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Speech

***109** RECENT TRENDS IN SEC REGULATION OF FOREIGN ISSUERS: HOW THE U.S. REGULATORY REGIME IS AFFECTING THE UNITED STATES' HISTORIC POSITION AS THE WORLD'S PRINCIPAL CAPITAL MARKET

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When Professor Howson [FN1] broached to me the idea for this event, he suggested that an appropriate topic might be my twenty years of practice as a corporate lawyer advising on cross-border merger and acquisition (M&A) transactions and securities offerings and the changes I have seen in that time. I had felt that a retrospective on my career might be a bit premature, but as I considered the subject, the premise seemed sound. The past twenty years have seen greater expansion and diversity of cross-border transactional practice for U.S. lawyers than at any point I can think of, with the possible exception of the period at the turn of the twentieth century prior to World War I (which, I hasten to add, I did not experience personally). But as a result of various developments since the turn of the millennium, it will be a challenge for the next twenty years to see similar expansion and diversity.

A bit of the history is important to provide context for the developments of the past few years. Since World War II, the United States has been the world's principal capital market. [FN2] This market has been uniquely broad and deep, with substantial retail participation by individual investors and small institutions, plentiful capital for equity financing and a willingness to hold long-term debt securities, with tenors of thirty years being common even for corporate issuers. [FN3] This was very different from our ***110** principal competition: London and the other markets of Europe. These markets were fragmented, relatively uninterested in equity securities--especially at the retail level--and not receptive to long-term debt financing. The “Belgian Dentist,” often cited as the classic Euromarket investor, favored medium-term, bearer debt securities of household-name issuers. [FN4] Otherwise, the market was dominated by large banks and insurance companies, possessed of extensive cross-shareholding stakes in corporate Europe.

Access to the attractive U.S. capital pool was closely regulated by the Securities and Exchange Commission (SEC) and its administration of the intricate network of U.S. securities laws including principally, for our purposes, the Securities Act (the “1933 Act” or the “Securities Act”) and the Exchange Act (the “1934 Act” or the “Exchange Act”). [FN5] These statutes and the Commission's rules created extensive disclosure requirements for public offerings of securities and ongoing disclosure obligations for issuers with securities listed on an exchange.

Until the 1980s, the relatively few foreign issuers who braved this gauntlet and sold securities registered with the SEC were generally either blue-chip issuers in their home countries with substantial capital needs that could be met only in the United States (such as British Petroleum's financing of development of Alaskan oil fields in the 1970s) or internationally-minded companies seeking both U.S. capital and the recognition that would come from listing on the New York Stock Exchange (NYSE) (Sony, which listed in the early 1960s, was the first Japanese company to do so). [FN6] I was working in our London office in 1989 when Bass PLC of England used its equity to acquire Holiday Inn and became the first foreign company to initially register with the SEC in connection with the acquisition of a U.S. public company. [FN7] The lawyers and securities firms that handled these transactions were a relatively small and hardy band; precedents were few and there was a considerable element of lore in the practice because firms tailored solutions for individual transactions through conversations with the SEC staff and each other. [FN8]

Similar factors affected private placements and offerings of securities outside the United States by U.S. and foreign issuers. A few seminal cases, no-action letters, and SEC releases provided only general principles to ***111** address these types of transactions, rather than precise guidance to practitioners on the specific requirements needed to insure the availability of a safe harbor from Securities Act registration. To the extent there was guidance, it pointed toward restrictive procedures and "daisy chains" of buyer certifications that inhibited both primary offerings and secondary trading of private placements and securities sold offshore that might flow back into the United States. In particular, Securities Act Release 4708, addressing offshore offerings, often left securities lawyers wrestling like philosophers counting angels as they struggled to decide whether securities had "com[e] to rest abroad." [FN9]

A significant change occurred in 1990 with the adoption of Rule 144A [FN10] and Regulation S. [FN11] Although neither of these was directed only, or even principally, at foreign issuers, the combination of the two dramatically changed the availability of the U.S. capital market to foreign issuers. [FN12] By combining their clearly defined safe harbors, foreign issuers were able to conduct offerings to institutional investors in the United States on a scale and with an ease that had never existed before. [FN13] As a result, during the 1990s, the volume of offerings by foreign issuers into the United States expanded dramatically.

