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The Once and Future New York Stock Exchange: The Regulation of Global Exchanges

Roberta S. Karmel

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I. INTRODUCTION

On June 2, 2006, NYSE Group, Inc. (NYSE Group), the parent of the New York Stock Exchange, Inc. (NYSE), announced a plan to merge with Euronext NV (Euronext), creating the first trans-Atlantic linkup of stock and derivatives markets.[1] Euronext is a Dutch holding company that, since 2000, has been operating, through subsidiaries, the former stock exchanges of Amsterdam, Paris, Brussels and Lisbon. In 2001, Euronext also acquired the London International Financial Futures and Options Exchange (LIFFE).[2] Euronext is the first pan-European exchange trading cash and derivatives and equities and bonds. The London Stock Exchange (LSE) also has been the object of trans-national takeover attention, having received bids from Deutsche Borse, Macquarie Bank of Australia and the Nasdaq Stock Market (Nasdaq).[3]

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1. *See* Bernard Wysocki Jr. & Aaron Lucchetti, *Without Borders: Global Exchanges Pose a Quandary for Securities Cops,* WALL ST. J., June 5, 2006, at A1; Ian McDonald & Aaron Lucchetti, *Will the NYSE's Colossal Merger Help Investors?,* WALL ST. J., June 4, 2006, at B1. This article is dated as of November 2006. Since then, the merger of the NYSE and Euronext has been accomplished and a bid by Nasdaq for the LSE appears to have failed. These events do not alter the analysis in the article. *See* Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Approval to Amendment No. 1 Regarding the Proposed Combination Between NYSE Group, Inc. and Euronext N.V., 72 Fed. Reg. 8033 (Feb. 22, 2007); Press Release, N.Y. Stock Exch., NYSE Euronext Celebrates Completion of NYSE Group, Inc./Euronext N.V. Merger (Apr. 4, 2007), *available at* http://www.nyse.com/events/1175251256417.html.

2. In October of 2001, Euronext—created only a year earlier through a merger of the Paris, Amsterdam, and Brussels securities exchanges—out-bid the LSE and Deutsche Borse to acquire LIFFE. *See* Vincent Boland & Charles Pretzlik, *Euronext Wins Battle for Liffe: Paris-Based Operator Beats Rivals with Pounds 555m bid for exchange*, FIN. TIMES (London), Oct. 30, 2001, at 1. Acquiring LIFFE, the second largest derivatives market in Europe, allowed Euronext to boast diverse products—securities and derivatives—across diverse markets—French, Belgian, Dutch, and now British constituents, giving Euronext LIFFE a significant place in the world of consolidating financial markets. *See* Peter Martin, *The End of Liffe As We Know It: Euronext's Deal Has Given it an Edge in the Consolidation of European Financial Markets but There is Much Still to Play For*, FIN. TIMES (London), Oct. 30, 2001, at 23.

3. *See* Aaron Lucchetti & Alistair MacDonald, *Ready to Deal: $60 Billion in Two Days*, WALL ST. J., Nov. 21, 2006, at C1; Alistair MacDonald & Aaron Lucchetti, *Nasdaq Stock Market is Cleared to Launch a Bid for the LSE,* WALL ST. J., Sept. 30, 2006, at B2; *Battle of the Bourses,* ECONOMIST, May 27, 2006, at 65; *Crossing the Pond,* ECONOMIST, Mar. 18, 2006, at 67. Deutsche Borse and Euronext also considered a merger. *See* David Reilly & Jason Singer, *Moving the Market: Euronext, Deutsche Borse Are Urged to Merge,* WALL ST. J., Jan. 18, 2006, at C5.

Whether any of these or other cross-border exchange consolidations will come to fruition, and the future structure of such transactions, is probably more a matter of politics and regulation than business exigencies and is therefore difficult to predict. National political opposition to the development of global exchanges is strong.[4] But as John Thain, the CEO of the NYSE remarked, "Most countries have an army, a flag, an airline and an exchange. . . . As the markets have become more global, that nationalist tendency on the part of exchanges—at least those that want to compete globally—has to break down."[5]

Another factor in the inevitable globalization of exchanges is that exchanges have demutualized and become public companies. They need to please their shareholders as well as their customers. Further, in the process of moving from mutual not-for-profit citadels of capitalism to public companies, national exchanges have lost their exclusivity and their mystique. Consequently, they should no longer be regarded as national champions, but permitted to function as ordinary companies. Although they play a key role in capital formation, the capital markets are no longer national. Although the images of the NYSE and Nasdaq were both tarnished by the scandals of recent years, they can probably best restore their former luster by competing as successful businesses in the global marketplace.[6]

At least three reasons for a merger between the NYSE and Euronext have been put forward. First, is the idea that investors will be able to buy stocks in the United States and Europe, thus making it more attractive and cheaper for them to buy foreign shares.[7] The NYSE and other U.S. exchanges have been losing listings, and especially IPOs, to European exchanges; merging with a European exchange may be a way to recapture the fees and trading profits from these listings.[8] However, the primary reasons why the NYSE has been losing listings is that foreign issuers are disenchanted with the U.S. stock market because of the costs of compliance

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4. *See* Jenny Anderson & Heather Timmons, *NYSE's Coup Stirs Political Opposition in Europe,* N.Y. TIMES, June 15, 2006, at C1; Alstair MacDonald, *U.K. Frets Over LSE Takeover*, WALL ST. J., Sept. 14, 2006, at C12; Aaron Lucchetti, *Big Board Sees a Bond Bonanza,* WALL ST. J., June 21, 2006, at C1; *see also* Heather Timmons, *Skeptics Blunting Rumor Mill,* N.Y. TIMES, Mar. 23, 2006, at C6.

5. Lucchetti, *supra* note 4, at C2.

6. *See* In the Matter of Nat'l Ass'n of Sec. Dealers, Exchange Act Release No. 37,542, 1996 SEC LEXIS (Aug. 8, 1996) (investigating anti-competitive practices by Nasdaq market makers); Press Release, SEC Charges the NYSE with Failing to Police Specialists (Apr. 12, 2005), *available at* http:/www.sec.gov/news/press/2005-53.htm; Jenny Anderson, *S.E.C. Asked Grasso if He Buoyed Stock,* N.Y. TIMES, June 15, 2006, at C1.

7. *See* Aaron Lucchetti, *Global Investing Made Easy*, WALL ST. J., Aug. 12, 2006, at B1; McDonald & Lucchetti, *supra* note 1, at B1.

8. *See* Jenny Anderson & Heather Timmons, *NYSE Group Aims to Buy European Exchange,* N.Y. TIMES, May 22, 2006, at Cl; Aaron Lucchetti, *NYSE, via Euronext, Aims to Regain Its Appeal for International Listings,* WALL ST. J., June 30, 2006, at C1.

with the requirements of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)[9] and because of the U.S. culture of shareholder litigation.[10] The merger of the NYSE and Euronext will not result in the automatic dual listing of issuers in Europe and the United States, a result that is not even desired at this time, but the potential for giving U.S. investors easier and cheaper access to investments in foreign securities is important.

A second justification for the NYSE-Euronext merger is that it will give the NYSE a derivatives platform. Although the NYSE launched a commodity futures exchange in 1979, this was not a successful business venture and was sold to the New York Cotton Exchange (NYCE) in 1993.[11] In the meantime, the trading of derivatives has skyrocketed and the NYSE would like to participate in this business. In the past, the Securities and Exchange Commission (SEC) was opposed to side-by-side trading of equities and derivatives at an exchange because it considered such trading to have the potential for giving unfair informational advantages to an exchange that traded both equities and options or futures on such equities.[12] Given the changes that have since occurred in the markets, the SEC should not impose constraints on the ownership of a derivatives exchange by the NYSE so as to make such a venture uneconomic.

When two exchanges combine, they can cut staff and share technology. Thus, a third reason that has been asserted for the creation of a global exchange by the NYSE is that the NYSE and Euronext will be able to operate from a common trading platform. This could expand the NYSE's

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9. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.). *See* Nelson Schwartz, *IPOs are picking London Over New York*, CNNMONEY.COM, Dec. 15, 2005, *available at* http://money.cnn.com/2005/12/15/commentary/pluggedin_fortune/index.htm.

10. *See* Greg Ip, Kara Scannell & Deborah Solomon, *Panel Urges Relaxing Rules for Oversight*, WALL ST. J., Nov. 30, 2006, at C1; Richard Hill, *Regulatory, Litigation Costs Seen as Causing Loss of U.S. Listings*, 38 Sec. Reg. & L. Rep. (BNA) No. 18, at 750 (May 1, 2006).

11. In 1980, the NYSE took aim at the financial futures market with the launch of the New York Futures Exchange (NYFE). The NYFE represented the NYSE's attempt to capture some of the futures market that was dominated by two Chicago exchanges—the Chicago Board of Trade (CBOT) and the Chicago Mercantile Exchange (CME). *See* Steve Lohr, *Debut for City's Futures Board*, N.Y. TIMES, Aug. 7, 1980, at D1. On opening day of the new exchange, membership was offered at $10,000 to NYSE members and $20,000 to nonmembers. *See id.* A little over a year later, the NYFE was already in trouble, with membership fees to non-NYSE members dropping to $8,000. *See* Paul Betts, *The Winners in Oil and Metals*, FIN. TIMES (London), Feb. 1, 1982, at 9. By the early 1990's, membership was offered for only $100, and average daily volume dwindled to 5,000 contracts (down from roughly 180,000 in its first year). Conceding the NYFE's failure, in September of 1993, the NYSE spun off the NYFE and merged it with the New York Cotton Exchange. *See* William B. Crawford Jr., *N.Y. Futures Exchange Near Deal with Cotton Exchange*, CHI. TRIB., Aug. 26, 1993, at 3N.

12. *See* Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT'L L. 319, 328 n.42 (2003). Arca recently became the "first integrated equities and options exchange in the U.S." Andrei Postelnicu, *Archipelago Buys Pacific Exchange*, FIN. TIMES (London), Jan. 5, 2005, at 29.

bond trading business as well as its equities business.[13] Whether these synergies will be able to be fully realized in the face of different trading systems and different regulatory requirements for the trading of securities in the United States and Europe remains to be seen.

Despite the several sound reasons for a trans-national merger between exchanges, stock exchanges cannot compete as ordinary business enterprises because of the manner in which they are regulated and because they function as self-regulatory organizations (SROs). Unless such regulation is significantly changed, the effort by exchanges to become global companies will be impeded. This Article will discuss the impediments to the creation of a global exchange posed by the U.S. federal securities laws and how these laws could be changed to permit the possible synergies of a combination between the NYSE or Nasdaq and a foreign exchange to be better achieved.

Even if the NYSE and Euronext merge, or some other consolidation between a U.S. exchange and a foreign exchange comes about, securities listed on Euronext will not be able to trade on the NYSE and Euronext will not be recognized as a U.S. securities exchange. Further, neither Euronext's issuers nor Euronext wish to be regulated by the U.S. SEC, and there have been assurances from SEC officials that they would not assert jurisdiction over Euronext or its listed companies.[14] Part II of this Article will discuss the regulation of foreign issuers and inquire whether the creation of a global exchange finally will lead to convergence between U.S. and European regulation and the development of a regime of mutual recognition.

In addition to the divergence of regulation of issuers in the United States and elsewhere, the United States and Europe have both recently passed regulations covering the trading of securities in the public securities markets, these regulations also diverge. Part III of this Article will discuss the differences between such regulation of trading in the context of foreign exchange access issues. Although much has been made of the possibilities of synergies in a NYSE-Euronext combination, the development of a common trading platform may be impeded by regulatory constraints on the trading of securities.

Part IV of this Article will discuss the approach of the Commodity Futures Trading Commission (CFTC) with regard to foreign exchange access, in contrast to the approach of the SEC and inquire whether the SEC should adopt the approach of the CFTC. Yet, while it might be easier for LIFFE to enter the U.S. markets than it would be for Euronext to do so,

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13. *See* Lucchetti, *supra* note 4, at C2.

14. *See* Kip Betz & Rachel McTague, *NYSE, Euronext $208 Merger Plan Would Create World's Largest Exchange,* 38 Sec. Reg. & L. Rep. (BNA) No. 23, at 962 (June 5, 2006); Judith Burns, *SEC Aims to Ease Europe's Fears On Cross-Border Market Merger,* WALL ST. J., June 17, 2006, at B2.

such a move would likely generate opposition from U.S. commodities exchanges.

A discussion of the need for a reworking of the regulation of listed companies and exchange trading would be incomplete without reference to the potential changes in the SRO's functions of exchanges. Part V of this Article will discuss the future of self-regulation by exchanges. Although self-regulation is deeply imbedded in the federal securities laws and the structure of the securities industry, it could become a casualty of the dramatic changes in the organization and functioning of exchanges. Although the author is loathe to see the end of exchanges as SROs, and believes that self-regulation has served the country well for all of its flaws, as the conflicts between the operation of exchanges as global businesses and regulators become more apparent, a serious reworking of how exchanges operate as regulators is in order.

If the NYSE-Euronext merger goes through, or even if it fails, now that the creation of a global exchange is a serious business plan by the NYSE Group, and by Nasdaq, bold action by the SEC will be required for the United States to remain a dominant competitor in the global markets. Whether the SEC will have the political backbone to take such action remains to be seen. If it does not, a deterioration in the power and efficiency of the NYSE and Nasdaq as leading exchanges could be a consequence, with a possible adverse effect on U.S. capital formation and the national economy.

