48. Annette L. Nazareth, U.S. Securities Exchange Commissioner, Remarks Before the NYSE Regulation Second Annual Securities Conference (June 20, 2006).

49. Kip Betz & Rachel McTague, *NYSE, Euronext $20B Merger Plan Would Create World's Largest Exchange*, 38 SECURITIES REGULATIONS & LAW (BNA) 962, June 5, 2006.

50. *Id.*

51. Arthur Rogers, *EU Official Will Not 'Stand in Way' of Merger Between NYSE, Euornext*, 38 SECURITIES REGULATIONS & LAW (BNA) 1190, July 10, 2006.

52. Donna Block, *SEC Calms Europe on Sarbanes-Oxley*, THE DAILY DEAL, June 6, 2006 ("Objections have been mounting from European politicians to the NYSE Group Inc.'s $10 billion agreed takeover of pan-European bourse Euronext NV.").

announced he would not "stand in the way" of the merger, conditioned his statement on regulatory aspects of the merger being properly dealt with.[53] Moreover, leaders of both France and Germany opposed this merger.[54] At a summit meeting in Paris on October 12, 2006, both French President Jacques Chirac and German Chancellor Angela Merkel recognized the ongoing market consolidation battle, but they called for a "European solution" not including a United States based stock exchange such as the New York Stock Exchange.[55]

Evidencing such resistance, a working group of Paris Europlace[56] published a report assessing the proposed merger between NYSE and Euronext in October 2006.[57] This report concluded that the merger "gives control to NYSE with no long-term assurance of the continued development of the European side of operations in the interest of users."[58] The group concluded that it would not be the merger of equals as was publicized, but would instead simply give the NYSE control of Euronext because, among many other proffered reasons, eleven out of twenty directors of the new company would be Americans and both the CEO and CFO would come from NYSE.[59] Serving as evidence of the European fears and reservations to the United States securities regulatory regime, the report called for an "unqualified assurance" that the risk of U.S. regulatory spill-over into Europe was under control, and deemed such assurance "vitally important" to all Euronext participants.[60]

B. Cross-Border Exchanges

Despite the resistance, legally required regulatory clearances were all obtained[61] and, on April 4, 2007, NYSE Euronext Inc. began trading

---

53. Rogers, *supra* note 51, at 1190.

54. Lawrence J. Speer, *French, German Leaders Join Lobby Opposing Merger of Euronext with NYSE*, 38 SECURITIES REGULATION & LAW (BNA) 1720, Oct. 16, 2006.

55. *Id.*

56. Paris Europlace is "the organization which promotes Paris as a financial market." Its purpose is to bring together the major "players in the financial industry," and it conducts international promotion, reform programs, and lobbying functions. *See* Paris Europlace, Paris EUROPLACE, Your Hub to Euroland, http://www.paris-europlace.net/ (last visited Jan. 14, 2008).

57. Lachmann Report, *supra* note 14.

58. *Id.*

59. *Id.*

60. *Id.*

61. Approval from the Autorité des Marchés Financiers (France) was obtained on January 19, 2007. Press Release, NYSE Euronext Inc., Combined Offer (Jan. 19, 2007), *available at* http://www.euronext.com/fic/000/019/025/190252.pdf. The Dutch Ministry of Finance issued a declaration conferring formal approval of the merger on February 2,

shares. Given the success of the merger between NYSE and Euronext, there is reason to expect stock exchanges will continue to move towards worldwide consolidation.[62] A stock exchange is itself a business enterprise.[63] Like any other business company, stock exchange management will focus on cutting expenses and increasing income.[64] This focus has become increasingly important due to "the recent trend of demutualization."[65] Demutualization refers to changes in the ownership structure of stock exchanges whereby exchanges organized as not-for-profit entities owned by members convert to publicly-owned organizations, usually for-profit corporations.[66] This trend has been heavily influenced and driven

---

2007. Press Release, NYSE Group Inc., Euronext and NYSE Group Welcome Dutch Ministry of Finance Declaration (Feb. 2, 2007), *available at* http://www.euronext.com/fic/000/014/938/149385.pdf. The SEC approved the merger on February 14, 2007. *The Monitor*, 26 NO. 4 BANKING & FIN. SERVICES POL'Y REP. 21, 21 (Apr. 2007). Although not legally required for the merger to proceed, the SEC and the College of Euronext Regulators (the Authority for the Financial Markets (Netherlands), Autorité des Marchés Financiers (France), Banking Finance and Insurance Commission (Belgium), Comissão do Mercado de Calores Mobiliários (Portugal), and Financial Services Authority (United Kingdom)) signed a Memorandum of Understanding for cooperation in market oversight on January 25, 2007. Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight (Jan. 25, 2007), *available at* http://www.sec.com/news/press/2007/2007-8_mou.pdf.

62. "[T]he difficulties inherent in coordinating different national rules and regulatory systems will not stand in the way of the creation of a world stock market." Poser, *supra* note 8, at 540.

63. By fulfilling the functions of market organization, information distribution, market regulation, and setting standards, stock exchanges are business enterprises. As market organizers, stock exchanges have been working towards making trading floors obsolete and have been integrating the use of technology in place of traditional human traders. Technology has also promoted exchanges' role as information distributors, which has become increasingly important for trades to happen more efficiently. Stock exchanges also regulate the markets that they operate and organize through rules for listed companies, as well as all other market participants. These rules foster investor confidence and provide fair trading and accurate price discovery. Through the rules, employed by both the NYSE and Euronext, stock exchanges have become corporate governance standards setters. Each one of these four roles will undoubtedly be performed more efficiently through consolidation of exchanges. *See generally* Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2545–2550 (2006).

64. *Id.* at 2549; *see also* International Organization of Securities Commissioners [IOSCO], Technical Committee, *Discussion Paper on Stock Exchange Demutualization* (Dec. 2000), *available at* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD112.pdf [hereinafter IOSCO Technical Committee Paper].

65. Fleckner, *supra* note 63, at 2551.

66. *Id.* at 2554–2555.

> Historically, most exchanges were not-for-profit organizations owned by their members. Over the past few years, there has been a trend among exchanges to

by recent changes in technology and increased competition between stock exchanges.[67]

NYSE Euronext Inc. is one of such demutualized and publicly held corporations listed on both the New York and Paris exchange platforms.[68] Demutualization brings with it a different corporate governance structure where shareholder interests are likely to dominate over the constituent groups who used to be in a position to exercise veto powers when the exchanges were operated as not-for-profit, member-owned corporations.[69] Because shareholders consistently try to maximize profits and the value of their investment, they support innovation in general and look favorably on acquisition and merger proposals.[70] It has been said, in light of demutualization, that "the rate of merger and acquisition activity seems likely to grow" since the dominant consideration of stock exchanges is now profitability.[71] Consequently, the number of stock exchanges operating around the world is likely to shrink radically from the 150 of today.[72]

"[T]he stock exchanges of the United States and Europe seem to be on a course of consolidation, largely driven by the need of the large firms

---

> consider alternative governance structures to these traditional mutual or cooperative models. The transformation of an exchange into a for-profit shareholder-owned company is referred to as 'demutualization.' In most cases, the demutualized exchange becomes a for-profit enterprise.