Although much of the issuance volume consisted of debt securities, the use of American Depository Receipts (ADRs) as a mechanism for issuing common shares of foreign companies exploded during the 1990s, with the number of ADR programs and the volume of ADR trading multiplying during this decade. [FN14]

At the same time, the SEC staff made accommodations that further enhanced the attractiveness of the U.S. capital markets to foreign issuers by taking into account the specific or unusual needs of these foreign issuers as compared to U.S. domestic issuers. These innovations built upon accommodations***112** to foreign issuers that had existed in SEC regulations for some years. For example, shortly after the adoption of the 1934 Act, foreign issuers were exempted from the proxy rules of Section 14 and the insider transaction reporting and short-swing profit disgorgement requirements of Section 16 of that Act. [FN15] Foreign issuers were entitled to use different registration forms which took some account of the differences between U.S. and foreign disclosure regimes and practices in the disclosure requirements (for

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example, by not requiring foreign companies to disclose individual compensation paid to the top five executive officers, and by limiting the need to report financial information by business segments). The annual reports on Form 20-F required of foreign issuers reporting to the SEC were due within six months of year-end, as opposed to within ninety days (at most) for the Form 10-K reports by U.S. issuers. [FN16]

During the 1990s, the SEC and its staff implemented other accommodations that eased foreign issuers' transition to SEC reporting status. [FN17] The long-standing requirement that foreign issuers reconcile their home country financial statements to U.S. Generally Accepted Accounting Principles (GAAP) was modified to permit foreign issuers to reconcile only the two most-recent fiscal years of financial results upon their initial registration, rather than the previous five years. The SEC staff made it a routine practice to review foreign issuer registration statements on a confidential basis, rather than requiring that the statements be publicly filed in order to commence the SEC staff review process, as is the case for U.S. issuers. This practice allowed foreign issuers to resolve SEC comments privately and to manage the potential embarrassment or adverse publicity from the significant change to their home country disclosure that they might face in the initial transition to U.S. GAAP and SEC disclosure requirements. Additionally, Regulation FD, requiring full disclosure of information formerly communicated selectively to securities analysts or institutional investors, exempted foreign issuers in recognition of the different practices in such communications that may exist in overseas markets as compared with the U.S. market. [FN18] The SEC staff also permitted foreign issuers to employ so-called “Exxon Capital” exchange offers (named after the first no-action letter permitting the technique) to give holders of their privately placed equity securities the opportunity to exchange for identical, freely tradable securities***113** in a registered public offering. [FN19] U.S. issuers are permitted to use this exchange technique only for debt securities. Foreign issuers could thereby take what became known as the “stepping stone” approach to entering U.S. markets by first issuing equity in a Rule 144A placement to institutions and then following some time later with an SEC-registered offering when they were ready to meet all the requirements.

Accommodation was not limited to capital raisings but also extended to M&A transactions. During the early 1990s, the SEC solicited comment on proposals to exempt certain tender and exchange offers for foreign target companies from Securities Act registration requirements and from procedural requirements of the SEC's tender offer rules that often conflicted with foreign country rules. [FN20] These proposals sought to deal with the routine exclusion of U.S. shareholders of the foreign target from such transactions on the basis that SEC filing and procedural requirements would be inconvenient and disruptive to the timing of what was essentially a foreign transaction. SEC registration of any securities to be offered in the acquisition was generally a practical impossibility due to the significant cost and delay of this exercise and the resulting ongoing SEC periodic disclosure obligations assumed by the issuer. After several years without any action, the SEC adopted Rule 802 which provided a Securities Act exemption and also made changes to the tender offer rules under Section 14 of the Exchange Act in order to permit cash tender offers and exchange offers to follow home country procedures, rather than potentially incompatible U.S. requirements, in situations where U.S. holders were only a small part of the foreign target's shareholder base. [FN21]

Many of the innovations to assist foreign issuers were shepherded by the SEC's Office of

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International Corporate Finance, which became, in some respects, an advocate for foreign issuers and actively assisted them in reconciling SEC requirements with the requirements and practices of these issuers' home countries. [FN22] This office was sensitive not only to the needs of individual transactions but also more systemic issues that could affect all foreign issuers.