II. SEC REGULATION OF FOREIGN ISSUERS

A. POLICY OF NATIONAL TREATMENT WITH EXEMPTIONS

Generally, the most common approaches to regulating foreign issuers which sell securities to domestic investors are: requiring compliance with host country laws (national treatment);[15] creating special host country rules for them;[16] developing harmonized international standards;[17] and accepting compliance with home country standards (mutual recognition).[18] The United States has approached this problem through national treatment, with some special rules to ameliorate the problems of compliance for foreign issuers. By contrast, the European Union (EU) has a regime of mutual

15. *See* Roel C. Campos, Comm'r, SEC, Remarks before the Centre for European Policy Studies: Embracing International Business in the Post-Enron Era (June 11, 2003), *available at* www.sec.gov/news/speech/spch061103rcc.htm.

16. *See id.* This has been the SEC's approach to some extent.

17. *See* Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievement of the European Communities,* 31 HARV. INT'L L. J. 185, 191 (1990).

18. *See id.* at 191–92.

recognition.[19] While there is no international securities regulator with the ability to impose a disclosure or other regulatory regime on all issuers worldwide, the International Organization of Securities Commissions (IOSCO) has developed a template for basic disclosure standards and the International Accounting Standard Committee (IASC) is developing international accounting standards (formerly known as IASs and now known as international financial reporting standards, or IFRS).[20]

When the Securities Act of 1933 (the Securities Act) was passed, Congress contemplated that foreign issuers might make offerings into the United States and provided a special disclosure regime for sovereign debt.[21] Further, the jurisdictional reach of the law extended to interstate and foreign commerce.[22] The SEC has the authority to impose its disclosure obligations on any foreign company that sells shares to U.S. nationals.[23] Similarly, the SEC could require any foreign issuer with more than 500 shareholders worldwide, of which 300 are U.S. investors, and which has $10 million in assets to register its equity securities pursuant to the Exchange Act, and thereafter be required to make annual and periodic reports to the SEC.[24] The SEC has not exerted its jurisdiction to this extent. Foreign issuers that would be required to file under the Exchange Act because they have $10 million in assets and 300 out of 500 U.S. shareholders can file for an exemption from such registration by filing all documents they are required to file in their home jurisdiction in English translation.[25] However, their securities cannot then trade on an exchange, but only in the pink sheets bulletin board. Therefore, if a company wishes to have an active trading market for its securities in the United States, it must register under the Exchange Act.

Further, the SEC compels foreign issuers desiring to raise capital in the United States or list on a U.S. exchange to enter the SEC disclosure system. The attitude of the SEC staff long has been that if a foreign issuer was going to tap the U.S. capital markets then it should play by the SEC's rules.

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19. *See* Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity,* 20 MICH. J. INT'L L. 207, 255–61 (1999).

20. *See* MARC I. STEINBERG, INTERNATIONAL SECURITIES LAW, A CONTEMPORARY AND COMPARATIVE ANALYSIS 27–38 (1999).

21. *See* Securities Act, Schedule B, 15 U.S.C. § 77aa (2000).

22. *See* Securities Act § 2, 15 U.S.C. § 77b(7) (2000).

23. *See* Europe and Oversees Commodity Traders, S.A. v. Banques Paribas London, 147 F.3d 118 (2d Cir. 1998), *cert. denied,* 525 U.S. 1139 (1999) (suggesting that the Securities Act applies when both the offer and sale of a security are made in the United States); Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (S.D.N.Y. 1988), *modified,* 890 F.2d 569 (2d Cir. 1989), *cert. dismissed,* 494 U.S. 939 (1989).

24. *See* Exchange Act § 12(b), (g), 15 U.S.C. § 78*l*(b), (g) (Supp IV 2004); Exchange Act § 13, 15 U.S.C. § 78m (Supp. II 2002); Exchange Act § 15(d), 15 U.S.C.S. § 78*o*(d) (LexisNexis 2006).

25. *See* Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (2007).

In the mid-1970's, the SEC requested public comment on improving the disclosure required by foreign issuers, noting that the registration forms used by the foreign issuers required substantially less information than required of U.S. domestic issuers.[26] The SEC then adopted Form 20-F as a combined registration and annual reporting form;[27] but, since corporate governance regulation generally was left to the states under U.S. law, it was similarly left to the national law of foreign issuers. Among other things, foreign issuers were exempted from SEC proxy solicitation regulations and short-swing insider transaction reporting requirements.[28] Further, in Form 20-F, the SEC bowed to some of the objections of foreign issuers and deleted certain proposed disclosures relating to corporate governance, in particular, the disclosure of the business experience and background of officers and directors, and the identification of the three highest paid officers and directors and the aggregate amount paid to them. In addition, it conditioned a material transactions disclosure to the requirements of applicable foreign law.[29]

Although the SEC generally refused to accord foreign regulators mutual recognition with respect to foreign issuer disclosure standards, it accommodated them to some extent by developing special registration and disclosure requirements for foreign issuers.[30] Additionally, following a policy of international cooperation during the 1980s and 1990s, the SEC fashioned special exemptions for foreign issuers[31] and amended its foreign issuer disclosure forms to comply with disclosure standards endorsed by IOSCO.[32] Also, prior to the enactment of Sarbanes-Oxley, the SEC had been working toward an international accounting regulatory regime pursuant to which foreign issuers might be able to file documents with the SEC using IAS (now IFRS) rather than U.S. Generally Accepted Accounting Principles (GAAP).[33] Similarly, SROs permitted foreign issuers

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26. *See* Means of Improving Disclosure by Certain Foreign Private Issuers, Exchange Act Release No.14,056, 41 Fed. Reg. 55,012, 55,013 (Dec. 16, 1976).

27. *See* 17 C.F.R. § 249.220f (2005). This continues to be the primary reporting form for foreign issuers.

28. *See id.* § 240.3a12-3 (2007).

29. *See* Rules, Registration and Annual Report Form for Foreign Private Issuers, Exchange Act Release No. 16,371, 44 Fed. Reg. 70,132, 70,133–35 (Dec. 6, 1979).

30. *See* Adoption of Foreign Issuer Integrated Disclosure System, Securities Act Release No. 6437, Exchange Act Release No. 19,258, Investment Company Act Release No. 774, 47 Fed. Reg. 54,764 (Dec. 6, 1982).

31. *See, e.g.*, Regulation S, 17 C.F.R. §§ 230.901–230.904 (2007); Rule 144A, 17 C.F.R. § 230.144A (2007); Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (2007); Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Securities Act Release No. 7759, Exchange Act Release No. 42,054, Investment Company Act Release No. 2378, 64 Fed. Reg. 61,382 (Nov. 10, 1999).

32. *See* International Disclosure Standards, Securities Act Release No. 7745, Exchange Act Release No. 41,936, 64 Fed. Reg. 53,900 (Oct. 5, 1999).

33. *See* International Accounting Standards, Securities Act Release No. 7801, Exchange Act Release No. 42,430, 65 Fed. Reg. 8896 (Feb. 23, 2000).

to obtain a waiver from many corporate governance requirements, although some minimal corporate governance requirements, such as holding an annual meeting and maintaining an audit committee, could not be waived.

B. IMPACT OF SARBANES-OXLEY

After 2002, foreign issuers were shocked to discover that various corporate governance provisions of Sarbanes-Oxley applied to them. They had become accustomed to a regime in which the SEC and the NYSE "assiduously avoided imposing governance requirements on foreign issuers."[34] Foreign issuers viewed the context for Sarbanes-Oxley to be U.S. financial scandals and failures, and argued that the SEC should not be imposing corporate governance regulations on corporations that functioned in very different corporate finance systems and with very different structures than U.S. firms.[35] Congress and the SEC took a unilateralist approach to corporate governance regulation, however, retreating to the view that if foreign issuers wish to tap the U.S. capital markets, they need to play by U.S. rules. Despite prior SEC reluctance to interfere in the corporate governance of foreign corporations, the automatic application of many provisions of Sarbanes-Oxley to all SEC registered companies made the SEC unwilling to craft exemptions for foreign issuers. Although the SEC did exempt foreign issuers from the requirement that their audit committees have independent directors if their governance structures achieved the same goals as the Sarbanes-Oxley audit committee provisions,[36] the SEC required foreign issuers to comply with other provisions such as the CEO-CFO certification requirements.[37]

Compliance with the internal control provisions of section 404 of Sarbanes-Oxley[38] proved particularly troublesome for foreign issuers. This section requires management to examine the effectiveness of a company's internal controls over financial reporting. Not only must the company report on such internal controls, but its auditors must attest to them.[39] Outside audit fees of U.S. companies subject to section 404 have greatly increased, and many argue that the costs of compliance with this provision are not

34. *See* 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, 1824 (2002).

35. *See* Kathryn Stewart Lehman, *Executive Compensation Following the Sarbanes-Oxley Act of 2002*, 81 N.C. L. REV. 2115, 2132–33 (2003).

36. *See* Final Rule: Standards Relating to Listed Company Audit Committees, Securities Act Release No. 8220, 68 Fed. Reg. 18,788 (Apr. 16, 2003).

37. *See* Sarbanes-Oxley § 302, 15 U.S.C. § 7241 (Supp II 2002); Sarbanes-Oxley § 906, 18 U.S.C. § 1350 (Supp. II 2002).

38. *See* 15 U.S.C. § 7262 (Supp. II 2002).

39. *See id.*

worth its benefits.[40] Thus far, the SEC has granted foreign issuers an extension of time for compliance with this provision, but a permanent exemption seems unlikely.[41] The SEC may not have the statutory power to exempt foreign issuers from section 404[42] and, in addition, in 2004 there were 1,200 foreign issuers registered with the SEC and foreign issuers comprised 16% of the NYSE's list.[43] Further, even if the SEC were now to craft exemptions for foreign issuers from the corporate governance and internal control provisions of Sarbanes-Oxley, foreign issuers would remain suspicious of the SEC's political will or ability to protect them from drastic changes in legal requirements in the future.

Marketplace developments in recent years also made a U.S. listing less attractive for foreign issuers. The European markets have matured to a point where capital can be raised there to meet the needs of most companies.[44] Foreign, and even some U.S. companies, engaging in IPOs or stock exchange listings have done so in Europe, rather than in the United States.

In 1999 and 2000, foreign IPOs on U.S. exchanges exceeded $80 billion—ten times the amount raised in London, but in 2005 London exchanges raised over $10.3 billion in foreign IPOs compared to $6 billion on U.S. exchanges.[45] In 2004, only three out of the twenty-five largest IPOs were listed on U.S. exchanges, in 2005 none of the twenty-five largest IPOs were listed on U.S. exchanges, and during the first half of 2006, only two of the largest twenty-five international IPOs were listed on U.S. exchanges. By contrast, in 2000, eleven of the twenty-five largest IPOs were listed on U.S.

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40. Many have asserted that Sarbanes-Oxley adds tremendous cost—estimated to be in the tens of millions of dollars per year in legal and accounting fees—to compliance in the US. *See* Francesco Guerrera & Andrei Postelnicu, *A Not So Foreign Exchange: China Shuns the West as a Location for Its Big Corp. Share Offers*, FIN. TIMES (London), Nov. 18, 2005, at 17. A high powered panel of experts is now examining whether Sarbanes-Oxley needs revision. *See* Rachel McTague, *New Panel to Study SOX, Competitiveness of U.S. Public Capital Markets, Issue Report,* 38 Sec. Reg. & L. Rep. (BNA) No. 37, at 1569 (Sept. 18, 2006); *Panel to Seek Changes to Sarbanes-Oxley,* WALL ST. J., Sept. 12, 2006, at A2.

41. *See* Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Foreign Private Issuers That Are Accelerated Filers, Securities Act Release No. 8730, Exchange Act Release No. 54,294, 71 Fed. Reg. 47,056 (Aug. 15, 2006).

42. *See* Rachel McTague, *Sarbanes Defends SOX, Lauds Letter Saying SEC Lacks Power for 404 Exemptions,* 38 Sec. Reg. & L. Rep. (BNA) No. 13, at 539 n.13 (Mar. 27, 2006).

43. *See* Proposed Rule: Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 15(d) of the Securities Exchange Act of 1934, Exchange Act Release No. 53,020, 70 Fed. Reg.77,688, 77,689–90 (Dec. 30, 2005).

44. *See* Kip Betz, *Former SEC Official Sees New Realities For Foreign Issuers Seeking to Raise Capital,* 38 Sec. Reg. & L. Rep. (BNA) No. 20, at 852 n.20 (May 15, 2006); *see also* Greg Ip, *Is a U.S. Listing Worth the Effort?*, WALL ST. J., Nov. 28, 2006, at C1.

45. *See* Stephen Fidler, *How the Square Mile Defeated the Prophets of Doom,* FIN. TIMES (London), Dec. 10, 2005, at 11.

exchanges.[46] Not only have foreign issuers declined to enter the U.S. trading markets since 2002, but they have also been lobbying for the ability to exit the U.S. disclosure system.

C. CONVERGENCE OF ACCOUNTING PRINCIPLES

Since 1982, the SEC has required all foreign companies which enter the SEC disclosure system to reconcile their financial statements to U.S. GAAP.[47] Foreign issuers have always found this requirement burdensome, but since last year it has become even more burdensome because the EU, in its Transparency Directive,[48] adopted IFRS as the applicable disclosure standard for all issuers across the EU,[49] which is applicable to consolidated financial reports and annual and half-yearly statements.

The SEC was given the statutory power to define accounting terms in the Securities Act.[50] The SEC, therefore, could have prescribed the substantive content of U.S. GAAP, but it delegated this power to the FASB and then enforced this regime by accepting U.S. GAAP financials as "authoritative" for purposes of SEC filings.[51] At one time there was hope that U.S. GAAP and IFRS would be harmonized and all companies in the international capital markets would report to investors in the same accounting language and format.[52] Alternatively, the SEC could accept IFRS as "authoritative" for purposes of SEC filings without any Congressional action and then foreign issuers which report their financial statements in IFRS would not have to reconcile to U.S. GAAP. Then U.S. issuers would continue to report in U.S. GAAP and foreign issuers wishing to list on a U.S. exchange or otherwise enter the U.S. disclosure system would report in IFRS if they preferred not to reconcile their financial statements to U.S. GAAP.

