NORTH CAROLINA LAW REVIEW

Volume 86 | Number 1 Article 3

12-1-2007

Regulating Listings in a Global Market

Steven M. Davidoff

REGULATING LISTINGS IN A GLOBAL MARKET*

STEVEN M. DAVIDOFF**

Non-U.S. companies increasingly appear to spurn U.S. stock markets and choose to list their securities abroad. The drivers behind this shift are complex, but many believe that a principal cause is regulatory. The SEC has promulgated arguably overburdensome, one-size-fits-all rules that fail to account for the heterogeneous desires of non-U.S. companies for differing levels of regulation. This was even before the Sarbanes-Oxley Act.

Previous proposals to ameliorate this problem have all suffered from the same analytical flaw: they have approached this issue from the supply side and argued that regulation should be structured to meet the desires of issuers. This Article is an attempt to reformulate this debate. I argue that analysis of the proper level of U.S. regulation for non-U.S. companies should take into strong account the demand-side interests of U.S. retail investors who are deprived of investing opportunities abroad when non-U.S. companies do not list in the United States. The SEC should therefore craft regulation to foster investor equality and opportunity and ensure that global investments are, to the extent feasible, available to U.S. investors.

To achieve this, the SEC should adopt a different regulatory standard for non-U.S. companies listing both in the United States and in their home market. This regulatory standard would borrow from mutual recognition principles embedded in conflict-of-laws jurisprudence. Under this standard, a non-U.S. company's compliance with its home market rules would be deemed satisfactory unless the quality of home market regulation was deemed to be sufficiently incomparable to U.S. regulation such that the benefits of investor access were outweighed by insufficient investor protections. This approach would create a regulatory scheme that would serve U.S. interests by attracting foreign

** Assistant Professor of Law, Wayne State University Law School. B.A., University of Pennsylvania; J.D., Columbia University School of Law; M.S., Finance, London Business School. The author would like to thank Olufunmilayo Arewa, Derek Bambauer, Erica Beecher-Monas, Bethany Berger, Caroline Bradley, Noah Hall, and Peter Henning for their helpful comments and Karissa Holmes, Celeste Pelzer, and Joshua Terebelo for their invaluable research assistance.

listings while sufficiently protecting domestic investors. It would also benefit U.S. stock markets and other U.S. market actors by allowing them to differentiate and provide regulatory products tailored to the individualized nature of the non-domestic listing decision.

INTRODUCTION

Finance is now global. The halcyon days when the U.S. capital markets were the primary place to raise capital and list securities are over. Non-U.S. capital markets have matured; issuers have increasing latitude

and choice as to where they list and obtain capital.[1] They have exercised this freedom with a vengeance. It now appears that some non-U.S. issuers[2] intentionally spurn the United States and choose to list their securities and raise capital abroad.[3] The drivers behind this shift are complex, but many believe that a principal cause is regulatory. Post-Sarbanes-Oxley,[4] many non-U.S. issuers perceive the United States as a litigation-prone, overregulated market.[5] This perception is buttressed by recent empirical studies that have found that the passage of the Sarbanes-Oxley Act precipitated statistically abnormal share price declines and lowered the equity premium for non-U.S. issuers listed in the United States.[6] We are

---

1. *See* COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 29–39 (2006) [hereinafter INTERIM CAPITAL MARKETS REPORT], *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (surveying the market for global listings and asserting that the U.S. markets are in comparative competitive decline).

2. Generally, a corporate issuer is classified under the U.S. securities laws as either a U.S. domestic issuer or a foreign private issuer. Foreign private issuers benefit from certain exemptions under the U.S. securities laws that are not available to U.S. domestic issuers. These exemptions and differences are described *infra* Parts III.A.1 & III.A.2. For simplicity's sake, throughout this Article, foreign private issuers are also referred to as "non-U.S. companies," "non-U.S. issuers," or "foreign companies" and are generally deemed to refer to foreign companies. The term "foreign private issuer," though, has a specific meaning under Rule 3b-4 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), and in certain instances, issuers with significant U.S. ties but that are organized and doing business outside of the United States do not qualify as foreign private issuers and are subject to the U.S. domestic issuer rules. 17 C.F.R. § 240.3b-4 (2006).

3. *See generally* Joseph D. Piotroski & Suraj Srinivasan, The Sarbanes-Oxley Act and the Flow of International Listings (Apr. 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=956987 (finding strong evidence that U.S. stock markets have experienced a decrease in frequency of non-U.S. listings post-Sarbanes-Oxley). This trend is further discussed *infra* Part I.

4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 800 (2002).

5. *See, e.g.*, INTERIM CAPITAL MARKETS REPORT, *supra* note 1, at 45–49 (asserting that the regulatory and litigation burden on non-U.S. issuers in U.S. markets is inordinate in comparison to non-U.S. markets); Robert G. DeLaMater, *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*, 39 CORNELL INT'L L.J. 109, 116 (2006) (arguing that in the wake of the Sarbanes-Oxley Act, "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"); Greg Ip, *Is a U.S. Listing Worth the Effort?*, WALL ST. J., Nov. 28, 2006, at C1 (reporting that non-U.S. issuers increasingly perceive declining benefit to a U.S. listing in light of heightened U.S. regulation).

6. *See generally* Kate Litvak, *The Effect of the Sarbanes-Oxley Act on Non-US Companies Cross-Listed in the US*, 13 J. CORP. FIN. 195 (2007), *available at* http://ssrn.com/abstract=876624 (finding that stock prices of foreign issuers cross-listed in the United States experienced significant negative abnormal returns during key announcements indicating that the Sarbanes-Oxley Act would fully apply to cross-listed foreign issuers); Kate Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, 105 MICH. L. REV. 1857 (2007) (finding that non-U.S. companies listing in the United States experienced an abnormal decline in market premiums post-Sarbanes-Oxley as measured using Tobin's q and market-to-book ratios); Craig Doidge et al., *Has New York*

discovering that the much-hyped regulatory response to perceived market failures may have had an unanticipated cost.

This places the U.S. Securities and Exchange Commission ("SEC") in a difficult position. If non-U.S. issuers are indeed abandoning the U.S. capital markets in part due to overregulation, should the SEC respond by alleviating this regulatory burden? This raises the specter of a race to the bottom as regulators and stock markets compete globally for listings.[7] It also implicates the appropriate base level of protection for U.S. investors: what is the right balance between regulation that will attract non-U.S. issuers to the U.S. market and at the same time provide the appropriate protections for U.S. investors? If one assumes that attracting non-U.S. issuers is the goal, the question becomes one of the proper scope of regulation for non-U.S. issuers accessing the U.S. capital markets.[8]

Previous scholarship on this issue has focused on the concerns of issuers and has fallen into two strains. Stephen J. Choi and Andrew T. Gutzman in a co-authored article and Roberta Romano in her own works have argued that issuers (whatever their origin) should be permitted to

Become Less Competitive in Global Markets? 36 (Eur. Corp. Governance Inst., Finance Working Paper No. 173/2007, 2007), *available at* http://ssrn.com/abstract_id=982193 (finding that the average valuation premium for cross-listed firms from 1990 to 2001 was 17.5% compared to 14.3% from 2002 to 2005); Philip G. Berger et al., The Impact of Sarbanes-Oxley on Cross-listed Companies (Jan. 8, 2005) (unpublished manuscript), *available at* http://www.rotman.utoronto.ca/facbios/file/SOX%20and%20ADRs%20010805%20updated.pdf (comparing a value-weighted portfolio of non-U.S. issuers listed in the Unites States to a similar portfolio of U.S. issuers and finding a statistically significant negative stock price reaction to the Sarbanes-Oxley Act in comparison to U.S. issuers); Xi Li, The Sarbanes-Oxley Act and Cross-Listed Foreign Private Issuers 29 (2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=952433 (finding that "while the abnormal returns at the delisting and deregistration announcements are negative before the passage of SOX, they are positive after the passage of SOX"). *But see* Haidan Li et al., Market Reaction to Events Surrounding the Sarbanes-Oxley Act of 2002 and Earnings Management (Sep. 24, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=475163 (finding significantly positive abnormal stock returns associated with the adoption of the Sarbanes-Oxley Act's requirements).

7. *See generally* Robert Bloomfield & Maureen O'Hara, *Can Transparent Markets Survive?*, 55 J. FIN. ECON. 425 (2000) (predicting that in equilibrium among markets, a race to the bottom results and low-transparency markets squeeze out high-transparency ones).

8. The question is intentionally limited to non-U.S. issuers; it does not encompass U.S. domestic issuers. The market for regulation and listings of U.S. domestic issuers is largely a captive one. Globally—for legal, cultural, and economic reasons—issuers tend to make their primary listing their home market. In the United States, this is a virtual legal requirement due to the structure of U.S. securities regulation. U.S. securities laws largely foreclose the ability of any significant U.S. domestic issuer to list abroad without a concurrent U.S. listing. The competitive market for non-U.S. issuers simply does not exist for U.S. domestic issuers. The driving forces and interests in setting this regulation are therefore different, and any theory of regulation for either would not be wholly analogous. The regulation of U.S. domestic issuers is thus beyond the scope of this Article and grist for a companion one.

freely select their governing regulation from any jurisdiction.[9] This choice would create a market with regulators competing for issuers by offering a menu of varying levels of regulation.[10] For example, a German company could list in the United States and choose to be regulated by the securities laws of a third jurisdiction, such as Japan.[11] A race to the top would consequently develop: issuers would migrate to those regulatory schemes that produced the economically optimal regulatory regime for that issuer.[12] Regulators would then compete to provide regulation that would attract the highest number of listings.[13] This regulatory portability argument has been criticized on a variety of grounds, including the simple fact that most issuers have overwhelming incentives to—and historically have—listed only in their home market.[14] Yet these critics largely have not offered any

---

9. Professors Choi and Guzman specifically propose a form of portable reciprocity in which issuers would choose their governing legal regime or elect to have no such regime govern their securities transaction. *See* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 907 (1998). In a book and two articles, Professor Romano proffers an argument for "competitive federalism" in which issuers would self-select their securities regulator from any jurisdiction, including those of the U.S. states. ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM IN SECURITIES REGULATION (2002); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQ. L. 387 (2001) [hereinafter Romano, *The Need for Competition*]; Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2427 (1998) [hereinafter Romano, *Empowering Investors*].

10. Professor Romano, in particular, argues free regulatory choice as a spur to regulatory competition to support issuer choice. Romano, *The Need for Competition*, *supra* note 9, at 389–92. Professors Choi and Guzman also briefly assert these benefits in support of issuer choice, but mostly rest their argument upon a consumer-based model whereby issuers as consumers benefit from a diversity of regulatory choice. Choi & Guzman, *supra* note 9, at 922–23.

11. Professors Choi and Guzman fully set out the parameters and complications of such a system in their article. Choi & Guzman, *supra* note 9, at 922–45; *see also* William J. Carney, *Jurisdictional Choice in Securities Regulation*, 41 VA. J. INT'L L. 717, 745 (2001) (arguing that market forces support adoption of a system of issuer regulatory choice but noting that "[m]uch remains to be done to flesh out an operating system, complete with a workable system of enforcing whatever rules issuers may adopt"). Professor Romano is more concerned with the theoretical benefits of such a system and with rebutting its detractors than with its actual details, although she does extensively address possible conflict-of-laws issues. Romano, *The Need for Competition*, *supra* note 9, at 389–92.

12. Professor Romano has put forth this argument forcefully in the debate concerning state charters, and so, not surprisingly, this argument is the foundation for her proposal concerning issuer choice and consequent international regulatory competition. Romano, *The Need for Competition*, *supra* note 9, at 392–97.

13. *Id.* at 392–94.

14. *See, e.g.*, Frederick Tung, *From Monopolists to Markets?: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 WIS. L. REV. 1363, 1368 (applying public choice theory to conclude that a regime of "issuer choice is politically implausible"). Issuer choice has also come under attack on a number of other grounds. Professor Merritt Fox has argued that such a system would produce a non-optimal outcome since an issuer's "private costs of disclosure would be greater than the social costs of such a disclosure." Merritt B. Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQ. L. 563, 564 (2001) (emphasis removed); *see also* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor*

thematic countersolution other than justifying and arguing for the current regulatory regime. And, ultimately, none of these proposals offers a prescriptive norm as to the appropriate level of U.S. regulation for issuers, including non-U.S. issuers.

The second strain of scholarship has focused on this more specific question. These scholars have examined the motivations driving non-U.S. issuers to list in the United States and voluntarily subject themselves to U.S. regulation.[15] An influential theory views U.S. regulation as a plus: a species of cross-bonding whereby high-quality, non-U.S. issuers seek to raise their profile and equity premium by subjecting themselves to enhanced U.S. regulation, in addition to any regulation imposed by their home market.[16] Thus, more stringent U.S. regulation of non-U.S. issuers, provided it is rationally based, is likely to attract the most desirable capital

---

Empowerment, 85 VA. L. REV. 1335, 1345–47 (1999) [hereinafter Fox, *Retaining Mandatory Securities Disclosure*]; Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696, 749 (1998). Professor James Cox has also argued that a multiple disclosure scheme will have a disparate and negative impact upon investors. James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1229–35 (1999). Finally, Professor Robert Prentice has argued that an issuer choice scheme will exacerbate the agency problem of management rent seeking and provoke a race to the bottom among regulators. Robert A. Prentice, *Regulatory Competition in Securities Law: A Dream (That Should Be) Deferred*, 66 OHIO ST. L.J. 1155, 1228–30 (2005).

15. *See* John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1763 (2002) (arguing that issuers cross-list in order to cross-bond and avail themselves of higher disclosure regimes to "enhance their share price and become able to raise additional equity at lower cost"); James A. Fanto & Roberta S. Karmel, *A Report on the Attitudes of Foreign Companies Regarding a U.S. Listing*, 3 STAN. J.L. BUS. & FIN. 51, 72 (1997) (surveying non-U.S. issuers and finding that they justify listing in U.S. markets for a variety of reasons, including disclosure requirements, a specific U.S. business purpose, the benefits of U.S. capital markets, and industry-specific reasons); G. Andrew Karolyi, *Why Do Companies List Shares Abroad?: A Survey of the Evidence and Its Managerial Implications*, 7 FIN. MKTS., INSTS. & INSTRUMENTS 1, 13 (1998) (finding that cross-listing issuers benefit from higher valuations and trading liquidity); Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 142 (2003) [hereinafter Licht, *Cross-Listing*] (rejecting the bonding hypothesis as a justification for cross-listing and arguing that "[t]he dominant factors in the choice of cross-listing destination markets are access to cheaper finance and enhancing the issuer's visibility"); Amir N. Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence*, 22 U. PA. J. INT'L ECON. L. 325, 326 (2001) [hereinafter Licht, *Managerial Opportunism*] (arguing that cross-listings are primarily the product of "managerial opportunism").

16. This theory, known as cross-bonding, has principally been put forth by Professor Coffee who argues "strong legal standards ... attract, rather than repel, issuers who are cross-listing." Coffee, *supra* note 15, at 1762. Professor Coffee has recently expanded upon and refined his theory, arguing further that "the greater institutional commitment of the United States to enforcement ... may be the underlying motor force that explains the ... 'bonding hypothesis.' " John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement* 16 (Colum. L. & Econ. Working Paper No. 304, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967482.

and issuers.[17] This argument appeared to be quite right at the turn of the millennium when non-U.S. issuers were flocking to list in the United States.[18] In a post-Sarbanes-Oxley world, though, it has come under significant stress as non-U.S. issuers increasingly cite excessive regulation as a reason to avoid U.S. capital markets.[19] Cross-bonding may therefore provide an explanation as to why some non-U.S. issuers list in the United States, but it now seems clear that it cannot definitively provide a holistic framework for the appropriate level of U.S. regulation.

This Article is an attempt to reformulate the debate. The previous scholarship has focused on a supply-side solution, looking to the desires of issuers to justify regulation.[20] This Article proposes an alternative. I argue that the proper level of U.S. regulation for non-U.S. issuers should not be primarily the regulatory concerns of issuers. It should instead strongly take into account the demand-side interests of investors who provide the necessary capital. U.S. investors are today segregated into two groups: sophisticated and non-sophisticated (retail) investors.[21] Sophisticated investors have the freedom to—and do—invest globally. For them, whether an issuer is listed in the United States or whether there is regulatory competition is irrelevant to their ability to invest.[22] This is not true for the U.S. retail investor.[23] For the average U.S. investor, it is prohibitively difficult and expensive to invest in non-U.S. issuers who are

17. Coffee, *supra* note 15, at 1827–29.

18. Professor Coffee's article was published immediately in the wake of the Sarbanes-Oxley Act and at the close of a period of unprecedented growth in non-U.S. listings on U.S. markets. Though he did not fully assess the Act's impact, he appeared to be nonplussed, theorizing that the Sarbanes-Oxley Act's increased regulation could serve to reinforce his cross-bonding theory by further attracting high-quality issuers. *Id.* at 1826.

19. *See supra* note 5.

20. This directive focus has largely been uniform. The one notable exception is the rather impractical proposal put forth by Professor Choi for a securities regulatory scheme that does not regulate issuers but rather regulates and licenses investors. *See generally* Stephen Choi, *Regulating Investors, Not Issuers: A Market-Based Proposal*, 88 CAL. L. REV. 279 (2000).

21. Sophisticated investors under the U.S. securities laws are those who exceed minimum wealth thresholds with the thresholds variant depending upon the type of offering. For purposes of this Article and unless specified otherwise, sophisticated investors are defined as investors with over $100 million in aggregate investments. These are termed "qualified institutional beneficiaries" under the Securities Act of 1933, as amended ("Securities Act"), 15 U.S.C. §§ 77a–77aa (2000 & Supp. 2004), and are typified by institutional investment funds. *See* 17 C.F.R. § 230.144A (1991) (Securities Act definition of qualified institutional beneficiaries). I employ this definition since, under the Securities Act, these investors have the fewest restrictions on their freedom to invest. Accordingly, although slightly overbroad, I term investors not meeting this threshold as non-sophisticated or "retail" investors. *See infra* notes 230–37 and accompanying text for a further discussion of the regulatory freedom sophisticated investors have to invest.

22. *See infra* notes 230–32 and accompanying text.

23. *See infra* notes 233–37 and accompanying text.

not listed in the United States.[24] Retail investors are thus denied opportunities to invest in non-U.S. issuers who choose not to list in the United States. They are ring-fenced, confined to investing in issuers listed in the United States and denied the acknowledged benefits of diversification that sophisticated U.S. investors easily obtain.[25]

If we recognize this investor disparity, it leads to an important conclusion as to the appropriate level of U.S. regulation of non-U.S. issuers. The SEC should craft regulation based on principles of investor equality and opportunity, and global investments should, to the extent feasible, be made available to all U.S. investors who desire them. Accordingly, the SEC should adopt regulations for non-U.S. issuers that easily permit them to list and raise capital in the United States. This would be a form of mutual recognition common under conflict-of-laws principles whereby a non-U.S. issuer's compliance with its home market rules would be deemed satisfactory.[26] No other significant U.S. regulation would be imposed upon such non-U.S. issuers unless the quality of home market regulation and enforcement were deemed to be sufficiently different from U.S. regulation to outweigh the benefits of investor access. To determine these base-level, necessary investor protections, the SEC would look to the fundamental interests of U.S. investors themselves. If it does look at these interests, the SEC should find that the regulation of most developed countries would suffice. This is particularly true in light of the increasing international harmonization of securities disclosure laws.[27] This approach would also be a significant expansion of the successful program adopted by

24. *Id.*

25. This disparity is further discussed *infra* Part III.A.3.

26. *See infra* notes 333–35 and accompanying text.

27. There is a global trend among regulators to cooperate and harmonize disclosure and listings standards, particularly with respect to accounting rules. *See* Roberta S. Karmel, *Will Convergence of Financial Disclosure Standards Change SEC Regulation of Foreign Issuers?*, 26 BROOK. J. INT'L L. 485, 488–501 (2000) (surveying legal trends towards harmonization of U.S. financial disclosure standards with international ones). *See generally* J. William Hicks, *Harmonization of Disclosure Standards for Cross-Border Share Offerings: Approaching an "International Passport" to Capital Markets?*, 9 IND. J. GLOBAL LEGAL STUD. 361 (2002) (assessing the prospects for future harmonization of disclosure standards in the global market). There are limits to this harmonization, and as Professors William Bratton and Joseph McCahery have rightly pointed out, global convergence is unlikely to eliminate core systematic differences due to their fundamental nature. *See* William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 219 (1999). Harmonization thus has its limits and is not a competitive solution to the global market for listings; rather, it has the potential to be a remedy for specific areas of difference that are amenable to harmonization such as accounting and disclosure standards. *See, e.g.*, John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 650 (1999) (agreeing that from a "path dependency perspective . . . formal convergence faces too many obstacles to be predicted" (emphasis removed)).

the SEC with respect to certain Canadian issuers through its Multi-Jurisdictional Disclosure Regime.[28] In the same vein, non-U.S. issuers who do not have a listing outside the United States or do not maintain a primary listing in a sufficiently high-standard regulatory and enforcement regime would continue to be subject to heightened, more tailored regulation similar to that currently applied to non-U.S. issuers. Non-U.S. issuers would also still maintain the option of voluntarily selecting a higher level of U.S. regulation for cross-bonding or other purposes if they deemed it appropriate.[29]

A demand-side theory of regulation, one crafted from the investor perspective, thus establishes a general principle guiding future SEC regulation of non-U.S. issuers. This is a coherent norm which in application also competitively positions the U.S. stock markets in the global market for listings. The U.S. stock markets would no longer be constrained, limited to offering the singular, one-size-fits-all securities regulation that the SEC currently requires. Rather, U.S. stock markets could then offer targeted regulation compatible with the individualized needs of non-U.S. issuers and competitive with the regulatory choice offered by other global stock markets. Accordingly, under this proposal, issuers should benefit through expanded regulatory choice that recognizes their preferences for varying levels of regulation when accessing the U.S. market. The U.S. stock markets should also gain from the ability to offer this regulatory choice, producing increased listings and trading volume.