IOSCO Technical Committee Paper, *supra* note 64, at 1. Internationally, demutualization began with the Stockholmsbörsen (Stockholm Stock Exchange) in 1993. Euronext demutualized 1997 and listed publicly in 2001. Between 1998 and 2001, the Australian Stock Exchange, Deutsche Börse, and the London Stock Exchange all underwent demutualization and listed publicly. It was almost ten years before the United States stock exchanges followed suit, but most of the prominent United States exchanges have been demutualized, and many are publicly held. The Nasdaq Stock Market demutualized and publicly listed in 2002. The Pacific Exchange and the Philadelphia Stock Exchange demutualized in 2004. The Chicago Stock Exchange followed in 2005. The Pacific Exchange is a public company, but the Philadelphia Stock Exchange and the Chicago Stock Exchange are not publicly traded. The NYSE demutualized in 2006 and is publicly traded. *See generally* Fleckner, *supra* note 63, at 2555–2562; *see also* Coffee, *supra* note 12, at 1800.

67. IOSCO Technical Committee Paper, *supra* note 64, at 2.

68. NYSE Group Newsletter, *supra* note 35.

69. Coffee, *supra* note 12, at 1801. This takes away from members of the stock exchange the control of decisions concerning the range of services to be offered by the exchange, as well as price and quality. Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325, 347–348 (2001).

70. Coffee, *supra* note 12.

71. *Id.*

72. For the estimate of 150 stock exchanges operating worldwide, *see* Craig Karmin et al., *Vision Test: Nasdaq's Drive to Build Global Exchange Hits Some Major Potholes*, WALL ST. J., June 25, 2001, at A1; *see also* Coffee, *supra* note 12, at 1759.

and institutions that control order flow to reduce transaction costs."[73] Additionally, driven by the desire to maximize profits, stock exchanges will move towards consolidation in order to obtain a greater market share.[74] It has been argued that stock exchanges are a form of natural monopoly and that major markets will have the effect of draining smaller markets, and, in the absence of agreements between exchanges to form an alliance, the end result will be "winner-takes-all," leaving only a few large stock exchanges in the major financial centers of the world.[75]

In fact, such radical shrinking in the number of stock exchanges has happened before when over 100 U.S. securities exchanges either consolidated or shut down in the early twentieth century.[76] During the nineteenth century, stock exchanges in the United States were sheltered from competition from other stock exchanges through geographic and communication barriers.[77] However, as technological innovations such as the telegraph, the telephone, and the stock ticker reduced the cost of barriers, more efficient national exchanges began to eliminate the local exchanges.[78] As stock exchanges were more easily able to compete with one another, they attempted to consolidate in order to obtain a greater market share, enabling larger exchanges to compete more effectively.[79]

Today the same evolution of stock exchanges and break down of cost barriers can be identified on an international scale. What used to be high cost barriers to communications and geography between international countries are being reshaped by developments in technology.[80] Globalization has increased the ease with which both information and capital flow from one country to another, and securities markets are now able to compete worldwide.[81] This process, which began in 2000 through the

---

73. Poser, *supra* note 8, at 539.

74. Coffee, *supra* note 12, at 1760.

75. *See id.* at 1760 n.6 (citing Carmine Di Noia, *Competition and Integration Among Stock Exchanges in Europe: Network Effect, Implicit Mergers and Remote Access*, 7 EUR. FIN. MGMT. 39, 42 (2001)).

76. *Id.* at 1759. There were nearly 250 stock exchanges operating in the United States during the nineteenth century and only slightly over 100 operating by the beginning of the twentieth century. *Id*. at 1759 n.2.

77. *Id.* at 1759 n.2 (citing R.C. MICHIE, THE LONDON AND NEW YORK STOCK EXCHANGES: 1850–1914, 167 (1987)). These barriers included the high costs of both long distance communication and the deliverance of stock certificates once a purchase was completed. *Id.*

78. *Id*.

79. *Id.* at 1760.

80. *Id.* at 1759.

81. *Id.* at 1760.

creation of Euronext, the first cross-border exchange,[82] has become more relevant through the creation of NYSE Euronext Inc., and will continue into the future.

The traditional stock exchange follows the auction model of the NYSE before the integration of their hybrid market. Stock exchanges were operated on a trading floor where individual broker-members of the stock exchange brought offers to buy and sell to one floor where they would attempt, directly competing in person through an "open-outcry," to get the best price for the trade.[83] In recent years, markets, especially in Europe, have begun to employ an electronic trading system that no longer requires persons to gather in one place.[84] As a result of the development of technology, people can sit behind a desk anywhere in the world and conduct trades by a simple push of the button.[85] The combination of the ease with which trades can be conducted across national borders and the public-owner's desire to maximize profits through obtaining a greater market share for the exchange will not be the sole reason for consolidation. However, the "increasing demand for round-the-clock intercontinental trading"[86] will serve as a driving force for stock market consolidation across national borders.[87]

Numerous supervisory authorities, including Securities and Exchange Commissioners in the United States and their European counterparts, exchange platform Chairmen and CEOs, and academic scholars, have

---

82. Euronext N.V. emerged from a merger in 2000 of the Paris, Amsterdam, and Brussels Exchanges. NYSE Euronext, History, http://www.euronext.com/editorial/wide/editorial-1994-EN.html (last visited Jan. 14, 2008).

83. NYSE Guide, *supra* note 24, at 5.

84. "European exchanges no longer look anything like traditional stock exchanges." Poser, *supra* note 8, at 501.

85. *Id*.

86. *Euronext NV Shareholders Vote to Approve Planned NYSE Merger, Big Board's Owners Expected to Give OK.* CHI. TRIB. Dec. 20, 2006, at 4 [hereinafter *Euronext NV Shareholders*].

87. 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, 299 (1991).

> Technology has made it possible for information regarding stock prices to be sent all over the world in seconds. Presently, computers route orders and execute small trades directly from the brokerage firm's terminal to the exchange. Computers now link together various stock exchanges, a practice which is helping to create a single global market for the trading of securities. The continuing improvements in technology will make it possible to execute trades globally by electronic trading systems.

Id.

recognized the future globalization of stock exchanges and acknowledged the difficulties in harmonization of regulations.[88] Global expansion is not limited to the single merger creating NYSE Euronext Inc. For example, before the merger with NYSE, Euronext had already put significant effort into cross-border exchanges culminating in harmonized IT platforms shared by all its markets in 2004.[89] Moreover, Nasdaq has acquired over twenty-five percent of the London Stock Exchange.[90] In light of these recent trends towards globalization, authorities realize it is time to work towards more cooperation between regulators and greater convergence of regulations across jurisdictions in order to achieve consistent international standards to govern such international entities. The National Association of Securities Dealers Chairman and Chief Executive Officer Robert Glauber has recognized that regulating future trades will be challenging because it will be "unclear now what home-country regulator will be responsible for them."[91]

The ultimate purpose of the creation of NYSE Euronext Inc. is to produce a fully integrated trading platform, [92] and the company has organized what appears to be a sensible solution to regulation conflicts by maintaining separate exchange platforms. However, now that the electronic trading system of NYSE Euronext Inc. has been implemented, participants of the stock exchange could hypothetically sit behind a computer in any part of the world and trade on either of the technically separate platforms. In the words of Robert Glauber, "NYSE-Euronext will inevitably migrate toward a more completely computerized trading platform. . . . When this happens, trades won't take place in New York, London, or Paris, they'll take place on a satellite over the Atlantic Ocean. What . . . regulator will [be] responsible for those trades?"[93]

---

88. *See, e.g.*, ABA Report, *supra* note 11; Coffee, *supra* note 12; Poser, *supra* note 8; Nazareth, *supra* note 48; Glauber, *infra* note 92; IOSCO Principles, *infra* note 216; OECD, *infra* note 206.