Although there has been considerable discussion of a regime under which U.S. GAAP and IFRS would have sufficient convergence so that the

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46. *See* Lucchetti, *supra* note 8, at C1. *See also* Rachel McTague, *Citigroup General Counsel Blames SEC, In Part for Loss of Global Edge in Markets,* 38 Sec. Reg. & L. Rep. (BNA) No. 46, at 1944 n.46 (Nov. 20, 2006).

47. *See* William C. Freund, *That Trade Obstacle, the SEC*, WALL ST. J., Aug. 27, 1993, at A6; Annette Nazareth, Comm'r, SEC, Remarks Before the Institute for International Bankers Annual Conference (Mar. 13, 2006), *available at* http://www.sec.lgov/news/speech/spch031306aln_iib.htm [hereinafter Nazareth Remarks].

48. *See* Directive 2004/109/EC of the European Parliament and of the Council on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC, 2004 O.J. (L 390) 38, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_390/l_39020041231en00380057.pdf.

49. *See* Stuart H. Deming, *Int'l Accounting Standards,* 40 INT'L LAWYER 363, 364 (2006).

50. *See* Securities Act § 19(a), 15 U.S.C. § 77s(a) (Supp II 2002).

51. *See* Securities Act § 19(b); Rule 4-01(a) of Regulation S-X, 17 C.F.R. § 210.4-01 (2005).

52. *See* Facilitation of Multinational Securities Offerings, Securities Act Release No. 6568, 50 Fed. Reg. 9281, 9283 (1985).

SEC would accept IFRS financial statements, there continue to be impediments to doing so. First, the IASB does not have a mechanism for interpreting IFRS and Europe does not have a securities commission at the EU level which could undertake such a task. Because there are now 25 member states of the EU it is unclear whether IFRS will be consistently interpreted. If IFRS is not consistently interpreted, it may be difficult for the SEC to accept IFRS as authoritative.[53]

Second, auditing standards are not included in the IASB's mandate and these vary considerably. There is no international body to oversee auditing. The establishment of the Public Company Accounting Oversight Board (PCAOB) in the United States pursuant to Sarbanes-Oxley, makes convergence of auditing standards between the United States and EU subject to some new and difficult dynamics. The EU Commission's proposal for a directive on statutory audits has been justified as "a basis for effective and balanced international regulatory cooperation with oversight bodies of third countries such as the [PCAOB]."[54] Although the PCAOB and the EU have worked out some of the problems with regard to the registration and inspection of foreign auditing firms which work on SEC filings, European issuers were left with a negative feeling regarding these problems.[55]

An agreement between the Chairman of the SEC and the Internal Market Commissioner for the EU as to a roadmap to end the need for EU issuers to continue to reconcile to U.S. GAAP was reached in 2005.[56] Then on February 27, 2006, European and U.S. accounting rule-makers announced a new memorandum of understanding regarding convergence of U.S. GAAP and IFRS. The agreement set forth their plan to develop a common set of standards over the next two years, rather than eliminating differences between their standards.[57] The SEC staff is now examining financial statements reported in IFRS to determine the extent to which they

53. *See* Nazareth Remarks, *supra* note 47.

54. *See* Commission Proposal for a Directive on Statutory Audit of Annual Accounts and Consolidated Accounts and Amending Council Directives 78/660/EEC and 83/349/EEC, COM (2004) 2, *available at* http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0177en01.pdf.

55. *See E.U., U.S. Resolve Dispute Over Regulation of Audit Firms,* World Sec. L. Rep. (BNA), at 27 (Apr. 4, 2006).

56. *See* Press Release, SEC, Chairman Donaldson Meets with EU Internal Market Commissioner McCreevy (Apr. 21, 2005), *available at* http://www.sec.gov/news/press/2005-62.htm.

57. *See FASB, IASB Set Guideposts in Following Roadmap to Convergence Through 2008,* 38 Sec. Reg. & L. Rep. (BNA) No. 10, at 397 (Mar. 6, 2006); Press Release, SEC and CESR Launch Work Plan Focused on Financial Reporting (Aug. 2, 2005), *available at* http://www.sec/gov/news/press/2006/2006-130htm. In October 2006, the European Parliament agreed to wait until January 1, 2009 to secure a trans-Atlantic agreement on IFRS/U.S. GAAP convergence before requiring U.S. issuers to report in IFRS. *See Parliament Oks Accounting Rules to Implement Transparency Directive,* World Sec. L. Rep. (BNA), at 3 (Nov. 2006).

converge with U.S. GAAP. Although IFRS and U.S. GAAP are converging, there are still significant differences between these two systems.[58]

Foreign companies do not want to become subject to U.S. accounting and auditing rules. The CEOs of both the NYSE and Euronext have stated that U.S. accounting regulations would not be extended to European companies as a result of the NYSE-Euronext merger.[59] The SEC is aware of this strongly felt view and has attempted to reassure foreign issuers listed on Euronext that they will not become subject to the SEC reporting requirements merely because they are listed on Euronext.[60] The U.S. litigation system is also anathema to foreign issuers. While the SEC may attempt to reassure foreign issuers that the SEC will not impose registration requirements on them, the SEC cannot exempt foreign issuers from the reach of the anti-fraud provisions of the securities laws. Yet, as long as EU issuers have a significant number of U.S. security holders, they become subject to suit under the anti-fraud provisions whether or not they are listed in the United States.[61]

D. DEREGISTRATION OF FOREIGN ISSUERS

European and other foreign issuers have been vociferous in complaining about their inability to exit the SEC disclosure system if and when they no longer wish to have their shares listed or traded in the United States. The desire of foreign issuers to deregister may arise because of flow back of their securities to their home markets and an unsatisfactory trading record in the U.S. markets. Alternatively, it may be due to the reluctance of foreign issuers to become subject to the corporate governance listing standards imposed by Sarbanes-Oxley or the need to comply with the section 404 internal controls provisions of Sarbanes-Oxley.

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58. *See* Deming, *supra* note 49, at 367–68; *see generally* PRICEWATERHOUSECOOPERS, SIMILARITIES AND DIFFERENCES: A COMPARISON OF IFRS AND US GAAP (2004), *available at* http://www.pwc.com/gx/eng/about/svcs/corporatereporting/SandD_04.pdf.

59. *See* Aaron Lucchetti, *Investors Sour on Exchange Shares,* WALL ST. J., June 14, 2006, at C3; Aaron Lucchetti, *NYSE-Euronext: One, But Two,* WALL ST. J., Sept. 22, 2006, at C4.

60. *See* Kip Betz & Rachel McTague, *NYSE, Euronext $20B Merger Plan Would Create World's Largest Exchange,* 38 Sec. Reg. & L. Rep. (BNA) No. 23, at 962 (June 5, 2006); Judith Burns, *SEC Aims to Ease Europe's Fears On Cross-Border Market Merger,* WALL ST. J., June 17, 2006, at B2; *Campos Reassures Europeans About Motives in Trans-Atlantic Financial Exchange Mergers,* 38 Sec. Reg. & L. Rep. (BNA) No. 30, at 1267 (July 24, 2006). The only exchange offering investors a combined list with harmonized listing standards is OMX AB, the operator of the Scandinavian and Baltic markets. *See* Alastair MacDonald, *Multiple Markets, One Listing,* WALL ST. J., Oct. 2, 2006, at C14.

61. *See* In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158 (S.D.N.Y. 2003); Parmalat Finanziaria Agrees to Entry of Permanent Injunction and Corporate Undertakings, SEC Litigation Release No. 18,803, 2004 SEC LEXIS 1631 (July 28, 2004); Press Release No. 2003-184, SEC, Commission Settles Civil Fraud Action Against Vivendi Universal, S.A., Its Former CEO, Jean-Marie Messier, and Its Former CFO, Guillaume Hannezo (Dec. 23, 2003), *available at* http://www.sec.gov/news/press/2003-184.htm.

Bowing to the pressure from foreign issuers, the SEC has proposed rules allowing a foreign issuer to terminate its registration under the Exchange Act and to cease its reporting obligations regarding a class of equity or debt securities under certain conditions.[62] Currently, in order to exit the SEC reporting regime, a foreign private issuer generally must, among other things, certify that it has fewer than 300 resident U.S. shareholders, and it must look through the record ownership of its shares to make this determination.[63] The SEC has issued a proposal to make de-registration no longer turn on the number of U.S. residents holding a foreign issuer's shares. Whether this proposed rule would permit very many foreign issuers to exit the SEC disclosure system is questionable. A better solution would probably be to exempt foreign issuers from the corporate governance provisions and section 404 of Sarbanes-Oxley, but this solution seems politically infeasible at this time.[64] Nevertheless, the SEC has issued a Concept Release in an effort to make section 404 compliance less costly and more practicable for all public companies, and implementation of some of the ideas in this release could alleviate some of the tensions between the SEC and foreign issuers.[65]

Over the long term, one would hope that there will be greater regulatory convergence between the SEC and European regulators with regard to disclosure and corporate governance policy for foreign issuers, but thus far this has not occurred. Disclosure regulation has become somewhat more compatible under the influence of IOSCO and recent EU directives, but corporate governance regimes within Europe and in Europe and the United States are still far apart.[66] Whether a merger between the NYSE and Euronext would help to spur such convergence is an interesting question. One would hope so.

III. FOREIGN EXCHANGE ACCESS

A. THE DEMAND FOR ACCESS

A persistent idea for cutting through the regulatory red tape, when a foreign issuer lists on a U.S. exchange, is foreign exchange access. So far

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62. *See* Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 15(d) of the Securities Exchange Act of 1934, Exchange Act Release No. 53,020, 70 Fed. Reg. 77,688 (Dec. 30, 2005).

63. *See* 17 C.F.R. § 240.12g3-2(a) (1996); *id.* § 240.12g-4(a)(2) (2000). If a foreign issuer has made a public offering into the United States, de-registration is even more difficult.

64. *See* Rachel McTague, *Sarbanes Defends SOX, Lauds Letter Saying SEC Lacks Power for 404 Exemptions,* 38 Sec. Reg. & L. Rep. (BNA) No. 13, at 539 (Mar. 27, 2006).

65. *See* Concept Release Concerning Management's Reports on Internal Control Over Financial Reporting, Exchange Act Release No. 54,122, 71 Fed. Reg. 40,866 (July 18, 2006).

66. *See generally* Roberta S. Karmel, *Reform of Public Company Disclosure in Europe,* 26 U. PA. J. INT'L ECON. L. 379, 388–403 (2006).

this idea has been persistently rejected by the SEC.[67] Until recently, stock exchanges were floor-based membership organizations that traded primarily domestic securities. Today, however, stock exchanges compete for international listings.[68] Further, stock exchanges around the world have become electronic markets and no longer have floors.[69] Even the NYSE, the last major exchange with a trading floor, after its merger with Archipelago Holdings, Inc. (Arca)[70] is creating a hybrid market and may eventually become an electronic exchange.[71] Financial regulators, and the SEC in particular, have only begun to address the problems of regulating such cyber-markets.[72]

Foreign exchanges which now engage in screen trading have been desirous of placing their screens in the United States and signing up U.S. members, without registering as exchanges with the SEC and without requiring all of their listed companies to become registered and reporting companies in the United States pursuant to the Exchange Act.[73] Former EU Commissioner Frits Bolkestein strongly advocated a transatlantic financial community that would permit foreign market access in the United States by European exchanges based on the principle of mutual recognition.[74] Some critics of the SEC and the NYSE have suggested that the SEC's refusal to allow free access to foreign exchanges is protectionist and anti-competitive.[75] SEC Commissioner Roel C. Campos responded to pressure for foreign market access by explaining that the SEC "imposes significant regulatory requirements on exchanges, as well as on issuers who list on those exchanges, whether foreign or domestic. The exemptions being requested by some foreign exchanges would create access to U.S. investors on different terms than those available to U.S. exchanges. This, in turn, puts

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67. *See, e.g.*, Benn Steil, *Is Exchange Reciprocity Doomed? Not at All: The Goal of a Vast, Integrated Transatlantic Securities Market Would Increase Investment Returns, Lower Capital Costs and Increase Growth*, FIN. POST (Canada), Mar. 27, 2003, at FP15.

68. *See* Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2572–74 (2006); *Good-bye to All That*, ECONOMIST, Jan. 30, 1999, at 67.

69. *See* Fleckner, *supra* note 68, at 2566–67; Suzanne McGee, *Stock Markets May Look Nothing Like They Used To; But They Still Serve the Same Crucial Role*, WALL ST. J., Jan. 11, 1999, at R42.

70. *See* Fleckner, *supra* note 68, at 2559.

71. *See* NYSE Group, Inc., Annual Report (Form 10-K), at 6 (Mar. 31, 2006), *available at* http://www.nyse.com/pdfs/2502T05_CNB.PDF [hereinafter NYSE Form 10-K].

72. *See* Paul Cohen, *Securities Trading Via the Internet*, 4 STAN. J. L. BUS. & FIN. 1, 34–35 (1998); Tamar Frankel, *The Internet, Securities Regulation and Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1345 (1998); Jane Kaufman Winn, *Regulating the Use of the Internet in Securities Markets*, 54 BUS. LAW. 443, 443–45 (1998).