Part I of this Article outlines the current global market for listings and assesses its competitive element. I find that the United States did indeed lose competitive stature in the global competition for listings from 2002 through 2006. But this decline appears to be primarily a comparative one due to the inevitable maturation of non-U.S. capital markets rather than one attributable to the Sarbanes-Oxley Act or any other recent change in U.S. regulation. Moreover, I find that almost all the major European stock markets during this time also experienced declining numbers of non-domestic listings, while the Asian markets entirely failed to attract any such listings. This leads to a number of conclusions concerning the current competitive state of the U.S. markets that run counter to the prevalent public consensus.

Part II then sets out the main actors who define this global market, as well as their sometimes divergent and competing interests. Part III details the current jurisdictional approaches to regulation of issuers. Part IV draws on the information and conclusions in the previous part to define the true

28. *See infra* note 335 and accompanying text.

29. The parameters of this proposal are more fully set forth *infra* Part V.

parameters of the global competition for listings and the competitive position of the United States therein. Part V concludes by referencing the established interests of the main actors who define this global market to put forth a normative regulatory model for non-U.S. issuers that encompasses investor access and equality principles.

I. THE GLOBAL LISTINGS MARKET

This Part surveys the current state of the global listings market. More specifically, it examines the leading internationally recognized stock markets in Asia, Europe, and the United States.[30] The goal is threefold: to assess the comparative strength of the U.S. market vis-à-vis its global competitors; to contextually place the recent decline, if any, of the U.S. market; and to discern current trends in the global listings market that may affect the U.S. market's future competitive position. The conclusions drawn from these analyses will support this Article's development and assessment of a prescriptive norm for the regulation of non-U.S. issuers.

A. *The United States*

In the United States, the two primary stock markets are the New York Stock Exchange ("NYSE") and the Nasdaq. The NYSE is the larger of the two and is the largest in the world. As of December 31, 2006, the NYSE listed 2,764 issuers[31] with an aggregate market capitalization of $25 trillion.[32] This compares to the Nasdaq which, as of December 31, 2006, had 3,388 issuers[33] with an aggregate market capitalization of $4.201 trillion.[34] In the year 2006, on an average trading day, over 1.827 billion shares, valued at over $68.29 billion, were traded on the NYSE[35] and over

30. I discuss the attributes that make these stock markets "leading" ones *infra* notes 268–73 and accompanying text.

31. New York Stock Exchange, Facts & Figures, http://www.nysedata.com/nysedata/Default.aspx?tabid=115 (follow "Listed Companies" hyperlink; then follow "NYSE Group—Number of Issuers" hyperlink) (last visited Sept. 6, 2007).

32. New York Stock Exchange, Facts & Figures, http://www.nysedata.com/nysedata/Default.aspx?tabid=115 (follow "NYSE Historical Statistics" hyperlink; then follow "Market capitalization of NYSE companies" hyperlink) (last visited Sept. 6, 2007).

33. Nasdaq Trader, Monthly Market Activity, http://www.nasdaqtrader.com/asp/tdMarkSpec.asp?RepType=1&cboMARDate=12%2F1%2F2006&MARSearchDate=12%2F2006 (last visited Sept. 6, 2007).

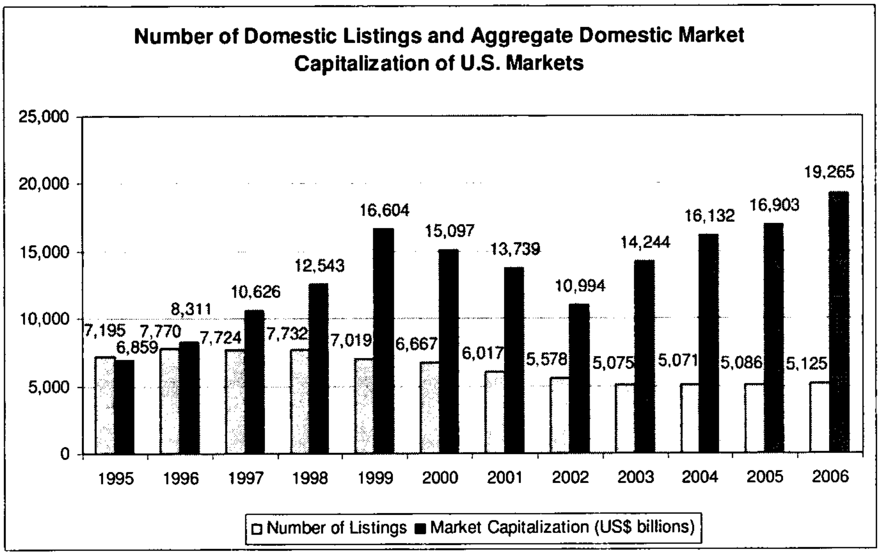
34. E-mail from Alex Garay, Economic Researcher, NASDAQ, to Josh Terebelo, Research Assistant to Professor Steven M. Davidoff, Wayne State University Law School (Feb. 12, 2007, 11:51 EST) (on file with the North Carolina Law Review).

35. New York Stock Exchange, Facts & Figures, http://www.nysedata.com/nysedata/Default.aspx?tabid=115 (follow "Market Activity" hyperlink on left; then follow "NYSE Group Volume in All Stocks Traded") (calculations based on 2006 chart) (last visited Feb. 17, 2007).

1.524 billion shares,[36] valued at over $47 billion, were traded on the Nasdaq.[37]

Both U.S. stock markets experienced rapid expansion in market size in the 1990s, growth which stalled in the new millennium as the technology bubble burst. The aggregate number of listings on both markets fell from 1995 through 2003 and remained flat thereafter. The following chart sets forth the number of domestic listings and aggregate domestic market capitalization of both markets on a combined basis from 1995 through 2006.[38]

Chart 1A



During this period, the pattern of market capitalization and listings size was different for non-U.S. issuers. The following chart sets forth the

36. Nasdaq Stock Exchange, Nasdaq Monthly Trading Data, http://www.nasdaqtrader.com/asp/tdMarkSpec.asp?RepType=1&cboMARDate=12%2F1%2F2006&MARSearchDate=&View.x=15&View.y=6 (follow "24 months" hyperlink under "Average Daily Activity") (last visited Feb. 17, 2007).

37. World Fed'n of Exchs., Average Daily Turnover, http://www.world-exchanges.org/publications/EQUITY606.xls (last visited May 15, 2007).

38. World Fed'n of Exchs., Domestic Market Capitalization, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Domestic Market Capitalization" hyperlink; repeat through 1995) (last visited Feb. 17, 2007).

number of non-U.S. listings and aggregate market capitalization of non-U.S. issuers listed on the NYSE from 1995 through 2006.[39]

Chart 1B

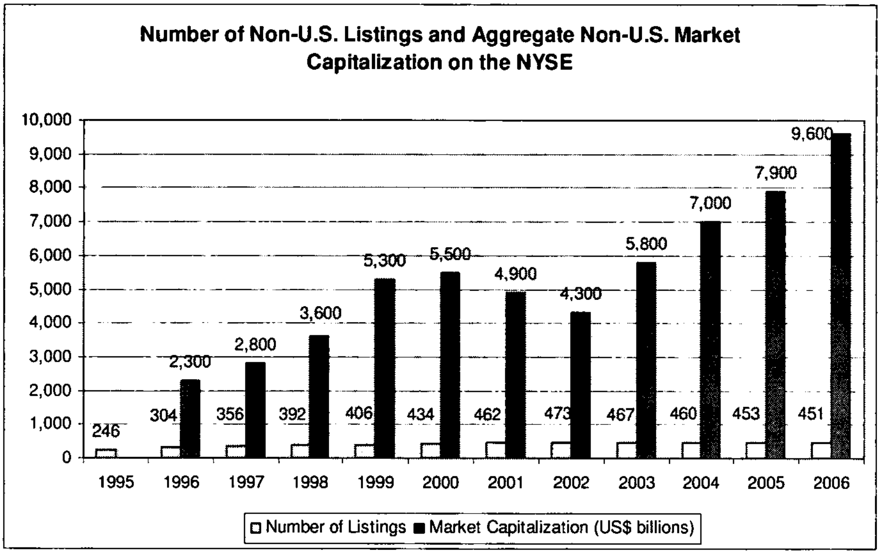


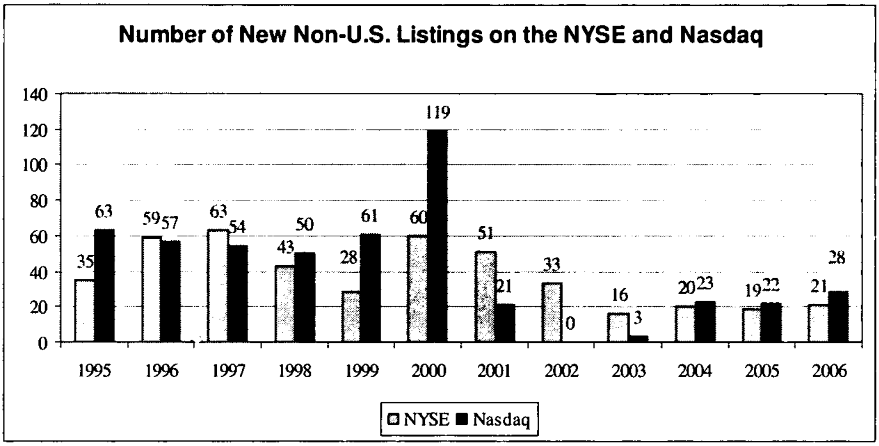
Chart 1B reveals the sometimes erratic growth in non-U.S. listings and non-U.S. market capitalization of the NYSE from 1995 through 2000 and the flat growth that has followed. This is a trend mirrored on the Nasdaq: non-U.S. listings on the Nasdaq grew from 361 at the end of 1995 to 488 at the end of 2000 but fell back to 321 by the end of 2006.[40] Nonetheless, when compared to Chart 1A and the relatively constant decline in domestic listings from 1995 through 2003, non-U.S. listings emerge as a key contributor to the recent historical growth of the U.S. market.

39. World Fed'n of Exchs., Number of Listed Companies, http://www.world-exchanges.org/WFE/home.asp?menu=344&document=3356 (data for "Number of Listings" comes from 1995 to 2006 "Number of Listed Companies" spreadsheets; data for "Market Capitalization" comes from 1996 to 2006 "Domestic Market Capitalization" spreadsheets) (last visited Feb. 17, 2007) (market capitalization figures unavailable for 1995). This is the continuation of a pre-existing trend: in 1990, there were only ninety-six non-U.S. listings on the NYSE itself, up from fifty-four such listings in 1985. Similarly, non-U.S. listings on Nasdaq grew from 185 in 1991 to 320 as of the end of 1995. Jonathan Macey & Maureen O'Hara, *The Economics of Stock Exchange Listing Fees and Listing Requirements*, 11 J. FIN. INTERMEDIATION 297, 302 (2002).

40. World Fed'n of Exchs., Number of Listed Companies, http://www.world-exchanges.org/WFE/home.asp?menu=27 (follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Listed Companies" hyperlink; repeat through 1995) (last visited Feb. 17, 2007).

The recent decline of non-U.S. listings on both U.S. markets is in part due to the lower number of non-U.S. issuers choosing to list in the U.S. market. The following chart sets forth the number of new non-U.S. listings on the NYSE and Nasdaq from 1995 through 2006.[41]

Chart 1C



The decline in new non-U.S. listings shown on Chart 1C is even starker when measured by volume. For example, in 2003, thirty-one percent of the NYSE's initial public offering volume derived from non-U.S. issuers, compared to just eight percent in 2005.[42] Not only have non-U.S. issuers increasingly chosen not to list in the United States, but non-U.S. issuers already listed in the United States have, since 2001, begun to depart from the U.S. market altogether. In the five-year period from the end of 2001 through 2006, thirty-one issuers voluntarily chose to delist from the NYSE.[43]

41. World Fed. of Exchs., Number of Listed Companies, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Newly Listed and Delisted Companies" hyperlink; data comes from "Foreign Companies" column; repeat through 1995) (last visited Feb. 17, 2007).

42. MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 46 (2007) [hereinafter MCKINSEY REPORT] (report of McKinsey & Co. on the competitiveness of the U.S. capital markets).

43. E-mail from Jean Tobin, NYSE Researcher, NYSE, to Josh Terebelo, Research Assistant to Professor Steven M. Davidoff, Wayne State University Law School (Oct. 19, 2006, 13:31 EST) (on file with the North Carolina Law Review). Moreover, the numbers with respect to delistings are abnormally low. The SEC adopted rules effective June 4, 2007, to permit non-U.S. issuers to delist freely. This appears to have resulted in a significant drop in listings by non-U.S. issuers subsequent to this date, as non-U.S. issuers who desire to delist are now able to do so. *See*

Despite this downward trend, the market capitalization of non-U.S. issuers relative to domestic issuers has increased over the last decade: as of December 31, 2006, 38.24% of the $25 trillion total market capitalization of the NYSE consisted of non-U.S. listings.[44] This compares with ratios of 25.2% and 30.8% at the end of 1996 and 2001, respectively.[45] This increase is primarily the result of the superior performance of the home markets for these non-U.S. issuers compared to the U.S. market.[46] Thus, while the number of non-U.S. listings may have declined, the relative importance of non-U.S. issuers to the U.S. investor for diversification purposes has become more significant. Moreover, prior to this decline, non-U.S. listings contributed an important accretive component to the U.S. market in times of negative growth in domestic listings.

The reasons postulated for the downward trend in new non-U.S. listings include overburdensome U.S. regulation, heightened litigation fears in a post-Sarbanes-Oxley world, improved quality, pricing, and liquidity of non-U.S. markets, the control by their governments of many prospective non-U.S. issuers and their preference for a home country listing, and lower transaction costs associated with listing in a non-U.S. market.[47] Moreover, this is a problem exacerbated by the simultaneous decline in the equity rating premium for listing in the United States relative to other well-

---

Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty To File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, 72 Fed. Reg. 16,934 (Apr. 5, 2007) (to be codified as 17 C.F.R. pts. 200, 232, 240, and 249); *see also* Emily Chasan, *Foreign Companies Check Out of U.S. Markets*, INT'L BUS. TIMES, Jul. 6, 2007, *available at* http://www.ibtimes.com/articles/20070706/sarbanes-oxley-companies.htm (reporting that, since the effective date of the SEC's new deregistration rules and as of July 7, 2007, "[a]bout 35 foreign companies have voluntarily announced plans to delist their stocks from U.S. exchanges").

44. N.Y. Stock Exch., Facts & Figures, http://www.nysedata.com/nysedata/Default.aspx?tabid=115 (follow "NYSE Historical Statistics" hyperlink; then follow "Market Capitalization of NYSE Companies") (last visited Feb. 17, 2007).

45. *Id.* The numbers for the Nasdaq are similar, and, as of December 31, 2006, the total market capitalization of Nasdaq was $4.201 trillion, with six percent being the non-U.S. issuer component. This compares with less than one percent at the end of 2001. E-mail from Alex Garay, Researcher, NASDAQ, to Josh Terebelo, Research Assistant to Professor Steven M. Davidoff, Wayne State University Law School (Feb. 12, 2007, 11:51 EST) (on file with the North Carolina Law Review).

46. It is also a result of the tendency of larger capitalized non-U.S. issuers to list on U.S. exchanges, creating disproportional effects on U.S. markets in times when there are higher returns on non-U.S. markets. *See* Marco Pagano et al., *The Geography of Equity Listing: Why Do Companies List Abroad?*, 57 J. FIN. 2651, 2676 (2002) (examining the characteristics of cross-listing corporate entities and finding that "cross-listing companies are significantly larger than companies that are only listed domestically").

47. I further discuss this debate and its ramifications for regulation of non-U.S. issuers *infra* notes 315–20 and accompanying text.

regulated exchanges.[48] The decline in new non-U.S. listings has likely been caused by a combination of the above; but whatever the reasons, the numbers reveal one certainty: since 2001, non-U.S. issuers have in some measure failed to choose or otherwise spurned the U.S. market, depriving it of an important growth component.

B. Europe

The European market for listings is more fragmented than the U.S. market. Each European Union ("E.U.") member-state has historically had its own home country exchange on which its domestic companies almost all uniformly chose to list.[49] The increasing integration of the E.U. has changed this landscape, resulting in a wave of consolidation among the European exchanges. The most prominent is the merger of the Paris Bourse, Amsterdam Stock Exchange, Brussels Stock Exchange, and Portuguese Stock Exchange to form Euronext.[50] The other significant consolidation is OMX, an agglomeration of the Nordic exchanges in Copenhagen, Stockholm, Helsinki, Riga, Tallinn, and Vilnius.[51] Despite this development and the increasing relative dominance of the London Stock Exchange ("LSE") within the E.U. market, European issuers still largely prefer to list on an exchange located in their home country.[52]

The three largest E.U. exchanges, as of December 31, 2006, are the LSE with 1,606 issuers and an aggregate domestic market capitalization of $3.79 trillion,[53] Euronext with 1,210 issuers and an aggregate domestic market capitalization of $3.71 trillion,[54] and Frankfurt's Deutsche Börse

48. *See* Luigi Zingales, *Is the U.S. Capital Market Losing Its Competitive Edge?*, J. ECON. PERSP. (forthcoming 2007) (manuscript at 12), *available at* http://faculty.chicagogsb.edu/luigi.zingales/vita/ (finding that on average the premium for listing in both the U.S. and home country stock markets almost halved, dropping by .19 since 2002).

49. This home country bias is discussed further *infra* Part II.B.

50. *See* Euronext, History, http://www.euronext.com/editorial/wide/0,5371,1732_4427342,00.html (last visited Feb. 17, 2007).

51. *See* OMX Corporate, About OMX, http://www.omxgroup.com/omxcorp/About_OMX/ (last visited Feb. 17, 2007).

52. *See* Sergei Sarkissian & Michael J. Schill, *The Overseas Listing Decision: New Evidence of Proximity Preference* 1 (Darden Grad. Sch. of Bus. Admin., Working Paper No. 03-07, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267103.

53. LONDON STOCK EXCH., MAIN MARKET FACT SHEET 16 (Dec. 2006), *available at* http://www.londonstockexchange.com/NR/rdonlyres/5190CE7B-2F05-4E9F-9109-2B561F423D66/0/MainMarketFactsheetDecember2006.pdf; London Stock Exch., Main Market Fact Sheet, http://www.londonstockexchange.com/NR/rdonlyres/2EC930DD-D365-421F-98E1-65104E18F791/0/MainMarketFactsheetDecember2006.xls (click on "Summary" tab) (converted to U.S. dollars at $1 = €0.7584).

54. EURONEXT, NEXT FACTS 6 (Dec. 2006), *available at* http://www.euronext.com/file/view/0,4245,1626_53424_1000744444,00.pdf?channelId=350260&local=1732 (converted to U.S. dollars at $1 = €0.7584).

with 836 issuers and an aggregate domestic market capitalization of $1.637 trillion.[55] The Deutsche Börse and the LSE have thus far remained independent; Euronext has been acquired by the NYSE.[56] Nonetheless, there is a general consensus that there will be further significant consolidation focusing on these two independent stock markets, and that this process will ultimately result in two or three dominant E.U. exchanges similar to the stock market consolidation that occurred in the United States in the early twentieth century.[57]

In addition to consolidating, the European exchanges are growing in size relative to the U.S. market. The following chart sets forth the number of domestic issuers listed on, and aggregate domestic market capitalization of, all E.U. stock exchanges from 1995 through 2006.[58]

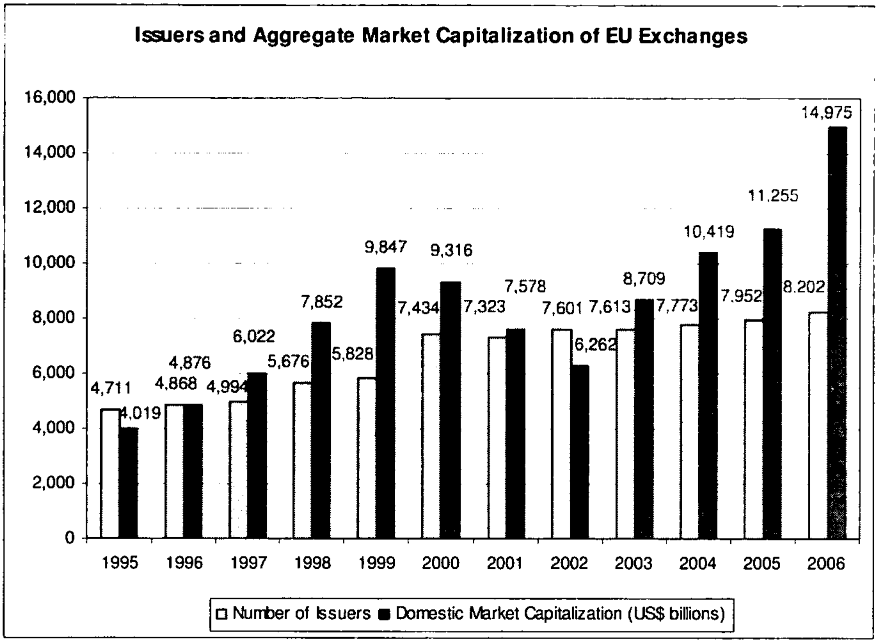
55. DEUTSCHE BÖRSE GROUP, FACTS AND FIGURES 1 (Jan. 2007), *available at* http://www1.deutsche-boerse.com/INTERNET/EXCHANGE/zpd.nsf/KIR+Web+Publikationen/AKLS-6XGJ64/$FILE/F&F_Januar_2007_E.pdf?OpenElement; World Fed'n of Exchs., Domestic Market Capitalization, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Domestic Market Capitalization") (converted to U.S. dollars at $1 = €0.7584).

