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# REFORM OF PUBLIC COMPANY DISCLOSURE IN EUROPE

BY ROBERTA S. KARMEL\*

## 1. INTRODUCTION

The European Union ("EU") is embarked on a number of projects to reform public company disclosure and to streamline securities offerings. The United States ("U.S.") has similarly been engaged in the reform of public company disclosure. The pace and quantity of rule making in both jurisdictions has been hectic and could be analyzed as an exercise in competitive regulation in a global capital marketplace.<sup>1</sup> Competition between U.S. and EU regulators, however, does not adequately explain the dynamics of disclosure reform programs in the U.S. and the EU. Rather, regulatory reform on both sides of the Atlantic is being driven by local and political imperatives. Although regulators are aware of global needs and market pressures, their decisionmaking is based more on domestic than on international considerations.

In the U.S., much of the reform of the past few years has been a reaction to market place scandals and concerns about the stability

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<sup>1</sup> Arguments favoring competition in international securities regulation have been made by some academic scholars. See, e.g., Steven J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 904-951 (1998) (recommending a competitive regulatory system allowing issuers and investors to choose which country's securities laws will govern their transactions); Roberta Romano, *Empowering Investor: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2418-27 (1998) (discussing the desirability of global regulatory competition and the advantage of allowing issuers to choose which jurisdiction's securities laws will govern). Empirical research questions the validity of the theory. See Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999-Part I*, 56 BUS. LAW. 653, 653-696 (2001) (finding that issuer choice of law in the European Union ("EU") has not resulted in regulatory competition).

of retirement savings, leading to the passage of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")<sup>2</sup> and subsequent rulemaking by the Securities and Exchange Commission ("SEC").<sup>3</sup> More recently, the Division of Corporation Finance of the SEC is returning to the job of streamlining the offering process because of changing technology.<sup>4</sup>

In Europe, the driving force for reform was the desire to harmonize disclosure policy and to create a European-wide capital-raising mechanism before the enlargement of the EU made such a task even more difficult.<sup>5</sup> This push for reform led to the development of the Financial Services Action Plan ("FSAP") in 1999 and its implementation in accordance with the Lamfalussy Process.<sup>6</sup> In addition, in 2003 the EU Commission issued a Company Law Action Plan ("CLAP") for modernizing company law and enhancing corporate governance in the EU.<sup>7</sup>

Disclosure reform in Europe has been patterned to a significant extent on the legislative framework of U.S. securities laws. Although some widely acknowledged defects of the U.S. legislative scheme have been replicated, since the EU has not established an administrative agency like the SEC to rationalize, implement, and enforce framework legislation, problems may well emerge in the administration of the FSAP directives.<sup>8</sup> Furthermore, the substan-

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<sup>2</sup> Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

<sup>3</sup> See JOHN T. BOSTELMAN, *THE SARBANES-OXLEY DESKBOOK* chs. 1, 2, app. A (2003).

<sup>4</sup> See Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 50,624, Investment Company Act Release No. 26,649, 70 Fed. Reg. 44,722 (proposed Nov. 17, 2004) (proposing rules that would modernize the registration, communications, and offering processes under the Securities Act and provide more timely investment information to investors in response to advances in technology).

<sup>5</sup> See generally Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 INT'L L. REV. 15, 15-54 (2003-04) (discussing the accession of ten new Member States to the EU and the economic difficulties they will face in the transition).

<sup>6</sup> See *infra* Sections 2.1-2.2.

<sup>7</sup> *Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, at 36, COM (2003) 284 final (May 31, 2003) [hereinafter *Modernising Company Law*].

<sup>8</sup> The Author has previously argued in favor of an EU-wide securities commission. Roberta S. Karmel, *The Case For a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9, 11-43 (1999).

tive provisions of the new EU directives have not been harmonized with U.S. law in many important respects. Nevertheless, the Lamfalussy Process has streamlined the production of framework directives, and the result should be improved financial disclosure in the EU capital markets. In addition, the substantive disclosure requirements in the EU are closer to the SEC's substantive requirements than were previously the case.

Yet, even if the disclosure requirements for public companies in the EU and U.S. were to converge, markedly different enforcement mechanisms for such legal requirements would likely lead to different disclosure documents. In addition to the lack of an EU-wide securities agency, civil enforcement of disclosure requirements by private parties is a matter of national law in the EU. The EU directives which will be discussed in this Article do not contain liability laws as do U.S. securities laws.

Section 2 of this Article will briefly explain the FSAP, the Lamfalussy Process, and the CLAP. Section 3 will describe the Prospectus Directive, the Transparency Directive, and those portions of the Market Abuse Directive and the CLAP that relate to public company disclosure. The Author will analyze how these new directives differ from their predecessor directives, and the ways in which U.S. and EU substantive law, with respect to offerings and annual and periodic reporting, both converge and diverge. Section 4 will question whether a unified capital market in Europe can be fully developed without the creation of an EU-wide securities commission or harmonized liability mechanisms, and will further question whether U.S.-EU convergence of disclosure policy is possible in the absence of an EU-wide securities commission.

## 2. THE FSAP, THE LAMFALUSSY PROCESS, AND THE CLAP

### 2.1. *The FSAP*

The FSAP 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. By the end of 2004, forty of the forty-two measures had been adopted at the EU Commission level.<sup>9</sup> These measures

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<sup>9</sup> See Charlie McCreevy, Eur. Comm'r for Internal Mkt. Servs., Speech at the

include a harmonized financial disclosure regime for listed issuers based on common international accounting standards,<sup>10</sup> the Prospectus Directive,<sup>11</sup> and the Transparency Directive.<sup>12</sup> In addition, a proposal for a directive on statutory audits would clarify the duties of statutory auditors, and standards for their independence and ethics, by providing for public oversight of the audit profession and improving cooperation within the EU between such bodies.<sup>13</sup>

The goal of the FSAP is to create integrated, efficient, deep, and liquid financial markets in the EU<sup>14</sup> in order to deliver a broad range of safe and competitive products to consumers and 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.<sup>15</sup>

Although one objective of the FSAP is to make the EU markets

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Press Conference on the Internal Market Strategy Implementation - Scoreboard (Jan. 27, 2005), (discussing the success of the EU in implementing internal market strategies) available at <http://www.euireland.ie/news/market/0105/internalmarketstrategyimplementationspeech.htm> (last visited Oct. 23, 2005) (discussing the success of the EU in implementing internal market strategies).

<sup>10</sup> Regulation No. 1606/2002 of the European Parliament and of the Council on the Application of International Accounting Standards, 2002 O.J. (L 243) 1.

<sup>11</sup> Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34, 2003/71, 2003 O.J. (L354) 64 (EC) [hereinafter Prospectus Directive].

<sup>12</sup> Directive 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, 2004/109, 2004 O.J. (L 390) 38 (EC) [hereinafter Transparency Directive].

<sup>13</sup> Commission Proposal for a Directive of the European Parliament and of the Council on the Statutory Audit of Annual Accounts and Consolidated Accounts and Amending Council Directives 78/660/EEC and 83/349/EEC, at 2, COM (2004) 177 final (Mar. 16, 2004).

<sup>14</sup> See SEC. EXPERT GROUP, FINANCIAL SERVICES ACTION PLAN: PROGRESS AND PROSPECTS, FINAL REPORT 5, 6 (2004), available at [http://www.europeansecurities.com/pubs/FSAP\\_stocktaking\\_Report.pdf](http://www.europeansecurities.com/pubs/FSAP_stocktaking_Report.pdf) (last visited Oct. 23 2005).