73. Foreign issuers with $10 million and 300 (out of 500) U.S. shareholders become subject to SEC registration unless they file for an exemption. *See* Exchange Act Rule 12g-3(2)(b), 17 C.F.R. § 240.12g-3(b)(2) (2005).

74. *See* Frits Bolkestein, Towards an Integrated European Capital Market, Keynote Address at Federation of European Securities Exchange Convention, London (June 13, 2003), *available at* http://www.fritsbolkestein.com/speeches.htm.

75. *See* Chris Huhne, *Atlantic Trade Wars Loom Again*, FIN. NEWS, June 22, 2003.

considerable stress on our system of regulation, disrupting the level playing field we have created for all market participants."[76]

There are two problems with regard to giving foreign securities exchanges access to the United States. The first is how to fit such exchanges into national market system (NMS) regulation. Domestic electronic communications networks (ECNs) or alternative trading systems (ATSs) have been brought into the NMS regulatory framework through the adoption of Regulation ATS[77] and a revised definition of the term "exchange" under the Exchange Act.[78] In its concept release proposing that ATSs should either register as exchanges or undertake new responsibilities as broker-dealers, the SEC addressed the problem of foreign exchanges wishing to access the U.S. capital markets.[79] As the SEC suggested in its concept release, today's technology enables market participants to tap simultaneous and multiple sources of liquidity from remote locations.[80] It is therefore possible for U.S. investors to obtain real-time information about trading on foreign markets from a number of different sources and to enter and execute their orders on those markets electronically from the United States.[81]

The second major problem preventing foreign stock exchange access is that thousands of foreign securities, which are not registered with the SEC and whose issuers do not meet SEC disclosure and accounting standards, would become tradeable.[82] The SEC has suggested several possible solutions to this problem. First, the SEC could subject foreign exchanges to registration as "exchanges" under the Exchange Act and prevent them from trading any securities not registered with the SEC under the Exchange Act. Second, the SEC could limit cross-border trading by ECNs, ATSs, or foreign exchanges seeking U.S. investors to operations through an access provider which would be a U.S. broker-dealer or ECN. Third, the SEC could limit trading in foreign securities by foreign exchanges to transactions

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76. Commissioner Roel C. Campos, Speech at the Centre for European Policy Studies: Embracing International Business in the Post-Enron Era (June 11, 2003), *available at* http://www.sec.gov/news/speech/spch061103rcc.htm.

77. *See* Regulation of Exchanges and Alternative Trading Systems, 63 Fed. Reg. 70,843, 70,844 (Dec. 22, 1998).

78. *See* Exchange Act Rule 3b-16, 17 C.F.R. § 240.3b-16 (2006). For a criticism of the SEC's approach of imposing more regulation upon ATS, see Mark Klock, *The SEC's New Regulation ATS: Placing the Myth of Market Regulation Fragmentation Ahead of Economic Theory and Evidence*, 51 FLA. L. REV. 753 (1999).

79. *See* Regulation of Exchanges, Exchange Act Release No. 38,672, 62 Fed. Reg. 30,485 (June 4, 1997) [hereinafter ATS Concept Release]. The problems of dealing with ATS facilities has troubled regulators world-wide. *See* Alexis L. Collins, *Regulation of Alternative Trading Systems: Evolving Regulatory Models and Prospects for Increased Regulatory Coordination and Convergence*, 33 LAW & POL'Y INT'L BUS. 481, 489 (2002).

80. *See* Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40,760, 63 Fed. Reg. 70,844, 70,847 (Dec. 22, 1998).

81. *See* ATS Concept Release, 62 Fed. Reg. at 30,521 n.213.

82. *See id.* at 30,528.

with sophisticated U.S. investors so that some exemption from Securities Act registration might be available.[83]

In granting an exemption from registration as an exchange to Tradepoint Financial Networks plc (Tradepoint) so it could operate a limited volume securities exchange in the United States, the SEC combined these various approaches.[84] Tradepoint was an electronic market maker system that allowed investors to trade securities listed on the LSE. The company also proposed to operate a specialist system for certain securities. The basis on which the SEC allowed Tradepoint to put its screens into the United States had two important limitations. Tradepoint had two levels of service for its members: one for the public market and one only to qualified institutional buyers (QIBs) as defined in Rule 144A.[85] Bids and offers for securities not registered under the Exchange Act could be made only by QIBs, and any such securities could only be resold outside the United States.[86] Further, access was effectively limited to broker-dealers and other sophisticated investors.[87]

While the SEC, as a practical matter, may currently be able to limit access to the U.S. markets by foreign exchanges to transactions with QIBs or other institutional investors, or to trading only in Exchange Act registered securities, this may not always be the best approach. As ECNs proliferate and retail investors become interested in buying foreign securities on foreign exchanges in the middle of the night, the SEC may find the approach it adopted in the Tradepoint exemption difficult to maintain and try some other approach to the problem of foreign exchange access.

B. TRANSPARENCY OF QUOTES AND PRICES

Since the SEC's Concept Release discussing foreign exchange access, the problems involved in allowing foreign exchanges into the United States have become even more intractable because the SEC has passed Regulation NMS,[88] and the EU has passed the Markets in Financial Instruments

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83. *See id.* at 30,529. In 2003 the staff of the Ontario Securities Commission recommended a new approach to the recognition of foreign based stock exchanges based on mutual recognition. *See* Ontario Sec. Comm'n, OSC Staff Notice 21-702, Regulatory Approach for Foreign-Based Stock Exchanges (Oct. 31, 2003), *available at* http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part2/sn_20031031_21-702_foreignbased.pdf.

84. *See* Order Granting Limited Volume Exemption from Registration as an Exchange Under Section 5 of the Securities Exchange Act, Exchange Act Release No. 41,199, 64 Fed. Reg. 14,953 (Mar. 29, 1999).

85. *See* 17 C.F.R. § 230.144A (2000).

86. Order Granting Limited Volume Exemption from Registration as an Exchange, 64 Fed. Reg. at 14,957.

87. *See id.* at 14,954–55. For further developments concerning Tradepoint, see Craig Karmin, *Tradepoint and Swiss Bourse Join to Expand System,* WALL ST. J., July 11, 2000, at C21.

88. *See* Regulation NMS, 17 C.F.R. § 242.600 (2005).

Directive (MiFID).[89] Although both laws are to some extent aimed at enforcing best execution obligations in the face of the threat of internalization and fragmentation[90] of securities price discovery mechanisms, they are based on different legal systems, and they are not necessarily compatible.

Regulation NMS is the most far reaching market structure initiative of the SEC since the 1970s. It is comprised of four new market structure rules reaffirming the SEC's interpretation of its mandate to facilitate the establishment of a national market system, as promoting a balance between fair competition among individual markets and assuring that such markets are linked together in a unified system that promotes interaction among orders in an NMS stock.[91] The four rules are: (1) an order protection rule; (2) an access rule; (3) a sub-penny rule (not relevant to this Article); and (4) market data rules and plans.

The SEC's mandate to facilitate the establishment of the NMS was added to the Exchange Act in 1975.[92] In a 1978 Policy Statement, the SEC asserted that Congress supported three major principles when directing the SEC to facilitate the development of the NMS. These were: (1) creating an ideal auction type market by implementing a nationwide system according to price and time priority for all limit orders of public investors over all professional orders; (2) the types of securities qualified to be included in an NMS should depend on their characteristics rather than where they were traded; and (3) a refusal to achieve a nationwide centralized auction-type market for qualified securities by abolishing over-the-counter trading in listed securities.[93] The SEC put down several building blocks for the NMS in the late 1970s, including: (1) the development of a composite quotation system; (2) the development of comprehensive market linkage and order routing systems in the form of the Intermarket Trading System (ITS); (3) a recommendation that all agency orders in NMS securities receive the benefit of auction-type trading protections; (4) the elimination of off-board

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89. *See* Directive 2004/39/EC of the European Parliament and of the Council of 21 Apr. 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. (L 145/1), *available at* http://www.mifid.ie/MiFIDLinks.html [hereinafter MiFID].

90. Internalization generally refers to the practice of a "broker-dealer who executes its customer order flow as principal without exposing that order flow to other market participants." DIV. OF MKT. REG., SEC, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS, Study I, at I-18 n.59 (Jan. 1994), *available at* http://www.sec.gov/divisions/marketreg/market2000.pdf. When such orders are internalized, the pricing mechanism may become fragmented because all orders do not interact with one another. Securities market regulators have long had to balance the desirability of market maker competition against the dangers of internalization and fragmentation. *See id.* at I-9.

91. *See id.* at I(B)(1).

92. *See* 15 U.S.C. § 78k-1 (2000).

93. *See* Development of a National Market System, Exchange Act Release No. 14,416, 1978 SEC LEXIS 2339 (Feb. 1, 1978).

trading prohibitions; and (5) a consolidated transaction reporting system. Regulation NMS is an effort to update this vision in light of changes in the markets over the last quarter of a century.

The most controversial part of Regulation NMS is the order protection rule, also known as the trade-through rule,[94] which establishes intermarket protection against trade-throughs for all NMS stocks.[95] A trade-through is the execution of an order by one trading center at a price that is inferior to the price of a protected quotation, often representing an investor limit order, displayed by another trading center.[96] The trade-through rule protects only quotations that are immediately accessible through automatic execution, and thereby eliminates any potential advantage that manual or floor based markets had over automated markets in the ITS system. The trade-through rule applies to all trading centers, including Nasdaq and broker-dealers acting as off-exchange block positioners in exchange listed stocks.[97] A protected bid or protected offer is an automated quotation displayed by an automated trading center that is the best bid or best offer of an exchange or Nasdaq.[98]

The SEC justified the order protection rule on the ground that it will encourage greater use of limit orders, which will help improve the price discovery process and contribute to increased liquidity and depth in the securities markets.[99] To the extent that conflicts between short-term and long-term investors occur in trading markets, the SEC opted to protect long-term investors by attempting to minimize volatility.[100] The SEC also asserted that the rule will promote intermarket competition by leveling the

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94. 17 C.F.R. § 242.611 (2005).

95. An NMS security has been redefined as "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." *Id.* § 242.600(b)(46).

96. Currently, trade-throughs are protected by reason of the ITS Plan, which was established by the markets in 1978 and applies only to listed securities. *See id.* § 242.600(b)(77); *see also* American Stock Exchange, Inc., Exchange Act Release No. 14,661, 43 Fed. Reg. 17,419 (Apr. 24, 1978). Problems with the operation of the ITS Plan and threats by the NYSE to withdraw from ITS were some of the factors leading to the Regulation NMS initiative.

97. *See* Rules 600(b)(78) & 611, 17 C.F.R. §§ 242.600(b)(78), 242.611 (2005). The order protection rule as initially proposed included a general opt-out exception; the final rule eliminated this exception in favor of more tailored exceptions, including intermarket sweep orders, quotations displayed by markets that fail to meet the response requirements for automated quotations and flickering quotations with multiple prices displayed in a single second. If the dealer simultaneously routes one or more intermarket sweep orders to execute against the full displayed size of each better priced, protected quotation, the exception for intermarket sweep orders will allow dealers to execute block orders for institutional clients internally at a price that would trade-through protected quotations. *See* Regulation NMS, Exchange Act Release No. 51,808, 70 Fed. Reg. 37,496, 37,524, 37,535–36 (June 29, 2005); 17 C.F.R. § 242.600 (2005).

98. *See* 17 C.F.R. § 242.600(b)(7), (57) (2005).

99. *See* Regulation NMS, 70 Fed. Reg. at 37,594.

100. *See id.* at 37,500.

playing field between automated and non-automated markets.[101] According to the SEC, the trade-through rule does not lessen the duty of best execution, which "requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances."[102] The SEC does not view the duty of best execution as inconsistent with manual routing, but believes that broker-dealers must take into account price improvement execution possibilities. According to the SEC, the new order protection rule undergirds the duty of best-execution by helping to ensure that customers' orders are not executed at prices inferior to the best protected quotations.[103]

Protecting the best displayed prices against trade-throughs necessitates giving broker-dealers and trading centers fair and efficient access to quotations. The access rule[104] is designed to promote access to quotations in three ways. First, it enables the use of private linkages, rather than mandating a collective linkage facility such as ITS. Using private linkages, market participants may obtain indirect access to quotations displayed by a trading center through the members, subscribers or customers of that trading center.[105] Second, the access rule limits the fees that any trading center can charge for accessing its protected quotations.[106] Third, the rule requires SROs to have rules that prohibit their members from displaying quotations that lock or cross protected quotations of other markets.[107]

Regulation NMS also updates the requirements for consolidating, distributing and displaying market information and amends the joint industry plans for disseminating market information. The allocation of market data revenues by exchanges and Nasdaq has been a source of controversy for some time.[108] In Regulation NMS, the SEC declined to go to a model based on market forces, taking the view that investors, and

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101. *See id.* at 37,594.

102. *Id.* at 37,537–38.

103. *See id.* at 37,538.

104. *See* 17 C.F.R. § 242.610 (2007).

105. *See* Regulation NMS, Exchange Act Release No. 51,808, 70 Fed. Reg. 37,502 (June 29, 2005).

106. *See id.*

107. *See id.* at 37,503.