56. *See* James Kanter, *Trans-Atlantic Exchange to Be Listed Today*, N.Y. TIMES, Apr. 4, 2007, at C2.

57. *See, e.g.*, Norman S. Poser, *The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation*, 22 U. PA. J. INT'L ECON. L. 497, 498 (2001) ("[T]he European stock exchanges are rushing headlong to consolidate.").

58. World Fed'n of Exchs., Domestic Market Capitalization, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (for "Number of Issuers," follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Listed Companies" hyperlink; repeat through 1995) (for "Domestic Market Capitalization," follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Domestic Market Capitalization" hyperlink) (last visited Feb. 17, 2007) (calculations on file with the North Carolina Law Review).

Chart 2A



The growth of the E.U. market shown on Chart 2A is marked when compared to the U.S. market. The aggregate domestic market capitalization of the E.U. market from 1995 through 2006 grew at an annual rate of 12.7%, compared to 9.5% for the domestic U.S. market.[59] The number of listings on all E.U. markets similarly increased at an annual rate of 5.2% during this same period, compared to a net decline in domestic listings on the U.S. market.[60]

The market for global equity listings, as opposed to domestic listings in Europe, historically has been almost wholly occupied by the LSE and the Deutsche Börse, with the LSE the clear market leader.[61] These are also the

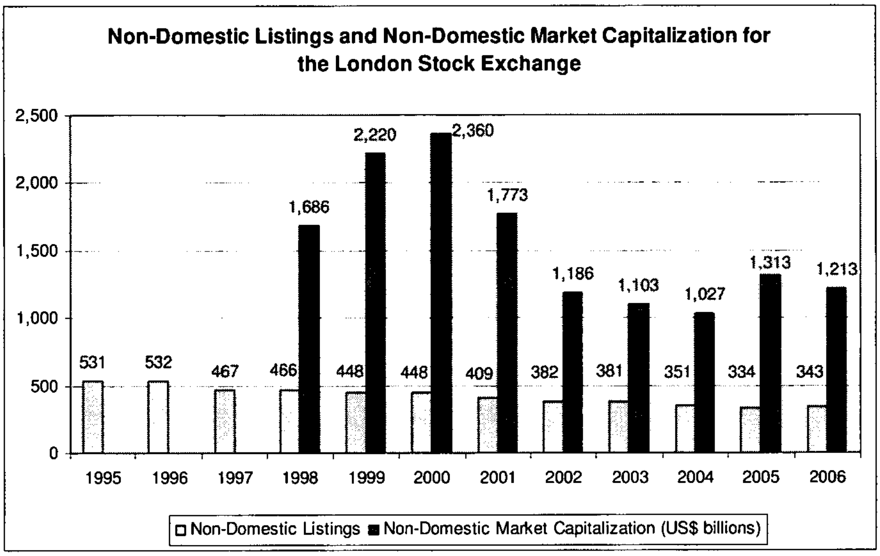
59. World Fed'n of Exchs., Domestic Market Capitalization, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "2006" hyperlink"; then follow "Equity Markets" hyperlink; then follow "Domestic Market Capitalization"; use numbers from "Change %" column) (last visited Feb. 17, 2007) (calculations on file with the North Carolina Law Review).

60. *Id.*

61. Both the Luxembourg and the Amsterdam sections of Euronext trade a number of debt and alternative investment funds of a global nature but have only a comparatively small number of equity listings. *See* Euronext, Euronext Amsterdam Factbook 2005, http://www.euronext.com/file/view/0,4245,1626_53424_820575992,00.xls?channelId=208369308&local=1732 (disclosing that, at the end of 2005, the Amsterdam section of Euronext listed only 131 equity issues out of approximately 1,750 total securities listed); LUX. STOCK EXCH.,

two thickest European markets, offering size and liquidity comparable to the U.S. market. Together, as of December 31, 2006, they comprised 47.3% of the daily trading volume[62] and 33.6% of the total domestic market capitalization on the E.U. market.[63] The following chart sets forth the number of non-domestic listings and non-domestic market capitalization for the LSE from 1995 through 2006.[64]

Chart 2B



FACTBOOK II: STATISTICS 56 (2006), http://www.bourse.lu/Accueil.jsp (follow "Statistics" hyperlink; then select 2006 in the drop-down box next to "Factbook II Statistics"; then click "Go!") (disclosing that, at the end of 2005, the Luxembourg Stock Exchange listed only 279 equity issues out of approximately 36,000 total securities listed).

62. Calculations by author based on material available at World Federation of Exchanges, Number of Trading Days, Average Daily Turnover, and Average Value of Trades, http://www.world-exchanges.org/WFE/home.asp?menu=406&document=4140 (last visited Feb. 17, 2007).

63. Calculations by author based on material available at World Federation of Exchanges, Domestic Market Capitalization, http://www.world-exchanges.org/WFE/home.asp?menu=406&document=4140 (last visited Feb. 17, 2007).

64. World Fed'n of Exchs., Statistics on Members, http://www.world-exchanges.org/WFE/home.asp?menu=378&document=3554 (last visited Feb. 17, 2007). Information regarding market capitalization available at London Stock Exchange, Main Market Fact Sheets, http://www.londonstockexchange.com/en-gb/ (follow "About the Exchange" hyperlink; then follow "Statistics" hyperlink; then follow "Fact Sheets" hyperlink) (last visited Feb. 18, 2007). Market capitalization data was not available for years prior to 1998.

Chart 2B shows a different growth pattern in non-domestic listings for the LSE than that of the U.S. market. Non-domestic listings on the LSE have steadily declined over the period, in contrast to the growth spurt experienced by the U.S. market from 1995 through 2001. The numbers are even more attenuated for the Deutsche Börse: non-domestic listings declined from 210 at the end of 1998 to 104 at the end of 2006.[65] Moreover, the market capitalization of non-domestic listings on the LSE fell in value by approximately 15.3% from 1998 to 2006.[66] Thus, from 1995 through 2006, and in contrast to the U.S. market, non-domestic listings do not appear to have been a substantial growth driver for the LSE and the Deutsche Börse. Rather, the expansion of these markets appears to have been primarily a function of an increase in domestic listings.[67]

These European statistics, though, do not reflect the new prominence of the less regulated, London-based Alternative Investment Market ("AIM"). The AIM was launched by the LSE in 1995.[68] It is a lightly regulated, alternative public market established primarily as an exchange for small, capitalized issuers.[69] The growth in the AIM has been explosive. The AIM was founded in 1995, and by the end of that year had 121 listings.[70] Listings then increased exponentially. By December 31, 2006, 1,634 companies with an aggregate market capitalization of $177.46 billion were listed on the AIM.[71] In 2006 alone there were 462 new listings on the

65. World Fed'n of Exchs., Statistics on Members, http://www.world-exchanges.org/WFE/home.asp?menu=10 (follow "Annual" hyperlink; then follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Listed Companies" hyperlink; repeat for 1998) (last visited Feb. 17, 2007).

66. Calculations made by author based on material available at London Stock Exchange, Main Market Fact Sheet, http://www.londonstockexchange.com/NR/rdonlyres/2EC930DD-D365-421F-98E1-65104E18F791/0/MainMarketFactsheetDecember2006.xls (click on "Summary" tab for 2006 information), and London Stock Exchange, Primary Market Fact Sheet—December 1998, http://www.londonstockexchange.com/NR/rdonlyres/478C90D9-AE95-4FBE-B93E-903F4D28AA62/0/142.xls (click on "Summary" tab for 1998 information).

67. Domestic listings on the LSE grew from 1,957 listings at the end of 1998 to 2,913 listings at the end of 2006, and on the Deutsche Börse grew from 452 listings at the end of 1998 to 656 listings at the end of 2006. World Fed'n of Exchs., Number of Listed Companies, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "1998" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Listed Companies" hyperlink; repeat for 2006) (last visited Feb. 17, 2007).

68. *See* London Stock Exchange, About AIM, http://www.londonstockexchange.com/en-gb/products/companyservices/ourmarkets/aim_new/About+AIM/ (last visited Feb. 17, 2007).

69. I discuss the AIM more fully *infra* Part III.B.1.

70. London Stock Exch., AIM Market Statistics 2, http://www.londonstockexchange.co.uk/NR/rdonlyres/C26FE728-83CE-459E-AEDB-237F3E6736E4/0/AIMStatistics0701.xls (last visited Feb. 17, 2007).

71. LONDON STOCK EXCH., AIM MARKET STATISTICS 2 (Dec. 2006), *available at* http://www.londonstockexchange.com/NR/rdonlyres/B7A0DF24-36E9-4EC3-AF89-9FE36AC8BCC8/0/Aimfs0612.pdf (last visited Feb. 17, 2007) (converted from U.K. pounds to U.S. dollars at $1 = £0.5109).

AIM, raising $19.46 billion in capital.[72] Underlying this strong growth is a sharp rise in the number of non-U.K companies electing to list on the AIM. As of December 31, 2006, 306 of the companies listed on the AIM were non-U.K. issuers.[73] Additionally, in 2006 there were 124 new non-U.K. issuer listings on the AIM, raising approximately $3.3 billion in capital,[74] including nineteen U.S. issuers who opted to list on the AIM, raising approximately $860 million.[75]

C. Asia

The final leg of this tripod is Asia. The two main players here are the Tokyo Stock Exchange ("TSE") and the Hong Kong Stock Exchange ("HKSE"). The TSE is the bigger of the two: it is the second largest stock market in the world with 2,391 issuers and an aggregate market capitalization of slightly more than $4.5 trillion as of December 31, 2006.[76] In contrast, the HKSE had, on that same date, 1,173 issuers with an aggregate market capitalization of $1.708 trillion.[77] As the following chart shows, both markets have also experienced a steady rise in domestic market capitalization in the last four years, following several years of inconsistent growth.[78]

72. *Id.* (converted from U.K. pounds to U.S. dollars at $1 = £0.5109).

73. *Id.*

74. London Stock Exch., AIM Market Statistics, http://www.londonstockexchange.co.uk/en-gb/about/statistics/factsheets/aimmarketstats.htm (follow "December 2006" hyperlink") (last visited Feb. 17, 2007) (converted from U.K. pounds to U.S. dollars at $1 = £0.5109).

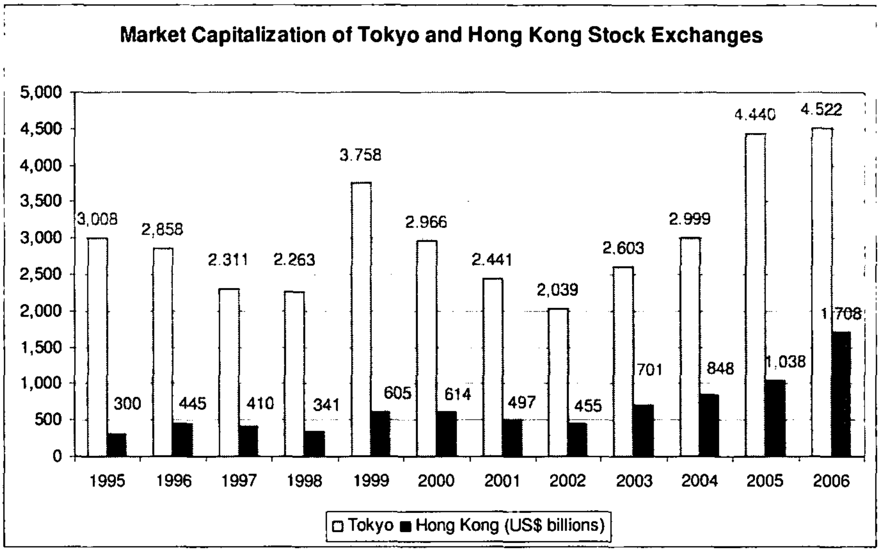
75. *Id.* (converted from U.K. pounds to U.S. dollars at $1 = £0.5109). There were thirty-eight U.S. issuers listed on the AIM at the end of 2006. *See id.*

76. World Fed'n of Stock Exchs., http://www.world-exchanges.org/WFE/home.asp?action=document&menu=28 (follow "2006" hyperlink; then follow "Domestic Market Capitalization" hyperlink) (last visited Feb. 17, 2007) (converted from Japanese Yen to U.S. dollars at $1 = ¥121.838).

77. H.K. STOCK EXCH., HKEX FACT BOOK, http://www.hkex.com.hk (follow "Data & Statistics" hyperlink on left; then follow "HKEx Fact Book" hyperlink; then follow "listing statistics" and "market capitalisation" hyperlinks for data) (last visited Feb. 17, 2007) (converted from Hong Kong Dollars to U.S. dollars at $1 = HK$7.807).

78. Tokyo Stock Exch., Market Value, http://www.tse.or.jp/market/data/value/historical-jika.xls (last visited Feb. 17, 2007); H.K. STOCK EXCH., HKEX FACT BOOK, http://www.hkex.com.hk (follow "Data & Statistics" hyperlink on left; then follow "HKEx Fact Book" hyperlink; then follow "2006" hyperlink; then follow "market capitalisation" hyperlink) (last visited Feb. 17, 2007).

Chart 3A

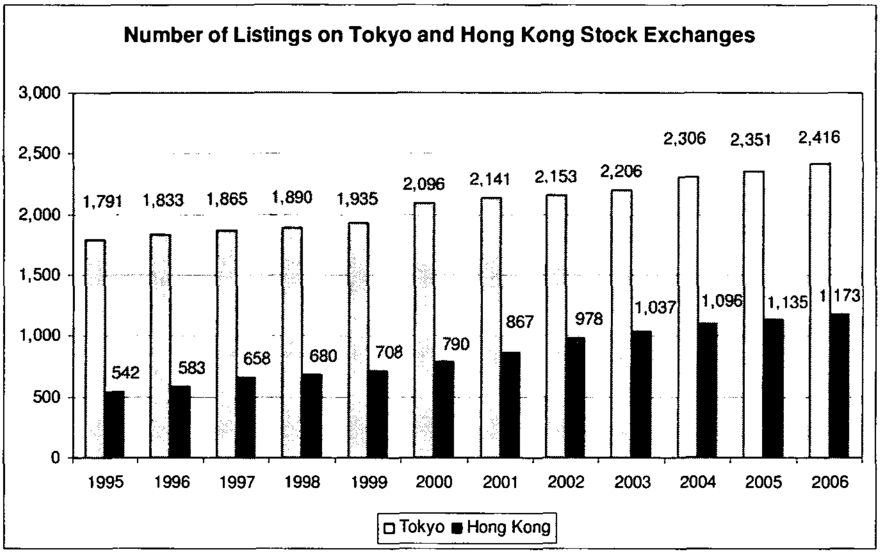


As Chart 3A shows, aggregate domestic market capitalization increased during the entire period at 3.8% annually on the TSE, compared to a blazing seventeen percent on the HKSE, a rate of growth well ahead of the U.S. and E.U. markets.[79] Moreover, the rising presence of the HKSE is also reflected in the public market for listings. The following chart sets forth the number of listings on the HKSE and the TSE from 1995 through 2006.[80]

79. Calculations by author based on material available at Tokyo Stock Exchange, Market Value, http://www.tse.or.jp/market/data/value/historical-jika.xls (last visited Feb. 17, 2007); H.K. STOCK EXCH., HKEX FACT BOOK, http://www.hkex.com.hk (follow "Data & Statistics" hyperlink on left; then follow "HKEx Fact Book" hyperlink; then follow "2006" hyperlink; then follow "market capitalisation" hyperlink; repeat through 1995) (last visited Feb. 17, 2007).

80. World Fed'n of Exchs., Statistics on Members, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (follow "2006" hyperlink; then follow "Equity Markets" hyperlink; then follow "Number of Listed Companies" hyperlink; repeat through 1995) (last visited Feb 17. 2007).

Chart 3B



As Chart 3B shows, the HKSE is adding listings at a significantly faster pace than the TSE: the HKSE more than doubled its number of listings from 1995 through 2006. In the worldwide market for new listings, the HKSE also had a robust year in 2006, with sixty-two new issuers listing, raising $42.67 billion in market capital.[81] This compares to 104 new listings for the TSE in 2006, raising $11.88 billion.[82] The HKSE's comparative rise is largely the product of the industrialization of China during this time period and the resulting increase in Chinese-listed companies that have largely preferred, or been directed by the Chinese government, to list on the HKSE.[83]

In contrast to the robust domestic listing market, the global listings market is nascent in Asia, and this is reflected on both the HKSE and the

81. H.K. Stock Exch., 2006 Market Statistics, http://www.hkex.com.hk/news/hkexnews/0701122news.xls (last visited Feb. 17, 2007) (converted from Hong Kong dollars to U.S. dollars at $1 = HK$7.807).

82. TOKYO STOCK EXCH., MAIN BOARD MONTHLY REPORT 5 (2006) http://www.tse.or.jp/english/listing/companies/statistics_12-y2006.pdf; Tokyo Stock Exch., Financing by Listed Companies, http://www.tse.or.jp/english/market/data/financing/index.html (last visited May 17, 2007) (converted from Japanese Yen to U.S. dollars at $1 = ¥121.838).

83. Mainland Chinese companies accounted for half of the market capitalization of the HKSE in 2006, compared to only sixteen percent in 1997. H.K. Stock Exch., 2006 Market Statistics 19–23, http://www.hkex.com.hk/news/hkexnews/0701122news.xls (last visited Feb. 17, 2007). In addition, mainland Chinese companies accounted for fifteen percent of the HKSE's total listings in 1997, compared to thirty-one percent in 2006. *Id.* at 22–23.

TSE. As of December 31, 2006, there were only eight non-domestic issuers listed on the HKSE, compared to twenty-five non-domestic issuers on the TSE.[84] Despite this, the HKSE is currently pegged as an emerging competitor, and Asia's best candidate, in the global listings market. This is due to the rising competitive status of the market, a product of Hong Kong's status as Asia's financial center, and its ability to attract listings by Chinese domestic companies with global profiles.[85] The HKSE's competitive stature is likely to increase as the Chinese market continues to grow and the HKSE itself continues to receive the blessings of the Chinese government as its preferred global stock market.[86]

D. The Global Market

The U.S. market is still the premier market in the world. As of December 31, 2006, it comprised forty-three percent of aggregate world domestic stock market capitalization and forty-five percent of aggregate world trading volume.[87] There were also 228 initial public offerings on the U.S. markets in 2006, raising approximately $46.1 billion.[88] Moreover, it appears that talk of the U.S. market's comparative decline in the global listings market may be overstated. The oft-cited fall in non-U.S. listings from 2002 through 2006 has coincided with an even more substantial, extended decline in non-domestic listings on European markets.[89] Meanwhile, the Asian markets have not made any significant entry into the global market for listings during this time period.[90]

---

84. World Fed'n of Stock Exchs., Number of Listed Companies 2006, http://www.world-exchanges.org/publications/EQUITY306.XLS (last visited Feb. 17, 2007). The TSE actually lost absolute market share for non-domestic listings in the period from 1990 to 2006; the number of non-domestic issuers listing on this market has dropped from seventy-seven non-domestic listings in 1995 to twenty-five as of December 31, 2006. *Id.* (2006 statistic); World Fed'n of Stock Exchs., Number of Companies with Shares, http://www.world-exchanges.org/publications/Ta1196.xls (last visited Feb. 17 2007) (1995 statistic).

85. *See, e.g.*, Keith Bradsher, *Hong Kong Set to Be No. 1 in 2006 Offerings, Surpassing London and New York*, N.Y. TIMES, Oct. 20, 2006, at C4 (reporting on the growing international prominence of the HKSE).

86. *See* Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004–2005*, 3 N.Y.U. J. L. & BUS. 243, 274–75 (2006) (discussing the influence of the Chinese government on listing decisions by mainland Chinese companies).

87. Calculations by author based on material available at World Federation of Exchanges, Domestic Market Capitalization, http://www.world-exchanges.org/publications/EQUITY106.XLS (last visited Feb. 17, 2006), and World Federation of Exchanges, Average Amount of Daily Turnover, http://www.world-exchanges.org/publications/EQUITY606.xls (last visited Feb. 17, 2006). More specifically, aggregate world trading volume in 2006 was $5.775 billion, of which the NYSE and Nasdaq combined comprised $2.582 billion. *Id.*

88. *See* Rob Garver, *An IPO Resurgence?*, CFO MAG., Feb. 1, 2007, at 13, *available at* 2007 WLNR 2367286.

89. *See supra* notes 65–67 and accompanying text.

90. *See supra* notes 84–86 and accompanying text.