<sup>15</sup> *Id.*

more competitive with the U.S. markets, the overriding goal is to unify the markets within Europe. EU policymakers envision a single capital market where companies can efficiently raise new capital and where retail, as well as institutional investors will be protected. The development of such a market is important because the aging of the population in Europe has created a need for private retirement savings schemes and the sclerosis of parts of European industry makes the raising of new cases a priority for policy makers.

Despite the introduction of the euro and the establishment of a European Central Bank, the creation of a single European capital market has been difficult because of rivalries between European stock exchanges, incompatible corporate finance systems in some of the key European economies, and language barriers. Nevertheless, the switch by exchanges from floor to electronic trading, which greatly facilitates cross border transactions, the ongoing consolidation of exchanges, and the globalization of the capital markets, has made the dream of a European capital market with harmonized securities regulation more realistic. The open question is whether the FSAP and its implementation according to the Lamfalussy Process will achieve these goals.

## *2.2. The Lamfalussy Process*

The usual legislative processes of the EU are complex. Most laws take the form of directives which are not self-executing and originate with the Commission. They are then vetted by the Parliament and finally adopted by the EU Council. To facilitate the implementation of the FSAP in Member States, the European Council of Economics and Finance Ministers established a Committee of Wise Men, chaired by Baron Alexandre Lamfalussy. The Lamfalussy Committee recommended that new securities regulation be adopted in Member States in four stages or levels, and the Lamfalussy Process is being followed. The purpose of the Lamfalussy Process is to streamline decisionmaking techniques, especially at the regulatory level.

Level one consists of directives or regulations<sup>16</sup> issued by the EU Parliament and Council, acting on proposals from the Commis-

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<sup>16</sup> Regulations are directly applicable as law in all Member States. Directives are binding, but leave each of the Member States to determine the method for incorporating them into national law. PAUL B. STEPHAN ET AL., *THE LAW AND ECONOMICS OF THE EUROPEAN UNION* 253 (2003).

sion. This legislative work usually takes the form of directives, although it may also take the form of regulations. The Lamfalussy Report recommended that FSAP directives be drafted at a level of generality, concentrating on key issues of principle and outlining areas where more detailed rules are required. These should be "framework directives" and not detailed prescriptive rules. Regulatory implementation of these directives has been delegated to two committees: a regulatory committee composed of representatives of EU national ministers of finance and an advisory committee composed of national financial supervisors. This regime of delegated rulemaking is called "comitology" and is operative in banking, securities and insurance, and some other fields.<sup>17</sup> In the securities field, the committee of national ministers of finance is the European Securities Committee, and the committee of national financial supervisors is the Committee of European Securities Regulators ("CESR").

The passage of rules at level two involves consultation with various groups and committees. Specifically, the Lamfalussy Committee proposed that before the European Securities Committee adopts any regulations it must consult with CESR, "which in turn must consult with investors, issuers, and market professionals."<sup>18</sup> This process is similar to the notice and comment process utilized by the U.S. SEC pursuant to the Administrative Procedure Act.<sup>19</sup> CESR then submits technical advice in the form of draft rules to the Commission for consideration and transmission to the European Securities Committee for approval.<sup>20</sup> Once the European Securities Committee approves a rule, it enters it into force without any further decision of Council or Parliament.<sup>21</sup> The legal basis for

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<sup>17</sup> See Council Decision 1999/468, 1999 O.J. (L 184) 23, 23 (EC) (conferring upon the European Commission the power to implement the rules they promulgate). The EU members have delegated certain powers to the Commission, and every legal act, directive, or regulation of the Commission must indicate the extent of the implementing powers conferred. When a committee assists the Commission in the exercise of any such implementing powers, the Comitology Decision provides criteria for the choice of committee procedures. See John F. Mogg, *Regulating Financial Services in Europe: A New Approach*, 26 FORDHAM INT'L L.J. 58, 63-64 (2002) (discussing the process of comitology in general).

<sup>18</sup> Manning Gilbert Warren III, *The Harmonization of European Securities Law*, 37 INT'L LAW. 211, 219 (2003).

<sup>19</sup> 5 U.S.C. § 553 (2000).

<sup>20</sup> Warren, *supra* note 18, at 219.

<sup>21</sup> Eddy Wymeersch, *Developments in European Financial Regulation 1* (Fin. Law

the regulation, however, must be found in a directive approved by the Council and Parliament.<sup>22</sup> This is similar to the requirement that the SEC act according to delegated authority in the statutes under which it operates.<sup>23</sup>

At level three, the securities regulators within the member states work with the relevant EU institutions and within CESR to produce greater coordination of regulations and the development of common standards and approaches. This process involves exchanges of information and experiences among CESR members, and agreements on conduct rules that supervisors will use in establishing national regulations or supervisory action.<sup>24</sup>

Level four involves continual monitoring and enforcement by the Commission to ensure that the EU laws passed at levels one and two are implemented.<sup>25</sup> If a member state has not complied with its obligations under the directives, the Commission can sue the member in the European Court of Justice.<sup>26</sup> An interesting question is whether private actions can be brought for failure to implement level one or two standards.<sup>27</sup>

Although this scenario sounds even more cumbersome than the normal convoluted EU legislative processes, the Lamfalussy Process was meant to be a fast track process and it worked surprisingly well in terms of generating framework directives to implement the FSAP. Nevertheless, the European Securities Committee is far from an EU-wide regulator or SEC. It has no administrative or enforcement powers, and the directives that have been passed to implement the FSAP still need to be adopted in the national laws

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Inst., Working Paper Series, No. WP 2004-10, 2004) available at <http://www.law.ugent.be/fli/WP/WP2004-pdf/WP2004-10.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> See *Nat'l Rural Elec. Coop. Ass'n v. SEC*, 276 F.3d 609, 614 (D.C. Cir. 2002) (holding that as long as an agency's findings are supported by substantial evidence and are in accordance with the law, the court will accept them); *Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 743 (D.C. Cir. 1986) (holding that the SEC was not delegated the authority to regulate banks as broker-dealers by the Securities Exchange Act of 1934).

<sup>24</sup> Wymeersch, *supra* note 21, at 2.

<sup>25</sup> Warren, *supra* note 18, at 219.

<sup>26</sup> Treaty Establishing the European Community, art. 226, Dec. 24, 2002, 2002 O.J. (C 325) 33.

<sup>27</sup> In some limited cases a state can be liable in damages for failure to implement a directive. See *Joined Cases C-6/90 & C-9/90, Frankovich v. Italy*, 1991 E.C.R. I-5357, I-5359, [1993] 2 C.M.L.R. 66, 68 (stating the three conditions necessary for a member state to be held liable when it does not follow a directive).



of the twenty-five EU member states. Although the members of CESR have the power to adopt national regulations, at the EU level CESR is only an advisory committee. Further, the powers given to national securities regulators are not the same in all member states. This legal framework has led to regulatory fatigue and overload in the EU.<sup>28</sup>

### 2.3. The CLAP

The CLAP is a program set forth in a Communication by the EU Commission to the Council and Parliament ("the Communication"), in the area of company law and corporate governance.<sup>29</sup> The CLAP is separate from but related to the FSAP. Its purpose is to foster global efficiency and competitiveness of businesses in the EU by strengthening shareholders' rights and third party (creditors, for example) protection. On the one hand, the Communication asserts that the CLAP will "contribute to rebuilding European investor confidence in the wake of a wave of recent corporate governance scandals,"<sup>30</sup> but on the other hand, after paying homage to international corporate governance standards, it criticizes Sarbanes-Oxley for its "outreach effects on European companies and auditors."<sup>31</sup> The CLAP is intended to create robust, equivalent international rules.