108. Several years ago, an Advisory Committee that addressed the question of market data fees recommended that the SEC permit a new system of competing consolidators to evolve from the unitary model of the Consolidated Tape Association (CTA), so that each market center would be permitted to sell its market information to any number of competing consolidators, which in turn could sell to vendors and subscribers. *See* Letter from Joel Seligman, Dean, Wash. Univ. Sch. Of Law, to Harvey Pitt, Chairman of the SEC, Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (Sept. 14, 2001), *available at* http://www.sec.gov/divisions/marketreg/market info/finalreport.htm. The CTA, a single source monopoly established in 1979, had, like ITS, become outdated, and the NYSE threatened to withdraw from it. In Regulation NMS, the SEC took a much more complicated approach, making changes not only to the CTA Plan, but also to the CQ Plan, which disseminates consolidated transaction and quotation information for exchange-listed securities. *See* Regulation NMS, 70 Fed. Reg. at 37,503 n.40.

particularly retail investors, benefit from the current consolidated system.[109] The Regulation NMS amendments to the joint industry plans[110] are designated to strengthen the existing market data system and preserve its integrity and affordability. The amendments update the formulas for allocating revenues generated by market data fees to the various SRO participants in the plans, based on the usefulness to investors of each SRO's market information, rather than the number of trades. The amendments also broaden participation in the governance of the plans by creating advisory committees composed of non-SRO representatives. The amendments also promote the wide availability of market data by authorizing markets to distribute their own data independently of the plans.[111]

Although Regulation NMS attempted to settle market structure issues for the near term, it has not yet become fully effective[112] and it accelerated so many changes in the configuration of the trading markets that it may be obsolete before it is implemented. Immediately after Regulation NMS was adopted, the NYSE merged with Arca[113] and Nasdaq acquired the ECN of Instinet Group, Inc.[114]—transactions that can be attributed at least in part to the importance Regulation NMS put on automated trading systems. Other consolidations among exchanges, in Europe as well as in the United States, are also reactions to the new regulations affecting the trading markets.

MiFID, like Regulation NMS, is a far reaching regulation designed to eliminate national rules which concentrate trading on official stock exchanges and enable real competition between different market execution centers, through pre- and post-trade transparency rules. It is part of the EU's Financial Services Action Plan (FSAP), and it will replace the Investment Services Directive (ISD), passed in 1993. MiFID was intended to promote a single market for both wholesale and retail transactions in financial instruments. It sets forth requirements for investment advice, the operation of multilateral trading facilities (MTFs) and services related to commodity derivatives.[115] This will give financial services firms more reliable passports for cross-border activity than existed under the ISD. The substantial changes MiFID is expected to make include a broader definition of "investment advice," client classification criteria, a revised approach for dealing with conflicts of interest, a new approach to best execution, and new requirements in relation to equity market transparency, especially for

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109. *See* Regulation NMS, 70 Fed. Reg. at 37,504.

110. *See* Rules 601 & 603, 17 C.F.R. §§ 242.601, 242.603 (2005).

111. *See* Regulation NMS, 70 Fed. Reg. at 37,504.

112. *See* Mohammed Hadi, *CBOE to Start Trading Stocks, Following Similar Plan by Rival*, WALL ST. J., July 28, 2006, at C3.

113. *See* Fleckner, *supra* note 68, at 2559; *see also* NYSE Form 10-K, *supra* note 71, at 6.

114. *See* Gaston F. Ceron, *Megamergers Roil Stock-Trading Scene*, WALL ST. J., June 1, 2005, at A6A.

115. *See* MiFID arts. 27, 28; EMILIOS AVGOULEAS, THE MECHANICS AND REGULATION OF MARKET ABUSE 298–99 (2005).

"systematic internalisers."[116] The trading transparency requirements and their application to internalisers have proved particularly controversial, and such controversy resonates with respect to the controversies over the trade through rule in the United States.

In 1993, when the ISD was adopted, securities trading in Europe was conducted on stock exchanges, also called "regulated markets," or by way of block trades executed upstairs by securities dealers. At that time, there was considerable controversy over a requirement to "concentrate" transactions on exchanges. Over a decade later, MiFID formally recognized the role of MTFs and directly addressed the responsibilities of "systematic internalisers." An MTF is defined as "a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments . . . in a way that results in a contract . . . ."[117] A "systematic internaliser" is defined as "an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MFT."[118] In 1993, when the ISD was adopted, competition between exchanges and MFTs were relatively unknown in Europe. Further, internalization was not common. Today, in jurisdictions where there is no concentration rule requiring orders to be brought to regulated markets, the EU Commission estimates that fifteen to thirty per cent of orders are internalized.[119] Since the MiFID abolishes the concentration rule, internalization may increase.

The political compromise that led to the abolition of the concentration rule, however, was the adoption of strict transparency rules.[120] Such rules will not only apply to regulated markets, but also to MFTs and investment firms. All of these rules are related to best execution responsibilities. The MiFID obligates EU member states to require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients.[121] This best execution standard can take into account price, costs, speed, likelihood of execution and settlement, size, nature, or other considerations relevant to order execution. Nevertheless, order handling and transparency rules limit the ability of investment firms to internalize orders.

116. Hector Sants, Speech at the FSA Annual Public Meeting, Implementation of the Markets in Financial Instruments Directive and Capital Requirements Directive: State of Play (July 21, 2005), *available at* http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2005/0721_hs.shtml.

117. *See* MiFID art. 4(15), 2004 O.J. (L 145/10). It is interesting to compare this definition with the definition of an alternative trading system in SEC regulations. *See* 17 C.F.R. § 242.300(a) (2005).

118. *See* MiFID art. 4(7), 2004 O.J. (L 145/10).

119. Emilios Avgouleas, *The New EC Financial Markets Legislation and the Emerging Regime for Capital Markets*, 23 Y.B. EUR. L., 321, 336 (2004).

120. *See Council Approves ISD Compromises; Dispute Remains Over Share Trading,* World Sec. L. Rep. (BNA), at 3 (Oct. 2003).

121. *See* MiFID art. 21(1), 2004 O.J. (L 145/18).

Member states must require investment firms to execute customer orders according to procedures or arrangements which provide for the "prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm."[122] These procedures must allow for the execution of comparable orders according to time priority. In the case of a client limit order, if an order in listed shares is not immediately executed, unless the client otherwise directs, the investment firm must make the order public in a manner which is easily accessible to other participants. This may mean sending the order to an exchange or MTF.[123]

Regulated markets are required to make public, on reasonable commercial terms and on a continuous basis, current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems.[124] In addition to such pre-trade transparency, regulated markets must publish the price, volume, and time for all equity trades executed in listed equities.[125] In order to ensure fair, orderly, and transparent operations, and fair access to regulated markets, the MiFID sets forth organizational requirements for such markets.[126]

The MiFID also requires systematic internalisers to publish a firm quote in listed shares for which they are internalisers and for which there is a liquid market. These quotes must be made available on a regular and continuous basis during normal trading hours.[127] Time priority is set forth as a standard for best execution. Nevertheless, systematic internalisers are allowed to decide, on a commercial basis, but in an objective and non-discriminatory way, the investors to whom they will give access to their quotes. Accordingly, systematic internalisers may decide to give access to their quotes only to retail clients, only to professional clients, or both, providing they do not discriminate within those categories.[128] One of the permitted methods for making quotes available is through a regulated market or exchange. Post-trade, as well as pre-trade disclosure, is mandated. Member states must require investment firms which effect transactions in listed shares off an exchange or MTF to make public the volume and price of those transactions and the time at which they were concluded. Further, this information must be made public on a real-time basis in a manner easily accessible to other market participants.[129] MTFs are similarly subject to pre-trade and post-trade transparency requirements.[130]

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122. *See id.* art. 22(1).
123. *See id.* art. 22(2).
124. *See id.* art. 44(1).
125. *See id.* art. 45(1).
126. *See* Avgouleas, *supra* note 119, at 342.
127. *See* MiFID art. 27(1)–(2), 2004 O.J. (L 145).
128. *See id.* pmbl.(5).
129. *See id.* art. 28(1).
130. *See id.* arts. 29, 30.

As pointed out by the U.S. Securities Industry Association (SIA), in a comment letter to the EU on an earlier draft of the MiFID, best execution and pre-trade and post-trade transparency requirements in the United States are "inextricably linked to the information and trading infrastructure in the United States," including the consolidated quotation system, the consolidated tape, intermarket linkages, automatic order routing and execution systems, electronic communication networks and a central clearing and settlement system.[131] Although regulations can remove barriers to competition, they cannot create market linkages. The MiFID asserts that fair competition requires that market participants and investors be able to compare the prices that intermediaries and trading venues must publish, but then merely recommends that Member States "remove any obstacles which may prevent consolidation at European level of the relevant information and its publication."[132] Similarly, the MiFID provides that Member States require that investment firms from other Member States have the right of membership or access to regulated markets in their territories, as well as the right of access to central counterparty, clearing, and settlement systems in their territories.[133]

MiFID is part of the FSAP, which consists of a series of policy objectives and specific measures to improve the single market for financial services in the EU. It is comprised of forty-two separate measures designed to harmonize EU Member States' regulation of securities, banking, insurance, mortgages, pensions and all other forms of financial transactions.[134] The goal of the FSAP is to create integrated, efficient, deep, and liquid financial markets in the EU in order to deliver a broad range of safe and competitive products to consumers and to achieve easier access to a single market for investment capital. Among the priorities of the FSAP are: revising the common legal framework for integrated securities and derivatives markets; removing outstanding barriers to raising capital on an EU-wide basis; ensuring the continued stability of the European markets; moving toward a single set of financial statements for listed European companies; creating a secure and transparent environment for cross-border restructuring; and providing legal security for cross-border security trading.[135]

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131. Letter from David Strongin, Vice President and Dir., Int'l Fin., Sec. Indus. Ass'n, to Dr. Alexander Schaub, Dir. General, Internal Mkt. of Directorate Gen. (Mar. 17, 2003), *available at* http://www.sia.com/2003_comment_letters/pdf/30545513.pdf.

132. MiFID pmbl.(34), 2004 O.J. (L 145/4).

133. *See id.* arts. 33, 34.

134. *See* Markets in Financial Instruments Directive, MiFID Links, http://www.mifid.ie/MiFIDLinks.html (last visited Mar. 31, 2007).

135. *See* SECURITIES EXPERT GROUP, FINANCIAL SERVICES ACTION PLAN: PROGRESS AND PROSPECTS, FINAL REPORT 6 (2004), *available at* http://www.europeansecuritisation.com/pubs/FSAP_stocktaking_Report.pdf.

One of the effects of the FSAP has been a consolidation of stock exchanges within Europe, of which Euronext is an example. While each exchange within Euronext operates as a separate subsidiary in its own country, governed and licensed by local regulators, all exchanges within Euronext have centralized their trading operations.[136] They utilize a common trading platform to create a single trading price for each security, and a broker-member of Euronext is able to trade all securities listed on any of the subsidiary exchanges.[137]

As can be seen, the goals and politics of Regulation NMS and the MiFID are quite disparate. Further, the history of exchanges in the United States and Europe and the problems of reconciling competition between evolving market centers—ATSs in U.S. terminology and MTFs in EU terminology—and maintaining best execution, especially for retail customers, is different in the two jurisdictions. Although both Regulation NMS and MiFID are efforts by regulators to incorporate ECNs into the equity trading markets, they approach this task differently, in part because the SEC traditionally has been more concerned about protecting retail investors and European regulators have been more concerned about preserving the wholesale markets. Accordingly, Regulation NMS includes ECNs in its trade-through requirements in a way which prodded exchanges and ECNs to consolidate, whereas in Europe ECNs were permitted to continue to deal with institutional investors outside of MiFID's transparency requirements.[138] Ironically, many of the major players in the European capital markets are affiliates of U.S. investment banks, and to some extent their trading activities in both the United States and Europe are in competition with the NYSE. The NYSE's efforts to expand into Europe should be viewed in the context of this competition.

Exchanges and their members are now confronted with the challenges of complying with both Regulation NMS and MiFID. Perhaps a merger between the NYSE and Euronext could precipitate a movement to harmonize or converge Regulation NMS and the MiFID. However, this is an unlikely prospect because of the tremendous complexity of both regulations and their differing treatment of institutional orders. An interesting question is whether the NYSE and Euronext will be able to construct a single trading platform to realize the synergies of their merger in the face of the different requirements of Regulation NMS and the MiFID. The Deputy Director of the SEC's Division of Market Regulation had

136. *See* Euronext, About Us: Our Business, History, http://www.euronext.com/editorial/wide/0,5371,1732_4427342,00.html (last visited Jan. 29, 2007).

137. *See* Norman S. Poser, *The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation,* 22 U. PA. J. INT'L ECON. L. 497, 505 (2001).

138. *See* AVOGOULEAS, *supra* note 115, at 299.

questioned how a common trading platform would be developed without significant regulatory change.[139]

IV. THE POLICIES OF THE CFTC

A. CROSS-BORDER ACTIVITIES

Commodity exchanges began to negotiate cross-border linkages prior to such transactions between security exchanges. In 1984, the Chicago Mercantile Exchange (CME) and the Singapore Monetary Exchange (SIMEX) instituted their mutual offset system, the first international linkage between exchanges.[140] In 1987, in conjunction with Reuters Holdings PLC, the CME pioneered GLOBEX, the first worldwide after hours electronic trading system.[141] In 1995, the CME launched the Growth and Emerging Markets (GEM) division to provide access to investment in emerging market countries.[142] In 1998, the CME launched GLOBEX2 based on a technology swap with the Paris Bourse and MATIF.[143]

Then in early 1998, Eurex, the all-electronic German/Swiss derivatives exchange, began talks with the Chicago Board of Trade (CBOT) regarding a joint venture to create a single global electronic trading system.[144] Two years later, CBOT members voted to discontinue the proposed alliance only to reconsider it six months later. Finally, on August 28, 2000, the CBOT Eurex Alliance was launched.[145] But this venture floundered, and on January 10, 2003, Eurex, the world's largest derivatives exchange, announced plans to open a U.S. exchange in Chicago.[146] Establishing a U.S. exchange was designed to allow Eurex to directly offer U.S. products such as U.S. Treasury securities, challenging older U.S. exchanges such as the CBOT and the CME.[147]

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139. *See Crossing the Pond*, *supra* note 3.