There are signs, however, that do raise concern. The growth in non-U.S. listings on the U.S. market appears to have stagnated after a period of sustained rise, and a number of currently listed non-U.S. issuers have chosen to exit the U.S. market.[91] Moreover, the European and Asian markets offer increasingly credible alternatives to the U.S. market. These non-U.S. markets have been able to leverage this position and capture an increasing share of the global market for capital. For example, in 2005, 352 companies issued equity outside their home markets for the first time, raising a total of $92 billion.[92] Only six percent of this equity, or $4.6 billion, was raised on the U.S. public markets.[93] This compares to 2000, when approximately half of global capital was obtained on the U.S. market.[94] Even more tellingly, nineteen of the twenty largest global offerings in 2005 chose not to list in the United States.[95]

Moreover, the bulk of offering activity occurred in just two jurisdictions: the London markets and the HKSE. In 2006, issuers making initial public offerings raised $46.9 billion on the AIM and the LSE[96] and $42.76 billion on the HKSE.[97] The AIM in particular is a controversial market. It has come under criticism for low returns, high volatility, illiquidity, and scandalous practices by its listed issuers.[98] However, it and the HKSE have become leading markets for new listings.[99] For example, post-Sarbanes-Oxley, there has been a sevenfold increase in non-domestic listings on the AIM.[100] Moreover, these and other non-U.S. markets,

---

91. *See supra* notes 39–43 and accompanying text. *See generally* INTERIM CAPITAL MARKETS REPORT, *supra* note 1, at 29–34 (asserting that the U.S. market has recently declined in relative competitiveness to foreign markets).

92. INTERIM CAPITAL MARKETS REPORT, *supra* note 1, at 29.

93. *Id. See also* Zingales, *supra* note 48, at 6 (finding that the U.S. market share for global initial public offerings went from fifty percent in 2000 to ten percent in 2005 if Chinese, Indian, and Russian offerings are excluded).

94. Zingales, *supra* note 48, at 2.

95. ERNST & YOUNG, ACCELERATING GROWTH: GLOBAL IPO TRENDS 4 (2006), *available at* http://www.ey.com/global/download.nsf/International/IPO_-_Global_IPO_Survey_2006/$file/E&Y-SGM-GlobalIPOSurvey2006.pdf.

96. London Stock Exch., Statistics, http://www.londonstockexchange.com/en-gb/about/statistics/ (for LSE statistic, follow "Main Market Statistics" hyperlink; then follow "2006" hyperlink; for AIM statistic, follow "AIM statistics"; then follow "2006" hyperlink) (last visited Feb. 17, 2007) (converted from U.K. pounds to U.S. dollars at $1 = £0.5109).

97. H.K. Stock Exch., 2006 Market Statistics 3, http://www.hkex.com.hk/news/hkexnews/0701122news.xls (last visited Feb. 2, 2007) (converted from Hong Kong Dollars to U.S. dollars at $1 = HK$7.807).

98. *See infra* notes 243–47 and accompanying text.

99. *See* Fung, *supra* note 86, at 245 ("Hong Kong has become a very substantial regional market in its own right, possessing the liquidity to support most of the large IPOs coming out of China.").

100. Piotroski & Srinivasan, *supra* note 3, at 4.

particularly the LSE, are likely to continue to gain traction, building critical mass and volume as their domestic capital markets grow.

This global non-U.S. activity should be contextualized, though, as it occurs in a market where competition for the primary listing of issuers has historically been absent. More specifically, almost all issuers traditionally choose to have their primary listing in their home jurisdiction.[101] The market for issuers in developed nations is still one for cross-listings.[102] These are issuers who have their primary listing in their home market but choose to cross-list on another market rather than make their primary listing abroad. Even then, a recent study found that fewer than ten percent of eligible issuers were cross-listed.[103] In large measure, this explains the success of non-U.S. markets in the past few years. The non-U.S. markets' new prominence in initial listings can largely be attributed to the increasing competitiveness of these markets and a timely comparative rise in domestic capital markets activity rather than any defect in the U.S. market.[104] But, where before these issuers chose to cross-list on the U.S. market, they no longer elect to do so.

The rapid industrialization of many developing countries may also relax this home country listing tendency. For example, in 2006, fourteen issuers from developing countries, primarily from the CIS region[105] and India, raised an aggregate amount of $14.43 billion in capital on the LSE.[106] Each of these issuers made the LSE their primary market when listing.[107] This is a trend likely to continue globally in other markets. The number of issuers from developing countries who choose to make their primary listing outside their home market is likely to increase as these countries gain economic strength but the development of local institutions does not keep pace. Yet, this is a development limited to issuers in industrializing nations

101. *See infra* Part II.B.

102. *See* Coffee, *supra* note 15, at 1770–79 (outlining the parameters of the global listings market).

103. *See* Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205, 216 (2004).

104. *See supra* Parts I.B.& I.C.

105. CIS stands for Commonwealth of Independent States, a loose confederation of nations formerly comprising the U.S.S.R.

106. London Stock Exch., Main Market Fact Sheet—December 2006, http://www.londonstockexchange.com/NR/rdonlyres/2EC930DD-D365-421F-98E1-65104E18F791/0/MainMarketFactsheetDecember2006.xls (click on "T8 Co's by value" tab); London Stock Exch., AIM Market Statistics—December 2006, http://www.londonstockexchange.com/NR/rdonlyres/B7C12B02-1C60-4B61-8271-33667EBA5D34/0/Aimfs0612.xls (click on "Co's by value" tab).

107. Here, the issuers may have kept a token listing for regulatory or political reasons in their home market but have made it publicly clear that their LSE listing is their primary one. In any event, I consider this a de facto primary listing due to the often substantially lower regulatory standards applied in their home market.

and not mirrored in developed nations. Thus, the market for global listings in the near future is likely to be two submarkets: one for cross-listings of issuers sited in developed countries and one for primary listings of issuers from industrializing countries.

The market for listings is a global one that has become increasingly competitive. Dominant players are emerging in both Asia and Europe who offer a realistic alternative to the U.S. market. This appears to be a natural result of the maturation of the U.S. market, as well as the development and quicker growth in Asia and Europe.[108] The competitive position of the United States also seems to be at a weak point; the United States is seen by many as an overregulated market where the reward for listing—a higher equity premium—and lower cost of capital may be adversely affected in a post-Sarbanes-Oxley world.[109] Meanwhile, as will be discussed in Part III, foreign stock markets currently offer a more differentiated and competitive regulatory product. This advantage is demonstrated by the decline in the number of non-U.S. issuers choosing to list or maintain a listing in the United States, and it is of particular import because non-domestic listings have historically been a source of growth for the U.S. market.[110] Not surprisingly, this state of affairs has stirred a fierce debate in the United States as to the cause and remedy for this and other perceived declines. This debate touches on the larger issue of the proper scope of U.S. regulation in competitive global capital markets.[111] Part II seeks to better understand this debate by setting forth the relevant interests of the main actors in the global market for listings.

II. THE ACTORS IN THE GLOBAL LISTINGS MARKET

Four of the principal actors in the global listings market are investors, issuers, regulators, and stock markets. The relevant interests of each of these actors are diverse and sometimes divergent. This Part lays out these material interests. The goal is still to establish a principled norm for U.S. regulation of non-U.S. issuers, one that both increases the competitiveness of the U.S. market and is premised upon the particularized needs of these primary actors.

A. *Investors*

Modern finance theory teaches that the goal of rational investors should be twofold. First, investors should expect a return commensurate

108. *See supra* note 96–104.

109. *See supra* note 6; *see also* INTERIM CAPITAL MARKETS REPORT, *supra* note 1, at 47–48.

110. *See supra* Part I.A.

111. For a further discussion of this debate, see *infra* Part IV.D.

with the risk taken in relation to their particular investments.[112] Second, investors should sufficiently diversify investments in order to avoid, to the fullest extent possible, idiosyncratic risk.[113] This is a norm; investors are not drones, but rather people with their own individual heuristics and cognitive psyches.[114] Put another way, different investors may, in practice, diverge from the theoretically optimal approach. For example, an investor may wish to invest all of his or her money in a "sure-thing" Internet stock tip (as told to him or her by a next-door neighbor).[115] But modern investment theory cannot control investors; it merely sets out an optimal strategy for these investors: investment according to risk and diversification. The ultimate goal is for all to make money.

Diversification is a multifaceted affair. It is global in nature and extends beyond any particular asset class.[116] Again, if one turns to modern portfolio theory, the rational investor should invest globally in order to achieve full diversification in equity markets.[117] The optimal equity investment portfolio will contain a sufficient number of stocks to mirror the global market, thereby hedging as much as possible against idiosyncratic risk.[118] If investors want to earn a rate of return higher or lower than the market risk associated with this diversified global portfolio, they can then leverage or deleverage their portfolio to adjust their risk.[119] This is the

112. *See* RICHARD A. BREARLY, STEWART C. MYERS, & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE 194–95 (8th ed. 2006) (discussing the relationship between investment risk and return: investors expect a higher or lower return commensurate with the risk-level of an investment).

113. The goal is to minimize the standard deviation of portfolio returns by selecting investments that do not, to the greatest extent possible, move in correlation to each other. *See* Harry M. Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 79 (1952) ("There is a rule which implies both that the investor should diversify and that he should maximize expected return.").

114. *See* Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135, 143–48 (2003) (reviewing evidence of cognitive bias by investors and its effect on market prices).

115. I am alluding here to the recent technology stock bubble of 1999–2001, a prominent real and recent example of this occurrence. *See generally* ROBERT SCHILLER, IRRATIONAL EXUBERANCE (2005) (finding investor behavior irrationally affected market prices during the period 1999–2001).

116. EDWIN J. ELTON ET AL., MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS 276 (7th ed. 2007) ("[I]nternational diversification is justified even if expected returns are less internationally than domestically.").

117. Global diversification provides a hedge against exchange rate movements as well as domestic economic and other localized events. *See* H.G. Grubel, *Internationally Diversified Portfolios: Welfare Gains and Capital Flows*, 57 AM. ECON. REV. 1299, 1311–13 (1968).

118. ELTON ET AL., *supra* note 116, at 258–63. Idiosyncratic risk is risk specific to an investment as opposed to market-wide risk. *See* Markowitz, *supra* note 113, at 89 (theorizing that an optimal investment position is in diversified, rather than industry-specific, assets).

119. *See* William F. Sharpe, *Capital Asset Prices With and Without Negative Holdings*, 46 J. FIN. 489, 500 (1991) ("When a riskless asset is available, the only negative holdings in equilibrium will involve borrowing by investors . . . .").

theoretically optimal course, but, once again, it remains largely that; the majority of individual investors do not own a diversified global portfolio, and their investments are instead domestically concentrated.[120]

So where do the interests of investors lie at this crossroads of reality and theory? One irreducible commonality exists in this divergence: investors as a group prefer to pick and choose their investments and to exercise that choice among the widest array of possible investments.[121] They can then select a preferred investment strategy based upon their own goals, biases, education, risk tolerance, and other self-selected factors. This desire spans the globe: investors want investment choice beyond the domestic arena in order to obtain maximum flexibility to select the risk, potential return, and diversification of their portfolio.[122] Investment choice is thus a primary interest of investors, while diversification in exercising that choice is the optimal recommended approach.

Investors want choice, but they also wish to invest on an informed basis. Investors, therefore, have an interest in the disclosure of sufficient information concerning their investments.[123] Yet, information being a public good, investors may disagree as to the desired level of public disclosure.[124] For example, a sophisticated investor might actually prefer a minimal disclosure regime. In such a market, the sophisticated investor

120. One 1991 study found that U.S. investors held approximately ninety-four percent of their investments in domestic U.S. securities. Kenneth R. French & James M. Poterba, *International Diversification and International Equity Markets*, 81 AM. ECON. REV. 222, 222 (1991). More recent numbers suggest that this bias persists but is deteriorating. *See* Linda L. Tesar & Ingrid M. Werner, *The Internationalization of Securities Markets Since the 1987 Crash*, *in* BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 281, 284 (R. Litan & A. Santomero eds., 1998) (assessing evidence of asset prices, portfolio holdings, and capital flows to find that the world is "moving, albeit gradually, toward a more integrated financial system"). The reasons for this continuing bias undoubtedly include capital markets barriers, although finance theorists suspect that there are a number of other unknown variables driving this behavior. *See* Marianne Baxter & Jermann Urban, *The International Diversification Puzzle Is Worse Than You Think*, 87 AM. ECON. REV. 170, 170 (1997); Raman Uppal, *The Economic Determinants of the Home Country Bias in Investors' Portfolios: A Survey*, 4 J. INT'L FIN. MGT. & ACCT. 171, 171–75 (1992).

121. *See* Tamir Agmon & Donald R. Lessard, *Investor Recognition of Corporate International Diversification*, 32 J. FIN. 1049, 1049 (1977) ("If there were no barriers to international capital flows, and if capital markets were uniformly well developed [sic], investors would diversify their portfolio holdings internationally . . . .").

122. *See* ELTON ET AL., *supra* note 116, at 263–70.

123. There is a vigorous debate on the need for mandatory disclosure in order to produce a socially optimal amount of such information, but all generally agree on the need for such information. Instead, their dispute concerns whether the information should be disclosed as a product of market or regulatory forces. *Compare* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 745 (1984) (arguing the economic necessity of mandatory disclosure) *with* Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 86–91 (proposing an optional form of regulatory regime in which issuers could choose their preferred disclosure level).

124. The current debate concerning the Sarbanes-Oxley Act is a trenchant example.

will have an advantage because he or she will have greater resources to find and analyze otherwise undisclosed information. The investor can then earn abnormal returns by investing in these mispriced investments.[125] Conversely, retail investors do not have such resources and therefore generally prefer a regime of higher required public disclosure, or a well-developed analyst regime, so that they do not have to bear significant information-gathering costs.[126] Again, in the divergence is a commonality. All investors desire sufficient information to be made available to them or the market; it is only the level of public availability of this information to others that they may disagree upon.[127]

Investors also desire a legal regime which permits effective enforcement of their rights. The scope and parameters of such a regime are debatable and likely to be disputed by other actors. From an investor perspective, though, they are likely to coalesce around an agreed kernel of fair and efficient adjudication, the ability to enforce obtained judgments, and a strong regulator that will enforce investor rights.[128] As for the rights themselves, their exact scope is also debatable. In the Western world, though, we can discern some universal norms.[129] Equity investors

125. *See generally* PETER D. SPENCER, THE STRUCTURE AND REGULATION OF FINANCIAL MARKETS 1–22 (2000) (discussing the incentive effects of asymmetric information in public markets).

126. *See* Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 819 (2006) ("Mandatory disclosure reduces search and information processing costs for investors by requiring cheap, readily available, standardized, and relatively reliable disclosure of information.").

127. Investors would then either review the information themselves or rely upon such information to be encapsulated in an efficient or semi-efficient market. *But see generally* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003) (considering the phenomenon of information overload and its implications for securities regulation and a mandatory disclosure scheme).

128. *See, e.g.*, John Fagan, *The Role of Securities Regulation in the Development of the Thai Stock Market*, 16 COLUM. J. ASIAN L. 303, 330–32 (2003) (describing the role of investor demand for law and law enforcement as driving stock market regulation).

129. These can most prominently be gleaned from the variety of governmental and non-governmental organizational reports which discuss and cite these norms. A prominent example is a report containing the corporate governance standards pronounced by the Organisation for Economic Co-Operation and Development ("OECD") and the country-by-country benchmarking program established by the World Bank against these standards. *See generally* OECD PRINCIPLES OF CORPORATE GOVERNANCE (2004) [hereinafter OECD PRINCIPLES REPORT], *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf (presenting the OECD principles of corporate governance and providing commentary on them); Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781 (2001) (proposing core legal protections necessary for a sufficiently strong securities market); The World Bank Group, Reports on the Observance of Standards & Codes, http://www.worldbank.org/ifa/rosc_cg.html (last visited Feb. 17, 2007) (describing the World Bank program). There is a similar project for disclosure standards by the International Organization of Securities Commissions, which released a set of non-financial disclosure standards in 1998. *See generally* INT'L ORG. OF SEC. COMM'NS, INTERNATIONAL DISCLOSURE

generally have the right to nominate and elect representatives, vote on select decisions, and enjoy minority protection.[130] These rights can generally be distilled into investors' desire for rights sufficient to protect their investment and structure agency relationships to ensure that management acts appropriately on their behalf.[131] Against this desire must be balanced investor needs to provide management with sufficient latitude to operate the issuer properly and to take appropriate business risks.[132] In the balance of the two, one derives the minimum rights investors ought to require before investing.

Finally, investors generally desire efficient capital markets.[133] Efficient capital markets for investor purposes are those which restrict insider trading and are thick and transparent.[134] "Thickness" is another term for markets with a high volume of trading activity. High volume is a predicate to market efficiency: investors can not only buy and sell investments easily but can also obtain and receive better prices on such sales and purchases due to narrower bid-ask spreads resulting from such volume.[135] Transparent markets are those in which investors have the ability to see the best price in the market and to execute trades quickly on

STANDARDS FOR CROSS-BORDER OFFERINGS AND INITIAL LISTINGS BY FOREIGN ISSUERS (1998), *available at* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf (containing the international disclosure standards promulgated by the International Organization of Securities Commissions).

130. *See* OECD PRINCIPLES REPORT, *supra* note 129, at 33 (stating that these rights are "the most basic rights of shareholders, which are recognised [sic] by law in virtually all OECD countries").

131. *See* Bernard Black, *The Core Institutions That Support Strong Securities Markets*, 55 BUS. LAW. 1565, 1565 (2000) (arguing that a fundamental prerequisite for strong public securities markets is the "confidence that the company's insiders (its managers and controlling shareholders) won't cheat investors out of most or all of the value of their investment").

132. This is the fundamental tension underlying Berle and Means' now-legendary observations concerning the separation of ownership from stockholder control. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 6 (Transaction Publishers 1991) (1932).

133. Again, there may be sophisticated investors who desire inefficient markets in order to advantage themselves of investment opportunities, but they do not comprise the general consensus.

134. *See, e.g.*, Bratton & McCahery, *supra* note 27, at 268–71 (discussing the global trend towards prohibition of insider trading).

135. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 571–72 (1984) (attributing trading volume as a force in assuring "the market's rapid assimilation into price of most routine information"); Paul G. Mahoney, *Market Microstructure and Market Efficiency*, 28 J. CORP. L. 541, 543–46 (2003) (discussing the role of intermediaries and trading volume in an efficient market).

that price.[136] This is yet another way for investors to ensure that they receive the best price available in the market.

The relevant interests of investors in the global market for listings can thus be summarized as a desire for global investment choice, information availability, effective legal regimes, sufficient protective rights, and efficient capital markets. If these interests are bundled together, they become the bare minimum standard desired by investors for the regulation of issuers and markets. From a rational investor viewpoint, any regulatory regime should encapsulate these standards and characteristics in order to promote and protect their interests. While investors may have different preferences beyond these bare-bones standards, rational public investors are generally aligned in desiring these fundamental building blocks as the basis for issuer and stock market regulation.[137]

B. Issuers

In theoretically perfect capital markets, the interests of issuers with respect to their listings would be aligned with those of their investors. Issuers would desire to and would list on those markets that supplied the socially optimal level of regulation, that is, the amount of regulation desired by their investors.[138] Issuers would be incentivized to engage in this behavior because this measure of regulation would provide a higher equity premium on their securities and lower their cost of capital.[139] In such theoretically perfect markets, issuers would then migrate across the globe seeking this optimal level of regulation, monitoring and changing their listings in response to market regulatory developments.[140] This is the logical basis for Professor Romano's argument for regulatory portability.[141]

This theory is not borne out in the current market for global listings.[142] Rather, a number of barriers exist in today's capital markets that collectively work to prevent the market from functioning in this theoretically efficient manner. The first of these barriers is the path

---

136. *See* James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. 77, 80–81 (1992) (highlighting the importance of market transparency in efficient markets).

137. To the extent someone would argue another higher right should be on this list, I discuss this further in the parameters of setting a regulatory norm for non-U.S. issuers *infra* Part V.B.

138. *See* Romano, *Empowering Investors, supra* note 9, at 2366.

139. *Id.*

140. *See* Romano, *The Need for Competition, supra* note 9, at 389–92.

141. *See supra* notes 9–13 and accompanying text.

142. *See* Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 BUS. LAW. 653, 655 (2001) (finding that "[i]ssuers from less well-regulated European jurisdictions do not seem to be taking advantage of the issuer choice provisions of the E.U. law").

dependency of the global listings market.[143] Issuers start life as private companies. As such, they usually come to the listings market with their jurisdiction of organization, accountants, and legal and other advisors chosen. For private companies in developed countries, these are almost always located in their home market; this is, after all, the market they are most accustomed to operating in and wherein they have typically raised their initial capital.[144] These prior choices and simple familiarity lead to a strong tendency for issuers in developed countries to list in their home market.[145] Moreover, once an issuer chooses to list in its home market, there can be barriers to relocating this listing. For example, there are transaction costs associated with any such move, including legal costs, taxes, costs associated with any required shareholder vote, and costs associated with the hiring and training of internal and external advisors to comply with a new legal regime.[146] Thus, issuers not only tend to list in their home country market initially, but they tend to remain listed there.[147] These biases may also be mutually reinforced by a similar cultural tendency among investors to weigh the proximity of a listing in their investment decisions, favoring investment in domestic, as opposed to foreign, issuers.[148]

The second barrier is a related cultural one. Issuers come to market with built-in cultural heuristics derived from their prior experiences in their

---

143. *Cf.* Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 157–62 (1999) (discussing path dependency and the political economy of corporate regulation).

144. This locality effect is evidenced by studies which have revealed a strong bias among U.S. domestic corporations to organize under the laws of the state where they are headquartered. *See* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1574 (2002) ("[T]he gravitational pull of a firm's home state is so strong that only about 5% of all firms that incorporate outside of Delaware make it anywhere else.").

145. *See* Sarkissian & Schill, *supra* note 52, at 5–14 (surveying the academic literature on the home country bias of investing and the listing decision).

146. *See* Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 562 (2005); *see also* Bebchuck & Roe, *supra* note 143, at 163 (stating that transnational reincorporations "will usually carry with them significant tax, regulatory, or other economic consequences").