Much of the CLAP is directed at modernizing company law, and this will undoubtedly be a slow process, particularly since the CLAP is not subject to the Lamfalussy Process. Some of the Commission's Communication is directed at corporate disclosure reform. In particular, the Communication stated that listed companies should be required to disclose in their annual reports "a coherent and descriptive statement covering the key elements of their corporate governance structure and practices," including the operation of the annual meeting; the composition and operation of the board and board committees; the control and voting rights of major shareholders; other relationships between controlling share-

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<sup>28</sup> See Ruben Lee, *Politics and the Creation of a European SEC: The Optimal UK Strategy—Constructive Inconsistency* 23 (Sept. 2005), available at <http://ideas.repec.org/p/fmg/fmgsp/sp161.html> (noting universal agreement among EU securities markets of the burden caused by the overwhelming number of regulatory initiatives).

<sup>29</sup> *Modernising Company Law*, *supra*, note 7, at 3-5.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* at 5.

holders and the company; and material transactions with third parties.<sup>32</sup> In addition, the Communication expresses the view that "shareholders of listed companies should be provided with electronic facilities to access the relevant information in advance of General Meetings."<sup>33</sup> It also advocates confirmation of the collective responsibility of board members for key non-financial statements,<sup>34</sup> and disclosure of director remuneration policy and the remuneration of individual directors.<sup>35</sup>

Company law reform, particularly reform that touches on the power relationships between management, directors and shareholders has been slow to come into effect in the EU, in part because of serious differences between the U.K. and Germany and other Continental countries with regard to the relative rights of shareholders and other corporate constituencies, particularly labor. These differences came to the fore in the battles over the Thirteenth Takeover Directive.<sup>36</sup> It is ironic that the defeat of this directive and its ultimate passage in a greatly watered down version led to the Report of a High Level Group of Company Law Experts,<sup>37</sup> which in turn led to the Communication on Modernizing Company Law. Even if the substantive recommendations in this Communication are not adopted for a long time, it is possible that the disclosure recommendations will become effective through actions by securities regulators, engaged in implementation of the Prospectus, Transparency and Market Abuse Directives.

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<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.*

<sup>36</sup> See Ernesto Hernandez-Lopez, *Bag Wars and Bank Wars, The Gucci and Banque National de Paris Hostile Bids: European Corporate Culture Responds to Active Shareholders*, 9 FORDHAM J. CORP. & FIN. L. 127, 175-81 (2003) (explaining the reasons behind the failure of the Thirteenth Takeover Directive to gain approval); see also *Commission Proposal for a Directive of the European Parliament and Council on Takeover Bids*, at 1-2, COM (2002) 534 final (Oct. 2, 2002) (describing the opposition that grew to the Thirteenth Directive from some Member States), Council Directive 2004/25, 2004 O.J. (L 142) 12 (EC) (making new directive).

<sup>37</sup> THE HIGH LEVEL GROUP OF CO. LAW EXPERTS OF THE EUROPEAN COMM'N, REPORT ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (Nov. 4, 2002), available at [http://europa.eu.int/comm/internal\\_market/en/company/company/modern/consult/report\\_en.pdf](http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf) [hereinafter HIGH LEVEL GROUP REPORT].

### 3. THE PROSPECTUS, TRANSPARENCY, AND MARKET ABUSE DIRECTIVES

#### 3.1. *The Prospectus Directive*

The Prospectus Directive is intended to play a key role in creating a single market for financial services in the EU. It seeks to impose a comprehensive disclosure regime on all EU jurisdictions of uniform application. Member states may not impose additional requirements. This has therefore been called a "maximum harmonization" initiative.<sup>38</sup> The aim of the directive is to ensure investor protection and market efficiency, in accordance with high international regulatory standards. The Prospectus Directive overhauls two prior prospectus directives which were largely unsuccessful in facilitating the raising of capital across borders in the EU because of an absence of harmonized procedures and inconsistent interpretations and implementations in Member States. Although the structure of the directive is similar to the structure of the Securities Act of 1933 ("Securities Act")<sup>39</sup> the United States and EU legal regimes have not been harmonized.

The Prospectus Directive relies on the "single passport for issuers" concept, whereby a prospectus approved by one competent authority will be required to be accepted throughout the EU, without additional approval or administrative arrangements by other Member States. Although the prior prospectus directives also embodied the single passport concept, language translation and other requirements could be imposed by host country regulators. Therefore, prior directives failed to bring into effect a single document for use in offerings throughout the EU. The difference is that the new Prospectus Directive formulates a "maximum harmonization," rather than a "minimum harmonization" regime.

The Prospectus Directive identifies two circumstances where a prospectus is required to be published: first, before an offer of securities is made to the public and second, before securities are admitted to trading on a regulated market. Prior to this Prospectus Directive, there were different definitions across the EU as to what constituted a "public offer." There is now a pan-European defini-

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<sup>38</sup> See EILIS FERRAN, BUILDING AN EU SECURITIES MARKET 138-208 (2004) (describing a new world securities disclosure regime in a framework of maximum harmonization).

<sup>39</sup> 15 U.S.C. §§ 77a-77aa (2000).

tion which is "a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities."<sup>40</sup> Resales are regarded as separate offers.

The Prospectus Directive does not apply to certain securities, for example, non-equity securities issued or guaranteed by a Member State or a Member State's regional or local authority, offerings by central banks, or certain offerings by credit institutions.<sup>41</sup> Nevertheless, it will apply to Eurobonds and convertible bonds. Offerings to "qualified investors," or to fewer than one hundred natural or legal persons per Member State who are not qualified investors, are exempt from prospectus obligations, as are offerings where the minimum subscription commitment is 50,000 euros. The concept of a "qualified investor" under the Prospectus Directive is similar to the concept of an "accredited investor" under U.S. law, but the definition of an accredited investor under SEC regulations is broader.<sup>42</sup>

For individuals to be characterized as "qualified investors," under the Prospectus Directive they must meet two of the following three criteria: 1) the investor has carried out transactions of a significant size on securities markets at an average frequency of at least ten per quarter over the previous four quarters; 2) the size of the investor's securities portfolio exceeds 0.5 million euros; or 3) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment. The definition of an accredited investor in the United States includes natural persons with a net worth of \$1 million, natural persons with income of over \$200,000 in each of the two most recent years, trusts with assets of at least \$5 million, and any officer, director or general partner of the issuer of the securities being offered. Also, in the United States this exemption does not permit the issuer to engage in any form of advertising or public solicitation. There is no such restriction in the EU. Another

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<sup>40</sup> Prospectus Directive, *supra* note 11, art. 2(1)(d), at 69. The definition of the term "offer" in the Securities Act is broader. See 15 U.S.C. § 77(b)(a)(3) ("The term 'offer for sale,' or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.").

<sup>41</sup> Prospectus Directive, *supra* note 11, art. 2, at 69. There are similar provisions exempting certain securities from SEC registration in the Securities Act. E.g. 15 U.S.C. § 77c(a)(2), (a)(5) & (a)(12).

<sup>42</sup> 17 C.F.R. § 230.501(a) (2005).

major difference between the SEC exemption and the Prospectus Directive exemption is that the United States has a 35 non-accredited purchaser limit, while the EU allows for up to 100 "non-qualified" investors per Member State. Currently there are 25 Member States in the EU; therefore, the Prospectus Directive's exemption can result in more than 2,500 "non-qualified investors" compared to only 35 unaccredited investors allowed in the United States.