As a result, the decade or so from the early 1990s through 2002 was something of a golden age with respect to access by foreign issuers to the U.S. capital markets and to cross-border acquisitions of U.S. target companies. An anecdote that illustrates the spirit of this age was the 1993 NYSE listing by Daimler-Benz, which was the first German company to register ***114** its equity securities with the SEC and list on the NYSE. [FN23] Prior to this time there had been considerable organized resistance from corporate Germany to SEC disclosure requirements and GAAP reconciliation. Daimler-Benz broke ranks and noted a few years later in its 1996 annual report that it had found the adoption of GAAP, which it described as "accounting standards of the highest reputation worldwide," to be most useful not as a compliance exercise for purposes of meeting SEC disclosure requirements, but as the "instrumental basis for value-oriented corporate management." [FN24] Daimler-Benz effectively said, "We can run the company better using U.S. GAAP." This was before it acquired Chrysler, a transaction made easier by the fact that Daimler-Benz was then an SEC-reporting issuer.

This attitude changed dramatically during a period of a few months ending in July 2002, when increasingly shrill public outcry over the corporate wrongdoing discovered at Enron, WorldCom, Tyco and other U.S. corporations culminated in the adoption of the Sarbanes-Oxley Act. [FN25] As is well known, the statute was enacted in haste with little debate or public comment and as a result contains a number of provisions that are difficult to apply in practice or that are internally inconsistent. However, with respect to foreign issuers, the adoption of Sarbanes-Oxley was doubly unfortunate in that no account was taken of the separate needs of foreign issuers or the fact that they may be subject to home-country requirements that conflict with the new U.S. requirements.

U.S. Congressmen might have regarded as only minor annoyances for foreign issuers such anomalies as the prohibition on loans to directors and executive officers, from which U.S. banks were exempted, but this was not minor to a director of a foreign bank listed in the United States who thus could not obtain a home mortgage loan from his own employer. More seriously, some foreign issuers found it very difficult to comply with provisions of Sarbanes-Oxley requiring the entire membership of the audit committee of the board of directors to be "independent." This was particularly problematic in countries such as Germany where labor union representatives, who are employees of the company, were required by local law ***115** to be members of the board but would not qualify as independent for Sarbanes-Oxley purposes. Most important is the multi-million dollar expense and many months of management effort required to meet the Section 404 internal controls requirements, which obviously is getting considerable publicity right now.

In one sense, the reaction in the United States to widespread corporate wrongdoing and the congressional action in response should not be surprising. There have been episodes in the United States in the past when the excesses of a bubble era led to extensive legislative enactments designed to regulate business activity. The boom in the 1920s and the Great Depres-

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sion, which led to the enactment of the Securities Act, the Exchange Act, and the Investment Company Act is obviously the prime example. [FN26] Another example closer in time to the present is the boom of the 1960s, which involved a similar technology bubble with names likes Xerox, IBM, and Polaroid instead of Amazon, eBay, and Yahoo, and also similar abuses of financial reporting, such as improper use of pooling accounting for acquisitions and the use of "cookie jar" accounting reserves to smooth corporate financial results. This led to increased regulation during the late 1960s and 1970s, including the adoption of the Williams Act to regulate corporate takeovers, ERISA in 1974, the Hart-Scott-Rodino Act in 1976, and the Foreign Corrupt Practices Act in 1977. The latter is noteworthy for our present purposes because it included audit and internal controls requirements that caused public companies to prepare extensive documentation of their internal controls, an exercise now overshadowed by the requirements of Section 404 of Sarbanes-Oxley. I must confess a personal involvement in the FCPA internal controls exercise, as I spent a summer in 1979 with a Fortune 500 company drawing flow charts to document the internal controls in the purchasing functions at a steel plant.