147. There has yet to be a comprehensive study of the frequency and magnitude of issuer relistings in the developed world, but anecdotal evidence reveals that this is a truly rare occurrence exemplified by the substantial worldwide publicity surrounding News Corporation's reincorporation and movement of its primary listing from Australia to the United States. *See* Geraldine Fabrikant, *News Corp. Plans to Follow Its Chief to the United States*, N.Y. TIMES, Apr. 7, 2004, at C1.

148. *See generally* Richard Portes & Hélène Rey, *The Determinants of Cross-Border Equity Flows: The Geography of Information* (Ctr. for Int'l Dev. & Econ. Research, Working Paper No. C00-111, 2000), *available at* http://repositories.cdlib.org/iber/cider/C00-111/ (examining the tendency of investors to weigh negatively distance in their investment decisions and exhibiting a gravity model whereby they tend to favor local investment choices).

home market. These include basic cultural inputs such as language, as well as more sophisticated cultural mores such as methods of interacting and interpreting applicable laws and customs.[149] For example, a German issuer listing in Japan would not only have to transact in a different language, but also would have to interpret and act under laws and customs with which it is inexperienced and may find difficult to rationalize, respond to, and comply with, thereby raising transaction costs for such listing above a suitable threshold.[150] Thus, issuers tend to list in familiar cultural markets—again, their home market—in order to mitigate these difficulties.[151]

The law and other listing rules may also pose an economically inefficient burden or otherwise influence an issuer's decision to list or remain listed. For example, listings standards and securities regulation governing a particular market historically have been crafted to regulate issuers organized within that jurisdiction without due regard to non-domestic issuers.[152] Thus, the listing standards of the Deutsche Börse are drafted primarily to regulate German companies and their unique attributes, not American companies that have different characteristics.[153] Under simple public choice theory, issuers may therefore prefer to list in their home markets in order to obtain seamless, efficient regulation, and a greater ability to influence and interact with regulators.[154] Moreover, the

149. *See generally* Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001) (arguing the importance of culture to corporate governance systems and the need to account for these cross-cultural differences in analyzing corporate law).

150. *See* Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L L. 195, 231–32 (2004) [hereinafter Licht, *Legal Plug-Ins*] (arguing that "[t]he theory and preliminary evidence on cultural emphases and cultural distance [point out] the magnitude of potential resistance by receiving countries, or corporations, to foreign legal elements").

151. These factors likely explain, in part, the low number of issuers who actually do make their primary listing in an alternative jurisdiction and, when doing so, why they list in culturally familiar jurisdictions. *See generally* Marco Pagano et al., *What Makes Stock Exchanges Succeed? Evidence from Cross-Listing Decisions*, 45 EUR. ECON. REV. 770 (2001) (empirical study of ten European exchanges finding that issuers have a tendency to cross-list in culturally similar jurisdictions).

152. This is predictable regulatory theory: regulators have strong public interest incentives to design a regime catering to domestic issuers without regard to foreign issuers. *Cf.* Fox, *Retaining Mandatory Securities Disclosure*, *supra* note 14, at 1407 (arguing that "among issuers worldwide, a major portion of the dispersion in their socially optimal levels of disclosure is explained by their nationalities").

153. *See* Mark I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 210–24 (1999) (examining the comparative differences between German and U.S. securities laws).

154. Public choice theory would predict that issuers would want to list in such jurisdictions; this is where their influence and political capital would be greatest. *Cf.* John C. Coates IV,

law can make it prohibitively difficult for issuers to list outside their home market, or to transfer from the home market to a foreign one. The principal offender here is the United States. U.S. securities laws make it quite difficult for domestic issuers to list outside the United States without an accompanying U.S. listing and for domestic issuers to delist once they have decided to list in the United States.[155]

A final barrier arises from rent seeking by issuer management. Decisions of when and where to list are typically made by management of the issuer.[156] Yet management's interests may sometimes be misaligned with those of investors and the issuer. For example, management may choose to list the issuer on a less regulated market in order to engage in practices to their own personal benefit that would not otherwise be permitted on an optimally regulated market.[157] Investors may then fail to put a stop to these practices due to collective action problems or other agency cost issues.[158] The result is that management may not always be incentivized and so may not choose the optimal regulatory listing for an issuer. Thus, even if the other three barriers did not exist and regulatory portability was a reality, issuers might still list on suboptimal regulatory markets due to managerial opportunism and rent seeking.

These barriers combine to push the market for global listings into a divergent paradigm rather than the theoretically efficient one. This is the current market reality where issuers list primarily in their home markets and stay listed there. The one principal exception to this reality is for issuers in developing countries. For them, the need for sufficient legal protections, the significantly higher equity premium, and the lower cost of capital resulting from listing in other markets increasingly overcomes the aforementioned barriers.[159] Thus, these issuers establish their primary

---

Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis, 41 VA. J. INT'L L. 531, 565–80 (2001) (discussing the political forces trending U.S. issuers against issuer choice in the domestic U.S. market).

155. *See* Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 684 (2002) (outlining the difficulties faced by a non-U.S. issuer wishing to delist from the U.S. markets). As previously discussed *supra* note 43, the SEC has recently adopted rules relaxing the delisting prohibitions for non-domestic issuers.

156. *See* Prentice, *supra* note 14, at 1219–20.

157. *See* James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 LAW & CONTEMP. PROBS. 157, 165–77 (1992) (examining the scope of managerial opportunism in choosing regulatory regimes).

158. *See, e.g.*, Licht, *Managerial Opportunism*, *supra* note 15, at 344–47 (observing managerial rent seeking in the context of the structuring of Israeli securities regulation).

159. The deficiencies and effects of underregulated securities markets have been well-documented. *See, e.g.*, Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277, 335–37 (2003) (examining the role of law and associated network effects in establishing strong securities markets).

listing on a non-domestic market. In this situation, there is no real difference in the interests of either type of issuer. Both rationally express a preference for a jurisdiction where there are sufficient legal protections in order to obtain a higher equity rating and lower cost of capital. The difference is simply that the importance of this requirement is sometimes enough in developing nations to overcome the barriers to a non-domestic primary listing.[160]

In contrast, issuer interests in the market for cross-listings are different. Traditionally, it was hypothesized that issuers cross-listed in order to raise otherwise unavailable capital, tap into non-domestic pools of trading liquidity, raise foreign shareholdings and their international profile, and facilitate takeover transactions.[161] More recent scholarship has posited that cross-listing is an exercise in cross-bonding, in which non-domestic issuers cross-list in order to avail themselves of higher regulation and a correspondingly higher equity rating and lower cost of capital.[162] The reality with respect to cross-listings is that any such choice to cross-list is probably based on a combination of these reasons and likely correlated with an issuer's market capitalization.[163] The decision whether to cross-list is a choice that will be made by management who will weigh these benefits against the detriment, if any, of additional regulation.[164] It is here again that inefficiencies creep into the process. Management may not correctly perceive the benefits versus the detriments, or may find substantial benefits, but do not want to be subject to additional regulation that may personally and adversely affect them. This is again a problem of managerial opportunism.[165]

Thus, the markets for primary listings and cross-listings are both subject to the barriers, path dependencies, transaction and agency costs, and

---

160. This is a main pillar in the argument that cross-listings are effected primarily for bonding purposes. Luzi Hail & Christian Leuz, *Cost of Capital Effects and Changes in Growth Expectations Around U.S. Cross-Listings* 3 (ECGI-Finance Working Paper No. 46/2004, 2006), *available at* http://ssrn.com/abstract=938230 (finding cross-listing by non-U.S. issuers on U.S. exchanges results in an "economically significant and sustained decrease" in their cost of capital, an effect which is "larger for firms from countries with weaker institutional structures").

161. *See* Licht, *Cross-Listing*, *supra* note 15, at 143–45 (tracing the historical development of theories of cross-listing).

162. The originator and leading proponent of this theory is Professor Coffee. *See* Coffee, *supra* note 15, at 1763.

163. I discuss the role of market capitalization as a driver in the cross-listing decision *infra* Part IV.A.

164. *See supra* notes 156–57 and accompanying text.

165. Professor Licht has asserted that these inefficiencies dominate the listing decision, making it an act of management avoidance and opportunism rather than one taken in the interests of the issuer or its stockholders. *See* Licht, *Legal Plug-Ins*, *supra* note 150, at 205 ("A sober analysis, especially of recent unpublished studies, indicates that the bonding hypothesis does not receive support from the extant empirical evidence while the avoiding hypothesis does.").

other inefficiencies that affect the ability of issuers to choose their listing market effectively. And while the theoretical norm is the optimal one, it appears unachievable in light of the substantial and enduring nature of the present barriers. Moreover, the aggregate effect of these externalities is to make the listing process unique for each individual issuer. Each issuer will have its own different interests and approach depending upon its individualized status. For primary listings, these characteristics should almost always push the issuer into a listing in its home market. Conversely, the individualized nature of each issuer's decision to cross-list makes it difficult to draw any blanket prescriptive norm for when issuers should or will cross-list. As will be discussed further in Part IV, this difficulty is also a regulatory problem: in light of the idiosyncratic and unpredictable needs of issuers in the cross-listing market, regulators may consequently be unable to competitively promulgate one-size-fits-all regulation to meet the needs of all potential cross-listing issuers.

C. Regulators

The interests of investors and issuers are increasingly global in nature, but the interests of securities regulators still tend to be local. Regulators are first and foremost creatures of their organic promulgating statute. This statute instructs them as to the interests for which they regulate, and typically this mandate extends only to the protection of the regulator's domestic market and the actors therein.[166] Developments outside the regulator's home market are not within this statutory compass. The result is that regulators often do not view the recruitment and maintenance of non-domestic listings as an interest to be accounted for.[167] Rather, their goal is to regulate within their organic statute and to protect their home markets and actors; whether this regulation produces more or fewer non-

166. For example, the Securities Act of 1933 requires that whenever the SEC is engaged in rulemaking in the public interest, it is also required to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b) (2000).

167. The use of the term "regulator" here and the discussion in this subpart does not include stock exchanges which often act as quasi-regulators or full regulators in their jurisdiction and have separate, differing interests, discussed *infra* at Part II.D. *Cf.* INT'L ORG. OF SEC. COMM'NS, REGULATORY ISSUES ARISING FROM EXCHANGE EVOLUTION, FINAL REPORT 5 (2006), *available at* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD225.pdf (describing the regulatory functions of stock exchanges). Additionally, in small domestic markets, a regulator may have different incentives causing it to be more hospitable to foreign listings. For example, the Australian Stock Exchange actually encourages U.S. issuers to offer their securities and list in Australia without an accompanying U.S. listing. *See* AUSTL. SECURITIES EXCH., U.S. COMPANIES-REGULATION S OFFERINGS ON ASX 1–4 (2004), http://www.asx.com.au/Listing Rules/guidance/gn07_us_companies_regulation_s_offerings.pdf.

domestic listings is not a concern.[168] Thus, regulators often do not regulate for competitive position in the global market, but rather for the protection of local interests.[169]

This statutory bias is reinforced by the traditionally captive nature of the domestic listings market.[170] Domestic issuer interests can therefore be minimized and securities regulators can sometimes overregulate in furtherance of other statutory interests. Overregulation of domestic issuers can also result from a regulator paying undue heed to one of its other domestic interests, such as investors.[171] Therefore, domestic issuers have limited options if they want or need to retain a public listing.[172] Overregulation can therefore subsist for long periods of time in domestic markets.[173] However, if this overregulation occurs in the global markets, its consequences are realized more quickly where issuer choice is more elastic.[174] Again, though, monopolist regulators may not be responsive to this early warning sign of overregulation because non-domestic issuers are not a regulatory focus.

The empire-building nature of regulatory agencies is also relevant. Organizational theory postulates that regulators tend to favor regulation

---

168. This would be contrariwise to a regulatory aggrandizement theory under which the securities regulator should favor a regulatory scheme that attracts the maximum number of listings. *See* Choi & Guzman, *supra* note 9, at 923 ("[R]egulators themselves benefit when many issuers and investors choose to be governed by their regulations. The regulators benefit from the increased size and importance of their own agencies."). But regulators, as monopolists, may be satisfied with the regulatory price captured from their domestic markets.

169. This is part and parcel of their monopoly position which produces an economic incentive to overregulate. *See* William J. Carney, *Introduction to the 2003 Randolph W. Thrower Symposium: Business Law: The Impact of Competition on Regulation*, 52 EMORY L.J. 1285, 1287 (2003).

170. *See supra* Part II.B. This is particularly true of the U.S. market where establishing overseas listings without a domestic listing is quite difficult due to the Securities Exchange Act of 1934's requirement for a U.S. issuer to mandatorily register once it achieves a minimum U.S. shareholding and asset base. *See infra* notes 216–18 and accompanying text.

171. A good example of this is seen in the SEC's sometimes single-minded favoritism towards regulation protective of the average stockholder over other interests. *See, e.g.*, Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527, 535 (1990) (discussing the SEC's takeover regulation as serving the average, retail investor through promulgation of a "primary objective of egalitarianism").

172. This is because U.S. securities laws currently do not permit a U.S. issuer to delist freely and maintain a public float. *See* Rock, *supra* note 155, at 683 (stating that under current U.S. securities laws, "for a typical firm to deregister, it must 'go private,' " that is, eliminate its status as a public company).

173. *See* Tung, *supra* note 146, at 562 (arguing that home country regulators "need not offer their domestic issuers much choice because those issuers typically cannot avoid their home jurisdictions").

174. *See, e.g.*, Romano, *The Need for Competition*, *supra* note 9, at 393 ("Regulatory competition also more quickly corrects for policy mistakes than a single regulator can, because in a competitive market, there is a built-in self-correcting mechanism . . . .").

that expands their jurisdiction and power.[175] In the global market for listings, empire building can take the form of overregulation and expansive jurisdictional claims.[176] For example, the SEC asserts a broad view of its global jurisdiction; it has repeatedly exercised its power extraterritorially to bring non-domestic enforcement action against non-domestic issuers in tandem with local regulators.[177] Empire building can therefore have a chilling effect on a jurisdiction's competitiveness in the global listings market. Non-domestic issuers may fear additional, significant regulatory oversight by a non-domestic agency with whom they do not have the same ability to enforce their rights or otherwise influence the regulatory process.[178] These non-domestic issuers may therefore choose to list in jurisdictions where regulators take narrower jurisdictional views and thus choose to rely upon home market regulators to enforce securities regulation.[179] Empire building may therefore lead regulators to regulate non-domestic issuers, but it may also produce inefficient results.

There is also the possibility of industry capture and other interest-biased regulation. Public choice theory predicts that a securities regulator should act to maximize its external welfare by catering to those interest groups who will benefit it the most.[180] These interests are typically domestic ones: those of domestic investors, issuers, stock markets, and

175. The theory is classically stated in ANTHONY DOWNS, INSIDE BUREAUCRACY (1967). The SEC, and any regulatory agency for that matter, is likely to oppose issuer choice since it would result in diminishment of its power. *See* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 916 (1994) ("[I]nstitutional biases . . . provide the best criteria for predicting agency behavior.").

176. *See* Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 226–27 (1997) (arguing that the overbroad extraterritorial application of U.S. securities laws will disincentivize non-U.S. issuers from including U.S. investors in their offerings).

177. *See* Macey, *supra* note 175, at 948 ("The SEC's major litigation efforts and regulatory initiatives have been designed to protect the Commission's regulatory turf, rather than to further important areas of public policy.").

178. *See, e.g.*, Choi & Guzman, *supra* note 176, at 228–30.

179. This trend is arguably illustrated by the non-U.S. issuer reaction to the Sarbanes-Oxley Act and the sometimes consequent claim that a listing on a less regulated exchange is the product of an attempt to avoid application of the Act. *See, e.g.*, Andrew Hill, *LSE Shareholders Need More Cake, Not More Icing*, FIN. TIMES (LONDON), Nov. 22, 2006, at 22 (describing a U.S. company's shareholders' decision to list on the AIM rather than on Nasdaq due to differences in listing standards).

180. Regulators favoring these interests can also become captive by regulating solely to these needs. In some instances, this capture could theoretically produce regulation attractive to global issuers. For example, if a regulator becomes captive of issuer or stock market interests who favor issuer choice, it may then regulate to those interests. *Cf.* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 44–46 (2003) (arguing that "market forces are unlikely to correct the biases affecting monopolistic regulators" and will thus continue to act solely for the interests of groups who will benefit it).

other domestic actors such as investment banks, attorneys, and accountants. The effect on non-domestic issuers depends upon which interest groups capture the regulator. So, regulation catering to stock market interests may lead to beneficial regulation for non-domestic issuers. More often, it produces regulation catering to domestic actors, reinforcing their competitive position in the market and producing regulation detrimental to non-domestic issuers.[181]

Regulator interests and actions thus have the theoretical potential for undue effects on domestic and non-domestic issuers and the jurisdiction's competitive position in the global listings market.[182] Because of the nature of regulators, the consequences for non-domestic issuers may not be of particular concern for these regulators: they will instead focus on regulating towards their statutorily defined domestic interests. Moreover, empire building and the largely captive domestic listings market may reinforce regulation that is inefficient for both domestic, as well as non-domestic, issuers.[183]

D. *Stock Markets*

The world's major stock markets are now largely for-profit enterprises.[184] The primary sources of their revenue are listing and trading fees.[185] Stock markets therefore have a strong interest in obtaining the highest number of listings and concomitant trading volume and in advocating for a level of regulation that produces these conditions.[186] This goal will sometimes be hampered by regulators who set suboptimal regulation (from a stock market perspective) in order to satisfy their own interests and the interests of other constituents.[187] Unlike issuers, though,

---

181. This phenomenon could explain, for example, how regulation in the United States, makes delisting from U.S. markets impractical or even impossible for both U.S. issuers and non-U.S. issuers equally.

182. *See generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (examining different models and examples of regulatory theory).

183. The actual historical actions of the SEC as it comports with this theory will be discussed further *infra* Part IV.D.

184. *See* Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2560–65 (2006) (looking at the historical trend of non-profit stock exchange demutualization and asserting that "[o]n balance, the trend is clearly toward demutualization").

185. *See* Macey & O'Hara, *supra* note 39, at 317.

186. This is a species of the "issuer choice" argument, but from a stock market perspective. Stock markets have the potential to exert particular influence in the United States since here securities regulation is a cooperative effort between the SEC and self-regulatory agencies that historically have been, in part, component subsidiaries of the stock markets. *See* Fleckner, *supra* note 184, at 2572–75 (examining the competitive boundaries of stock market competition and self-regulation).

187. *See supra* Part II.C.

stock markets can more easily migrate across the globe, establishing or buying stock markets in other jurisdictions.[188] Theoretically, stock markets should therefore respond to regulatory inefficiency by erecting multiple markets in separate jurisdictions in order to provide global issuers a menu of regulatory choice for their listings. This is simple consumer economics: the stock markets are only providing a product—a listing—and therefore, in order to maximize profit, will take the necessary steps to ensure that that product is optimal for their consumers, the issuers.[189]

The recent wave of consolidation engulfing the exchanges reflects these forces and interests. Stock markets are combining within regions (for example, Euronext and OMX).[190] They are also consolidating globally: the NYSE has acquired Euronext, and the Nasdaq has agreed to acquire OMX.[191] Nasdaq, as of February 10, 2007, had purchased 29.16% of the LSE and failed in a bid to purchase the remaining outstanding shares.[192] Meanwhile, the Deutsche Börse and TSE also have been rumored to be further participants in this global consolidation with either each other or other exchanges.[193] This trend is likely to produce a smaller number of global stock markets and more regionally based, rather than local, trading markets.[194] Importantly, the global and regional reach of these markets

---

188. Professor Licht terms this "stock exchange mobility," a force spurred by reduced international regulation. *See* Amir N. Licht, *Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation*, 41 VA. J. INT'L L. 583, 584–85 (2001).

189. *See, e.g.*, *id.* at 616–17 (analogizing the competition for listings to competition in the consumer retail market).

190. *See supra* notes 50–51 and accompanying text. In June of 2007, the LSE also made a takeover bid to acquire the Borsa Italiana. *See* Alistair McDonald, *LSE Snags Borsa Italiana, Beating Out NYSE Euronext*, WALL ST. J., June 23, 2007, at B3. *See generally* Amir N. Licht, *Stock Market Integration in Europe* (Harvard Inst. for Int'l Dev., CAER Discussion Paper No. 15, 1997), *available at* http://www.faculty.idc.ac.il/licht/SMIEur.pdf (examining this general trend of regional integration).

191. Julia Werdigier, *Nasdaq Agrees to Buy OMX, Operator of 7 Stock Exchanges in Europe*, N.Y. TIMES, May 26, 2007, at C3.

192. *See* Press Release, NASDAQ, Final Offers Lapsed (Feb. 10, 2007), *available at* http://www.nasdaq.com/newsroom/news/pr2007/ne_section07_014.stm. Nasdaq subsequently announced that it would sell this stake to facilitate the financing of its bid for OMX. *See* Julia Werdigier, *Nasdaq, Its Overtures Scorned, Says It Will Sell Its Stake in the London Exchange*, N.Y. TIMES, Aug. 21, 2007, at C3.

193. On January 31, 2007, the TSE and NYSE announced a non-exclusive alliance to work together on "trading technology, investment products, marketing and regulation." Gaston F. Ceron, *NYSE and Tokyo Tie a Knot*, WALL ST. J., Feb. 1, 2007, at C2. Moreover, this consolidating trend is truly global and is exemplified by the NYSE's recent purchase of a five-percent stake in India's National Exchange. Aaron Lucchetti & Eric Bellman, *NYSE Extends Reach to India*, WALL ST. J., Jan. 11, 2007, at C3. *See generally* Susan Wolburgh Jenah, *Commentary on a Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 69, 70 (2007).