In addition to the qualified investor exemption, the Prospectus Directive has a small offer exemption, defined as offers where the total consideration is less than 2,500,000 euros within a twelve month period, or for the publication of a prospectus within a single state, offers of securities with a total consideration of less than 100,000 euros within a twelve month period.<sup>43</sup> In the United States, by comparison, the small offering exemption under the securities laws caps the dollar amount of exempt offerings at \$5 million dollars.<sup>44</sup> There are two small offer exemptions under SEC regulations: small offerings up to \$1 million dollars that are registered within a state and offerings of \$5 million of restricted securities to no more than thirty-five unaccredited investors.<sup>45</sup>

The Prospectus Directive does not specify the detailed form and content of prospectuses, but an EU Implementing Regulation prescribes content and format schedules for equity, debt and other types of securities.<sup>46</sup> This is a Level two regulation developed pursuant to the Lamfalussy Process, and it is what gives teeth to the maximum harmonization concept because EU regulations, unlike directives, are self-executing. The EU disclosure standards thus put in place are intended to be in accordance with the International Disclosure Standards approved in 1998 by the International Organization of Securities Commissions, and already adopted by the SEC in revisions to its foreign issuer disclosure requirements.<sup>47</sup>

The EU Regulation implementing the Prospectus Directive provides for incorporation by reference of information already dis-

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<sup>43</sup> Prospectus Directive, *supra* note 11, arts. 1(2)(h) & 3(2)(e), at 69-71.

<sup>44</sup> 15 U.S.C. § 77c(b) (2000 & Supp. II 2002).

<sup>45</sup> 17 C.F.R. §§ 230.504-505 (2005).

<sup>46</sup> Commission Regulation 809/2004, 2004 O.J. (L 149) 1 (EC).

<sup>47</sup> International Disclosure Standards, Securities Act Release No. 7745, 64 Fed. Reg. 53,900 (Oct. 5, 1999). This Form applies to foreign issuers in the SEC disclosure regime. The SEC believed that its requirements for U.S. issuers exceeded International Organization of Securities Commissions' ("IOSCO") international standards.

closed by an issuer in annual or interim financial reports and certain other documents.<sup>48</sup> The extent to which such incorporation by reference will be utilized is unclear since the Commission's regulation warns that the aim of incorporation by reference is to reduce costs, but also to ensure investor protection. These aims will occur in "accordance with high regulatory standards adopted in the relevant international fora" and should not interfere with interests the prospectus is meant to protect.<sup>49</sup> The disclosure requirements for prospectuses are located in annexes to the Commission's regulation. It is noteworthy that one of these requirements is trend information "expected to have a material effect on the company's financial condition and results of operations in future periods."<sup>50</sup>

Although the thrust of this requirement is similar to the SEC's requirements for management's discussion and analysis ("MD&A") of financial condition and results of operations, the SEC's regulation is considerably more fulsome.<sup>51</sup> Whether the securities regulators that review prospectuses in the twenty-five different EU jurisdictions will interpret and enforce this requirement similarly or whether the discussion of trends in EU prospectuses will use the same kind of language and format as the MD&A in U.S. prospectuses remains to be seen.

The inclusion of an MD&A in financial reports has become an international standard. International Organization of Securities Commissions ("IOSCO") has noted that corporate financial collapses in the first few years of the twenty-first century "highlighted the need for improved disclosure and transparency" and the MD&A "provides a context within which . . . the financial statements can be interpreted."<sup>52</sup> According to IOSCO, the MD&A provides information about the components of a company's earnings and cash flow.<sup>53</sup> Such disclosure of management's assessment of factors and trends which are anticipated to have a material effect on the company's future financial condition and operations enables

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<sup>48</sup> Prospectus Directive, *supra* note 11, art. 11(1), at 75.

<sup>49</sup> *Id.* pmb. 10, at 65.

<sup>50</sup> *Id.* at 84.

<sup>51</sup> See 17 C.F.R. § 229.303 (2005) (regulating management's discussion and analysis).

<sup>52</sup> TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, GENERAL PRINCIPLES REGARDING DISCLOSURE OF MANAGER'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS 2 (Feb. 2003), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD141.pdf>.

<sup>53</sup> *Id.* at 3.

investors to look at the company through the eyes of management.<sup>54</sup> Accordingly, the convergence between U.S. and EU in the MD&A portions of disclosure documents will influence disclosure throughout the global capital markets.

Under the Prospectus Directive, each issuer has a "home Member State" and the "competent authority" or chosen securities regulator in that country will process the issuer's disclosure documents. For all EU issuers, the home Member is the Member State where the issuer has its registered office.<sup>55</sup> Non-EU issuers can choose a home Member State.<sup>56</sup> Once the competent authority in the home Member State approves the prospectus, because the legal regime has become one of "maximum harmonization," a securities regulator in another EU Member State cannot impose additional disclosure requirements.<sup>57</sup>

Another significant change wrought by the Prospectus Directive is that stock exchanges were deprived of their prior role in many European countries in vetting prospectuses. This is because the Prospectus Directive requires that only one supervisory authority in each Member State be designated to review and approve prospectuses, and that the authority should be "independ[ent] from economic actors."<sup>58</sup> This is to guarantee the avoidance of conflicts of interest.<sup>59</sup> Since EU Member States now have government securities regulators who are members of CESR, these regulators presumably will process prospectuses. The Prospectus Directive therefore substitutes one competent administrative authority in each Member State for the approximately forty regulatory organizations (before the 2004 enlargement) previously coordinating the vetting of securities offering documents. Administrative authorities in each Member State are permitted, however, to delegate some powers to exchanges so long as ultimate responsibility remains with the administrative authority. This change reflects one of the fundamental policy underpinnings of the Prospectus Directive (separation of the supervisory body from the market it is supervising).

There is an important difference between the EU Prospectus

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<sup>54</sup> *Id.*

<sup>55</sup> Prospectus Directive, *supra* note 11, art. 2(m), at 70.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* art. 17, at 78.

<sup>58</sup> *Id.* pmbl. 37, at 67.

<sup>59</sup> *Id.*

Directive and the Securities Act. The Securities Act contains civil liability provisions permitting either the SEC or private parties to sue issuers and their officers, directors, and advisors for failures to register securities or for false or misleading disclosures in prospectuses.<sup>60</sup> The EU Prospectus Directive merely provides that Member States have to "ensure that responsibility for the information given in a prospectus attaches at least to the issuer, or its administrative, management or supervisory bodies, the offeror, and the person[s]" requesting listing of the issuer's securities.<sup>61</sup> Whether such responsibility is enforced by governmental prosecutors or private parties is left to the national law of the twenty-five EU countries.

### 3.2. *The Transparency Directive*

Many U.S. commentators on the federal securities laws have bemoaned the accidental passage of the Securities Act regulating securities distributions prior to the passage of the Securities Exchange Act of 1934 ("Exchange Act")<sup>62</sup> regulating annual and periodic disclosures by public companies.<sup>63</sup> A variety of reforms attempting to integrate the Securities Act and the Exchange Act have been advocated over the years, and the SEC has acted administratively to achieve as much integration of the two statutes as possible.<sup>64</sup> Such reform is ongoing, but a move to company registration has not been possible. The EU seems to have copied the same

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<sup>60</sup> Rescission is available to purchasers of securities sold in unregistered transactions in violation of the registration provisions pursuant to section 12(a)(1) of the Securities Act. 15 U.S.C. § 77l(a)(1) (2000). The issuer and specified persons participating in a registered offering are liable for damages under Section 11 of the Securities Act for materially false or misleading statements in a registration statement. 15 U.S.C. § 77k (2000). Additional liability for fraudulent statements is contained in section 17(a) of the Securities Act for suits brought by the SEC. 15 U.S.C. § 77q(a) (2000 & Supp. II 2002). Both the SEC and private plaintiffs can bring suits for damages under section 12(a)(2) of the Securities Act and section 10(b) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 77l(a)(2) & 78j(b) (2000 & Supp. II 2002). Exempt securities and securities sold in exempt transactions are also subject to certain anti-fraud provisions.