But now in the twenty-first century, the regulatory scheme of Sarbanes-Oxley is imposed upon a very different world than that of the 1970s or the 1930s, as far as foreign issuers are concerned. First, these extensive requirements follow the many years of gradual opening and encouragement to foreign issuers that we have just been discussing, and so there is the shock of this reversal in the trend. [FN27]

Secondly, during this twenty-year period, the extent and detail of non-U.S. regulation of corporate transactions, such as securities offerings and M&A, expanded significantly. [FN28] For example, as late as the 1980s and early 1990s, most countries, even in Europe, did not have regulatory ***116** schemes governing mergers and acquisitions involving public companies such as the Williams Act or the Hart-Scott-Rodino Act in the United States. Securities market regulation was significantly less comprehensive and even insider trading was not a crime in many developed countries until well after 1990. [FN29] One need only review periodicals such as The World Securities Law Report to see the change: Current issues are replete with reports of comprehensive regulatory schemes in countries as diverse as the People's Republic of China, Lithuania, Finland, Colombia, and South Africa, concerning takeover regulation, fiduciary duties of directors, securities offering prospectus requirements, and securities market regulation, none of which existed a decade or two ago. The Common Market project that has created today's European Union has produced a unified, law-making jurisdiction comparable in scale and influence to the United States. [FN30] Foreign companies thus have more conflicts to address between their home country regulation and the regulations to which they are subject as a result of registering with the SEC as well as more credible benchmarks to which the U.S. regulatory approach can be compared.

Consequently, the U.S. model is not as well regarded as it was a few years ago; it is no longer the gold standard to which other regulatory schemes could only aspire. [FN31] The U.S. model has been tarnished by the scandals of 2001 and 2002, as all of Enron, WorldCom, Tyco, Adelphia and the other companies so prominent among the scandals were obviously SEC-registered, listed on U.S. stock exchanges, and audited under U.S. generally accepted auditing standards.

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Thirdly, the current wave of regulation goes beyond disclosure, which had typically been the focus and extent of U.S. federal securities regulation, into more substantive matters. Precluding loans to officers and directors, requiring independent directors, and defining precisely the contours of independence of directors and auditors all contribute to a feeling that foreign issuers are having their operations and governance regulated much more tightly than they had ever expected would be the case. The NYSE and NASDAQ typically had granted foreign issuers broad “home country practice” exemptions from their corporate governance listing requirements, but ***117** Sarbanes-Oxley did not. [FN32]

The feelings of dissatisfaction are exacerbated by the belief of many foreign issuers that Sarbanes-Oxley was solving a problem that they never had in the first place. Executive compensation was generally lower and much less lavish outside the United States and stock options much less common. [FN33] In addition, the structural nature of many non-U.S. markets led to less opportunity for managerial abuse. [FN34] Many foreign companies--especially larger ones and especially those in Asia and emerging markets--are controlled by a majority or other large shareholder, often a government or family group, which keeps close watch on managerial prerogatives and compensation. This sort of majority control can raise other issues, such as treatment of minority shareholders or the potential for related party transactions that are not arm's-length. But such control does act to constrain the abuses of managers at the expense of owners that Professors Berle and Means identified as a problem in U.S. corporations as long ago as 1932 and that were generally at the root of the high-profile scandals that precipitated the Sarbanes-Oxley Act. [FN35]