194. *See* Poser, *supra* note 57, at 539 (observing that "the stock exchanges of the United States and Europe seem to be on a course of consolidation, largely driven by the need of the large

should make them less sensitive to the vagaries of regulation in a particular jurisdiction. If a market is overregulated, global and regional stock markets will maintain an equal regulatory footing among domestic competition, while at the same time having the ability to direct global listings to their affiliated, less regulated exchanges. For example, the NYSE can now direct issuers who are dissatisfied with the level of regulation in the United States to the Euronext, which may have a more attractive regulatory regime. These issuers would then gain many of the benefits of a NYSE listing without having to subject themselves to U.S. regulation. The market for global listings is thus likely to become even more fluid in the future. It will provide greater flexibility for issuers to cross-list in different markets and engage in regulatory arbitrage but still permit them to utilize the technology and expertise of a preferred exchange.[195]

III. THE REGULATION OF THE GLOBAL LISTINGS MARKET

This Part sets forth the current scope of regulation for global listings.[196] The purpose is to establish further a generalized framework to analyze, in Part IV, the effects of domestic regulation on a jurisdiction's competitive status in the global listings market, as well as the extent any such regulation embodies the interests of the market's primary actors. The particular focus in this section is upon the U.S. regulation of global listings. This is because U.S. securities regulation is generally viewed as the benchmark against which other jurisdictions are measured.[197] This Article is also an attempt to prescribe a future regulatory norm for U.S. regulation of non-U.S. issuers. Nonetheless, this Part will discuss alternative higher and lower comparative regulatory schemes in order to set forth the comparative array of regulation available in the global market for listings.

---

firms and institutions that control order flow to reduce transaction costs"). *See generally* Chris Brummer, Stock Exchanges and the New Market for Securities Laws (Sept. 14, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1014683 (examining the trend of acquisition of foreign competitors by U.S. stock exchanges and its consequences for regulatory competition in the global listings market).

195. The global technology and expertise offered by stock markets is wholly transportable when it is an electronic trading system. This partially explains the move by the NYSE away from its open outcry system. *Cf.* Poser, *supra* note 57, at 524–27 (examining the competitive differences between open outcry and electronic trading methods).

196. Again, because the market for domestic listings is unique and different from the global market, the focus of this Part is upon the regulation of global listings and not domestic ones.

197. *See* David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey*, 16 CARDOZO L. REV. 1765, 1779 (1995) (tracing the role of the SEC in the structure of U.S. securities regulation and asserting that the "U.S. securities markets are the best securities markets in the world").

A. The U.S. Regulatory Model

One of two levels of U.S. regulation applies to global issuers who raise capital in the United States, depending upon the nature of the issuer's capital raising and listing status.[198] The first level is a high one: it covers issuers who fully list and raise capital publicly in the U.S. market. The second level is a significantly lower one applicable to issuers who raise capital privately and do not otherwise list on a U.S. stock market. There is also a third scheme intertwined with the other two that regulates the ability of U.S. investors to invest in private offerings. I discuss each of these below.

1. Public Capital Raising and Listings

The SEC has promulgated a differentiated regulatory model for issuers listing and publicly raising capital in the U.S. market. A full-fledged regulatory scheme extends to domestic issuers, while an alternative one is applicable to non-U.S. issuers, otherwise known as foreign private issuers.[199] The regime for non-U.S. issuers requires a lower level of disclosure for raising public capital under the Securities Act than that required for domestic issuers. It also significantly exempts non-U.S. issuers from the Exchange Act's reporting requirements.

Non-U.S. issuers are thus relieved from many of the Exchange Act's strictures otherwise applicable to domestic issuers, including Form 10-Q quarterly reporting, Section 14A proxy regulation, Section 16 short-swing reporting requirements and rules, and Regulation FD disclosure.[200] The SEC has also erected a regime of relaxed and specific form disclosure for non-U.S. issuers in their remaining Exchange Act reporting. Annual reports can be filed under Form 20-F as opposed to a Form 10-K, while an issuer does not need to report material events on Form 8-K but rather must only report home country filings on Form 6-K.[201] In both instances, the requirements for disclosure are principally those promulgated by the

---

198. *See generally* 1 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS chs. 2, 6 (7th ed. 2004) (delineating the regulation applicable to global issuers who raise capital in the U.S. markets).

199. This alternative regulatory system dates to the late 1980s; from that time, the SEC promulgated a series of tailored rules and exemptions designed to accommodate non-domestic issuers listing and publicly raising capital in the United States. *See* Daniel A. Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies*, 17 NW. J. INT'L L. & BUS. 30, 31 (1996) (discussing how securities regulations affect offerings outside the United States).

200. *See* 17 C.F.R. § 240.3a12-3 (2007) (exemption from Sections 14(a), 14(b), 14(c), 14(f) and 16 of the Exchange Act); § 240.13a-13 (exemption from Form 10-Q quarterly reporting requirements); *Id.* §§ 243.100–.103 (exemption from Regulation FD).

201. *See* Forms, Securities Exchange Act of 1934, 17 C.F.R. §§ 249.220f, 249.306 (2007).

International Organization of Securities Commissions ("IOSCO"). They are relaxed from the domestic standards that comport with the general needs of non-domestic issuers and permit a measure of parity with disclosure required in a non-U.S. issuer's home country.[202] In particular, the audited financial statements that must be included in a non-U.S. issuer's annual report on Form 20-F can be reconciled with the U.S. generally accepted accounting principles ("U.S. GAAP"), while mandated disclosure therein concerning executive compensation and other items is held to a lower standard.[203] Finally, with regard to public capital raising, the SEC has adopted specific forms under the Securities Act for non-U.S. issuers.[204] These forms set lower standards of disclosure, similar to Exchange Act requirements, including the ability for non-U.S. issuers to include financial statements that are U.S. GAAP-reconciled rather than prepared in accordance with U.S. GAAP.[205]

This issued regulation makes no distinction among non-U.S. issuers with respect to the level of home country regulation imposed. In fact, the SEC has never even considered, proposed, or adopted regulation which would adjust the level of regulation applicable to a non-U.S. issuer depending upon the nature of its home country regulation. The regime for non-U.S. issuers simply applies universally. Thus, issuers listed on the LSE, organized in and regulated by the United Kingdom and therefore subject to significant home country regulation, are treated identically as issuers who have their primary listing in the United States but who are otherwise organized under the laws of the Philippines and are subject to

202. *See* International Disclosure Standards, Securities Act Release No. 7745, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) (Sept. 28, 1999); Integrated Disclosure System for Foreign Private Issuers, Securities Act Release No. 6360, [1981–82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,054, at 84,648 (Nov. 20, 1981); *see also* 1 GREENE ET AL., *supra* note 198, § 3.03.

203. Moreover, the SEC has adopted a view of materiality under Rule 10b-5 and other securities antifraud provisions to account for the differing disclosure environment of non-domestic issuers. *See, e.g.*, Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Exchange Act Release No. 42,054 [1999–2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,214, at 82,540 (Oct. 22, 1999) (stating that the application of the U.S. securities laws' antifraud provisions "may be different in the context of foreign disclosure requirements and practices"). On November 15, 2007, the SEC also voted to permit the use of International Financial Reporting Standards ("IFRS") without U.S. GAAP reconciliation by foreign private issuers in their SEC filings. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Takes Action To Improve Consistency of Disclosure to U.S. Investors in Foreign Companies (Nov. 15, 2007), *available at* http://www.sec.gov/news/press/2007/2007-235.htm.

204. These are Forms F-1, F-3, and F-4. 17 C.F.R. § 239.31 (2007); § 239.33; § 239.34.

205. The SEC also promulgated safe-harbor exemptions from Exchange Act and Securities Act requirements for non-domestic takeover activity. *See generally* Brett Carron & Steven M. Davidoff, *Getting U.S. Security Holders to the Party: The SEC's Cross-Border Release Five Years On*, 12 U. PA. J. INT'L ECON. L. 455 (2005) (describing the exemptions available to foreign private issuers in cross-border takeovers).

significantly less home country regulation and oversight.[206] On its face, this failure to differentiate is not sensible. Some non-domestic issuers may therefore be overregulated, subject to overlapping and redundant regulation under SEC and home country rules, while others, likely from developing countries, may actually be underregulated.

Moreover, the relaxed regulatory scheme described above received a significant shock with the enactment of the Sarbanes-Oxley Act in 2002. The Sarbanes-Oxley Act cut a wide swath: the law made no attempt to distinguish between domestic and non-domestic issuers in the scope or application of its regulation.[207] Thus, the increased level of regulation imposed on non-U.S. issuers by the Sarbanes-Oxley Act has been qualitatively significant. It is also regulation that makes no attempt to take into account the special needs of non-domestic issuers. For example, the Sarbanes-Oxley Act requirement that each U.S.-listed issuer have an audit committee comprised of independent directors is not consistent with the German statutory mandate that employee representatives constitute half of any such committee.[208] The SEC has been able to smooth out some of these implementation problems through subsequent rulemaking.[209] Yet, even if the SEC wanted to, without congressional action, it can do nothing about the applicability of Sarbanes-Oxley's core regulation, such as the

206. Here, I am thinking of British Petroleum p.l.c., a publicly traded company listed on the LSE with a cross-listing on the NYSE, and Psi Technology Holdings, Inc., a company organized under the laws of the Philippines listed solely on the Nasdaq. BP p.l.c., Form 20-F (Mar. 6, 2007), *available at* http://www.sec.gov/Archives/edgar/data/313807/000115697307000346/b848881-20f.htm; PSi Technologies Holdings, Inc., Form 20-F (July 16, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1106714/000119312507155740/d20f.htm.

207. *See* Kenji Taneda, *Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation*, 2003 COLUM. BUS. L. REV. 715, 716–17.

208. 15 U.S.C. § 78j-1(m)(3)(B) (2004) (section 301 of Sarbanes-Oxley) (prohibiting affiliation or compensation of members of the audit committee). *See generally* Anupama J. Naidu, *Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate into Costs to the United States*, 18 EMORY INT'L L. REV. 271, 272 (2004) (discussing the effect of Sarbanes-Oxley on German issuers). When enacted, the audit committee requirement was also in tension with the rules of other countries on the selection and independence of auditors. *See* Taneda, *supra* note 207, at 739 (noting the conflict between the Sarbanes-Oxley Act and the laws of many European countries since "it is common in Europe for outside auditors to be appointed directly by the shareholders, not by a special committee of independent directors").

209. *See, e.g.*, Standards Relating to Listed Company Audit Committees, Exchange Act Release No. 33-8220, [2003 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,902 (Apr. 9, 2003) (adopting certain exemptions and clarifying the Sarbanes-Oxley Act's independent audit committee requirements for foreign private issuers).

much-maligned requirement that all domestic and non-U.S. issuers certify their disclosure controls and procedures.[210]

2. Private Capital Raising

The U.S. regulatory scheme applicable to those who raise capital privately is entirely different than the one applicable to public capital raising. A private capital raising can be defined under U.S. securities law as an offering that is made solely to sophisticated investors as established through a net worth requirement and not through the public market.[211] The regulatory regime applicable to such a capital raising is limited. Generally, so long as an issuer raises capital privately from investors with aggregate minimum worth, the offering does not need to be registered, and generally only the antifraud provisions of the securities laws apply.[212] Moreover, the offering can be underwritten if it is confined to qualified institutional buyers; these are generally investors who hold more than $100 million worth of securities.[213] This offering exemption, known as a Rule 144A offering, is the preferred method of non-domestic issuers to offer securities in the United States, and it is the primary regulatory vehicle that non-domestic issuers now employ to raise U.S. capital.[214] In 2005, non-U.S. issuers raised $53.2 billion in the private markets through Rule 144A offerings, compared to $4.7 billion in the public markets.[215]

210. Non-U.S. issuer protest has been particularly vigorous at Sarbanes-Oxley's Section 404 requirement as to certification of disclosure controls and procedures. *See* INTERIM CAPITAL MARKETS REPORT, *supra* note 1, at 115–16.

211. There are also exemptions available for capital raisings extended to a limited number of unaccredited investors. *See* C. Edward Fletcher, III, *Sophisticated Investors Under the Federal Securities Laws*, 1988 DUKE L.J. 1081, 1120–26 (discussing the structure of securities registration exemptions for sophisticated and unsophisticated investors).

212. These exemptions are embodied under the judicial gloss placed on Section 4(2) of the Securities Act and Rule 506 of Regulation D. *Id.* at 1120–24. A Rule 144A offering by a non-U.S. issuer is often combined with a Regulation S offering to shareholders outside the United States. *See* 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 the use of Regulation S and Rule 144A by foreign private issuers). For a description of the parameters of Regulation S, the governing rules for securities offerings made outside the United States, see Offshore Offers and Sales, Securities Act Release No. 6863, [1989–90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524 (Apr. 24, 1990).

213. 17 C.F.R. § 230.144A (1991); *see also* Resale of Restricted Securities, Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145, Securities Act Release No. 33-6862 [1989–90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523, at 80, 641–42 (Apr. 23, 1990).

214. *See* Luis F. Moreno Trevino, *Access to U.S. Capital Markets for Foreign Issuers: Rule 144A Private Placements*, 16 HOUS. J. INT'L L. 159, 195 (1993).

215. INTERIM COMMITTEE REPORT, *supra* note 1, at x; *see also* Zingales, *supra* note 48, at 7 (finding that "94% (by value) of the global IPOs that do not list in the United States (57% by number) still choose to market their issues" to institutional investors through a Rule 144A offering).

The U.S. reporting regime under the Exchange Act is automatically triggered for a domestic issuer once it exceeds more than 500 shareholders of record and has more than $10 million in assets.[216] It is triggered for a non-U.S. issuer once it exceeds 300 shareholders residing in the United States.[217] For domestic issuers, this rule applies no matter the method of capital raised, whether public or private.[218] It is different for non-U.S. issuers. Here, Rule 12g3-2b of the Exchange Act provides an exemption to the Exchange Act reporting requirements.[219] A non-U.S. issuer who elects to furnish certain information to the SEC that they are otherwise required to file with their home regulator and whose securities are not listed or quoted on a U.S. market is exempt from the reporting requirements of the Exchange Act, even if they have more than 300 shareholders residing in the United States.[220] Thus, unlike domestic issuers, non-U.S. issuers can widely offer securities privately by availing themselves of the Rule 12g3-2b exemption and effectively avoid triggering the Exchange Act's reporting requirements. The Rule 12g3-2b exemption is a powerful exemption that permits non-U.S. issuers to raise capital privately in the United States through a Rule 144A offering subject to only minimal regulation.[221]

Many non-U.S. issuers also pair their private equity capital raising with a level-one American Depositary Receipt program.[222] This is a trading program established using the Rule 12g3-2b exemption by a depositary bank for non-U.S. issuers who have not previously raised equity capital through a U.S. registered offering.[223] Shares are deposited in the program, and the depositary bank then issues depositary receipts representing these shares. The depositary receipts are then tradable on the over-the-counter

216. 15 U.S.C. § 78l(g) (2002) (500 shareholder requirement); 17 C.F.R. § 240.12g-1 (2007) ($10 million in assets requirement).

217. 17 C.F.R. § 240.12g3-2(b)(1) (2007).

218. *See* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 1762 (4th ed. 2001 & Supp. 2003). In addition, the reporting requirements of the Exchange Act are triggered if the issuer has any securities listed for trading on any national securities exchange or otherwise makes a registered offering of securities under the Securities Act. *See* 15 U.S.C. §§ 78l(a), 78o(d) (2000).

219. § 240.12g3-2(b)(1).

220. *Id.*

221. *See generally* Susan Chaplinsky & Latha Ramchand, *The Impact of SEC Rule 144A on Corporate Debt Issuance by International Firms*, 77 J. BUS. 1073 (2004) (describing the preference of non-U.S. issuers to structure their U.S. offerings as non-public ones under Rule 144A in order to sidestep U.S. regulation).

222. *See generally* Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48 (1993) (providing a comprehensive overview of ADR programs).

223. *Id.* at 54–57.

market with the prices displayed in the Pink Sheets.[224] The majority of non-U.S. issuers with securities traded in the United States elect to have their securities traded in this manner, including such well-known companies as Nestle and Nintendo.[225] These facilities are not optimal from either an investor or non-U.S. issuer perspective. For investors, trading in these securities is not on a primary market and therefore is often illiquid, with low volume and high bid-ask spreads.[226] Pricing is also not transparent and analyst coverage typically nonexistent.[227] Moreover, while issuers are exempt from Exchange Act reporting requirements with a Level I program, they cannot access the public capital markets nor generally use their securities as an acquisition currency in the U.S. market without becoming subject to such requirements.[228] Thus, the benefits that non-U.S. issuers expect from a cross-listing do not exist with a quotation on the Pink Sheets.

3. U.S. Investors

There is a separate regulatory scheme that determines which U.S. investors can invest in private offerings in the United States. I have already noted, in Part III.A.2, that private offerings are limited to U.S. investors who meet minimum aggregate wealth thresholds. Practically, in widespread offerings outside of the venture capital community, issuers limit their sales even more narrowly to qualified institutional investors, such as mutual or hedge funds with more than $100 million in liquid assets.[229] These investors can therefore freely invest, without regulatory limitation, in both private and public offerings in the United States. There is also no regulatory barrier to sophisticated investors, i.e., qualified institutional investors, investing in non-domestic issuers who choose not to

---

224. *Id.* at 57. To conduct a Rule 144A offering, a non-U.S. issuer must not offer securities of the same class as securities listed on a U.S. national securities exchange registered under Section 6 of the Exchange Act (e.g., the NYSE) or quoted on a U.S. automated inter-dealer quotation system (e.g., the Nasdaq). 17 C.F.R. § 230.144A(d)(3) (2007). The Pink Sheets is a pricing and financial information service for securities quoted on the over-the-counter markets. *See* Pink Sheets—Electronic Quotation and Trading System for OTC Securities, http://www.pinksheets.com/pink/about/index.jsp (last visited Nov. 7, 2007).

225. There are currently over 1,200 non-U.S. issuers with this type of ADR program. *See* Bank of New York Depositary Receipt Database, http://www.adrbny.com/dr_directory.jsp (last visited Feb. 17, 2007).

226. *See* Andrew G. Karoyli, *The Role of American Depositary Receipts in the Development of Emerging Equity Markets*, 86 REV. ECON. & STAT. 670, 687 (2004).

227. *Id.*

228. *See* American Depositary Receipts, Exchange Act Release No. 34-29226, [1990–1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,740, at 81,594 (May 30, 1991).

229. This is largely because these offerings are most frequently accomplished under the auspices of Rule 144A. *See supra* note 216 and accompanying text.

even access the U.S. capital markets.[230] These are the majority of non-U.S. issuers: the approximately 33,000 non-U.S. issuers who maintain a listing abroad and never raise capital in the United States.[231] The only barrier to sophisticated U.S. investors investing in these issuers is a practical one; namely, a relationship is needed with a broker who can execute these trades. However, these large investors generally do have the sophistication and wherewithal to establish the international brokerage network connections necessary to invest freely outside the United States.[232]

Non-sophisticated, or retail, U.S. investors do not have similar freedom. First, they are effectively restricted by SEC regulation from investing in significant private offerings; they can generally access only public offerings.[233] This restriction effectively bars retail investors from the bulk of the U.S. market for non-domestic offerings that are confined to sophisticated investors. Moreover, U.S. retail investors cannot invest outside the United States with the ease of sophisticated investors.[234] Many brokers will not execute trades for retail investors on non-U.S. exchanges.[235] If an investor can find a willing broker, the execution costs for any trade are quite high, transparency and pricing are less than optimal, and execution is delayed.[236] Retail investors are also often restricted by

230. *See supra* notes 211–15 and accompanying text.

231. As of December 31, 2005, it is estimated that there were over 33,000 publicly listed non-U.S. issuers who did not maintain a U.S. listing. This estimate is based on an analysis by the author of data made publicly available by the World Federation of Exchanges, and the number is higher than this as this database does not include all international stock markets. *See* World Fed'n of Exchs., Number of Listed Companies 2005, http://www.world-exchanges.org/publications/EQUITY305.XLS (last visited Feb. 17, 2007).

232. They accomplish this by executing their trades through affiliates that are outside the United States, thereby sidestepping the SEC's broker-dealer restrictions and Regulation S requirements. *See* 1 GREENE ET AL., *supra* note 198, § 9.03[3].

233. The SEC has promulgated in Rule 506 of Regulation D a de minimis safe harbor for retail investors to participate in direct private offerings by issuers. 17 C.F.R. § 230.506 (2007). However, most non-U.S. issuers choose to issue securities under Rule 144A, which does not contain such an exception and, even if they do issue directly, choose to limit their offering to qualified institutional investors for liability and practical reasons. *See* § 230.144.

234. The trend, though, is for more brokers to offer this service to retail investors in response to heightened retail investor demand for trading access to non-U.S. issuers. *See, e.g.*, Charles Schwab & Co., Inc., Global Investing Services, http://www.schwab.com/public/schwab/investment_products/stocks/global_investing?cmsid=P-981910&lvl1=investment_products&lvl2=stocks (last visited Feb. 17, 2007) (offering investment assistance to retail investors with respect to foreign non-U.S. listed stocks).

235. Foreign brokers in particular are leery of executing such trades because they may, by virtue of such action, subject themselves to U.S. broker-dealer regulation. *See* 1 GREENE ET AL., *supra* note 198, § 9.02 (noting the SEC position that "using the U.S. mails, wires, or telephone lines to trade securities with U.S. persons located in this country" could require a foreign broker-dealer to register in the United States).