140. *See* Chris Sherwell, *Singapore Bridges a Time Gap*, FIN. TIMES (London), Sept. 7, 1984, at 1.

141. GLOBEX launched in June of 1992. *See* Jeffrey Taylor, *Futures Firms Banking on Globex Debut*, WALL ST. J., June 24, 1992, at C1.

142. *See Merc Expands; Emerging Markets Division Gets OK*, CHI. TRIB., Nov. 3, 1995, at 3N.

143. More recently, the New York Mercantile Exchange has proposed North America's first stock-futures combination with the Toronto Stock Exchange, Inc. *See* Leah McGrath Goodman, *Nymex Considers a Partnership With Owner of Toronto Exchange,* WALL ST. J., June 3, 2006, at B5.

144. Both parties reached an agreement in principle on the electronic platform in March of 1998. *See* Nikki Tait, *CBOT Link with Eurex Delayed to 2000*, FIN. TIMES (London), Dec. 28, 1999, at 19.

145. *See* Daniel Rosenberg, *CBOT's First Day of Eurex Alliance Gets Good Reviews*, WALL ST. J., Aug. 29, 2000, at C15.

146. *See* Press Release, Eurex to Launch U.S. Exchange (Jan. 10, 2003), *available at* http://www.eurexchange.com/about/press/press_231_en.html.

147. *See id.*; Joseph Weber, *A Battle Royal Is Brewing in Chicago*, BUS. WK. ONLINE, Sept. 18, 2003, http://www.businessweek.com/bwdaily/dnflash/sep2003/nf20030918_2279_db035.htm.

Shortly after the Eurex announcement, the CBOT and the CME went to Washington. Testifying before the U.S. House Agricultural Committee and the CFTC, the CBOT and the CME urged that Eurex's application to become a registered U.S. futures exchange be carefully reviewed. The Chicago exchanges raised concerns over the potential lack of transparency in the Eurex model, and questioned Eurex's compliance with U.S. law since some market surveillance functions would be performed in Europe.[148] Ultimately, these efforts proved unsuccessful as the CFTC later designated Eurex—by way of its subsidiary, the U.S. Futures Exchange, L.L.C. (USFE)—a contract market for the automated trading of futures and options on futures contracts.[149] While Eurex was successful in establishing a U.S. exchange, it failed in its attempt to win CBOT's U.S. Treasury futures market. In 2005, Eurex announced that it would shift its focus to foreign exchange futures, rather than commit to treasuries. Some suggested that the CBOT's efforts against Eurex's entrance into the U.S. market may have bought it enough time to mount a competitive response, which has allowed CBOT to remain the top U.S. Treasury exchange.[150]

Eurex is not the only European exchange raising hackles at U.S. commodity exchanges. The IntercontinentalExchange, Inc. (ICE) is an electronic trading network based in Atlanta, which matches buyers and sellers of energy contracts around the world. After being rebuffed by the New York Mercantile Exchange (Nymex), when Nymex was offered an investment in ICE, ICE began to compete with Nymex. Then ICE purchased the International Petroleum Exchange in London, best known for trading Brent crude oil futures, which was regulated in the United Kingdom. ICE then shut down its trading floor, and continued to operate under the aegis of the U.K. Financial Services Authority in the United States.[151] It could do so because of CFTC policies, which will be explained below.

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148. *See The Application for Contract Market Designation of the U.S. Future Exchange, LLC Before the Commodity Futures Trading Commission, Hearing Before the H. Comm. on Agriculture*, 108th Cong. 1 (2003) (statements of Charles P. Carey, Chairman, Chicago Board of Trade & Terry Duffy, Chairman, Chicago Mercantile Exch.); Press Release, Commodity Futures Trading Comm'n, U.S. Futures Exchange, LLC (USFE) Contract Market Designation Application (Sept. 16, 2003), *available at* http://www.cftc.gov/dea/deausfesubmissions_and_comments_table.htm.

149. *See* Press Release, Commodity Futures Trading Comm'n, CFTC Designates New Exchange (Feb. 4, 2004), *available at* http://www.cftc.gov/opa/press04/opa4886-04.htm.

150. *See* Chris Clair, *Ferscha Out at Eurex*, HEDGEWORLD DAILY NEWS, Dec. 29, 2005. On July 27, 2006, Man Group, a hedge fund manager and futures broker, purchased 70% of Eurex U.S. The new company, U.S. Futures Exchange, will not follow Eurex U.S.'s failed strategy of competing directly with other exchanges. Instead, the new venture plans on creating innovative products aimed at hedge funds. *See* Jeremy Grant, *Man Group Nabs 70% of Eurex U.S.*, FIN. TIMES (London), July 28, 2006, at 38.

151. *See* Bernard Wysocki Jr. & Aaron Lucchetti, *Global Exchanges Pose a Quandary For Securities Cops,* WALL ST. J., June 5, 2006, at A1.

B. CFTC INITIATIVES

The CFTC permits a foreign commodities exchange to install an electronic trading terminal in the United States based on various conditions and representations by that foreign exchange as to how it will conduct trading. This policy dates back to 1999, when the CFTC instructed its staff to process "no-action letter" requests from foreign boards of trade seeking to place terminals in the United States.[152] The first of these letters, issued prior to this policy statement, was given to Eurex.[153]

In 2000, the CFTC issued a policy statement allowing foreign boards of trade that had placed automated trading systems in the United States to list certain additional futures and options contracts without further regulatory approvals.[154] However, because of differences in philosophy between the CFTC and the SEC, which have shared jurisdiction over security futures, financial regulators were unable to reach agreement on rules that would allow security futures listed on foreign exchanges to be traded in the United States.[155] CFTC commissioners advocated cooperation across markets and national borders to deal more efficiently and effectively with expanding global markets and advances in technology. On May 15, 2006, the CFTC and the Committee of European Securities Regulators published online guides for conducting derivatives business in the United States and the EU.[156]

This internationalism has been interrupted by the complaints of Nymex that it is a victim of unfair competition from ICE. In January 2006, the CFTC approved, over Nymex's objection, ICE's application to list West Texas crude oil futures—the U.S. benchmark which Nymex trades—

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152. *See* Access to Automated Boards of Trade, 64 Fed. Reg. 32,829 (June 18, 1999).

153. *See id.* at 32,830 n.1; Press Release, Commodity Futures Trading Comm'n, CFTC's Trading & Markets Division Authorized the DTB to Install and Utilize Computer Terminals in the United States (Mar. 4, 1996), *available at* http://www.cftc.gov/opa/press96/opa3893–96.htm.

154. *See* Press Release, Commodity Futures Trading Comm'n, CFTC Issues Statement of Policy Permitting Certain Foreign Boards of Trade to List New Futures and Option Contracts through U.S.-Located Trading Systems, (July 3, 2000), *available at* http://www.cftc.gov/opa/press00/opa4414-00.htm.

155. *See* Patrick Tracey, *Rulemaking for Foreign Security Futures Eludes SEC-CFTC Agreement, Newsome Says*, 35 Sec. Reg. & L. Rep. (BNA) No. 24, at 1011 (July 1, 2003).

156. *See* Press Release, Commodity Future Trading Comm'n, Release No. 5182-06, Facilitating Transatlantic Derivatives Business: U.S. (CFTC) and EU Regulators, Through CESR, Take Joint Steps to Respond to Industry Concerns and to Facilitate Transatlantic Business by Use of Online Guides (May 15, 2006), *available at* http://www.cftc.gov/opa/press06/opa5182-06.htm. IOSCO, as long ago as 1990, succeeded in establishing principles for the oversight of screen-based trading systems for derivative products. *See* INT'L ORG. OF SEC. COMM'NS (IOSCO), A RESOLUTION ON PRINCIPLES FOR THE OVERSIGHT OF SCREEN-BASED TRADING SYSTEMS FOR DERIVATIVE PRODUCTS (Nov. 1990), *available at* http://www.iosco.org/library/resolutions/pdf/IOSCO RES3.pdf. The former Director of the Office of International Affairs of the CFTC once expressed the view that electronic markets are perfect international trading vehicles. *See* Andrea M. Corcoran, *The Uses of New Capital Markets: Electronic Commerce and the Rules of the Game in an International Marketplace*, 49 AM. U. L. REV. 581, 583 (2000).

without U.S. regulation. ICE's West Texas contract, unlike Nymex's, does not involve physical delivery of oil, but rather it is limited to cash settlements of each contract tied to the price of West Texas oil on Nymex. Nymex, unsuccessfully, went to court claiming that its prices were trademarked and could not be copied by a rival exchange.[157] Nymex now claims that the CFTC should not allow ICE the unfair advantage of looser U.K. regulations that impose no limit on the size of positions that investors can take. As a result of this regulatory loophole, hedge funds have abandoned Nymex for ICE, which has captured almost a third of the market.[158] Nymex points out that ICE is currently enjoying less stringent U.K. regulations through no-action relief despite the fact that it is based in the United States (and no longer runs a physical exchange in London), and ICE's contracts are based on a product that is produced, stored, and delivered in New York.[159]

The dispute between Nymex and ICE highlights the ambiguity of CFTC's no-action relief. The CFTC has never defined "the point at which . . . [a foreign board of trade] that makes its products available for trading in the U.S. [through an] . . . electronic trading system . . . is no longer 'located outside the U.S.' for purposes" of CFTC regulation.[160] While most foreign boards of trade that are granted no-action relief are regulated abroad, some foreign exchanges, such as Eurex, are subject to U.S. regulation. The CFTC therefore scheduled a public hearing for June 27, 2006 addressing this issue.[161] At the opening of the hearing, one of the CFTC commissioners remarked that "[d]etermining where an [electronic] exchange is located is difficult, if not impossible."[162]

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157. *See* Gillian Tett, *Stock Markets and Currencies: ICE-Nymex Saga Exposes New Problems for Regulation*, FIN. TIMES (London), June 16, 2006, at 38.

158. *See* Wysocki & Lucchetti, *supra* note 151; Jeremy Grant and Gillian Tett, *Capital Markets and Commodities*, FIN. TIMES (London), June 27, 2006, at 45.

159. Senator Charles Schumer expressed concern that, without U.S. regulations, purchasers on ICE could potentially drive the price of oil up to $100/barrel or higher. In response, ICE argues that oil is a globally traded commodity, and U.S. and U.K. regulators have information-sharing agreements and a strong working relationship. *See* Wysocki & Lucchetti, *supra* note 151, at A1. Since the CFTC has authorized ICE to list West Texas under U.K. regulations, Nymex has launched its own electronic trading of twelve energy contracts on the Chicago Mercantile Exchange's Globex platform. The strong early reports by Nymex coupled with the possibility that the CFTC might tighten regulation of ICE suggest that Nymex might soon recapture the West Texas market share it lost earlier this year. *See* Gerelyn Terzo, *A Bad Week for the ICE: Shares Fall as Rival Nymex Goes Electronic and CFTC Considers a Tighter Rein*, INV. DEALERS' DIG., June 19, 2006. This saga continues as ICE has agreed to purchase the New York Board of Trade. *See* Aaron Lucchetti & Susan Buchanan, *ICE Agrees to Buy Nybot, Whose Members Will Meet to Weigh Offer*, WALL ST. J., Sept. 15, 2006, at C3.

160. Boards of Trade Located Outside of the United States and the Requirement to Become a Designated Contract Market or Derivatives Transaction Execution Facility, 71 Fed. Reg. 34,070 (June 13, 2006).

161. *See id.*

162. Bernard Wyosocki, *CFTC Wrestles With Regulatory Turf In Age of Electronic Futures Trading*, WALL ST. J., July 3, 2006, at C1.

If one of the major purposes of the NYSE-Euronext merger is to capture the derivatives trading on LIFFE for U.S. investors, this jurisdictional hassle could become critical. Would LIFFE continue to be regulated by the Financial Services Authority in London, or would it come under the jurisdiction of the CFTC? This controversy also holds a lesson for the SEC. If the SEC were to reverse some of its prior policies and allow foreign exchange access so that Eurex could place terminals in the United States for direct trading access, such a policy would give thousands of foreign issuers not registered with the SEC direct trading access to the U.S. capital markets. U.S. issuers might complain and businesses that think such a policy would be a competitive threat might sue. If Congress became involved, internationalism would likely give way to nationalism. On the other hand, the business most likely to be at a competitive disadvantage in such a scenario is the NYSE itself because foreign issuers would have much less of an incentive to list on the NYSE.

V. THE FUTURE OF SELF-REGULATION BY THE NYSE

A. THE HISTORIC ROLE OF SELF-REGULATION

The NYSE was an SRO prior to the adoption of the federal securities laws. While the SEC has assumed greater responsibility for the regulation of listed companies, exchange members and trading markets than was once the case, Euronext has ceded most of its SRO functions to government regulators. The anticipation of a NYSE and Euronext merger raises a question as to whether the NYSE will be able to continue functioning as an SRO to the same extent as it does presently. This question is already in the air because of other developments.

Prior to the enactment of the Exchange Act, stock exchanges were private membership organizations under state law. When the federal securities laws were passed, stock exchanges were required to register with the SEC.[163] The SEC thus obtained oversight authority over stock exchanges, but the stock exchanges continued to have rulemaking and regulatory authority with respect to their members, their trading markets and their listed companies. Before 1934 no analogue to stock exchanges for the over-the-counter (OTC) market existed, but in 1938 Congress passed the Maloney Act to establish a framework for an OTC SRO.[164] Only one such association, the NASD, exists for OTC brokers and dealers. All broker-dealers registered with the SEC, except those doing business exclusively on a securities exchange, are required to join the NASD.[165]

163. *See* Exchange Act §§ 5–6, 15 U.S.C. §§ 78e–78f (2000).