Other changes, aside from legal and regulatory developments, have also altered the landscape confronted by foreign issuers. The securities markets outside the United States have grown in breadth and depth of their own over the past twenty years and now afford issuers in their home countries significant opportunities for financing that did not previously exist. In addition, markets in Europe have developed greater receptivity to equity offerings and longer-term debt offerings, making those markets a more viable alternative to U.S. capital markets. For example, the London Stock Exchange has been actively marketing listing in London as an alternative to listing in New York; some issuers outside of Europe, including a few from Asia such as Air China last year, have decided to list their shares in London rather than New York. The steps taken by the European Union to harmonize prospectus requirements and to adopt International Financial Reporting Standards have also helped to move that market in the direction of a more unified capital market, compared with the fragmentation of twenty years ago. Finally, the ability to conduct significant offerings to institutional investors in the United States by using Rule 144A has led many foreign issuers to conclude that there is no need for the incremental, retail demand afforded by SEC registration. [FN36] In other words, when billion-dollar***118** securities offerings can be completed without SEC registration to U.S. institutional investors who are willing to accept the issuer's home market as the trading venue, foreign issuers are less willing to incur the costs of SEC registration and U.S. listing.

Foreign issuers have also realized that as a result of provisions of the Securities Act that were designed with a very different world in mind, deregistration and exit from the SEC reporting scheme is extraordinarily difficult in practice. A number of foreign issuers that have explored the possibility of deregistering and leaving the United States market are unable to do so because this is permissible only upon a showing that they have fewer than 300 shareholders

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in the United States, without regard to the proportion this might represent of their total shareholder base or worldwide trading volume. [FN37]

To its credit, the SEC appears to be doing what it can to restore some accommodation to the U.S. regulatory scheme to account for the particular problems of foreign issuers. [FN38] Indeed many of the more irritating problems of Sarbanes-Oxley have been addressed. Foreign banks have been exempted in the same manner as U.S. banks from the prohibition on loans to executive officers and directors; the requirements for independent directors have been modified to permit foreign companies that are subject to local employee board representation requirements to treat such representatives as independent. [FN39] In addition, the SEC has recently adopted rules that would delay the application of the Section 404 internal controls requirements for an additional year to allow foreign issuers increased time to comply, and the SEC staff is soliciting suggestions from foreign issuers on other useful changes. [FN40] Finally, former Chairman Donaldson and other commissioners of the SEC have made it clear that they are studying the difficulties of the current deregistration requirements and intend to develop revised standards that would be more consistent with standards elsewhere in the world.

It is an open question whether these well-intentioned efforts will be enough to convince foreign issuers to remain in the SEC reporting system and to continue to enter it. There have been only a handful of new U.S. listings from Europe and Asia (and none from Japan) since the adoption of Sarbanes-Oxley in 2002. [FN41] My experience and that of my partners in our ***119** overseas offices is that foreign issuers are now very cautious about entering the U.S. public capital markets and subjecting themselves to ongoing SEC requirements. We should keep in mind the example of Japan, although for many reasons I do not think the analogy is especially close. At the peak in 1991, there were 127 foreign companies listed on the Tokyo Stock Exchange, drawn by the promise of a huge pool of liquid savings in a country challenging the United States for world economic leadership. Today, after a decade of delistings with very few new entrants, only twenty-nine foreign companies are still listed. [FN42] Attention has shifted to the Shanghai Stock Exchange and proposals for China Depository Receipts to facilitate Chinese investment in foreign securities, as well as recent changes by the Securities Exchange Board of India to allow the offering of Indian Depositary Receipts to Indian investors.

As I said earlier, I believe this is part of the cycle of markets. History has shown that we go through periods of boom followed by bust, with the bust followed by increased regulation. Eventually, of course, market participants adapt themselves to the increased regulation, regulators are persuaded to accommodate various practices and the economy and capital markets enter another period of boom. The cycle repeats. Whether the U.S. capital markets will continue to compete successfully with an integrated European capital market or the developing capital markets in Asia, particularly China, remains to be seen and is a question more for economists and bankers than lawyers. But what we lawyers can concern ourselves with is the extent to which U.S. laws and regulations in this area contribute to or impede access by foreign issuers to U.S. markets. I believe we would all agree that such access is a desirable thing, for U.S. investors, for the U.S. economy, and certainly for market participants and professionals working in this area. [FN43] In the effort to protect and enhance that access I believe we can count on the historic adaptability and creativity of the U.S. corporate and securit-

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ies bar, in which I include not only practitioners but also academics who teach and write extensively on these subjects and propose improvements in regulation, and judges who struggle faithfully to apply U.S. law, including principles of conflicts of laws and international comity, to proceedings involving foreign transactions.