89. Press Release, NYSE Group Inc., *supra* note 3.

90. *Euronext NV Shareholders*, *supra* note 86, at 4.

91. Rachel McTague, *In Face of Market Globalization, Glauber Raises Question of Regulatory Cooperation*, 38 SECURITIES REGULATION & LAW (BNA) 1111, June 26, 2006.

92. Robert Glauber, Chairman and CEO, National Association of Securities Dealers, Luncheon Address at the Harvard Business School Global Leadership Forum (June 21, 2006), *available at* http://www.nasd.com/PressRoom/SpeechesTestimony/RobertR.Glauber/NASDW_016838.

93. *Id.*

II. SELF-REGULATION

One possible answer to this question is to allow the stock exchanges themselves to be the primary regulators through their own rules and regulations, or self-regulation. Self-regulation has been defined as "[a]n organization's or industry's control, oversight, or direction of itself according to rules and standards that it establishes."[94] Such regulation has proven rather effective. Before an issuer may list on either the New York Stock Exchange or any of the Euronext platforms, they enter into a contractual listing agreement with the stock exchange and are bound to meet certain requirements under the contract.[95]

A. Historical Success of Self-Regulatory Organizations

Early in the history of NYSE listing requirements, the NYSE was simply concerned with financial disclosure for listed companies.[96] Today, however, the listing requirements include "independent audit committees, ownership interests of corporate directors and officers, shareholders' voting rights, shareholders' ownership interests and the maintenance of fair and orderly markets in listed securities."[97] The listing requirements developed pursuant to the NYSE goal of ensuring integrity of the securities markets.[98] They are designed to increase investor confidence by promoting liquidity and transferability of shares.[99] Such listing requirements have proven to be effective in monitoring corporate issuers notwithstanding governmental regulations, at least in the United States.[100] Historically in the United States, listing standards could be considered a "substitute for government regulation."[101]

---

94. BLACK'S LAW DICTIONARY 1391 (8th ed. 2004).

95. This section focuses on the overall effectiveness of the enforcement of regulations in stock exchanges through the self-regulatory organization and not the specific regulations themselves. Therefore, the listing requirements of Euronext N.V. will not be discussed. While the listing requirements for NYSE and Euronext are similar, it should be noted that Euronext stock exchanges and the NYSE do not impose the exact same requirements on listed companies. One notable difference is that NYSE traditionally imposes higher transparency requirements on listed companies than Euronext imposes on its listed companies. Coffee, *supra* note 12, at 1830.

96. *See generally* Karmel, *Listing Requirements*, *supra* note 69, at 328.

97. *Id.* at 329 (citing NYSE Listed Company Manual (1999), *available at* http://www.nyse.com/listed/listed.html).

98. *Id.* at 329.

99. ABA Report, *supra* note 11, at 1497.

100. *See* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990). This case foreclosed the possibility that the SEC could impose listing standards governing voting rights of shareholders. The stock exchange itself, however, could impose such rights. Therefore,

The NYSE, through NYSE Regulation Inc.,[102] imposes high corporate governance standards on listed companies and has the ability to reach beyond the federal regulations.[103] Listing standards were originally enacted by the NYSE in order to create "a brand name associated with high quality."[104] Current listing requirements of the NYSE include independent audit committee requirements.[105] Also, each share from an issuer is only entitled to one vote, no more and no less.[106] Shareholders must approve any issuance of more than twenty percent of outstanding common stock or voting power.[107] Failure to comply with these requirements could result in delisting of the issuer from the exchange.[108] Each one of these rules goes beyond federal regulation and supersedes the authority of the SEC to further ensure investor confidence. Additionally, there are a number of requirements, such as shareholder approval, that also go beyond state law corporate governance laws.[109]

Because of such effectiveness, scholars have argued that stock exchange self-regulation will be sufficient in an international setting.[110] Some base this argument on a market-based theory of regulating stock exchanges and corporate fraud,[111] and such arguments include basic competition principles. Private investors will feel more secure investing in companies that are held to higher standards; therefore, the exchanges have incentive to require issuers to meet such standards.[112]

---

the stock exchanges have a longer reach than the SEC in the creation and enforcement of corporate governance standards.

101. "The NYSE argued that if its listing standards for securities offered for sale adequately protected the investing public, then government regulation would be unnecessary." Karmel, *Listing Requirements*, *supra* note 69, at 327.

102. A wholly owned subsidiary of NYSE Group Inc., NYSE Regulation Inc. is an independent, not-for-profit subsidiary that enforces marketplace rules as well as federal securities laws against participants of the NYSE. NYSE Guide, *supra* note 24, at 11.

103. *See Business Roundtable*, 905 F.2d 406.

104. ABA Report, *supra* note 11, at 1497.

105. *Id.* at 1511.

106. *Id.* at 1499.

107. *Id.* at 1511.

108. *Id.* at 1515.

109. *Id.* at 1513–1514.

110. *See, e.g.*, Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002); Poser, *supra* note 8.

111. *See, e.g.*, Ribstein, *supra* note 110.

112. *See generally id.*

B. Problems with Self-Regulation

On the other hand, with the recent demutualization of stock exchanges, self-regulation has become increasingly problematic.[113] Foremost, regulation imposed by a publicly-listed company listed alongside the companies to which the regulation applies creates numerous conflicts of interest.[114] "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[115] The stockholders will demand high prices in order to maximize profit.[116] However, for the stock exchange to remain an effective self-regulatory body, it will also have to take into account the interests of the customers who are listed on the exchange.[117] Such customers will demand low prices, and stock exchanges will be pressured to please both groups. This creates an inherent conflict of interest that did not exist before demutualization of stock exchanges, i.e., when the customers were the owners of the stock exchanges.[118]

The recent demutualization has created incentives for both over-regulation and under- regulation by stock exchanges.[119] The main incentive for under-regulation arises from the desire to maximize profits.[120] As with every business function, self-regulation will cause the stock exchange to incur expense and since the stock exchange is a business enterprise,[121] it will weigh these expenses against the direct income from regulation.[122] Since little income[123] is generated by increased regulation,

---

113. "[D]emutualization by the self-regulated markets could exacerbate concerns about the ability or willingness of self-regulated markets to continue to develop and maintain high listing standards." ABA Report, *supra* note 11, at 1540; *see generally* Karmel, *Listing Requirements*, *supra* note 69, at 348.