<sup>61</sup> Prospectus Directive, *supra* note 11, art. 6(1) at 73.

<sup>62</sup> 15 U.S.C. §§ 78a-78mm (2000 & Supp. II 2002).

<sup>63</sup> See Milton Cohen, "Truth in Securities" Revisited, 79 HARV. L. REV. 1340 (1966) ("In a coordinated disclosure law and its administration primary emphasis should shift from the 1933 Act's sporadic, ad hoc disclosures to the 1934 Act's continuous disclosure system").

<sup>64</sup> Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 50,624, Investment Company Act Release No. 26,649, 70 Fed. Reg. 44,722 (proposed Nov. 17, 2004).



structural problem that is embedded in U.S. law and has made the Prospectus Directive relatively stronger and more detailed than the Transparency Directive. Some integration of offering and annual reporting is contemplated in the Prospectus and Transparency Directives. However, company registration and a comprehensive unified regime for financial reporting by public companies across Europe has not come into existence.

The Transparency Directive establishes requirements regarding the disclosure of annual, periodic, and ongoing information by issuers whose securities (equity or debt) are admitted to trading on a regulated market. Therefore, it is more limited in its scope than the Prospectus Directive, even though various "new markets" in Europe, as well as traditional stock exchanges, are considered regulated markets. In other ways, the Transparency Directive captures more issuers than the Prospectus Directive because it applies to non-EU issuers who have securities listed on an EU market. The Transparency Directive establishes uniform financial reporting standards and publication requirements among the Member States, requiring EU issuers to publish financial reports within four months after the end of the financial year. The reports must remain publicly available for at least five years.<sup>65</sup>

The Transparency Directive also prescribes the contents of the annual financial report to include audited financial statements, a management report, and a statement by responsible persons within the issuer certifying the accuracy of the financial statements and management report.<sup>66</sup> A significant change made by the Transparency Directive is the adoption of International Financial Reporting Standards ("IFRS") (formerly International Accounting Standards) as the applicable disclosure standard for all issuers across the EU. Consolidated financial reports, annual and half-yearly, must be drawn up in accordance with the EU's regulation compelling the adoption of IFRS.<sup>67</sup>

A troubling issue for U.S. and other non-EU issuers is whether they will be compelled to report financial information according to IFRS or they will be allowed to continue to use U.S. generally accepted accounting principles ("GAAP"). This will depend on

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<sup>65</sup> Transparency Directive *supra* note 12, art. 4(1), at 44.

<sup>66</sup> *Id.*

<sup>67</sup> Council Regulation on the Application of International Accounting Standards, 1606/2002, 2002 O.J. (L 243) 1-2 (EC).

whether the EU will deem U.S. GAAP "equivalent" to IFRS.<sup>68</sup> CESR has published a draft concept paper with regard to this matter,<sup>69</sup> but the politics of this decision make predictions difficult. Nevertheless, an agreement between the Chairman of the U.S. SEC and the Internal Market Commissioner for the EU concerning a roadmap to end the need for EU issuers to continue to reconcile to U.S. GAAP<sup>70</sup> should encourage the EU to find that U.S. GAAP and IFRS are "equivalent." Although IFRS and U.S. GAAP are converging, there are still significant differences between these two systems.<sup>71</sup> Even more importantly, there is no international body to oversee auditing. The establishment of the Public Company Accounting Oversight Board ("PCAOB") in the U.S. pursuant to Sarbanes-Oxley, makes convergence of auditing standards between the U.S. 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 [PSAOB]."<sup>72</sup>

The Transparency Directive as proposed would have required quarterly reporting, but as adopted it only requires half-yearly reporting. On the other hand, disclosures may have to be made more frequently because the Directive is based on a theory of continuous rather than periodic reporting and has provisions requiring interim management statements about material events, and so

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<sup>68</sup> Transparency Directive, *supra* note 12, art. 23(4) at 53.

<sup>69</sup> COMM. OF EUROPEAN SEC. REGULATORS, Ref. No. CESR/05-001, CONCEPT PAPER ON EQUIVALENCE OF CERTAIN THIRD COUNTRY GAAP AND ON DESCRIPTION OF CERTAIN THIRD COUNTRIES MECHANISMS OF ENFORCEMENT OF FINANCIAL INFORMATION (2004), available at [http://www.cesr-eu.org/data/document/05\\_001.pdf](http://www.cesr-eu.org/data/document/05_001.pdf).

<sup>70</sup> See Press Release, SEC Chairman Donaldson Meets with EU Internal Market Commissioner McCreavy (Apr. 21, 2005), available at <http://www.sec.gov/news/press/2005-62.htm> (describing a meeting in Washington, D.C. on April 21, 2005 between SEC Chairman William Donaldson and EU Internal Market Commissioner Charles McCreavy).

<sup>71</sup> See generally PricewaterhouseCoopers, *Similarities and Differences – A Comparison of IFRS and US GAAP* 4-12 (Oct. 2004), available at [http://www.pwcglobal.com/gx/eng/about/svcs/corporatereporting/SandD\\_04.pdf](http://www.pwcglobal.com/gx/eng/about/svcs/corporatereporting/SandD_04.pdf) (highlighting the differences between the two frameworks).

<sup>72</sup> *Commission Proposal for a Directive of the European Parliament and of the Council on Statutory Audit of Annual Accounts and Consolidated Accounts and Amending Council Directives 78/660/EEC and 83/349/EEC*, at 2, COM (2004) 177 final (Mar. 3, 2004).

disclosures may have to be made more frequently than half-yearly.<sup>73</sup> In other ways, however, disclosure requirements have been made more stringent. For example, a stricter regime has been put in place for the notification by investors of the acquisition or disposition of major shareholdings.<sup>74</sup> Although Member States have less discretion to structure more lenient rules than previously, the Transparency Directive is not a "maximum harmonization" directive. Member States are permitted to impose additional disclosure obligations on issuers that are more onerous than those prescribed by the EU Directives.

The Transparency Directive requires disclosures about major shareholdings,<sup>75</sup> which can be likened to disclosure obligations under U.S. law. Section 13(d) of the Securities Exchange Act of 1934 requires disclosure of transactions that result in any one person becoming the beneficial owner of more than 5% of any class of securities.<sup>76</sup> Rule 13d-2 requires disclosure relating to any "material" increase or decrease in the percentage of the class beneficially owned.<sup>77</sup> "Material" is defined as any acquisition or disposal of securities equal to or greater than 1%.<sup>78</sup> A beneficial owner is defined in Rule 13d-3 as any person who directly or indirectly has voting power or investment power over the security.<sup>79</sup> By comparison, the Transparency Directive requires shareholders to disclose acquisitions or disposals of shares of an issuer where the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal reaches, exceeds, or falls below eight trig-

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<sup>73</sup> Transparency Directive, *supra* note 12, art 9, at 47.