Most importantly, I count on law students such as yourselves who are interested in these topics and demonstrate that interest through their work in class and on law journals and who form the next generation of corporate and securities lawyers. We look forward to your help in continuing efforts to address the conflicts of U.S. and foreign regulation of corporate activity and to fashion solutions that serve the interests of your clients, the capital markets, and the societies that depend upon them.

Thank you very much for the opportunity to be with you today.

[FNd1]. This article was originally delivered as a lecture in the Clarke Program series at Cornell Law School on March 14, 2005 and generally speaks as of that date, although certain updating and citation revisions have been made for publication. Robert G. DeLaMater is a partner in the Mergers & Acquisitions Group and Financial Institutions Group at Sullivan & Cromwell LLP in New York.

[FN1]. Professor Nicholas Howson was a Visiting Assistant Professor of Law at Cornell Law School for 2004-05.

[FN2]. See generally Maurice Obstfeld & Alan M. Taylor, Global Capital Markets: Integration, Crisis, and Growth (2004) (outlining the trend towards globalization in financial markets since the late nineteenth century and evaluating the costs and benefits of further integration).

[FN3]. See, e.g., Irina Shirinyan, The Perspective of U.S. Securities Disclosure and the Process of Globalization, 2 DePaul Bus. & Com. L.J. 515, 517-520 (2004) (describing the dispersed ownership characteristics of U.S. financial markets).

[FN4]. Alison Macleod, In Search of the Belgian Dentist, Euromoney, June 1984, at 57 (describing Belgian investors' impact on world currency markets). The term “Belgian Dentist” describes the archetypal Belgian investor who is middle class and traditionally conservative in his approach.

[FN5]. See Joel Seligman, The Transformation of Wall Street (rev. ed. 1995) for a detailed history of the Securities and Exchange Commission.

[FN6]. See, e.g., Barrie A. Wigmore, Securities Markets in the 1980s 118-210 (1997) (describing both under- and over-performing industries in U.S. securities markets during the early 1980s).

[FN7]. See generally, David J. Kaufmann & David W. Oppenheim, Selected Business and Legal Issues in the Acquisition of Franchisors or Franchisees, 23 Franchise L.J. 141 (2004) (describing the legal and business issues that confront a franchise when acquiring or being acquired by a franchise company).

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[FN8]. See, e.g., Thomas Lee Hazen, The Law of Securities Regulation 721-25 (5th ed. 2005) (examining the extraterritorial application of the securities laws).

[FN9]. Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters of Foreign Offerings as Broker-Dealers, Securities Act Release No. 4708, 29 Fed. Reg. 9828 (July 9, 1964). The release reads, in part:

[T]he Commission has not taken any action for failure to register securities of United States corporations distributed abroad to foreign nationals, even though use of jurisdictional means may be involved in the offering. It is assumed in these situations that the distribution is to be effected in a manner which will result in the securities coming to rest abroad.

Id.

[FN10]. General Rules and Regulations, Securities Act of 1933, 17 C.F.R. § 230.144A (2005).

[FN11]. General Rules and Regulations, Securities Act of 1933, 17 C.F.R. §§ 901-05 (2005).

[FN12]. See, e.g., Trig R. Smith, Note, The S.E.C. and Regulation of Foreign Private Issuers: Another Missed Opportunity at Meaningful Regulatory Change, 26 Brook. J. Int'l L. 765, 771-73 (2000) (describing effects of Regulation S and Rule 144A on foreign private issuers).

[FN13]. See, e.g., Kellye Y. Testy, Comity and Cooperation: Securities Regulation in a Global Marketplace, 45 Ala. L. Rev. 927, 930-32 (1994) (discussing the explosion of international securities activities in the early 1990s).