114. Fleckner, *supra* note 63, at 2590; IOSCO Technical Committee Paper, *supra* note 64.

115. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. Sup. Ct. 1919).

116. Fleckner, *supra* note 63, at 2591.

117. *See generally id.*

118. *Id.* at 2591.

> As competition increases and exchanges move from mutual or cooperative entities to for-profit enterprises, new elements enter into the environment. The interests of the owners of the exchange may diverge from those of the principal customers of its trading services. The commercial nature of the exchange becomes more evident: maximizing profits becomes an explicit objective.

IOSCO Technical Committee Paper, *supra* note 64, at 2–3.

119. *See generally* Fleckner, *supra* note 63, at 2593–2595.

120. *Id.* at 2593.

121. *See supra* text accompanying notes 61–93.

122. Fleckner, *supra* note 63, at 2593.

123. And possibly no income.

publicly traded stock exchanges have little incentive to regulate.[124] Moreover, the desire to attract new customers who wish to list on the exchange, thereby increasing profits, could actually lead to decreased regulation.[125] Aside from reducing the regulation imposed on customers, publicly held stock exchanges may also have an incentive to not enforce existing regulations. For example, a publicly held stock exchange that is listed on its own platform may choose not to enforce any regulation with which it is not itself in full compliance.[126]

The desire to maximize profits may also create incentives to over-regulate.[127] Stock exchanges may collect fines and other kinds of payments from companies listed on the exchange for violations of imposed regulation.[128] However, there is no guarantee that listed companies will in fact violate even the strictest of regulations.[129] Over-regulation is not a sure source of profit for the stock exchange itself, so the main concern created by demutualization of stock exchanges is under-regulation.[130]

Under-regulation creates a grave concern for the vitality of the markets. Securities regulation is essential to maintaining confidence in stock exchanges and financial markets in general.[131] Because of the conflicts of interest created by demutualization, the publicly-held for-profit stock exchanges are not in the best position to ensure effective securities regulation and investor confidence. Because the "law matters" and the strength of legal protection will determine companies' access to external finance, the transnational stock exchanges will need outside regulation and guidance to insure the integrity of the listing requirements.[132]

---

124. *Id.*

125. IOSCO Technical Committee Paper, *supra* note 64; Fleckner, *supra* note 63, at 2594.

126. Fleckner, *supra* note 63, at 2594.

127. *Id.*

128. *Id.* at 2594–2595.

129. *Id.*

130. *Id*.

131. *See generally* Groshen and Parchomovsky, *supra* note 10.

132. Coffee, *supra* note 12, at 1829. The more confidence investors have in the market and in the exchange, the more likely they are to provide capital to invest in the companies. *See generally id.*; ABA Report, *supra* note 11. This Note does not suggest that listing requirements should be ignored. Listing requirements remain an essential part of securities regulation. However, now that stock exchanges are publicly owned and for-profit, there is a need for an independent body that can supervise self-regulation rules and regulations.

III. EXISTING REGULATION: DIFFERENCES AND COOPERATION

NYSE Euronext Inc. operates in both the European Union and the United States. Since the exchanges themselves cannot be relied on to be the main securities regulators, either governmental regulation system could, hypothetically, take the lead role in regulating NYSE Euronext Inc. One could argue that the United States should take the regulatory role because the company will be incorporated in the United States.[133] On the other hand, perhaps regulation should be left to the European Union since that is where all but one exchange, the NYSE, are located. However, neither seems likely since neither jurisdiction will want to hand its regulatory powers over to the other.[134] Therefore, the European Union and the United States could work together and regulate the exchange in harmony.

On January 25, 2007, the SEC and the College of Euronext Regulators[135] signed a Memorandum of Understanding ("MOU") "in order to facilitate cooperation in market oversight" in relation to the creation of NYSE Euronext Inc.[136] While the regulators agree to "consult, cooperate and exchange information in connection with oversight of NYSE Euronext," the "MOU does not create any legally binding obligations" on the parties.[137] The MOU is a large step towards achieving convergence of regulations, but the MOU is more focused on "ongoing, informal, oral consultations [and] periodic meetings" and explicitly states that the authorities involved stress the "importance of local regulation of local markets."[138] Such cooperation is a necessary step in facilitating the inevitable consolidation of exchanges across national borders, but, because of fundamental regulatory differences discussed below, there remain several barriers to overcome if stock exchanges truly begin to function on a transnational basis. In the face of continued stock exchange consolidation, which increases the need for a single regulatory structure across

---

133. *See* Form S-4, *supra* note 30.

134. Regulatory systems are reluctant to relinquish any part of their sovereignty. *See* Poser, *supra* note 8, at 540.

135. The College of Euronext Regulators are the Authority for the Financial Markets (Netherlands), Autorité des Marchés Financiers (France), Banking Finance and Insurance Commission (Belgium), Comissão do Mercado de Calores Mobiliários (Portugal) and Financial Services Authority (United Kingdom). Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight (Jan. 25, 2007), *available at* http://www.sec.com/news/press/2007/2007-8_mou.pdf (last visited Jan. 11, 2008).

136. *Id.*

137. *Id.* at 3.

138. *Id.* at 3, 5.

nations, full convergence in regulating stock exchanges may not occur, at least in present day.

A. United States and European Union Systems

Historically, the United States and the European Union[139] come from two distinguished capital systems: a market-oriented model system and a bank-oriented model system.[140] The U.S. system has followed the market-oriented model whereby corporations collect capital directly from the public.[141] The ownership structure is characterized by high fragmentation where one single owner can rarely independently affect the management of the corporation.[142] European corporations, in contrast, follow the bank-oriented model and collect capital primarily through banks.[143] Most often the result is that a single bank will finance the majority of the firm, offer a very wide range of services to corporations, and create the presence of major shareholders in the ownership structure of the firms from the outset.[144] The U.S. separation of banks from the securities business is due in part to the Glass-Steagall Act of 1933, which prohibited commercial banks from holding shares of industrial companies.[145] In Europe, the separation of banks from the securities business did not occur.[146] Corporate governance for companies listed on the NYSE is geared towards the protection of the individual investor, who needs more protection. Euronext listed company regulations are more relaxed because they are aimed at the more sophisticated institutional investor who is better able to protect itself.

The different investment systems and focus of regulations are evident through disparate securities laws such as Regulation NMS[147] in the United States and the Markets in Financial Instruments Directive[148] ("Mi-

139. Mainly Germany, France, and Italy. Gustavo Visentini, *Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?*, 23 BROOK. J. INT'L L. 833, 838 (1998). Because Euronext's headquarters is located in France, the merger with the NYSE poses the problem of harmonization between the United States and France. Therefore, much of this part of the analysis will focus on France.

140. *Id.* at 838–839.

141. *Id.* at 838.

142. *Id.* at 839.

143. *Id.* at 838–839.

144. *Id.* at 839.

145. *Id.* at 838.

146. *Id.*

147. Regulation NMS, 17 C.F.R. § 242.660 (2005).

148. Council Directive 2004/39, 2004 O.J. (L 145) 1-44 (EC) *amended by* Council Directive 2006/31/EC, 2006 O.J. (L 114) 60-63 [hereinafter MiFID].