<sup>74</sup> Under the prior directive, the obligation was triggered at a threshold of 10%, 20%, one-third (or at the Member State's choice, 25%), 50%, and two-thirds (or at the Member State's choice, 75%). Under Article 9 of the Transparency Directive these obligations are initially triggered at a lower first threshold of 5%, followed by 10%, 15%, 20%, 25%, 30%, 50%, and 75%. *Id.* art. 9, at 47. Member States remain free to provide for further thresholds, including lower ones such as a 4% threshold in the UK and a 2% threshold in Italy. Under article 12, investors are required to disclose how much the shares represent in terms of voting rights and capital, the date on which the acquisition or the disposition took place, and the identity of the shareholder, including any person or entity entitled to exercise voting rights on behalf of the security holder. *Id.* art. 12, at 48. Overall, however, Member States have much less discretion than they did under the former directive.

<sup>75</sup> Transparency Directive, *supra* note 12, arts. 9, 10, at 47.

<sup>76</sup> 15 U.S.C. 78m (2000 & Supp. II 2002).

<sup>77</sup> 17 C.F.R. § 240.13d-2 (2005).

<sup>78</sup> *Id.*

<sup>79</sup> 17 C.F.R. § 240.13d-3 (2005).

gering thresholds ranging between 5% and 75%.<sup>80</sup> These notification requirements also apply to a natural person or legal entity entitled to acquire, dispose of, or to exercise voting rights.<sup>81</sup> In the U.S., beneficial owners must notify the SEC, the issuer and each exchange where the security is traded about changes in ownership. The statement must identify the beneficial owner, the source and amount of funds used to make the purchases, and the number of shares of the security beneficially owned.<sup>82</sup>

If the purpose of the purchases or prospective purchases is to acquire control of the issuer, any plans or proposals to liquidate, merge, or sell the assets of the issuer must also be disclosed. This disclosure is the thrust of section 13(d), the underlying purpose being to alert other shareholders of a potential change of control. Section 13(d) reports must be filed with the SEC within ten days of the transaction. Notably, the Sarbanes-Oxley accelerated reporting deadlines do not apply to section 13(d) transactions; they apply only to section 16 insider transactions.<sup>83</sup>

In the EU, relevant shareholders and owners of voting rights are required to notify the issuer and the competent authority of the issuer's home Member State about changes in ownership.<sup>84</sup> Upon receipt of the notification, but not later than three trading days after learning of the transaction, the issuer must make public all the information contained in the notification.<sup>85</sup> The notification must contain the following information: 1) the resulting situation in terms of voting rights, 2) the chain of controlled undertakings through which voting rights are effectively held, if applicable, 3) the date on which the threshold was reached or crossed, and 4) the identity of the shareholder.<sup>86</sup> Shareholders and owners of voting rights must notify the issuer "as soon as possible," but not later than four trading days after the shareholder learns or should have learned of the acquisition/disposal.<sup>87</sup> The "should have learned" language in the Transparency Directive places an affirmative duty

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<sup>80</sup> *Id.*

<sup>81</sup> Transparency Directive, *supra* note 12, art. 9 (1), at 47.

<sup>82</sup> Securities Exchange Act of 1934 § 13(d)(1), 15 U.S.C. 78m (2000 & Supp. II 2002).

<sup>83</sup> See *infra* note 106 (explaining accelerated reporting deadlines).

<sup>84</sup> Transparency Directive, *supra* note 12, arts. 9, 19(3), at 47, 51.

<sup>85</sup> *Id.* art. 12(6), at 48.

<sup>86</sup> *Id.* art. 12(1)(a)-(d), at 48.

<sup>87</sup> *Id.* art. 12(2)(a), at 48.

on shareholders to monitor changes in their shareholdings closely to determine whether they have reached a position requiring disclosure.<sup>88</sup>

The Transparency Directive also seeks to facilitate proxy voting and to enhance shareholder involvement at general meetings by updating EU law with respect to information provided to investors. Issuers must provide information on the time, place, and agenda of meetings, make available a proxy form for each person entitled to vote, and publish notices. They also must distribute circulars concerning the allocation and payment of dividends and the issue of new shares. The Transparency Directive also facilitates the use of electronic means by allowing issuers to use electronic means to communicate with shareholders.

Furthermore, a central aim of the Transparency Directive is to create a single electronic network across member states. The competent authority of each member state must now operate a system for disseminating information about a particular issuer at a single source and must now create a place for the central storage of regulated information. The home member state must also require issuers to use media outlets for the effective dissemination of information throughout the EU. However, the absence of an European securities commission with a mandate to develop an electronic disclosure system similar to the SEC's EDGAR system is an impediment to a harmonized EU disclosure system for public companies.

Just as the Transparency Directive does not harmonize the means for dissemination of financial and other disclosures by public companies, neither does it harmonize civil liability provisions throughout the EU. Enforcement by either governmental or private parties is left to national law. In the long run, this failure to adopt uniform liability standards may undermine the entire disclosure regime established by the Prospectus and Transparency Directives.<sup>89</sup>

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<sup>88</sup> In its draft technical advice, CESR reiterates this point, stating that natural persons and legal entities must exercise a high duty of care when acquiring and disposing of major shareholdings. COMM. OF EUROPEAN SEC. REGULATORS, Ref. No. CESR/05/05407 ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE, 38 (2004) available at [http://www.cmvm.pt/cooperacao\\_internacional/docs\\_cesr/05\\_407.pdf](http://www.cmvm.pt/cooperacao_internacional/docs_cesr/05_407.pdf). CESR goes on to define that duty of care as requiring parties to follow up on instructions that it has given and to take active steps to establish whether or not and when the instruction was carried out. *Id.*

<sup>89</sup> Jeffrey B. Golden & Dorothee Fischer-Appelt, *The EU Prospectus and Transparency Directives – Toward A Unified European Capital Markets Regime*, in INSTITUTE

### 3.2.1. Language Requirements

A serious problem with past directives was that securities regulators were able to insist upon the translation of a prospectus into the local language. One of the ways in which the new Prospectus Directive is designed to achieve better harmonization is that EU member states can no longer compel issuers from another state to translate their prospectuses, except that they may compel a translation of a summary into the host country's language. Prospectuses can be issued in the language of the issuer's home state regulator, or a language accepted by that regulator, or in a language customary in the sphere of international finance. While most cross-border prospectuses will likely be published in English as a result, discussion of this result was neatly sidestepped in the language of the Prospectus Directive.<sup>90</sup>

Similarly, under the Transparency Directive, an issuer trading only in its home member state may only disclose information in a language accepted by the competent authority in that state. If the issuer is trading in both its home member state and in one or more host member states, then it must disclose information in a language accepted by the competent authority in its home member state and either a language accepted by the competent authorities of its host member states or in a language customary in the sphere of international finance. If an issuer is only trading in host member states, then it may choose between the language accepted by the competent authorities of the host member states and a language customary in the sphere of international finance. While host member states may try to impose these requirements to avoid "language shopping," the result of these requirements will likely be to increase the use of English in disclosure documents.

### 3.3. The Market Abuse Directive

The Market Abuse Directive<sup>91</sup> was the first directive to follow the Lamfalussy Process and is interesting for that reason alone. In addition, the changes it makes to the prior Insider Dealing Direc-

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ON SECURITIES REGULATION IN EUROPE (FOURTH ANNUAL) 19, 36 (PLI Corp. Law & Practice, Course Handbook Series No. 1460, 2005).

<sup>90</sup> See FERRAN, *supra* note 38, at 165 (noting that the formulation avoids specifying which European languages should be used, a potentially divisive political issue).