236. *See* Aaron Lucchetti, *How to Buy Foreign Shares*, WALL ST. J., Aug. 12–13, 2006, at B1.

issuers from investing in their offerings as a consequence of the structure of the U.S. securities laws.[237] Consequently, retail investors who, at this time, want to invest abroad can practically and efficiently invest only in issuers who fully list on the U.S. market.

B. Alternative Regulatory Models

The U.S. securities regulatory scheme is arguably the benchmark against which the world's other securities regimes are measured. This does not mean that these other regulatory systems aspire to mimic the U.S. regime; rather, they look to the United States to measure the appropriateness of their regulation, borrowing from the United States as they deem appropriate and differentiating themselves where economic or other interests militate. In the global market for listings, this has led to three generalized competing schemes that can be grouped into low, medium, and high regulatory models.

1. The Low Regulation Model

The low regulation model is one that is now best embodied in the AIM. The AIM initially began as a small-cap market for companies with a need to raise public capital.[238] It is still largely a small capitalized market but, as of October 31, 2006, it had 1,307 listed issuers, 395 of which were issuers with a market capitalization greater than $100 million and forty-six of which were issuers with a market capitalization greater than $500 million.[239] Moreover, the AIM is increasingly viewed as an attractive listing environment for issuers due to its relaxed listing requirements. The AIM currently has no substantive listing rules other than a requirement to

237. There are many ways the requirements of the U.S. securities laws foster exclusion of U.S. persons. First, if the non-U.S. issuer's securities are held of record by more than 300 persons, it triggers the reporting requirements under the Exchange Act. *See* 17 C.F.R. § 240.12g3-2(a) (2007). An issuer therefore may choose to exclude investors located in the United States in order to stay below this 300-person threshold. Second, the Regulation S "safe harbor" from registration is unavailable if U.S. residents purchase the distributed securities within any restricted period. *See id.* § 230.900. And under Rule 903(a), the offer must be an "offshore transaction," which Rule 902(i) defines as one that does not include purchases by a U.S. resident. §§ 230.902–03. Resales by a non-U.S. resident who made a proper purchase under Rule 904 to a U.S. resident also violate the "safe harbor" if the sale occurs within the restricted period. *See* § 230.904. Therefore, a non-U.S. issuer has incentives to exclude U.S. persons in order to maintain a "good" offering under Regulation S.

238. For a comprehensive description and history of the regulatory scheme governing the AIM, see Jose Miguel Mendoza, Securities Regulation in Low-Tier Listing Venues: The Rise of the Alternative Investment Market (Aug. 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1004548.

239. London Stock Exch., AIM Market Statistics, Oct. 31, 2006, http://www.londonstockexchange.com/NR/rdonlyres/98BE8920-8CFB-483F-8D37-4F006B12C663/0/LISTDATEAIMCOS.XLS (converted from U.K. pounds to U.S. dollars at $1 = £ 0.5128).

be represented by a nominated advisor and file an admissions document.[240] Even these bare requirements for an admissions document can be waived if the issuer has been previously listed for eighteen months on another designated market.[241]

The key to AIM regulation is the nominated advisor. These are vetted brokers who guide the issuer through the listing process and any ongoing requirements of the AIM.[242] The AIM is thus a "reputational" market. Investors rely upon the prior reputation of the nominated advisors as a proxy for the quality of issuers listed rather than on the regulation itself.

The AIM, discussed in Part I.B, has experienced explosive growth. Yet, it is not without its problems. First, AIM-listed companies have delivered a meager cumulative gain of just one percent, for a compound annual return of 0.1% over a nine-year period ending in 2005.[243] Second, in recent years a number of registered nominated advisors, responsible for ensuring an AIM-listed company's good behavior, were themselves privately censored.[244] Third, the AIM has had some high-profile failures, such as the near implosion of Regal Petroleum.[245] Finally, the AIM has been criticized for high volatility, illiquidity, and large spreads in trading.[246] The average daily traded volume on the AIM for each issuer in 2006 was only two percent of issuers on the Nasdaq.[247] These problems are all

240. LONDON STOCK EXCH., AIM RULES FOR COMPANIES, Rules 1 & 3, at 4 (2007), http://www.londonstockexchange.com/NR/rdonlyres/91B19E7D-550C-440A-BCCA-52A32F19 13DB/0/AIMRULESFORCOMPANIES_2007.pdf.

241. *Id.*, Rule 3, at 4.

242. *See, e.g.*, *id.* at Introduction ("Where an AIM company has concerns about the interpretation of these rules, it should consult its nominated adviser."). Notably, the AIM does impose a modicum of on-going reporting obligations on listed issuers, including half-yearly reporting and disclosure requirements. *Id.*, Rules 17 & 18, at 36–37 (notification of material information and requirement for half-yearly reports).

243. Philip Coggan, *Ready, Aim, Fire! But Investors Can Miss the Target*, FIN. TIMES (London), Feb. 25, 2006, at 14. In contrast, the United States' Russell 2000, a similarly composed small capitalization index of U.S. issuers, returned an annual rate of 8.57% during this time period. Bloomberg Terminal Database (last visited Feb. 5, 2007).

244. Iain Dey, *You Have To Go into AIM with Your Eyes Open*, SUNDAY TELEGRAPH (London), June 18, 2006, at 6.

245. Peter Garnham & Philip Stafford, *Small-Caps: Regal Petroleum's Share Price Suffers Steep Slide*, FIN. TIMES (London), Feb. 1, 2006, at 46 (reporting a 69% slide in Regal Petroleum shares in one trading day). There are a number of other examples. For example, Chariot, an alternative lottery company, crashed within four weeks of its initial public offering. *See* Matthew Garrahan, *Monday Blues Leave Chariot Shaky*, FIN. TIMES (London), June 6, 2006, at 21.

246. Forty percent of listed issuers on the AIM regularly do not have their shares traded in any given trading day. Coggan, *supra* note 243; *see also* Harvey Jones, *AIMing for Recovery*, WHAT INVESTMENT (London), Dec. 1, 2006, at 12, *available at* http://www.whatinvestment.co.uk/shares/in-depth/253766/aiming-for-recovery.thtml (noting that "small, high-risk companies typically trade on wider spreads [on the AIM] than companies on the main market, and liquidity can often be a problem").

247. *See* MCKINSEY REPORT, *supra* note 42, at 52.

consequences that financial theorists predict should exist on any lightly regulated, small capitalization market.[248]

The AIM, despite these issues, appears to be competing with the U.S. regulatory model on the lower end of the capitalization scale as it is gaining market share in the global listings market for these issuers.[249] The AIM also appears to be expanding its market, gaining traction in the competition for global listings among larger capitalized issuers.[250] The continuance of this trend is uncertain: further implosions, continued low returns, or other difficulties associated with the AIM's low regulation mantra may all work to bring the AIM's rise to a halt. Yet, the continued listings trend remains upward and the economic by-product effects of larger mass, such as thicker markets, are likely to mitigate some of the AIM's problems. In the short term, the AIM is likely to be a more severe competitor to the U.S. model on the lower end of the range where higher regulation costs are more significant to issuers; rent seeking is more prevalent; and the desire for a higher equity rating, lower cost of capital, and other benefits of a high regulation model is often outweighed by more immediate cash flow desires.[251] Moreover, with the AIM's success have come imitators: the Growth Enterprise Market of the HKSE and the Entry Level listings standards of the Deutsche Börse are the two most significant.[252] In the future, it is likely that there will be a competitive trend towards additional lower regulation markets, and a further siphoning off of low market capitalization issuers from more highly regulated markets into low regulation models.

---

248. *See generally* Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333 (2006) (examining the positive effects of strong regulation on stock market markets).

249. In light of its public problems, the LSE has announced a review of the AIM's regulations intended to regulate the market more fully. David Blackwell, *LSE to Review Aim Regulations*, FIN. TIMES (London), Oct. 2, 2006, at 21.

250. *See supra* notes 70–75 and accompanying text.

251. Because of these issues, the likelihood that the AIM, or any other low regulation exchange, will expand deeply into the larger capitalized global listings market is unlikely. I discuss this further *infra* Part IV.A.

252. Other exchanges observing the success of the AIM have also expressed interest in the lower end of the market. *See, e.g.*, Joe Bolger, *Threat to AIM as Singapore Looks at Own Junior Market*, TIMES (London), May 17, 2006, at 53 (reporting that the Singapore Exchange is studying a junior market modeled on the AIM). Euronext also has its own such market, Alternext, which as of October 17, 2006, had only attracted sixty-one listings. Alternext Highlights, http://www.euronext.com/alternext/landing/0,4486,1732_203915424,00.html (last visited Feb. 17, 2007).

2. The Middle Regulation Model

The middle regulation model is a shorthand, catch-all phrase describing the regulatory regimes existent in the primary developed European and Asian markets. These regimes can be classified into two distinct archetypes: a dispersed ownership model and a concentrated ownership one.[253] The concentrated ownership regulatory scheme is one present in jurisdictions where a substantial majority of issuers have a significant shareholder. The regulation in these regimes is designed to accommodate, or is the economic cause of, such concentration.[254] Conversely, the dispersed ownership regulatory model is characterized by widespread ownership of shares. It too is built to accommodate, or is the cause of, such ownership dispersion.[255]

The dispersed ownership model exists in its most prominent form in the United States and the United Kingdom.[256] The LSE is therefore the U.S. market's primary global competitor in this regulatory subcategory.[257] As expected from economically similar ownership models, the regulatory scheme of the LSE is broadly analogous to the U.S. market, and in some cases is more strict than the U.S. one.[258] For example, issuers listed on the LSE have historically been required to make real-time disclosure, as opposed to the periodic disclosure regime in the United States.[259] Issuers

253. *See* Bratton & McCahery, *supra* note 27, at 218.

254. *See* Rafael La Porta et al., *Corporate Ownership Around the World* (Harvard Inst. of Econ. Research, Paper No. 1840, 1998), *available at* http://ssrn.com/abstract=103130 (surveying the ownership structure of large corporations in twenty-seven wealthy economies and finding that, except in economies with high shareholder protection, relatively few of these firms are widely held).

255. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 59–64 (2001) (discussing theories explaining the origins of dispersed ownership markets).

256. *But see* Clifford G. Holderness, *Myth of Diffuse Ownership in the United States*, REV. FIN. STUDIES (forthcoming), *available at* http://ssrn.com/abstract=991363 (finding evidence of ownership concentration in a representative sample of U.S. public firms with ninety-six percent having blockholders who own an average of thirty-nine percent of common stock).

257. *See* Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459, 465 (2001) ("The United States has a companion, however, in the dispersed ownership category, this being the United Kingdom.").

258. *See generally* Simon Gleeson & Harold S. Bloomenthal, *The Public Offer of Securities in the United Kingdom*, 27 DENV. J. INT'L L. & POL'Y 359 (1999) (detailing regulations adopted by the E.U. and the United Kingdom's resulting regulatory scheme).

259. FINANCIAL SERVICES AUTHORITY HANDBOOK, DISCLOSURE RULES AND TRANSPARENCY RULES, DTR 2.2.9 (2007), *available at* http://fsahandbook.info/FSA/html/handbook/DTR. These rules implemented Article 6 of the E.U. Market Abuse Directive (Directive 2003/6/EC) which mandated the adoption of a continuous disclosure regime. *See* FIN. SERV. AUTH., UK IMPLEMENTATION OF THE EU MARKET ABUSE DIRECTIVE (2003/6/EC), Parts 1 and 2 (2004), *available at* http://www.hm-treasury.gov.uk/media/1/B/market_abuse_parts1and2_180604.pdf.

listed on the LSE are also subject to similar reporting requirements and corporate governance standards as issuers on the U.S. market, albeit without the SEC's stricter disclosure obligations.[260] The most significant difference between the two is in enforcement. The U.K. regulator, the Financial Services Authority, is not as active in oversight supervision and enforcement as the SEC. Further, the U.K. securities market is a significantly less litigious one than the U.S.'s, and securities class actions are not commonly utilized as an enforcement mechanism.[261]

Concentrated ownership models predominate in Continental Europe and in the Asian markets, and they are the more prevalent of the two types.[262] The most important of these markets are the Deutsche Börse and Euronext in Europe and the TSE in Asia.[263] Market regulation of these regimes is generally set at a lower level than that in dispersed ownership regimes.[264] Regulation instead comes through significant or majority stockholders whose interests largely align with minority holders.[265] Still, the regulatory requirements of these regimes in Europe include similar attributes as the dispersed ownership one, including continuous disclosure requirements, International Accounting Standards ("IAS") or U.S. GAAP

---

260. Issuers listed on the LSE are subject to annual and half-yearly reporting requirements, international accounting standard requirements for European companies, and other significant regulations. *See* UKLA Listing Rules 4 (listing particulars requirement), 9.8 (annual report and IAS requirements), and 9.9 (half-yearly report), http://fsahandbook.info/FSA/html/handbook/LR (last visited Feb. 17, 2007). In addition, similar to Sarbanes-Oxley, the U.K. Financial Services Authority has adopted a Combined Corporate Code; issuers on the LSE are expected to comply with the code and disclose the extent of such compliance. FIN. SERV. AUTH., THE COMBINED CODE ON CORPORATE GOVERNANCE (2003), *available at* http://www.fsa.gov.uk/pubs/ ukla/lr_comcode2003.pdf.

261. *See* Coffee, *Impact of Enforcement*, *supra* note 16, at 31–39. *See generally* Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications* (Harvard Law and Econ., Discussion Paper No. 521, 2005), *available at* http://ssrn.com/abstract=839250 (analyzing data regarding financial regulation in different countries and concluding that intensity of securities enforcement actions is much higher in the United States than in Germany and the United Kingdom).

262. *See* Marco Becht & Colin Mayer, *Introduction* to THE CONTROL OF CORPORATE EUROPE, at 19 (Fabrizio Barca & Mario Becht eds., Oxford University Press 2001) (finding that 64.2% of German listed companies, 56.1% of Italian listed companies, and 26.3% of Swedish listed companies have a controlling majority of shareholders); Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81, 82 (2000) (finding that in Hong Kong, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Taiwan, and Thailand, over two-thirds of companies are majority controlled).

263. Here, the HKSE is a hybrid—a concentrated ownership model with a regulatory apparatus based upon the U.K. model. *See generally* CHINA SECURITIES HANDBOOK 1995–96 (1995).

264. *See* Coffee, *supra* note 255, at 3.

265. As Professors Bratton and McCahery point out, this oversight is not always optimal and can be adversely affected by internal agency costs as well as loss of management objectivity. *See* Bratton & McCahery, *supra* note 27, at 225–27.

financial statement requirements, prohibitions on insider trading, and oversight by market regulators.[266]

In the global listings market at the middle regulatory level, the primary competitors of the U.S. market are currently the LSE and the Deutsche Börse.[267] The HKSE, which is a hybrid of the concentrated and dispersed ownership model, should also be added to this list, but not for its current status. It has historically failed to attract global listings. Rather, the HKSE is placed on this list for its competitive potential due to the increasing strength and thickness of its market and its natural tendency to be the epicenter of the rapidly growing Chinese listings market.[268] The other regulatory markets have not achieved competitive footing; they largely focus on domestic listings, do not compete in the global listings market, and lack the characteristics necessary to transform them into a competitive force.[269] This is to be expected. In the global marketplace the markets located in the financial centers of the globe—Frankfurt, Hong Kong, London, and New York—are most likely to be the leaders; they offer the concentrated resources of the world's financial centers and the most active trading markets. Each of these four markets is fundamentally different in scope and character and keyed to the ownership model of its domestic companies, but the base-level regulation is broadly the same: each has its own disclosure requirements and ongoing regulatory supervision as well as requirements for IAS or U.S. GAAP financial statements.[270] Moreover, they all have more commonalities with the U.S. securities regulation scheme than divergences, and there is an accelerating global movement towards harmonization of these securities markets.[271] Additionally, until the Sarbanes-Oxley Act, the U.S. market was generally considered to be the more highly regulated one, but not significantly more so than the regulatory schemes of the Deutsche Börse, the HKSE, and the

---

266. This is largely a result of the numerous harmonizing E.U. directives issued over the past few years. *See* Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, 26 U. PA. J. INT'L ECON. L. 379, 380 (2005) (reviewing recent E.U. public market reforms and requirements and asserting that "[d]isclosure reform in Europe has been patterned to a significant extent on the legislative framework of U.S. securities laws").

267. See *supra* Part I.

268. *See supra* notes 79–83 and accompanying text.

269. *See supra* notes 62–64, 84 and accompanying text.

270. The non-U.S. regimes often model themselves on IOSCO standards, allowing them to distinguish themselves from U.S. standards; yet, these standards are increasingly convergent with U.S. ones. *See generally* Steinberg & Michaels, *supra* note 153, at 261–65.

271. Prentice, *supra* note 126, at 835 (discussing increasing commonality of securities market regulation). *See also* Gerard Hertig & Hideki Kanda, *Creditor Protection*, *in* THE ANATOMY OF CORPORATE LAW 71, 82 (2004) (observing that "it seems that the capital markets and regulation are inexorably pressing European and Japanese companies toward the U.S./U.K. model of financial reporting").

LSE.[272] All were seen as competitive candidates in the global listings market for middle regulation. In light of the passage of the Sarbanes-Oxley Act, though, the U.S. market is often viewed by many as a significantly more regulated jurisdiction where the regulation imposed is considered overly burdensome.[273]

3. The High Regulation Model

The U.S. model is viewed globally as a relatively high regulation market for listings generally and non-domestic listings particularly, but there have been sporadic attempts to create a regulatory scheme that is set at a higher level than the U.S. regulatory scheme. The two most recent attempts have been the Neuer Markt, a now defunct affiliated market of the Deutsche Börse, and the Novo Mercado, an affiliated market of the São Paulo stock exchange, the Bovespa.[274] Both exchanges promulgated high listings standards in an attempt to lure both domestic and non-domestic listings, and which have in some respects exceeded the SEC's own threshold level of regulation for listings.[275] The Neuer Markt spectacularly failed while the Novo Mercado has yet to have any material impact on the global listings market.

The Neuer Markt was launched in 1997 and rapidly gained traction: as of November 27, 2000 it had listed 318 issuers with an aggregate market capitalization of $160 billion.[276] This vigorous start was also reflected in the Neuer Markt's ability to attract non-domestic issuers due to its marketing as an alternative choice to Nasdaq for high technology

272. The U.S. market, though, has historically been seen as a significantly more litigious jurisdiction. *See* Coffee, *Impact of Enforcement*, *supra* note 16, at 31–39.

273. *See supra* notes 5–6 and accompanying text. *See generally* Olufunmilayo B. Arewa, Securities Regulation and Corporate Governance: Small Business, Sarbanes-Oxley and Global Capital Markets 3 (July 18, 2001) (unpublished draft, on file with the North Carolina Law Review) (discussing the "the implications of SOX for the competitiveness of U.S. capital markets, particularly with respect to the capital needs of small issuers").

274. These are the two examples which Professor Coffee highlights to support his cross-bonding thesis. He concludes that "the relative success of the Neuer Markt and the relative failure (at least to date) of the Novo Mercado may show that there is a market for 'high disclosure,' but that emerging market firms are less willing to opt into substantive governance reform." Coffee, *supra* note 15, at 1803.

275. *See id.* at 1804–08.

276. John H. Christy, *Queen of Small Caps*, FORBES, Nov. 27, 2000, at 312. The Neuer Markt would peak at 345 issuers. Andrew Cave, *Frankfurt to Close Ailing Neuer Markt*, DAILY TELEGRAPH (London), Sept. 27, 2002, at 33, *available at* http://www.telegraph.co.uk/money/main.jhtml;jsessionid=DH51IORXAX4E3QFIQMFSFFWAVCBQ0IV0?xml=/money/2002/09/27/cnneu27.xml.

companies.[277] With this success lay the seeds of the Neuer Markt's collapse: the popping of the technology bubble resulted in a ninety percent decline in aggregate market capitalization on the Neuer Markt in just one year, from 2001 to 2002.[278] There were also several high-profile issuer implosions and other scandals left in the wake of this precipitous decline.[279] By 2003, the Neuer Markt's reputation was in tatters. With listings and volume in severe decline, the Deutsche Börse closed the market and folded the remaining listings back into its primary market, with two-thirds electing to be governed by the high regulation scheme of the Deutsche Börse regulatory system, the prime listings standard.[280]

The Bovespa, the São Paulo stock exchange, launched the Novo Mercado in 2001.[281] The market was established to compete for listings by small and medium capitalized companies, both domestically and in the global listings market in Latin America.[282] Similar to the Neuer Markt, the competitive strategy of the Novo Mercado has been to establish high regulatory standards in order to attract listings.[283] Issuers who list on the Novo Mercado must provide minority protections, including full tag-along rights, must prepare financial statements to U.S. GAAP or IAS, and must comply with a number of other significant regulatory obligations.[284] The Novo Mercado has generated substantial publicity for its listing standards, both generally and within the academic community that follows such things, but as of December 31, 2006, it had only forty-four listings.[285] Its growth, until recently, has been slow and, although it has been cited as spurring innovation in Brazilian regulation and is increasingly attracting

277. *See* Naidu, *supra* note 208, at 307 ("The Neuer Markt's model, based on Nasdaq, was geared toward 'young firms in growing industries,' as opposed to more established blue-chip companies.").

278. Justin Schack, *After the Fall*, INSTITUTIONAL INVESTOR, Sept. 2002, at 33, 40.

279. *See* Neal E. Boudette, *Neuer Markt's Battered Image May Be Poised for a Recovery*, WALL ST. J., Mar. 13, 2002, at C11.

280. The remaining one-third elected to be governed by the General Standard segment. Press Release, Deutsche Börse (June 3, 2003), *available at* http://deutsche-boerse.com/dbag/dispatch/en/listcontent/gdb_navigation/home/Content_Files/10_homepage/News/13_press/pm_pr_03-06-03_neusegmentierung.htm.