FID") in the European Union. Regulation NMS and MiFID are both aimed at reconciling competition between markets but "they are not necessarily compatible."[149] For example, one of the four rules[150] promulgated by Regulation NMS is an order protection rule against trade-throughs[151] for all national market system securities.[152] A trade-through occurs when one trading center executes an order "at a price that is inferior to the price of a protected quotation, often representing an investor limit order, displayed by another trade center."[153] One of the SEC's justifications for the order protection rule was that it "will promote intermarket competition by leveling the playing field between automated and non-automated markets and, to the extent that the existing trade-through rule serves to constrain competition, by removing this barrier to competition."[154] This rule serves to eliminate any potential advantage that manual markets had over automated systems.[155]

In contrast, MiFID permits investment firms that frequently and systematically deal on their own accounts by executing orders outside a regulated market to make information available to only specific categories of clients.[156] These investment firms can make quotes available "only to retail clients, only to professional clients, or both."[157] Although MiFID emphasizes fair competition among markets and market participants, it only suggests the removal of obstacles that could prevent fair competition and it allows electronic communications networks to deal with institutional investors outside of MiFID.[158] This is unlike Regulation NMS which has caused electronic communications networks to consolidate and always operate within Regulation NMS, thereby "leveling the

149. Roberta Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355, 371 (2007).

150. *Id.* at 372.

151. *Id.* The trade-through rules establish "intermarket protection against trade-throughs." *Id.*

152. National market system securities were redefined by Regulation NMS to mean "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." Regulation NMS, 17 C.F.R. § 242.600(b)(46) (2005).

153. *Id.*

154. Regulation NMS, 70 Fed. Reg. 37,496, 37,594 (June 29, 2005)(to be codified at 17 C.F.R. pt. 200, 201, 230, 240, 242, 249, and 270).

155. Karmel, *The Once and Future New York Stock Exchange*, *supra* note 149, at 372.

156. *Id.* at 376.

157. *Id.*

158. *Id.* at 378.

playing field."[159] One explanation for this disparity is because the United States comes from a market-oriented model system of regulation while the European Union comes from a bank-oriented model system.

Another notable difference between U.S. and E.U. securities law caused by the different market structure is that the United States provides for private enforcement by individuals alongside criminal actions by the state, but the private remedy is not always available in Europe.[160] Most of the securities law governing member states of the European Union is provided through directives proposed by the European Commission, which, if enacted by the Council, become part of Community law.[161] Directives impose binding guidelines on member states, and failure to propose legislation within these guidelines could lead to action against the state by the Commission.[162] Individual rights to bring an action for a violation of securities law, such as those found in the United States, are not typically found in directives.[163]

Currently, the United States is a two-tiered system of securities regulation, and market participants have to comply with both federal and state laws.[164] The SEC, empowered by the Securities Exchange Act of 1934, has broad authority over the securities industry in the United States, including the power to regulate and register the various stock exchanges and participants of the exchanges.[165] Although the SEC remains limited in what rules and regulations it can create and enforce, the agency exerts direct power and binding authority over the securities markets.[166]

E.U. securities law is less centralized, at least in part because the directives simply establish goals and guidelines but leave it up to the member states to decide how to implement and enforce such goals.[167] This structure has been a significant barrier to achieving a truly uniform E.U. secu-

---

159. Regulation NMS, *supra* note 154; *see also* Karmel, *The Once and Future New York Stock Exchange*, *supra* note 149, at 378.

160. Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COM. L. J. 351, 379 (2006).

161. Treaty Establishing the European Community, art. 57(2), Oct. 2, 1997, 37 I.L.M. 56 (1998).

162. Engle, *supra* note 160, at 359.

163. Although there are some Directives that give an individual the right to enforce. *See id.*

164. Whitney Debevoise & Penny Somer-Greig, *Securities Law In the Untied States*, *in* INTERNATIONAL SECURITIES LAW HANDBOOK 503, 504 (Klumer Law International 2d ed. 2005).

165. JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION 5–8 (Aspen Publishers, 5th ed. 2006).

166. Poser, *supra* note 8, at 532.

167. Engle, *supra* note 160, at 357, 379.

rities law.[168] In some ways, it appears to be a two-tiered system because the European Community does in fact issue binding directives on the member states, but, unlike the SEC which has been granted direct powers to regulate, the "implementation and enforcement of securities law in the E.U. is found in the national law of the member states."[169] The European Union does retain some control over securities law because each member state is subject to obligations under European Union and European Community treaties.[170] However, because the decision of how to enforce these directives is left to the member states, the "starting point" for European securities law is found in each nation state's securities laws and not those of the European Union.[171] In contrast, U.S. securities law is basically federal and is simply supplemented by state laws.[172]

Such fundamental differences pose practical problems in enacting converging laws and regulations. Even if the European Commission were to comply entirely with the United States regulations, the E.U. member states retain a certain amount of implementation and enforcement powers. Therefore, there is no guarantee that each state would implement directives in the same manner. Furthermore, the United States system is concerned with the individual investor, but the European system is concerned with the large institutional investor.

B. Europe and the Sarbanes-Oxley Act

One of the largest concerns for NYSE Euronext Inc. is that "[f]oreign companies do not . . . generally wish to become subject to regulation by the Securities and Exchange Commission . . . and . . . have been clamor-

---

168. *See generally id.* The European Union has, as of yet, been unable to form a single securities law governing all member states. Some have suggested a European Securities and Exchange Commission similar to that of the United States. *Id. See also* Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9 (1999). However, this idea has not been fully developed into a reality.

169. "In Europe, the national law of the stock exchange governs securities trading activities on a stock exchange. As a preliminary matter, it is the law of the stock exchange that 'will decide whether the financial instrument in question is a security and is therefore qualified to be listed.'" Alexander B. St. John, *The Regulation of Cross-Border Public Offerings of Securities in the European Union: Present and Future*, 29 DENV. J. INT'L L. & POL'Y 239, 244–245 (2001) (quoting Gerhard Wegen & Christian Lidenmann, *The Law Applicable to Public Offerings in Continental Europe*, *in* THE LAW OF CROSS-BORDER SECURITIES TRANSACTIONS 153, 156 (Hans Van Houte ed. 1999)); *see also* Engle, *supra* note 160, at 358, 379.

170. For example, despite the fact that the laws of each nation state decides whether a financial instrument is a security, a security is now substantively defined through directives of the European Commission. Engle, *supra* note 160, at 358.

171. *Id.* at 379.