[FN14]. See e.g., Kevin Lamiman, Worldly Choices: Overseas Investment Opportunities Grow, Better Investing, May 2004, at 34-36, available at http:// www.adrbny.com/files/Inv_opp_grow.pdf (discussing the recent growth of ADRs).

[FN15]. General Rules and Regulations, Securities and Exchange Act of 1934, 17 C.F.R. § 240.3a12-3 (2005).

[FN16]. See Forms, Securities Exchange Act of 1934, 17 C.F.R. §§ 249.220f, 249.310 (2005).

[FN17]. See e.g., Isaac C. Hunt, Jr., Comm'r, U.S. Sec. and Exch. Comm'n, Remarks at the Bank of New York/CTEC Program: Securities in the U.S. and Russian Stock Markets (May 19, 1997), http:// www.sec.gov/news/speech/speecharchive/1997/spch154.txt (outlining efforts by both U.S. and Russian securities regulators to facilitate cross-border securities trading).

[FN18]. Regulation FD, 17 C.F.R. §§ 243.100-243.103. For an analysis of the impact of Regulation FD, see D. Casey Kobi, Wall Street v. Main Street: The SEC's New Regulation FD and Its Impact on Market Participants, 77 Ind. L.J. 551 (2002).

[FN19]. See Vitro, Sociedad Anonima, SEC No-Action Letter, 1991 SEC No-Act. LEXIS 1311 (Nov. 19, 1991); Morgan Stanley & Co., Inc., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 762 (June 5, 1991) (both applying the Exxon Capital rule).

[FN20]. See Concept Release on Multinational Tender and Exchange Offers, 55 Fed. Reg. 23751 (proposed June 7, 1990) (now codified at 17 C.F.R. pts. 230, 240).

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[FN21]. General Rules and Regulations, Securities Act of 1933, 17 C.F.R. § 230.802 (2005).

[FN22]. See First-Time Application of International Financial Standards, 70 Fed. Reg. 20674 (Apr. 20, 2005) (to be codified at 17 C.F.R. pt. 249) (enumerating the changes to be made in reporting standards, first-time applications, and Form 20-F amendments).

[FN23]. See James D. Cox, Regulatory Duopoly in U.S. Securities Markets, 99 Colum. L. Rev. 1200 (1999) (analyzing International Accounting Standards as an adequate substitute for the SEC's disclosure requirements); Dennis E. Logue & James K. Seward, Anatomy of a Governance Transformation: The Case of Daimler-Benz, 62 Law & Contemp. Probs. 87 (1999); Andrew H. Walcoff, From German Shepherds to Wet Poodles: The SEC Exacts Concessions from Daimler-Benz Concerning Disclosure of Its Hidden Reserves, 24 Ga. J. Int'l & Comp. L. 169 (1994); Isaac C. Hunt Jr., Comm'r, Sec. and Exch. Comm'n, The Impact of the SEC on Financial Reporting (April 19, 1996), http:// www.sec.gov/news/speech/speecharchive/1996/spch097.txt.

[FN24]. Daimler-Benz, Annual Report (Form 10-K), at 44-45 (Dec 31, 1996).

[FN25]. See Larry E. Ribstein, Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002, 28 J. Corp. L. 1 (2002) (arguing that market devices are enough to prevent fraud and the cost of increased regulation could be significant); Minodora D. Vancea, Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?, 53 Duke L.J. 833, 874 (2003) (concluding that “both legal and economic justifications suggest that cooperation would render a faster and more sustainable rule of law” that the unilateral application of Sarbanes-Oxley to foreign firms).

[FN26]. See Gregory A. Mark, The Legal History of Corporate Scandal: Some Observations on the Ancestry and Significance of the Enron Era, 35 Conn. L. Rev. 1073 (2003).

[FN27]. See Christopher Woo, The Effects of the Sarbanes-Oxley Act on Foreign Private Issuers (seminar paper, International Finance Seminar, Harvard Law School), available at http:// www.law.harvard.edu/programs/pifs/pdfs/christopher_woo.pdf (last visited Dec. 4, 2005); William H. Donaldson, Chairman, Sec. and Exch. Comm'n, U.S. Capital Markets in the Post Sarbanes-Oxley World: Why Our Markets Should Matter to Foreign Issuers (January 25, 2005), http:// www.sec.gov/news/speech/spch012505whd.htm.