164. Exchange Act § 15A, 15 U.S.C. § 78*o*-3 (2000).

165. *See* Exchange Act § 15(b)(8), 15 U.S.C. § 78*o*(b)(8) (Supp. II 2002). Before 1983, the NASD did not have this kind of an SRO monopoly. *See* Pub. L. No. 98-38, § 3(a), 97 Stat. 206 (1983).

Although the efficacy of self-regulation was called into question by stock market abuses reported in the 1963 SEC Special Study,[166] that Study concluded that self-regulation should be maintained and strengthened.[167] The Securities Acts Amendments of 1975[168] further enlarged the SEC's oversight role over the stock exchanges and the NASD by, among other things, giving the SEC the power to initiate, as well as approve, SRO rulemaking,[169] expanding the SEC's role in SRO enforcement and discipline,[170] and by allowing the SEC to play an active role in structuring the market.[171] For the first time, the statute set forth requirements with respect to the composition of exchange and association boards of directors.[172]

Sarbanes-Oxley both diminished and strengthened self-regulation. On the one hand, the SEC was authorized to administer regulations regarding aspects of corporate governance that previously had been left to state law.[173] On the other hand, many of the new corporate governance regulations were imposed upon public companies by way of NYSE listing requirements dictated by Sarbanes-Oxley and the SEC. The SRO listing rules, as approved by the SEC implementing Sarbanes-Oxley, include provisions mandating executive sessions of non-management directors, define committee independence for audit and nominating committee members, define audit committee financial experts, set forth specific size requirements and obligations of the audit committee, and require companies to have codes of business conduct and ethics.[174] Continuing education for directors is suggested.[175]

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166. SEC, REPORT OF THE SPECIAL STUDY OF SECURITIES MARKET, H.R. DOC. NO. 88-95, pt. 4, at 502 (1963).

167. *See id.* pt. 5, at 201–02.

168. *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

169. *See* Exchange Act § 19(c), 15 U.S.C. § 78s(c) (2000).

170. *See id.* § 19(c), (d), (g).

171. *See* Exchange Act § 11A, 15 U.S.C. § 78k-1 (2000).

172. *See* Exchange Act § 6(a)(3), 15 U.S.C. § 78f(a)(3) (2000); Exchange Act § 15A(b)(4), 15 U.S.C. § 78*o*-3 (2000).

173. For example, provisions on certifications, loans to executives, and bonuses are all now subject to Sarbanes-Oxley. *See generally* Jonathan Shirley, *International Law and the Ramifications of the Sarbanes-Oxley Act of 2002*, 27 B.C. INT'L & COMP. L. REV. 501, 524–25 (2004) (describing the broad impact of the Sarbanes-Oxley Act).

174. *See* Order Approving Proposed Rule Changes Relating to Corporate Governance, Exchange Act Release No. 47,516, 68 Fed. Reg. 14,451 (Mar. 25, 2003).

175. Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Corporate Governance, Exchange Act Release No. 47,672, 68 Fed. Reg. 19,051, 19,057 (Apr. 1, 2003) (noting that director orientation and continuing education must be described in corporate governance guidelines); Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to Enhanced Corporate Governance Requirements Applicable to Listed Companies, Exchange Act Release No. 48,706, 86 Fed. Reg. 62,109, 62,114 (Oct. 31, 2003) (noting that listed companies are urged to develop and implement continuing education programs for all directors).

In Europe, implementation of the EU's securities law directives—starting with the ISD in the early 1990s, and more recently the FSAP directives—have resulted in the creation of new and strengthened national securities regulators. Regulatory functions previously exercised by stock exchanges with respect to listed companies and trading members are now exercised by government commissions. This change in the balance between government and self-regulation was a by-product of the harmonization of the securities laws and the requirements for their enforcement. The ISD, the Insider Dealing Directive, the Public Offering Prospectus Directive and the Market Abuse Directive all require supervision and enforcement by government securities regulators.[176] Referring to the likelihood of a transatlantic combination of exchanges, and the differences between U.S. and foreign regulation, SEC Commissioner Annette L. Nazareth stated:

> If, in an international market, the jurisdiction in which a company lists becomes less important, the SEC may not be able to impact corporate governance or effect other reforms through listing standards. And, even if foreign jurisdictions have strong corporate governance requirements, fundamental differences exist between U.S. and foreign reporting and disclosure regimes.[177]

The same could probably be said for stock exchange regulation of its members and trading markets.

B. The Organization and Reorganization of the NYSE

Until 1972, the NYSE Constitution consisted of thirty-three members, composed of the chairman, the president, three representatives of the public and twenty eight members' representatives. Significant changes were made to the NYSE Constitution in 1972, after the NYSE incorporated and adopted a new governance structure. When the NYSE was incorporated in 1971, the SEC expressed some doubts as to whether this step would impair the effectiveness of the exchange as a self-regulator.[178] By the time the 1975 Act was passed Congress was not inclined to put rigorous corporate governance standards into the Exchange Act. In part, this was not necessary because the term "member" of an exchange was defined in such a way as to divorce it from the concept of a "seat"[179] and the SEC was given plenary control over specialists' activities.[180] In addition, the SEC was given the

176. *See* Council Directive 89/592, 1989 O.J. (L 334) 30 (EC); Council Directive 2003/71, 2003 O.J. (L 345) 64 (EU); Council Directive 2003/6, 2003 O.J. (L 096) 16 (EU).

177. Annette L. Nazareth, Speech by SEC Commissioner: Remarks Before the Securities Industry Association Market Structure Conference (May 24, 2006), *available at* http:www.sec.gov/news/speech/2006/spch052406aln.htm.

178. *See* Exchange Act Release No. 9112, 1971 SEC LEXIS 98 (Mar. 17, 1971).

179. *See* Exchange Act § 3(a)(3), (9), (19), 15 U.S.C. § 78c(a)(3), (9), (19) (Supp. IV 2004).

180. *See* Exchange Act § 11(b), 15 U.S.C. § 78k (2000). Previously exempt specialists, floor traders and floor brokers were required to register with the SEC.

power to abrogate, amend or add to the rules of any SRO.[181] Although self-regulation was preserved, and in some ways strengthened, a new emphasis on competition, investor protection and fair procedures changed the manner in which exchanges and associations could operate. Access to the market was opened up[182] and standards were put in place for the design of exchange and NASD rules and disciplinary proceedings.[183]

With specific reference to exchange boards of directors, the Exchange Act was amended in 1975 to provide that the rules of an exchange must "assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer."[184] A corresponding provision was inserted for associations.[185] The House bill had required that exchanges and associations include public representatives and further required that these SROs appropriate sums for use of public directors to employ staff independent of the exchange or association, but such provisions were dropped in the conference committee.[186]

The NYSE went beyond the requirements of the Exchange Act. Until its 2003–2004 reorganization, the NYSE had a constituency board composed of half public directors not associated with the securities industry, while the half that was so associated remained a constituency board.[187] There were requirements for industry directors from firms that had substantial direct contact with securities customers, for specialist members and non-specialist floor members and geographical specifications.[188] Most of the non-industry directors were associated with listed companies. Disciplinary matters were conducted by exchange committees. Appeals from disciplinary matters were heard by the committee for review, a board committee which acted for the NYSE board in deciding such appeals. The enforcement group was not organizationally separate from the rest of the NYSE staff. The SEC conducted regular oversight inspections of NYSE enforcement matters.

On September 17, 2003, Richard Grasso resigned as chairman and CEO of the NYSE in the midst of a storm of criticism over his compensation. Public focus on his outsized retirement pay package obscured some of the

181. *See* Exchange Act § 19(c), 15 U.S.C. §.78s(c) (2000).
182. *See* Exchange Act § 11A(b)(5)(A), 15 U.S.C. § 78k-1 (2000); Exchange Act § 19(f), 15 U.S.C. § 78s(f).
183. *See* Exchange Act § 6(b)(7), 15 U.S.C. § 78f(b)(7) (2000); Exchange Act § 15A(b)(8), 15 U.S.C. § 78*o*-3 (2000); Exchange Act § 19(b), (d), 15 U.S.C. § 78s(b), (d).
184. *See* Exchange Act § 6(a)(3).
185. *See* Exchange Act § 15A(b)(4).
186. *See* H.R. REP. No. 94-229 (1975).
187. *See* NYSE CONST., art. IV, § 2(a)–(b) (2003) (NYSE Guide (CCH) ¶ 1151 (2003)).
188. *Id.*

more fundamental issues the NYSE was then facing.[189] At the time, the NYSE was examining its own corporate governance policies, at the behest of the SEC and the Council of Institutional Investors.[190] The SIA had raised some serious questions about the future of self-regulation.[191] Important changes in the securities trading markets and SEC market structure regulation threatened the way in which the NYSE had functioned for a very long time.[192] Relevant to the NYSE's continuation as an SRO were a series of major securities scandals concerning questionable and illegal behavior by securities firms and stock exchange specialists.[193] The inquiry into trading ahead of customer orders and other problematic specialist activity raised questions not only about the NYSE's effectiveness as a regulator, but also about the long term viability of the exchange's floor trading system.[194]

Almost as soon as John Reed was named Interim Chairman and CEO of the NYSE, a proposal was put forth to reorganize the NYSE's board of directors and alter its enforcement arm. A reconstituted board of directors, of six to twelve members plus a chairman and CEO, was put into place.[195] All of the board members other than the CEO were required to be independent of management, members, and listed companies. This board was then given the responsibility for appointing a board of executives of

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189. *See* Kate Kelly & Susanne Craig, *Weakened NYSE Faces Host of Challenges,* WALL ST. J., Sept. 18, 2003, at C1.

190. *See* COUNCIL OF INSTITUTIONAL INVESTORS, PRIVATE ENTITY WITH A PUBLIC PURPOSE: GOVERNANCE OF THE NEW YORK STOCK EXCHANGE (July 2003), *available at* http://www.cii.org/library/publications/nyse_governance.htm.

191. *See* SEC. INDUS. & FIN. MKTS. ASS'N, REINVENTING SELF-REGULATION: WHITE PAPER FOR THE SECURITY INDUSTRY ASSOCIATION'S AD HOC COMMITTEE ON REGULATORY IMPLICATIONS OF DE-MUTUALIZATION (Oct. 14, 2003), *available at* http://www.sia.com/market_structure/html/siawhitepaperfinal.htm. *See also* Roberta S. Karmel, *Should There Be a Single SRO,* N.Y.L.J., Oct. 21, 1999.

192. Proposed changes to the national market structure regulations were made in February 2004, but had been brewing for some time. *See* Regulation NMS, Exchange Act Release No. 49,325, 69 Fed. Reg. 11,126 (Mar. 9, 2004) (releasing proposed rules for public comment).

193. *See* Laurie P. Cohen & Kate Kelly, *NYSE Turmoil Poses Question: Can Wall Street Regulate Itself?,* WALL ST. J., Dec. 31, 2003, at A1. In 2005, the United States Attorney's Office and the SEC charged fifteen specialists for violating federal securities laws through patterns of fraudulent and improper trading. *See* Press Release, U.S. Attorney's Office, S.D.N.Y., 15 Current and Former Registered Specialists on the New York Stock Exchange Indicted on Federal Securities Fraud Charges 1 (Apr. 12, 2005), *available at* http://www.usdoj.gov/usao/nys/press releases/April05/specialistindictmentpr.pdf; Press Release, SEC Institutes Enforcement Action Against 20 Former New York Stock Exchange Specialists Alleging Pervasive Course of Fraudulent Trading (Apr. 12, 2005), *available at* http://www.sec.gov/news/press/2005-54.htm. In addition, the SEC charged the NYSE with failing to police the accused specialists. *See* Press Release, SEC Charges the New York Stock Exchange With Failing to Police Specialists (Apr. 12, 2005), *available at* http://www.sec.gov/news/press/2005-53.htm.

194. *See* Aaron Lucchetti & Kara Scannell, *Fifteen Indicted in NYSE Case,* WALL ST. J., Apr. 13, 2005, at C1; *New Order At Big Board, Years of Turmoil Give Chief Opening for Change,* WALL ST. J., Apr. 22, 2005, at A1.

195. *See* Order Approving Proposed Rule Change Relating to the Amendment and Restatement of the Constitution of the Exchange to Reform the Governance and Management Architecture of the Exchange, Exchange Act Release No. 48,946, 68 Fed. Reg. 74,678, 74,679 (Dec. 24, 2003).

twenty-two members, responsive to the exchange's various constituencies and comprised of institutional investors, listed company CEOs, lessor members, upstairs firm CEOs, specialist firm CEOs, floor brokers and the NYSE Chair and CEO.[196] The board of executives meets with the board of directors at least six times a year to discuss exchange performance, membership issues, listed-company issues, and public issues relating to market structure and performance. This new structure took much of the "self" out of self-regulation. After this reorganization, John Reed remained Chairman; John Thain was appointed CEO by the new board.[197] Richard Ketchum was shortly thereafter named Chief Regulatory Officer, and his office was structured so that he would report directly to the Regulatory Oversight & Regulatory Budget Committee of the NYSE board of directors, rather than to the NYSE's CEO.[198]

These governance changes set the stage for far reaching changes in the NYSE's business model. In April 2005, the NYSE announced a plan to acquire Arca, a deal designed to transform the NYSE from a mutual organization to a public company.[199] Due in part to litigation against the NYSE, this transaction was not completed until March 7, 2006, but in the meantime, NYSE Group was organized on May 2, 2005 as a holding company. NYSE Group now operates NYSE and NYSE Arca as two securities exchanges, the former, for the time being, continuing as an agency auction floor based marketplace, and the latter operating as an all-electronic stock exchange.[200] The planned NYSE Hybrid Market is designed to emulate, in a primarily automatic-execution environment, a traditional auction market.[201]

Both NYSE and NYSE Arca are SROs. In connection with the merger of the NYSE and Arca, NYSE Regulation, Inc. (NYSE Regulation) was formed as a separate not-for-profit subsidiary of NYSE Group. It has a number of structural and governance features designed to ensure its independence, in addition to its separate non-for-profit form. Each director of NYSE Regulation, other than its CEO, must be independent and a majority of the members of NYSE Regulation's board and its compensation nominating committees must be persons who are not directors of NYSE Group. Its programs are funded primarily through fees assessed directly on

196. *See id.*

197. *See* Kate Kelly, Greg Ip & Ianthe Jeanne Dugan, *For NYSE New CEO Could Be Just the Start*, WALL ST. J., Dec. 19, 2003, at C1.