172. *Id.*

ing to exit from the U.S. disclosure system."[173] Moreover, the NYSE has been losing listings, especially initial public offerings, to foreign exchanges.[174] In the words of Securities and Exchange Commissioner Paul S. Atkins, "According to the *Wall Street Journal*, in the year 2000 nine out of every ten dollars raised by foreign companies through new stock listings were done in New York, but by 2005 the numbers had reversed so that nine out of every 10 dollars were raised outside of America."[175]

In the wake of corporate scandals of the 1990s,[176] the U.S. Congress amended the laws governing corporate governance and disclosure through the implementation of Sarbanes-Oxley.[177] Sarbanes-Oxley focuses mainly on heightening disclosure by regulated companies to increase investor confidence.[178] Among many other things, Sarbanes-Oxley increases regulation over auditing committees, calls for the independence of such committees, requires companies to adopt and disclose a code of ethics, and calls for greater transparency and heightened disclosure.[179]

On December 20, 2002, shortly after Sarbanes-Oxley was enacted, David Devlin, the President of the Fédération des Experts Comptables Européens (European Federation of Accountants), addressed a letter to Jonathan G. Katz, Secretary of the U.S. SEC.[180] Devlin stated that the European Federation of Accountants supports the provisions of the Sarbanes-Oxley Act, but went on to say,

> [T]he Act is very much related to the U.S. legal environment and can be seen as a reaction to mainly U.S. financial reporting problems. For European companies and their auditors, many of the Sarbanes-Oxley Act measures, especially as regards their details, are, in our opinion,

---

173. Roberta S. Karmel, *NYSE-Euronext Merger: Rules to Stem Exit by Foreign Issuers*, 236 N.Y.L.J. 3 (Aug. 17, 2006).

174. *Id.*

175. Paul S. Atkins, United States Securities and Exchange Commissioner, Remarks Before the Association Française De Gouvernement D'enterprise (French Association of Corporate Governance) (June 15, 2006).

176. Such as Enron, WorldCom, and Tyco International.

177. Irwin H. Steinhorn & William M. Lewis, *Corporate Compliance Under the Regulations Implementing Sarbanes-Oxley*, 60 CONSUMER FIN. L.Q. REP. 30, 30 (2006).

178. *Id.*

179. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.); *see also* Steinhorn & Lewis, *supra* note 177.

180. Letter from David Devlin, President, Fédération des Experts Comptables Européens (European Federation of Accountants) to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (Dec. 20, 2002) *available at* http://www.sec.gov/rules/proposed/s70203/ddevlin1.htm (last visited Jan. 13, 2008).

> unnecessary, disproportionate, burdensome, or even impossible to apply.[181]

Compliance with Sarbanes-Oxley is very costly, especially to the smaller corporation.[182] Additionally, Sarbanes-Oxley, enacted hastily in response to financial scandals, includes sections which apply to foreign issuers without consideration as to whether it was appropriate to do so.[183] Generally, foreign issuers can obtain exemptions from both stock exchange listing requirements and other governmental regulations,[184] but Sarbanes-Oxley does not make such an exception. Foreign issuer registrations and listings have declined in recent years as a result of Sarbanes-Oxley. Because Sarbanes-Oxley imposes on companies much more demanding corporate governance standards than regulations in Europe, the United States has lost a significant portion of initial public offerings to foreign stock exchanges in the recent years since its passage.[185] Such trends could explain why the NYSE believed it was in their best interest to merge with Euronext. However, the same facts explain the European resistance to Sarbanes-Oxley and pre-merger resistance to NYSE Euronext Inc.

Despite this resistance, European securities regulations appear similar to Sarbanes-Oxley in many respects. In 1999, the European Union completed the Financial Services Action Plan ("FSAP"), "an ambitious reform agenda . . . designed to provide the regulatory underpinning for a single deep and liquid capital market . . . under harmonized rules."[186]

---

181. *Id.*

182. *See* Nathan Wilda, *David Pays for Goliath's Mistakes: The Costly Effect Sarbanes-Oxley has on Small Companies*, 38 J. MARSHALL L. REV. 671, 680 (2004) ("Because the Act does not distinguish between large and small companies, the burden of compliance is weighing very heavily on smaller firms.").

183. Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 STETSON L. REV. 849, 887 (2004).

184. *See* ABA Report, *supra* note 11, at 1514–15.

185. Glauber, *supra* note 92. Sarbanes-Oxley is

> so demanding, in fact, that most newly-listed, non-US public companies in the last 18 months are listed on exchanges outside the United States. In 2000, pre-Sarbanes-Oxley, about 47 percent of global IPO equity was raised on US exchanges. In 2005, post-Sarbanes-Oxley, that number was 5.7 percent. In 2000, nine of the top ten worldwide IPOs registered on U.S. markets. In 2005, only one of the top 24 did so.

Id. (citing NYSE Chairman Marshall Carter testimony to House Capital Markets Subcommittee. Apr. 26, 2006).

186. Niamh Moloney, *Time to Take Stock on the Markets: The Financial Services Action Plan Concludes as the Company Law Action Plan Rolls Out*, 53 INT'L & COMP. L. Q. 999, 999 (Oct. 2004).

FSAP has increasingly become more regulatory[187] and reflects the policy goals of E.U. securities laws to protect investors and assure proper functioning of the capital market.[188] In many ways, after the U.S. passage of Sarbanes-Oxley, foreign regulators such as the FSAP have begun "to put in place their own corporate governance reforms in response to the scandals in the capital markets and Sarbanes-Oxley."[189]

In May 2003, the European Commission presented another action plan titled *Modernising Company Law and Enhancing Corporate Governance in the European Union — A Plan to Move Forward* which calls for enhanced corporate governance standards.[190] The plan's initiatives include requiring listed companies to submit an annual statement concerning internal corporate governance (or a code of ethics), promoting independence of directors, and calling for heightened transparency.[191] Many parallels can be drawn between this action plan and recent U.S. legislation such as Sarbanes-Oxley. Some have even suggested that Sarbanes-Oxley did nothing more than codify what was already accepted as good corporate governance and practice.[192] In fact, such parallels have been used to argue a pattern of "foreign regulators' responsive actions to impose some of the same new standards" that the United States has imposed.[193]

Nevertheless, Sarbanes-Oxley and similar European regulations are not quite the same. The United States regulators require a much higher standard of disclosure than do their European counterparts. Therefore, there is an inherent conflict for companies that are traded in the United States and European Union because, at least for companies foreign to the United States, meeting the home country requirements will not always satisfy U.S. rules and regulations. Despite these differences in securities law, as globalization moves forward and the publicly-held stock exchanges at-

---

187. *Id*.

188. Eric Engle, *supra* note 160, at 358.

189. Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, *supra* note 183, at 887 (arguing for an overall pattern of foreign jurisdictions first objecting to Sarbanes-Oxley and later initiating at least some regulations following the new standards set forth under Sarbanes-Oxley).

190. Europa, Internal Market, Modernisation of Company Law and Enhancement of Corporate Governance, http://ec.europa.eu./internal_market/company/modern/index_en.htm (last visited Jan. 14, 2008).

191. *See generally id.*; Karmel, *Securities and Exchange Commission Goes Abroad*, *supra* note 183, at 888.

192. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 917–923 (2003); *see also* Karmel, *Securities and Exchange Commission Goes Abroad*, *supra* note 183, at 891.