<sup>91</sup> Council Directive 2003/6, 2003 O.J. (L 96) 16 (EC) [hereinafter Market Abuse Directive].

tive will improve continuing disclosures by public companies over and above the requirements of the Transparency Directive. This is because the Market Abuse Directive is based on the theory that the prohibitions against insider dealing exist because such dealings interfere with market transparency.<sup>92</sup>

Accordingly, issuers must inform the public of insider dealing as soon as possible. Further, an issuer may only delay the publication of inside information provided that such omission "would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information."<sup>93</sup>

In my opinion, this formulation has a better theoretical grounding than the U.S. law against trading on inside information because it links the obligation to make public disclosure with the prohibition against trading on inside information and does not depend on the existence of a fiduciary duty to a purchaser or seller ignorant of inside information held by the other side of the trade.<sup>94</sup> One problem with the duty to disclose is that in the absence of an EU-wide regulator or a completed single market for securities, there is no obvious or agreed-upon method for disclosing inside information effectively.

The Market Abuse Directive also has a provision analogous to SEC's Regulation FD,<sup>95</sup> which provides that when an issuer or agent of the issuer discloses any inside information to a third party in the normal course of his employment, it must make complete and effective public disclosure of that information simultaneously.<sup>96</sup> The Market Abuse Directive mandates that the issuer posts this information on its web site, though whether such disclosure will in fact inform market participants of that information is an unanswered question.

Another difference between U.S. law and the Market Abuse Directive is how each treats the reporting of transactions by officers, directors, and principal stockholders and the existence of short-selling profit prohibitions. In the U.S., section 16 of the Securities Exchange Act governs the disclosure requirements for directors,

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<sup>92</sup> *Id.* at 17.

<sup>93</sup> *Id.* art. 6(2).

<sup>94</sup> See Roberta S. Karmel, *Outsider Trading on Confidential Information – A Breach in Search of a Duty*, 20 CARDOZO L. REV. 83, 107 (1998) (arguing that the fiduciary duty theory is "unduly narrow" from a policy perspective).

<sup>95</sup> SEC Regulation FD, 17 C.F.R. § 243.100 (2004).

<sup>96</sup> Market Abuse Directive, *supra* note 91, art. 6(3).

officers, and principal stockholders.<sup>97</sup> Principal stockholders are defined as beneficial owners of more than 10% of any class of non-exempt equity security registered pursuant to section 12. Article 6(4) of the Market Abuse Directive is the EU corollary to the U.S. section 16 reporting requirements.<sup>98</sup> This provision imposes disclosure obligations on “persons discharging managerial responsibilities within an issuer or financial instruments” and “persons closely associated with them.”<sup>99</sup> Persons “discharging managerial responsibilities” include the issuer’s administrative, management or supervisory bodies and senior executives who have regular access to inside information and power to make managerial decisions.<sup>100</sup> Persons “closely associated” include spouses, partners legally equivalent to spouses, dependent children, and relatives who share the same household.<sup>101</sup> However, unlike section 16(a) of the Exchange Act, the Market Abuse Directive does not require beneficial owners of more than 10% of any class of any equity security to file reports disclosing changes in beneficial ownership.<sup>102</sup> Furthermore, member states may decide to exempt issuers from or delay the notification requirement if the total amount of transactions is less than five thousand euros for the calendar year.<sup>103</sup> The total amount of transactions is computed by summing up the transactions made by persons discharging managerial responsibilities and those closely associated.<sup>104</sup>

Finally, section 16(b) of the Exchange Act requires the disgorgement of “short swing” profits realized by directors, officers and 10% beneficial owners of the corporation to prevent the “unfair use of information” which may have been obtained by insiders.<sup>105</sup> Shareholders may sue to enforce this law. The Market Abuse Directive does not contain any such prohibition on profit realization by insiders.

In the U.S., section 403 of the Sarbanes-Oxley Act of 2002 accel-

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<sup>97</sup> Securities Exchange Act of 1934 § 16, 15 U.S.C. § 78p (2000 & Supp. II 2002).

<sup>98</sup> Market Abuse Directive, *supra* note 91, art. 6(4).

<sup>99</sup> *Id.*

<sup>100</sup> Commission Directive 2004/72, art. 1(1), 2004 O.J. (L 162) 70, 71 (EC).

<sup>101</sup> *Id.* at 73.

<sup>102</sup> *But see supra* note 74 (noting the specific percentages where reporting is required by the Transparency Directive).

<sup>103</sup> Commission Directive 2004/72, art. 6(2), 2004 O.J. (L 162) 70, 73 (EC).

<sup>104</sup> *Id.*

<sup>105</sup> 15 U.S.C. § 78p(b) (2000 & Supp. II 2002).



erates the time for reporting insider transactions from the calendar month plus ten days to two days after the transaction.<sup>106</sup> Comparatively, the Implementing Directive requires all issuers to file insider transaction statements within five working days from the transaction date.<sup>107</sup> However, issuers must comply with the rules of notification of the member state in which it is registered, which may require the issuer to comply with a filing period shorter than the five day ceiling imposed by the Implementing Directive. Additionally, member states have the authority to exempt issuers from these disclosure obligations if the dollar amount of their transactions for the year is less than five thousand Euros.<sup>108</sup> No such discretionary exemption exists in the United States.

In the U.S., the Sarbanes-Oxley amendments to the Securities Act of 1934 impose electronic filing requirements on all section 16 reports.<sup>109</sup> The SEC must make these filings available on a publicly accessible Internet site by the end of the business day following the filing.<sup>110</sup> The EU Market Abuse Directive, on the other hand, simply states that member states shall ensure that issuers inform the public "as soon as possible" of insider transactions; there is no specific manner by which competent authorities are required to disseminate information to the public.<sup>111</sup>

Additionally, SEC rules require issuers who maintain a corporate website to post each statement reflecting insider changes in beneficial ownership on its website by the end of the business day following the filing of the statement with the SEC.<sup>112</sup> The Market Abuse Directive contains a similar requirement. EU Member States must ensure that issuers post all information required to be disclosed publicly on their Internet sites "for an appropriate period," but the Directive does not specify the time frame within which such posting should take place following the transaction.<sup>113</sup>

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<sup>106</sup> Sarbanes-Oxley Act § 403, Pub. L. No. 107-204, 116 Stat. 745, 788 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

<sup>107</sup> Commission Directive 2004/72, 2004 O.J. (L 162) 70, 73 (EC).

<sup>108</sup> *Id.*

<sup>109</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78p (2000 & Supp. II 2002).

<sup>110</sup> *Id.*

<sup>111</sup> See Market Abuse Directive, *supra* note 91 ("The competent authority may issue guidance on matters covered by this Directive, e.g. definition of inside information in relation to . . . market manipulation.").

<sup>112</sup> Securities Exchange Act of 1934 § 16, 15 U.S.C. § 78p (2000 & Supp. II 2002).

<sup>113</sup> *Id.*

Foreign private issuers (as defined in Rule 3b-4) are exempt from the Exchange Act's section 16 reporting requirements.<sup>114</sup> Conversely, the Market Abuse Directive does not exempt securities registered by a non-EU issuer from its reporting requirements. The impact on U.S. issuers is expected to be *de minimis*, given that section 16 reporting requirements are more stringent overall than the EU's.