198. *See* Press Release, New York Stock Exch., NYSE Board Names Richard G. Ketchum as Chief Regulatory Officer and Takes Other Regulatory Action (Jan. 8, 2004). Ketchum began serving as Chief Regulatory Officer in March 2004. *See* Press Release, New York Stock Exch., Richard G. Ketchum to Assume Role as NYSE Chief Regulator Effective March 8 (Mar. 8, 2004).

199. *See Redrawing the battle lines*, ECONOMIST, Apr. 30, 2005, at 70.

200. *See* NYSE Form 10-K, *supra* note 71, at 4.

201. *See id.* at 16.

member organizations.[202] The regulatory activities of NYSE Regulation include: listed company compliance, member firm regulation, market surveillance, enforcement, and dispute resolution/arbitration.[203]

Under the merger plan of NYSE and Euronext, a holding company would be formed. Initially this parent was to have twenty directors—eleven from NYSE Group and nine from Euronext. This was later changed to a board of twenty-two directors, with half from NYSE Group and half from Euronext. The current CEO of NYSE—John Thain—would become CEO of this new company and the current CEO of Euronext—Jean-Francois Theodore—would become deputy CEO. The current Chairman of Euronext would become the Chairman of the Board and the current Chairman of NYSE Group would become Deputy Chairman. The two exchanges would be run as distinctly separate companies.[204] How NYSE Regulation would fit into this new corporate structure is unclear. Should it be completely separated from the NYSE as will be the case with the NASD and Nasdaq, or should it remain under the umbrellas of NYSE Group? Would there be any securities industry members or listed company executives on the board of directors?

C. THE SEC'S CONCEPT RELEASE ON SELF-REGULATION

The SEC has issued proposed governance rules for stock exchanges that would require that these SROs and any of their affiliates have boards with a majority of independent directors and that their nominating, governance, compensation, audit and regulatory oversight standing committees be composed of independent directors. These standing committees would be mandated, and the SEC sets forth in its proposal their minimum purposes and responsibilities.[205] An "independent director" is defined as a director who has no material relationship with an exchange or affiliate of an exchange, any member of the exchange or affiliate of a member, or any issuer listed or traded on the exchange.[206] Further, employment by an exchange or member within the past three years, or the receipt of $60,000 by the director or an immediate family member from the exchange or a member within the past year makes a director not independent. There is a similar definition of an "independent director" for the NASD.[207] This proposal is essentially based on the NYSE's reorganized board as described above.

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202. *See id.* at 41–42.

203. *See id.* at 39–40.

204. Press Release, New York Stock Exch., Announcement Related to NYSE Group-Euronext Combination (Nov. 21, 2006), *available at* http://www.nyse.com/press/1164064471943.html; Betz & McTague, *supra* note 60.

205. *See* Fair Administration and Governance of Self-Regulatory Organizations, Exchange Act Release No. 50,699, 69 Fed. Reg. 71,126, 71,134–40 (Dec. 8, 2004).

206. *Id.* at 71,214–15.

207. *Id.* at 71,219.

Section 6(b)(3) of the Exchange Act requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and the administration of its affairs. Further, an exchange must provide that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer.[208] Although the NYSE board of executives is a traditional constituency group, which has a fair representation of exchange members, it is an advisory board, not an operating board with ultimate decision making authority. The SEC's rule proposal regarding exchange governance would require that the nominating committee of the board administer a fair process that provides members with the opportunity to select at least 20% of the total number of directors.[209] The SEC asserts that the board could nevertheless be composed solely of independent directors, so long as 20% of those independent directors are selected by the exchange's members. This may not be consonant with the statute, and in addition, it transforms the NYSE into an organization without securities industry members and therefore raises an issue as to whether it continues to be an SRO.[210]

Both Nasdaq and the SIA strongly objected to the SEC's proposal that exchange boards not include issuer or member firm representatives. Nasdaq argued that such a regulation would "either marginalize members and issuers or result in an unwieldy and excessively bureaucratic decision-making process that is ill suited to a public company . . . ."[211] The SIA argued that any governance reforms should be consistent with the balance between SEC oversight of SROs and regulation guided by the direct involvement of industry participants in both SRO and market functions.[212]

In addition to mandating a board of independent directors, the SEC proposed that exchanges and associations must effectively separate their regulatory functions from their market operations and other commercial interests, use regulatory funds only to fund regulatory obligations and establish procedures to prevent the dissemination of regulatory information to third parties.[213] In the SEC's view, the conflicts between an exchange as a market operator and as a regulator, and as a membership organization and

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208. *See* 15 U.S.C. § 78f(b)(3) (2000). Section 15A(b)(4) of the Exchange Act contains an identical requirement applicable to the NASD. *See* 15 U.S.C. § 78*o*-3(b)(4) (2000).

209. *See* Fair Administration and Governance of Self-Regulatory Organizations, 69 Fed. Reg. at 71,137.

210. *See* Comment Letter from Edward S. Knight, Exec. Vice President and Gen. Counsel, Nasdaq, to Jonathan G. Katz, Sec'y, SEC 10–13, 21 (Mar. 8, 2005) (regarding the Proposed Rulemaking on SRO Governance (File No. S7-39-04), as well as the Concept Release concerning Self-Regulation (File No. S7-40-04)).

211. *Id.* at 12.

212. *See* Comment Letter from Marc E. Lackritz, President, SIA, to Jonathan G. Katz, Sec'y, SEC, 4 (Mar. 9, 2005) (regarding the SRO Governance and Transparency Proposal (File No. S7-39-04), as well as the SRO Concept Release (File No. S7-40-04)).

213. *See* Fair Administration and Governance of Self-Regulatory Organizations, 69 Fed. Reg. at 71,141.

as a regulator, are exacerbated if an exchange becomes demutualized and also has shareholders to whom it is responsible, and so separation of the regulatory component of an exchange or association's functions is therefore necessary.[214] The separation of the regulatory function of an SRO could be achieved by spinning off the regulatory organization into a separate entity, as is now the case at the NASD, though a functional separation within a single entity, or through a subsidiary of a holding company, as now the case at the NYSE. In either case, the SRO must appoint a chief regulatory officer who would report directly to the proposed independent regulatory oversight committee.[215]

Another important part of the SEC's proposal is a limitation on the amount of stock in an exchange or association that could be owned or voted by any one broker-dealer.[216] The SEC also has proposed special rules for exchanges or associations that go public and list on their own boards.[217] Finally, the SEC has proposed a complete overhaul of the public disclosures made by exchanges and associations, as well as the disclosures made by them to the SEC on a confidential basis. Some of the disclosures that could be of interest include what proportion of an exchange or association's total budget is devoted to regulatory expenses, as well as the dollar amounts of regulatory revenues and expenses. Other relevant financial information required to be disclosed on an annual basis would include revenues from regulation, transaction fees, market information fees, fines and penalties, listing fees and other fees paid by issuers, and investments.[218] There has long been speculation about how different sources of exchange revenue contribute to an exchange's operations and regulatory activities. Once such information is made public, some of the exchange's constituents might well demand changes in how the exchange is run, especially if exchanges become public companies.

The SEC's current preoccupation with the conflicts between an exchange's regulatory functions and its members, market operations, listed issuers, and shareholders prompted the issuance of a concept release on the future of SROs, in addition to the SEC's rule proposals described above.[219] Although the concept release details these conflicts, it is worth noting that all of these conflicts have existed for many years, except for the conflict between an exchange's regulatory functions and shareholders. Further, it can be argued that the conflicts between exchange regulatory functions and

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214. *See id.*

215. *See id.* at 71,142.

216. The proposal is twenty percent, with a request for comment as to whether this should be lower. *See id.* at 71,143–46.

217. *See id.* at 71,227–28 (to be codified at 17 C.F.R. § 242.800).

218. *See id.* at 71,241–54 (to be codified at 17 C.F.R. § 249.2).

219. Concept Release Concerning Self-Regulation, Exchange Act Release No. 50,700, 69 Fed. Reg. 71,256 (proposed Dec. 8, 2004).

shareholders is a less acute conflict than between exchange regulatory functions and members. What has changed is the context of self-regulation.

In a global market where exchanges are public companies, it is difficult for them to continue to operate as SROs to the extent they have done so in the past. Further, the scandals of the past several years have raised serious questions about the ability of exchanges to regulate their members, their markets, or their listed companies. The SIA has been lobbying for a single regulator for broker-dealers in order to decrease the duplication and costs of regulation by several SROs.[220] The latest iteration of this idea is for a hybrid SRO structure, where market regulation would remain with exchanges, but there would be one SRO to deal with broker-dealer issues currently handled by the NYSE and NASD.[221] The NYSE now has a board with no securities industry members. While regulation has been delegated to NYSE Regulation, this non-profit subsidiary also does not have industry board members. Further, in Europe, its counterparts are government regulators. While good arguments can still be made for self-regulation as opposed to a system of direct government regulation, and SROs are deeply embedded in the U.S. system of securities regulation, if exchanges become global, regulators will also have to operate on a global level. Whether it is more efficient and effective for such regulators to be SROs rather than government agencies remains to be seen.

VI. CONCLUSION

Both individual and institutional investors are purchasing securities abroad in record numbers.[222] Although the securities markets have become global, the SEC's policies remain focused on the construct of protecting U.S. investors by regulating U.S. public corporations and markets. Almost twenty years ago, the author made some recommendations to facilitate foreign issuer trading and listing in the United States. One of these recommendations was that the SEC should amend Rule 12g3-2 under the Exchange Act to permit any world class foreign issuer whose securities are traded on a principal foreign market, including listed companies, to be exempt from section 12 of the Exchange Act.[223] Another recommendation was that the SEC should develop a new "wraparound form" for foreign issuers, recognizing international GAAP standards as "authoritative" within

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220. *See* Randall Smith, Aaron Lucchetti & Suzanne Craig, *Wall Street Pushes for Fewer Market Masters,* WALL ST. J., June 20, 2006, at C1.

221. Press Release, Sec. Indus. & Fin. Mkts. Ass'n, NYSE/NASD Regulatory Merger Endorsed by SIFMA (Nov. 28, 2006), *available at* http://www.sia.com/SIFMA_Press/2006_press_releases/35254696.html; Rachel McTague, *SIA Hammerman Says Association Seeks Internet Disclosure, Hybrid SRO,* 38 Sec. Reg. & L. Rep. (BNA) No. 26, at 1114 (June 26, 2006).

222. Ian McDonald, *Forget Xenophobia: Go Abroad for Gains*, WALL ST. J., Mar. 6, 2006, at R1.

223. *See* Roberta S. Karmel & Mary S. Head, *Barriers to Foreign Issuer Entry Into U.S. Markets,* 24 LAW & POL'Y INT'L BUS. 1207, 1226 (1993).

the meaning of Rule 4-01 of Regulation S-X. The wraparound form would be designed for use as a Securities Act registration statement for multi-jurisdictional offerings by world class foreign issuers and as an Exchange Act registration statement for foreign issuers other than world class issuers.[224] Other commentators similarly suggested that the SEC should engage in some form of mutual recognition in order to permit foreign issuers to trade on the NYSE or other U.S. markets.[225] Instead of following this type of policy, the SEC attempted to squeeze foreign issuers into the mold of U.S. issuers for purposes of Securities Act offering documents and annual and periodic reporting statements.

This policy was reasonably successful to the extent U.S. capital markets were far deeper and more liquid than foreign markets, and foreign issuers needed to come to New York regardless of the cost of complying with U.S. regulations. But markets in Europe and elsewhere are now viable alternatives to the U.S. markets. Furthermore, U.S. investors are more interested in buying foreign securities than they were in the past.

Frequently the SEC is more interested in protecting its jurisdiction and procedures for regulated entities and transactions than in adopting alternative regulations for companies that cannot or will not comply with the SEC's rules, even if this results in an enormous unregulated market. This occurred with the development of the private placement markets as an alternative to the market for registered offerings. It has also occurred with the exodus of U.S. investment banks abroad doing business through foreign subsidiaries that they are not able to do in a differently regulated environment. The NYSE has determined to go to Europe to capture business that it has not been able to capture in New York, primarily because of regulatory impediments. Whether this business gambit will work out depends in part on the willingness of the SEC and European regulators to permit it to be successful.

In order for truly global stock exchanges to develop, however, it will be necessary to dismantle national regulatory barriers—in the United States, Europe and elsewhere—to securities listings and replace them with international standards. Furthermore, the regulation of markets will also have to be reviewed in order to achieve international convergence of standards.

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224. *See id.* at 1231–32.

225. *See* Edward F. Greene, Daniel A. Braverman & Sebastian R. Sperber, *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413 (1995).