193. Karmel, *Securities and Exchange Commission Goes Abroad*, *supra* note 183, at 891.

tempt to maximize efficiency and profitability, the European Union and United States will have to cooperate and attempt to work out such differences. As Securities and Exchange Commissioner Nazareth recognized, attempting to harmonize international securities regulation "would not succeed if a single regulatory authority or standard setter operated in isolation or tried to achieve convergence on a jurisdiction by jurisdiction basis."[194]

C. Existing International Regulatory Organizations and Cooperation

At a quick glance, E.U. and U.S. securities law appear relatively cooperative in past years and, at least on policies and overarching principles, seem to agree on large-scale securities regulation issues.[195] This is evidenced through cooperative dialogue for accomplishing international and cross-border securities regulation, such as the Memorandum of Understanding between the SEC and the College of Euronext Regulators.[196] The scope of regulatory cooperation goes well beyond that single agreement. For example, the SEC has an Office of International Affairs for the promotion of international regulatory and enforcement cooperation.[197] The United States' Financial Accounting Standards Board and the International Accounting Standards Board are working together in an attempt to converge two sets of accounting standards.[198] In August 2006, the SEC and the Committee of European Securities Regulators issued a joint work plan which was a direct result of a December 2005 meeting between the chairmen of each organization.[199] In addition, the Securities and Ex-

194. Nazareth, *supra* note 48.

195. *See generally* Engle, *supra* note 160.

196. Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight (Jan. 25, 2007), *available at* http://www.sec.com/news/press/2007/2007-8_mou.pdf.

197. The Office of International Affairs supports investor protection through international regulations and cooperation in the global capital market. It works to promote high regulatory standards worldwide and to minimize the extent to which international borders can be used to avoid regulatory compliance or escape detection. Securities and Exchange Commission, Office of International Affairs, http://www.sec.gov/about/offices/oia.htm (last visited Jan. 14, 2008).

198. Nazareth, *supra* note 48.

199. The main focus of the work plan was to apply internationally acceptable accounting standards to internationally active companies. Additionally, the two organizations will "forge a closer dialogue" on disclosure and reporting standards. These organizations would like to reduce or avoid conflicting regulatory decisions on the application of the International Financial Reporting Standards and the U.S. Generally Accepted Accounting Principles. *See generally* Press Release, Securities and Exchange Commission, SEC and CESR Launch Work Plan Focused on Financial Reporting (2006), *available at* http://www.sec.gov/news/press/2006/2006-130.htm.

change Commission's Consolidated Supervised Entity program and the European Union's Financial Conglomerates Directive have begun to harmonize regulation in areas such as large global investment banks.[200]

Another example of cooperation is the International Corporate Governance Network ("ICGN"), which was formed in 1995 by a group of institutional investors.[201] The ICGN adopted corporate governance principles[202] and many member institutional investors, such as pension funds, have relied on these principles in internal formation.[203] While the principles are sound guidelines, they have only been applied internally by institutional investor members and do not apply to the regulators themselves.[204]

Each country affected by the creation of NYSE Euronext Inc. also cooperates with each other through the to the Organization for Economic Co-operation and Development ("OECD").[205] In 1999 and again in 2004, the organization published the OECD Principles of Corporate Governance.[206] The publication is simply a statement of the principles that member states should follow to achieve good corporate governance standards and it is not binding on the member states. [207] The principles do not suggest that any one form of governance is appropriate, but instead highlight similar underlying elements.[208] The organization aims to lay down a core set of guidelines governing the behavior of corporations in any mar-

---

200. Through these programs, the international financial institutions avoid considerable overlap and duplication that would otherwise result from business activity in varying jurisdictions that regulate their activities. Nazareth, *supra* note 48.

201. International Corporate Governance Network [ICGN], The Development of the Network, http://www.icgn.org/organisation/founder_members.php (last visited Jan. 14, 2008).

202. The principles adopted are very similar to those adopted by the Organization of Economic Co-operation and Development discussed in the following paragraph.

203. *See* ICGN, ICGN Statement on Global Corporate Governance Principles (July 9, 1999), http://www.icgn.org/documents/globalcorpgov.htm (last visited Jan. 13, 2008).

204. *Id*.

205. Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728. Member countries include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, the Slovak Republic, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The Commission of the European Communities takes part in the OECD. *Id*. art. 13.

206. Organization for Economic Co-operation and Development [OECD], *OECD Principles of Corporate Governance* (2004), *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf (last visited Jan. 13, 2008).

207. *Id.*

208. *Id.* at 13.

ket economy.[209] The first principle set forth is "Ensuring the Basis for an Effective Corporate Governance Framework," and it states that "[t]he corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities."[210] The principles were published before the realization of a global stock exchange such as NYSE Euronext Inc. However, the OECD recognized that, even on a domestic level, there are often multiple legal domains acting on one regulated entity and it calls for the need to limit overlaps and potential conflict.[211]

As for the national securities regulators affected by the NYSE-Euronext merger, the United States' Securities and Exchange Commission, France's Autorité des Marchés Financiers, Belgium's Banking, Finance, and Insurance Commission, the Netherlands Authority for the Financial Markets, Portugal's Comissão do Mercado de Valores Mobiliários, and the United Kingdom's Financial Services Authority all participate in the International Organization of Securities Commissions and Similar Organizations ("IOSCO").[212] Moreover, commissioners from securities regulation agencies of the United States, the United Kingdom, France, and Belgium are members of IOSCO's executive committee.[213] IOSCO was formed in 1983 between North and South American securities regulatory agencies.[214] European and Asian securities regulatory agencies began to join in 1984, and "[t]oday IOSCO is recognized as the international standard setter for securities markets."[215] Under the Pream-

---

209. *Id.*

> The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principals.

Id.

210. *Id.* at 17.

211. *Id.* at 31.

212. OICV-IOSCO, IOSCO Membership and Committee Lists, *available at* http://www.iosco.org/lists/display_members.cfm (last visited Jan. 14, 2008).

213. *Id.*

214. OICV-IOSCO, IOSCO Historical Background, *available at* http://www.iosco.org/about/index.cfm?section=history (last visited Jan. 13, 2008).

215. *Id.*

ble to IOSCO's bylaws, these "[s]ecurities authorities resolve to cooperate together to ensure a better regulation of the markets, on the domestic as well as on the international level, in order to maintain just, efficient and sound markets."[216] IOSCO decided to undertake harmonization issues subsequent to its fourteenth annual conference in 1989 and has been grappling with it ever since.[217]

Nevertheless, IOSCO has been called the most important of all organizations for influencing international securities regulations[218] and in May 2003 the organization published the *Objectives and Principles of Securities Regulation*, which lays out thirty principles derived from three main objectives for securities regulation.[219] The three objectives are "the protection of investors," "ensuring that markets are fair, efficient . . . transparent," and "the reduction of systematic risk."[220] IOSCO recognizes the trend towards global market places and the need for "increasing interdependence of regulators."[221] However, IOSCO does not have binding regulatory authority over its members, who have encountered many difficulties in coming to harmony.[222] It follows, therefore, that if the best organization for influencing international securities regulations lacks binding power over its members, there is actually an "absence of true 'international securities regulation.'"[223]

IV. AN ALTERNATIVE APPROACH

While it remains true that IOSCO lacks binding powers over its members and enforcement mechanisms, it also remains true that IOSCO has been the best organization for influencing international securities. Ideal transnational regulation could be achieved by creating an organization

---

216. International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2003) *available at* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf (last visited Jan. 13, 2008) [hereinafter IOSCO Principles].