#### 4. RECOMMENDED CLAP DISCLOSURES

The High Level Group Report endorsed disclosure as a "powerful regulatory tool in company law."<sup>115</sup> Further, the report noted that information and disclosure is an area "where company law and securities regulation come together."<sup>116</sup> Accordingly, in a number of areas, particularly in the area of remuneration, the report took the view that the "form and level of remuneration of executive directors should be left to the companies and their shareholders."<sup>117</sup> Nevertheless, among the reforms recommended were the public disclosure of general remuneration policies for directors and the actual remuneration of individual directors.<sup>118</sup>

The similar recommendations in the Commission's Communication of May 2003<sup>119</sup> were not translated into a directive, but rather a non-binding recommendation.<sup>120</sup> This recommendation urged member states to adopt measures with regard to director remuneration in four areas: first, all listed companies should issue a statement of their policies on directors' pay, including a breakdown of fixed and variable remuneration; second, directors' remuneration policy should be on the agenda of the shareholders' general (or annual) meeting; third, the disclosure of remuneration of individual directors should be detailed; and fourth, shareholders should approve share and share option plans.<sup>121</sup> These kinds of disclosure and governance controls of management and director remuneration exist in the U.S. under the SEC's disclosure require-

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<sup>114</sup> *Id.*

<sup>115</sup> HIGH LEVEL GROUP REPORT, *supra* note 37, at 33.

<sup>116</sup> *Id.* at 34.

<sup>117</sup> *Id.* at 64.

<sup>118</sup> *Id.* at 65-67.

<sup>119</sup> *Modernising Company Law*, *supra* note 7, at 16.

<sup>120</sup> Commission Recommendation 2004/913, at 16 2004 O.J. (L 385) 55 (EC).

<sup>121</sup> *Id.* at 56-58.

ments<sup>122</sup> and stock exchange listed rules implementing the Sarbanes-Oxley Act.<sup>123</sup> Whether the Commission's recommendations with regard to these matters will become either a legal requirement or a standard of conduct remains to be seen.

## 5. CONCLUSION

Although the EU Prospectus, Transparency, and Insider Dealing Directives are patterned after the general framework of the federal securities laws and the SEC's development of the law on insider trading, the substantive provisions of the EU directives have not been harmonized with U.S. law. Further, although much has been accomplished in Europe to implement the FSAP over the past five years, much remains to be done. Implementation of the CLAP is at a very early stage.

The numerous directives adopted pursuant to the FSAP still need to be implemented in the twenty-five countries which make up the EU. Furthermore, when the directives become the law of these countries, the laws will have to be enforced. Even CESR has questioned whether the current institutions and regulatory agencies of the EU, operating pursuant to the Lamfalussy Process, will be capable of integrating the EU capital markets and establishing uniform standards for financial regulations.

In a Preliminary Progress Report, CESR analyzed the work and progress of securities regulators in implementing the FSAP.<sup>124</sup> This report has been put out for comment and it examines three questions: How integrated are the EU securities markets? What challenges are faced by CESR and what possible improvements could be made to this network of regulators? What challenges are faced by mutual recognition and what possible improvements could be made to this regulatory technique?<sup>125</sup> The report suggests that since CESR is obligated to deliver convergence of policy, supervision, and enforcement, there may be difficulties in realizing the

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<sup>122</sup> 17 C.F.R. § 229.201 (2004).

<sup>123</sup> See Order Approving NYSE and Nasdaq Proposed Rule Changes Relating to Equity Compensation Plans, 68 Fed. Reg. 39,995 (July 3, 2003) (proposing rules for NYSE and Nasdaq requiring stockholder approval of compensation arrangements).

<sup>124</sup> COMM. OF EUROPEAN SEC. REGULATORS REF. NO. 04-333f, PRELIMINARY PROGRESS REPORT: WHICH SUPERVISORY TOOLS FOR THE EU SECURITIES MARKETS, AN ANALYTICAL PAPER BY CESR 2-3 (2004), available at <http://www.kreditilsynet.no/archive/0sto/01/03/Cesrr003.pdf>.

<sup>125</sup> *Id.* at 4.

promise of the FSAP due to the diversity of powers and supervisory intensity of securities regulators. Without greater convergence and coordination, the trust necessary for mutual recognition will not be sufficient and there will be an insistence by host country regulators to impose higher standards. Most of the problems described in the Preliminary Report deal with prudential supervision, not disclosure regulation.

Some problems in the area of disclosure regulation were also highlighted. With regard to some of the recent accounting failures, there were cases in which the home country securities regulator did not have the legal authority to require a change in accounting standards. Therefore, host country regulators were obliged to require changes in cooperation with the SEC.<sup>126</sup> Indeed, accountants are regulated separately in different EU countries. This raises a number of questions (outlined by CESR as follows): How can a host country authority rely on a home country authority if the power to require the disclosure of non-misleading information is not granted to the latter? Should securities regulators have more operational powers with regard to the application of accounting standards? Does Europe have appropriate supervisory tools for interpreting IFRS?<sup>127</sup> These questions go to the heart of whether the FSAP can be fully implemented pursuant to the Lamfalussy Process without the creation of an EU-wide securities regulator. Although Europe is now committed to a single language with regard to financial disclosure in the form of IFRS, interpretation and enforcement of these accounting principles is another matter. There is no European-wide regulation of auditing, and authority to regulate accounting failures is not given to all EU securities regulators.

The CESR Preliminary Progress Report is concerned with disparate enforcement by governmental securities commissions. Differences in civil liability provisions available to investors wronged by fraudulent disclosures are an equally serious problem. In the U.S., Congress has attempted to harmonize private enforcement of the securities laws through pre-emption.<sup>128</sup> A similar effort to harmonize the enforcement of directives in the EU is an unlikely prospect. The securities class action is not an investor protection

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<sup>126</sup> *Id.* at 20.

<sup>127</sup> *Id.*

<sup>128</sup> Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

mechanism that exists in Europe, and the possibility of imposing liability in private litigation depends on the substantive law and judicial systems in each of the EU member states.

One observer of developments in the EU has argued that despite the UK's opposition to a European securities commission, support for such an agency is growing and may accelerate because of recent "no" votes on the proposed EU Constitution.<sup>129</sup> In addition to the difficulties of harmonizing the laws of twenty-five EU member states, a task which seriously impedes the development of an EU-wide regime for public company disclosure, the absence of a European securities commission makes convergence of EU and U.S. law very difficult. The recent agreement between the U.S. and the EU on a roadmap for convergence and mutual recognition of accounting principles required the participation and assent of the Chairman of the SEC and the Internal Market Commissioner of the EU.<sup>130</sup> This agreement addresses a major issue affecting world-class public companies, and realistically could not have been achieved in negotiations between the U.S. SEC and twenty-five different European securities commissions. Most disclosure issues are resolved by regulatory staffers operating at a lower level and are even less likely to be negotiated successfully on a multi-agency basis.

Since the capital markets are global, securities regulators and supervisors will have to work together more closely and more cooperatively than has been the case in the past in order to achieve true convergence of disclosure regulations.<sup>131</sup> Financial regulators in the EU have their hands full trying to implement the FSAP and beginning to work on the CLAP. The U.S. SEC is still dealing with the aftermath of the bursting of the technology bubble, the implementation of the Sarbanes-Oxley Act and putting into effect other reforms in response to current problems in the U.S. markets. As long as securities regulators are more attuned to political and economic developments in their own countries than in the global marketplace, convergence of disclosure policy will remain a distant

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<sup>129</sup> Lee, *supra* note 28, at 23-26.

<sup>130</sup> See Press Release, *supra* note 70 (announcing efforts to promote investment protection for foreign investors as well as to improve global accounting standards).

<sup>131</sup> See Alexander Schaub, Address at the Euro Symposium: Financial Integration in EU25—Lessons Learnt and Prospects for the future (Nov. 12, 2004), available at [http://europa.eu.int/comm/internal\\_market/speeches/2004/2004-11-12-schaub\\_en.htm](http://europa.eu.int/comm/internal_market/speeches/2004/2004-11-12-schaub_en.htm).

goal. Moreover, if U.S. and EU disclosure regulations are to become harmonized, there is a need for the EU to have a single regulator at the EU level to negotiate with the U.S. SEC.

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