[FN28]. See Alan Beller, Dir., Div. of Corp. Fin., Sec. and Exch. Comm'n, Regulation in a Global Environment, Remarks at the American Academy in Berlin (Apr. 20, 2004), http://www.sec.gov/news/speech/spchalb042004.htm (giving a background of the U.S. securities markets and discussing current regulations).

[FN29]. See Thomas C. Newkirk, Assoc. Dir., Div. of Enforcement, & Melissa A. Robertson, Senior Counsel, Div. of Enforcement, Sec. and Exch. Comm'n, Insider Trading: A U.S. Perspective, Remarks at the 16th International Symposium on Economic Crime (Sept. 19, 1998), http:// www.sec.gov/news/speech/speecharchive/1998/spch221.htm (weighing arguments for and against insider trading).

[FN30]. See Maria Camilla Cardilli, Regulation Without Borders: The Impact of Sarbanes-Ox-

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ley on European Companies, 27 Fordham Int'l L.J. 785 (2004) (discussing issues raised by foreign governments concerning the new U.S. regulation).

[FN31]. See Roberta S. Karmel, The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance, 33 Stetson L. Rev. 849 (2004) (questioning whether foreign governments would bring their securities laws into harmony with Sarbanes-Oxley).

[FN32]. See Jennifer Morris, Foreigners Forced to Play by US Rules, Euromoney, Oct. 2002, at 42; see also Larry E. Ribstein, International Implications of Sarbanes-Oxley: Raising the Rent on US Law, 3 J. Corp. L. Stud. 299 (2003) (arguing that the SEC should carve out exceptions to Sarbanes-Oxley for foreign corporations).

[FN33]. See Mark J. Loewenstein, The Conundrum of Executive Compensation, 35 Wake Forest L. Rev. 1, 4 (2000).

[FN34]. But see Fools Rush in; the CAO Derivatives Fiasco, Economist, Dec. 11, 2004, at 78 (describing the fraud committed by China Aviation Oil).

[FN35]. See generally, Adolf A. Berle & Gardiner C. Means, The Modern Corporation & Private Property (Transaction Publishers 1991).

[FN36]. Susan Chaplinsky & Latha Ramchand, The Impact of SEC Rule 144A on Corporate Debt Issuance by International Firms, 77 J. Bus. 1073 (2004).

[FN37]. 17 C.F.R. § 240.12g-4 (2003).

[FN38]. Heather Timmons, SEC Gives Foreign Firms Some Hope on New Rules, N.Y. Times, Jan. 26, 2005, at C4 (enumerating the changes under consideration).

[FN39]. Press Release, Sec. and Exch. Comm'n, SEC Adopts Fund Disclosure Rules and Foreign Bank Loan Exemption; Proposes Shell Co. Rules (Apr. 13, 2004), http://www.sec.gov/news/press/2004-50.htm.

[FN40]. Press Release, Sec. and Exch. Comm'n, Extension of Compliance Dates for Non-Accelerated Filers and Foreign Private Issuers Regarding Internal Control over Fin. Reporting Requirements (Mar. 2, 2005), http:// www.sec.gov/news/press/2005-25.htm.

[FN41]. Robert G. DeLaMater, China and the Global Capital Markets, Statement before the U.S.-China Economic and Security Review Commission, (Aug. 11, 2005), available at http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_08_11wrts/delamater_robert_wrts.htm (emphasizing the importance of structuring the U.S. system to accommodate foreign issuers).

[FN42]. Barney Jopson, Dearth of Overseas Listings Concerns Tokyo, Fin. Times (London), July 5, 2004, at 23 (describing recent Japanese efforts to convince foreign issuers to list in Tokyo).

[FN43]. See DeLaMater, supra note 41.

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