217. Harold S. Bloomenthal & Samuel Wolff, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 1:74. *See generally* OCIV-IOSCO, About IOSCO, http://www.iosco.org/about/ (last visited Jan. 14, 2008).

218. *See* Harold S. Bloomenthal & Samuel Wolff, *supra* note 217, § 1:73 (West Group, 2006); Roberta S. Karmel, *The IOSCO Venice Conference*, N.Y.L.J. Oct. 19, 1989, 3 ("[IOSCO] is the most important of these organizations because its members include the securities administrators of more than 50 countries. Further, its annual conference brings together both governmental securities regulators . . . as well as private-sector observers with an interest in international securities regulation.").

219. IOSCO Principles, *supra* note 216, at 1.

220. *Id.* at 5.

221. *Id.* at 2.

222. *See* Bloomenthal & Wolff, *supra* note 217, § 1:73.

223. *Id.*

following IOSCO's widely accepted foundations but giving that organization binding, self-regulatory powers over the transnational stock exchanges.[224]

A special study of the American Bar Association found that the United States Congress may authorized a special self-regulating-type entity to fill in what was then a void in the corporate governance process.[225] The entity proposed by the American Bar Association would be quasi-governmental in nature, but it would not be a complete substitute for self-regulation by the stock exchanges themselves.[226] As a slight variation to this suggestion, such a quasi-governmental entity could be created on an international basis to converge separate national securities regulation regimes. This would remain a quasi-governmental agency, not a full-fledged governmental agency, because governmental bodies are not always best suited to make the same kinds of business decisions that are involved in maintaining an international securities market.[227]

The new organization would, of course, require authorization through a treaty or multiple treaties ratified by and binding upon each country. Member countries would each send one person, qualified in the home state for the role of a securities regulator, to the organization and each

---

224. There are many practical difficulties in obtaining consent from various nations. By no means does this Note mean to suggest this alternative approach is easily accomplished. There are political obstacles that may not be overcome, and countries may not be willing to relinquish monitoring powers over these exchanges. An example of a successful organization similar to the one this Note proposes is the World Trade Organization ("WTO").

> Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations . . . .
>
> . . .
>
> At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits . . . .

World Trade Organization, *Understanding the WTO* 9 (World Trade Organization Information and Media Relations Department, Feb. 2007), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf.

225. This study was conducted before the passage of Sarbanes-Oxley, yet many findings and suggestions are still relevant today. The report suggests that this SRO-type entity be supervised by the SEC, which would not be applicable to an international organization of the sort. ABA Report, *supra* note 11, at 1537–38.

226. *Id.*

227. *See* Poser, *supra* note 8, at 534.

country would have a say in the operations and decisions of the organization. Any future transnational stock exchanges operating among countries party to the treaty would fall under the jurisdiction of this organization. New rules and regulations, binding on each member country, would be generated through negotiations in which each country would have a right to participate. Final rules would take the form of a treaty signed by each member state. Major issues applying to a large number of exchanges may be resolved in treaties to which every member nation is bound, and issues more specific to an individual stock exchange could be resolved through treaties to which only affected member states are party. During the negotiation process, each member country's authority over the process would be weighted according to the percentage of listed companies operating within that country as compared to the overall number of listed companies. As other exchanges become transnational and fall under the organization's authority, the weight due to each member state's position may change, but matters previously decided will remain unaffected and will apply to these new exchanges equally, so long as the exchanges affected lie within a previously bound member state.

The newly created organization would play more of a monitoring role. Like IOSCO, it would produce and promote principles for corporate governance standards. However, these principles would be binding on the stock exchanges. The stock exchanges themselves would be required to issue listing requirements in accordance with these standards. The organization would have the power to approve or amend the rules as proposed by the stock exchange for implementation and enforcement upon market participants. The stock exchanges would adhere to the principles, but there would be enough flexibility for each exchange to take into account similarities and differences of each country in which they operate. Since, as previously discussed, listing requirements by stock exchanges themselves are an essential part of securing the integrity of the financial markets, the exchanges themselves would remain the chief enforcement mechanism. However, because of the problems with demutualization and the conflicts of interest that have been created, this new entity is necessary to oversee the stock exchange listing requirements through formal and binding approval processes for stock exchange implementation of the organization's rules and regulations.

CONCLUSION

Such an organization may not work in practical terms, at least with the state of the world today. Neither the United States nor the European Union will look favorably on releasing control over regulation within their jurisdictions.[228] However, this new organization would not require the domestic governments to give up all regulatory powers. For example, the SEC would still have jurisdiction over national exchanges remaining in the United States. Additionally, each government could retain an appropriate amount of authority within the organization depending on the percentage of listed companies operating in each country. There is also the possibility that binding principles may conflict with the domestic laws of a member state governing domestic markets. Ideally any such conflicts will be overcome by maintaining firm principles with flexible implementation by stock exchanges, allowing specific regulations to incorporate domestic concerns.

Potential conflicts with domestic governmental agencies may become even less important in light of the uncertainty as to what the role of government regulators should be in influencing the future structure of the markets.[229] The European Commission has not had much of an influence over the development of the cross-border links of Euronext, nor has the SEC influenced the creation of NYSE Euronext Inc. Consolidation is driven by the exchanges themselves as they begin to seek more effective and efficient ways to maximize profit.[230] Therefore, it would make sense to allow the driving force behind consolidation to take on the task of regulating such consolidated entities, but the stock exchanges cannot be relied upon because of the conflicts inherent in these demutualized, for-profit entities.[231]

The fact of the matter is that stock exchanges are ready to become transnational, but the world is not prepared to effectively regulate them. Still, the more confidence investors have in the markets, the more likely they are to provide capital to invest in companies.[232] The world is moving towards a securities market system whereby a single investor sitting anywhere in the world will be able to engage the purchase and sale of securities anywhere else in the world. Having a uniform set of standards under which that investor can do so would makes her more confident in the system and more likely to contribute capital. To achieve these benefits, someone needs to assume the regulatory role.

IOSCO has attempted the closest and most successful regulators forays, but even actions taken by that organization are merely suggestions and have no binding authority over its members. Consequently, the problem is how to enforce the accomplishments of IOSCO. There is no per-

228. Poser, *supra* note 8, at 540.
229. *Id*.
230. *See supra* text accompanying notes 61–93.
231. *See supra* text accompanying notes 113–132.
232. Coffee, *supra* note 12, at 1829; ABA Report, *supra* note 11.

fect solution to the lack of a sufficient regulatory body; however, an international organization with monitoring and enforcement powers could fill the regulatory gaps by ensuring that the principles many countries agree upon today are honestly implemented in the future.

Sara M. Saylor[*]

* B.A., New York University (2005); J.D., Brooklyn Law School (expected 2008). I would like to thank the Brooklyn Law School Faculty for their helpful suggestions and the editorial staff of the *Brooklyn Journal of International Law* for their help in preparing this Note for publication. Any errors or omissions are my own.