281. *See generally* Jonathan Wheatley, *Big Year in Brazil, Thanks to Bovespa and Novo Mercado*, FIN. TIMES (U.S.), Dec. 6, 2004, at 26 (discussing the establishment of the Novo Mercado).

282. *See* Craig Karmin, *Brazil Prepares Launch of Market to Encourage Foreign Investment Through Good Governance*, WALL ST. J., Dec. 14, 2000, at C16.

283. *See* John William Anderson, Jr., *Corporate Governance in Brazil: Recent Improvements and New Challenges*, 9 L. & BUS. REV. AM. 201, 211–17 (2003) (reviewing the regulatory scheme of the Novo Mercado and its competitive strategy).

284. Novo Mercado Rules, http://www.bovespa.com.br/Companies/NovoMercadoSpecial/cias_niveisdif_intro_i.htm (last visited Nov. 21, 2007).

285. *See* Bovespa Web site, http://www.bovespa.com.br/indexi.asp (last visited Feb. 17, 2007).

domestic listings,[286] it is not currently viewed as a serious competitor in the global market for listings, even within Latin America.[287]

IV. COMPETITION IN THE GLOBAL LISTINGS MARKET

A. *Defining the Listings Market*

The market for listings is thus a dynamic and economically competitive one where issuers have a menu of choice embodied in three broad-based regulatory models: high, medium, and low. In this market, both the low and the medium regulatory models have established competitive purchase: issuers actively seek out and list in both regimes and stock markets are incentivized to offer such choice. This has not been true of the high regulatory model, and this scheme has largely failed to gain footing among issuers in the global marketplace.

Issuers also further gravitate towards either low or medium regulatory schemes depending upon their own market capitalization. Small capitalized issuers have largely acted to list on low regulation markets, such as the AIM, rather than subject themselves to high regulation. The reasons for this preference failure are grist for further study, but include lower transaction costs and compliance requirements, easier capital raising, and simple rent seeking by corporate officers.[288] It may also be due to the inability of many small capitalized issuers to meet the listings standards of high regulation markets. Low capitalization issuers have thus historically been predisposed to weigh these factors over the perceived benefits of a high regulation market. This weighing is constant, though, and at times when the benefits of a high regulation market were forcefully apparent, small capitalized issuers have acted to avail themselves of such high regulation. This occurred with the Neuer Markt in the midst of the technology bubble. Small capitalized issuers initially flocked to this market because of the substantially higher equity rating attributed to listing issuers.[289] Yet, this was in an aberrational market, and the premium equity

---

286. *See* Boudette, *supra* note 279.

287. *See* Prentice, *supra* note 14, at 1199 (asserting that Novo Mercado "was a great idea theoretically," but that few companies have been interested in cross-bonding with this market). The Novo Mercado, though, has experienced a small growth spurt in 2006 and 2007, with twenty initial public offerings in 2006 and twenty-nine in 2007 (through July 30, 2007). *See* Antonio Regalado, *Big Brazil Deal Has Investors Calling for Level Playing Field*, WALL ST. J., Jul 30, 2007, at C1.

288. *Cf.* Stephen J. Choi & Kon Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 CHI. J. INT'L L. 277, 289–90 (2002) (discussing the transaction costs associated with cross-listing in overseas to higher regulation markets).

289. *See After Greed, Fear: No End to the Troubles of the Neuer Markt*, ECONOMIST, May 25, 2002, at 73.

rating for listing thereupon was primarily due to the technology bubble. Such clear-cut benefits have been otherwise absent in high regulation markets. Smaller capitalized issuers have therefore, when provided the option, generally acted to list on lower regulation markets rather than high ones.

Small capitalized issuers have also tended to list on low regulation markets when given the choice between middle and low regulation regimes. For example, as of October 31, 2006, there were 1,186 small capitalized issuers on the AIM, defined for this purpose as an issuer with a market capitalization less than $100 million.[290] In contrast, on the LSE, the AIM's middle regulation big sister market, the number of small capitalized issuers on that date was approximately 314.[291] The reason for this preference also requires further study but is likely due to substantially the same reasons that small capitalized issuers choose to list on low regulation markets. This preference is transitory, though, and as issuers grow in size, the benefits of a more highly regulated market typically come to outweigh the transaction costs. These issuers then tend to migrate towards higher regulatory regimes as they grow in size either in their own country or through cross-bonding with a higher regulatory regime in another jurisdiction.[292]

Medium- and large-sized issuers have also been sluggish to list on high regulation markets.[293] This failure is puzzling, as some advocate that these companies should naturally favor this regulatory model as the most socially and economically optimal one.[294] These are established issuers who can afford the compliance costs; moreover, for these issuers, the lower cost of capital and higher equity rating provided by a high regulation model should outweigh these expenses. These issuers also desire the analyst coverage and thicker capital markets typically more available in a more highly regulated market. It is for these reasons that medium- and large-sized issuers have also tended to eschew the low regulation model. The AIM and LSE again provide good examples. As of December 31, 2006, there were 200 issuers listed on the LSE with a market capitalization

290. London Stock Exch., AIM Market Statistics—October 2006, http://www.londonstockexchange.com/NR/rdonlyres/98BE8920-8CFB-483F-8D37-4F006B12C663/0/LISTDATEAIMCOS.XLS (converted from U.K. pounds to U.S. dollars at $1 = £0.5128).

291. London Stock Exch., Main Market Fact Sheet—October 2006, http://www.londonstockexchange.com/NR/rdonlyres/197FE405-BCD3-47E6-83C5-7468B023D16A/0/MainMarketFactsheetOctober2006.xls (click on "T8 Co's by Value" tab; add data in cells C16 through C20).

292. *See infra* notes 295–98 and accompanying text.

293. This is exemplified by the failure of such markets to develop and those that have emerged to prosper.

294. *See* Coffee, *supra* note 15, at 1763.

between £500 million and £2 billion and 137 with a market capitalization over £2 billion, compared to twenty issuers with a market capitalization on the AIM between £500 million and £2 billion and one on the AIM with a market capitalization over £2 billion.[295] Instead, these issuers tend to cluster in middle regulatory regimes, migrating from lower regulatory ones as they grow in size, and the larger capitalized issuers who do stay in low regulatory regimes arguably do so due to managerial opportunism.[296]

The reason for the counterintuitive preference of larger issuers for middle, as opposed to high, regulation is uncertain. One possible explanation is economic: a high regulatory regime may simply be an overregulated one, with the level of regulation not optimally set to a particular issuer's private needs. Another reason may be flexibility. Issuers can typically obtain the thick capital markets and analyst coverage they desire in middle regulatory regimes; if they want increased regulation, they can internalize it and self-regulate. This phenomenon has occurred with many large capitalized issuers such as General Electric.[297] Self-regulation here provides for greater flexibility and reduces liability exposure while providing the potential for equivalent benefits. Finally, as with small capitalized issuers and particularly in developed countries, this preference may sometimes be due merely to the simple inability of an issuer to meet these higher standards.[298]

The regulatory market for listings is thus one where middle and low regulatory products compete for separate pools of issuers. When provided the choice, small capitalized issuers preferentially list on low regulation

---

295. London Stock Exch., Main Market Fact Sheet—December 2006, http://www.londonstockexchange.com/NR/rdonlyres/2EC930DD-D365-421F-98E1-65104E18F791/0/MainMarketFactsheetDecember2006.xls (click on "T8 Co's by value" tab); London Stock Exch., AIM Market Statistics—December 2006, http://www.londonstockexchange.com/NR/rdonlyres/B7C12B02-1C60-4B61-8271-33667EBA5D34/0/Aimfs0612.xls (click on "Co's by value" tab).

296. This, for example, explains the historical trend of issuers to migrate from the Nasdaq and American Stock Exchange to the NYSE. The NYSE in the past has been viewed as the more highly regulated of the three. *See* Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325, 355 (2001) ("From 1869 until the mid 1980s the NYSE tried to differentiate itself from the AMEX and Nasdaq by having higher listing standards and advertising a blue chip issuer list.").

297. This is a recent development. In the past, General Electric was criticized for impenetrable disclosure practices particularly with respect to its Capital Business Unit. It voluntarily responded by substantially increasing the amount and transparency of its disclosure. *See* Rachel Emma Silverman, *GE to Change Its Practices of Disclosure*, WALL ST. J., Feb. 20, 2002, at A3.

298. For example, the failure of the new high regulation main market of the Warsaw Stock Exchange in the mid-1990s to attract a substantial number of issuers has been attributed to its setting of standards above the capability of its clientele of issuers to meet. *See* Celia R. Taylor, *Capital Market Development in the Emerging Markets: Time to Teach an Old Dog Some New Tricks*, 45 AM. J. COMP. L. 71, 97 (1997).

markets while medium and larger issuers list on middle regulation markets. In the face of such diversity of want and in perfect capital markets, the optimal competitive position for any stock market would be to offer an array of regulatory choice in order to meet the needs of its consumers, i.e., issuers. However, in the midst of this choice and the regulatory market structure outlined previously, issuers in the developed world still favor listing in their home markets. Even if their preferred regulatory option is available, the domestic country bias typically dominates and issuers elect a less optimal social choice to primarily list in their own jurisdiction.[299] The global competition for listings is thus not a strong force motivating stock markets to offer a regulatory menu for domestic issuers. Rather, the driver of stock market regulatory differentiation with respect to domestic issuers is primarily a function of alternative capital choices in the domestic market, such as private shareholding or bank finance.[300]

B. *The Global Market for Cross-Listings*

Things are different in the global market for cross-listings. A diversity of regulatory choice here provides a clear competitive advantage. Issuers may choose to cross-list for non-regulatory reasons; they may cross-list in another jurisdiction to tap pools of liquidity, raise their non-domestic public profile, gain an international acquisition currency and shareholder base, or for other reasons.[301] There is simply no current academic agreement on a definitive reason why issuers choose to cross-list. A differentiated regulatory menu is therefore more responsive to this diversity and places a market on firmer globally competitive footing.

A low regulation listing regime can sometimes be more attractive to an issuer looking to cross-list, as it comes at a reduced regulatory cost.[302] But this is likely to be a red herring for small capitalized issuers. A low regulation market is unlikely to provide liquidity or other tangible market benefits to them; rather, trading and liquidity in smaller markets

299. *See supra* notes 143–55 and accompanying text.

300. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 171–77 (1994).

301. For further discussion of non-regulatory reasons why issuers choose to cross-list, see Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 323 (2005); Craig Doidge et al., *Private Benefits of Control, Ownership, and the Cross-Listing Decision* 35–36 (Nat'l Bureau of Econ. Research, Working Paper No. W11162, 2006), *available at* http://papers.ssrn.com/sol13/papers.cfm?abstract_id=679321; Amir N. Licht, Bonding and Dominance in Securities Markets: Cross-Listing and Corporate Governance 9–15 (Nov. 2002) (unpublished working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668424.

302. This is particularly true since the stock price in the home market tends to dominate the stock price in the cross-listed market. *See* Kenneth A. Froot & Emil M. Dabora, *How Are Stock Prices Affected by the Location of Trade?*, 53 J. FIN. ECON. 189, 190–91 (1999).

economically accrues, if at all, to larger issuers. This is exemplified by the AIM; the bulk of trading on the AIM occurs with respect to its medium and large issuers.[303] This lack of apparent benefits offered by a lightly regulated market has led some commentators to view such listings as primarily a product of managerial opportunism or a simple inability of the issuer to meet the standards of more highly regulated markets.[304] Meanwhile, for larger issuers, the benefits of such a listing are also sparse. They may accrue trading liquidity and widen their shareholder base, but to a lesser extent than if they cross-listed in the target jurisdiction's more highly regulated market, if one existed. Moreover, the benefits of cross-bonding are absent. It is for these reasons that medium and large capitalized issuers are also less likely to cross-list on low regulation markets.

A higher regulatory option is thus economically likely to be—and is today—the preferred market for cross-listing. Issuers who cross-list to these markets do so for a number of reasons: cross-bonding, a reputational gain, increased equity rating, thicker capital markets, lower cost of capital, and other non-regulatory reasons.[305] Further, the middle level of regulation offered by these global markets is typically of sufficient weight to provide the benefits a cross-listing issuer expects.[306] This may be one explanation why high regulation markets have not developed or otherwise attracted significant numbers of cross-listings. Moreover, cross-listings in low regulation markets are likely to be the result of managerial opportunism or the poor quality of an issuer, while a middle regulation cross-listing is more apt to be a product of sounder financial calculus. A regulator is therefore likely to be more comfortable with a middle regulation regime for cross-listings. Because of the attractiveness and issuer preference for this type of regulation, this market is also a more fiercely competitive one among stock markets. Accordingly, and given the heterogeneity of issuer reasons to

303. *See* MCKINSEY REPORT, *supra* note 42, at 52 ("Not only is the average daily traded volume per company on AIM a mere 2 percent of that on NASDAQ, but even that limited liquidity is highly concentrated in the few companies at the very top end of AIM's market capitalization range." (exhibit citation omitted)).

304. *See generally* Licht, *Managerial Opportunism*, *supra* note 15 (arguing that cross-listing to lesser regulated markets are primarily the product of managerial opportunism).

305. *See* William A. Reese, Jr. & Michael S. Weisbach, *Protection of Minority Shareholder Interests, Cross-listings in the United States, and Subsequent Equity Offerings* 1–3, 9 (Nat'l Bureau of Econ. Research, Working Paper No. W8164, 1999), *available at* http://ssrn.com/abstract=194670.

306. *See generally* Mark H. Lang et al., *ADRs, Analysts, and Accuracy: Does Cross Listing in the United States Improve a Firm's Information Environment and Increase Market Value?*, 41 J. ACCT. RES. 317 (2003) (finding that firms that cross-list on U.S. exchanges have greater analyst coverage and increased forecast accuracy relative to firms that are not cross-listed).

cross-list, the ability to offer regulatory choice even within a middle regulatory choice is an important competitive advantage.

C. *The Global Market for Non-Domestic Primary Listings*

There is a final strain in the global listings market: primary listings by issuers outside their home country market. The listing decisions of these issuers typically bear the same characteristics as the decisions of issuers in domestic paradigms. Issuers tend to list abroad in accordance with their size; small capitalized issuers list in less regulated markets and middle and larger capitalized issuers list in middle regulation markets. Due to greater choice among regulatory regimes, this market is more divergent and competitive than the market for cross-listings, and regulatory flexibility is likely to enhance a market's competitiveness with respect to potential listings.[307] A singular example of this is of Israeli issuers who regularly list on the middle regulation U.S. market in order to avoid the securities law regime applicable if they otherwise were to list on their home market, the Tel Aviv Stock Exchange.[308]

D. *The U.S. Position in the Global Listings Market*

The global exchanges have competitively responded to this diversity of issuer preference by providing products tailored to these needs. The LSE created the AIM to compete at the lower end of the regulatory sphere and provide an alternative to the LSE's middle regulatory scheme.[309] The HKSE has taken similar steps by creating its Growth Enterprise Market for smaller capitalized issuers.[310] Meanwhile, the Deutsche Börse has implemented a three-tiered regulatory system: Prime, General, and Entry.

---

307. This choice is also likely to allow for greater managerial opportunism in the listing decision. *See* Licht, *Managerial Opportunism*, *supra* note 15, at 328–29.

308. Israeli issuers listed on a U.S. market are permitted under Israeli law to make their disclosures in accordance with the SEC foreign private issuer regime and are not subject to more stringent Israeli securities law disclosure requirements. *See id.* at 341, 346 ("By listing, and remaining listed, only in the American market officers and controlling persons of Israeli issuers were able to take advantage of its more lenient disclosure regime."). There are currently forty-six Israeli issuers listed on the NYSE and the Nasdaq in this category. Tel Aviv Stock Exchange, Market Data, http://www.tase.co.il/taseeng/marketdata/stocks/marketdata/marketdata.htm?action=2 (last visited Feb. 17, 2006). The theory that Israeli issuers list in the United States to avoid Israeli law has been disputed. *See* Ariel Yehezkel, *Foreign Corporations Listing in the U.S.—Does Law Matter? Testing the Israeli Phenomenon*, 2 N.Y.U. J.L. & BUS. 351, 400 (2006) ("Minor differences between the two legal systems were found insufficient to justify the decisions of Israeli corporations to incur the high costs incident to listing in the U.S.").

309. *See supra* notes 238–41 and accompanying text.

310. *See* Hong Kong Stock Exchange, About GEM, http://www.hkgem.com/aboutgem/e_default.htm (follow "The Market for Growth Enterprises" hyperlink) (last visited Feb. 17, 2007).

Each tier is distinguished in terms of both its listing requirements and regulations.[311]

The primary competitors of the United States thus offer an array of regulatory choice when it comes to listings and cross-listings. These are options that the U.S. model does not provide. The U.S. listings market is subject to one-size-fits-all regulation which varies only if the issuer is a domestic or non-domestic one.[312] U.S. stock markets are prohibited from providing a differing array of regulation below the middle regulation base level set by the SEC.[313] The United States has thus ceded the low regulation market. And, as we have seen, the United States is losing its competitive advantage in the middle regulation market as other global markets become thicker and the equity premium of issuers awarded on those markets converges with the U.S. market.[314] This is the real phenomenon outlined in Part I. The consequence has been the recent decline in non-U.S. listings on the U.S. market.

Moreover, beyond these structural failings, there is a growing public belief that the perhaps inevitable relative decline of the U.S. market has been hastened by the enactment of the Sarbanes-Oxley Act and a general perception that the United States is an overregulated market.[315] Some U.S. regulators have recognized this problem and both President Bush and Secretary of the Treasury Henry M. Paulson, Jr. have endorsed the need for some measure of regulatory reform, though they have been parsimonious

---

311. *See* Deutsche Börse—Europe's Premier Listing Platform, Market Structure, http://deutsche-boerse.com/dbag/dispatch/en/kir/gdb_navigation/listing/10_Market_Structure (last visited Feb. 17, 2007).

312. *See supra* Part III.A.1.

313. The Nasdaq has made some attempts above the U.S. base-level requirements to establish a tiered market system through its Nasdaq Global Select Market, Nasdaq Global Market, and Nasdaq Capital Market segments. *See* Joseph Radigan, *Analysis: Blue-Chips Get a Nasdaq Tier of Their Own*, SEC. INDUS. NEWS, Feb. 27, 2006, at 17. Reflecting the preference of large capitalized issuers for middle, as opposed to high, regulation, the strictest tier of the Nasdaq market (the Nasdaq Global Select Market) does not impose additional regulatory burdens above those of the Nasdaq Global Market but rather denotes the Nasdaq segment's requirement of higher market capitalization and trading liquidity. *See* NASDAQ GLOBAL SELECT MARKET 1–2 (2006), www.nasdaq.com/about/NASDAQGlobalSelectFS_071206.pdf.

314. The U.S. markets were already losing market share prior to passage of the Sarbanes-Oxley Act. According to one study examining non-U.S. initial public offerings between 1992 through 1999, the percentage of non-U.S. IPOs listing during this time period dropped from 45.8% in 1992 to 9.4% in 1999 and the percentage of the offering amount actually marketed in the United States dropped from 64.6% in 1992 to 25.2% in 1999. *See* Alexander P. Ljungqvist et al., *Global Integration in Primary Equity Markets: The Role of U.S. Banks and U.S. Investors*, 16 REV. FIN. STUD. 63, 69 (2003); *see also* Doidge et al., *supra* note 6, at 43 (finding a lack of support for the "argument that the U.S. exchanges have become less competitive").

315. *See, e.g.*, MCKINSEY REPORT, *supra* note 42, at 11 ("[T]he declining position of the US goes beyond this natural market evolution to more controllable, intrinsic issues of US competitiveness.").

with details.[316] Whether this and competing SEC-sponsored initiatives result in a roll-back of the Sarbanes-Oxley Act or a pruning of other regulation applicable to non-domestic issuers remains to be seen.[317] Still, while there may be some reform, there is no talk of radical change. The U.S. market will still likely be one where a singular regulation scheme is applied to all and the U.S. stock markets are legally barred from offering significantly tailored regulatory choice. The U.S. regulatory market under current reform proposals is thus likely to remain competitively disadvantaged in the global listings market; it does not offer the array of choice other systems do and does not meet the specific desires of its investors and non-U.S. issuers.

Why is the U.S. regulatory system structured in this manner? There exists no good answer. In the late 1980s and early 1990s, the SEC did appear in some measure to recognize these disparities. The result was the alternative scheme for foreign private issuers in effect today.[318] However, the SEC never enunciated any guiding principle behind this alternative regulation nor acknowledged the structure of the competitive market for global listings or the diversified investing needs of U.S. investors.[319] There has simply never been an SEC-espoused theory as to the competitive structure of the U.S. regulatory system for non-U.S. issuers. There only exists haphazard regulation based in some measure on the SEC's primary enunciated interest of protecting U.S. investors.[320] This is small comfort to the other U.S. actors, including U.S. investors, in this increasingly globalized world. If the U.S. market is to remain rationally competitive and the SEC is to meet the interests of its constituents, U.S. securities regulation must coherently regulate global listings. To build this uniform theory of regulation, we must first return to principles underlying the global listings market.

---

316. *See* Henry M. Paulson, U.S. Sec'y of the Treasury, Remarks at the Economic Club of New York on the Competitiveness of U.S. Capital Markets (Nov. 20, 2006) (transcript available at http://www.ustreas.gov/press/releases/hp174.htm); John D. McKinnon & Christopher Conkey, *Bush Gives Hope to Foes of Sarbanes-Oxley Law*, WALL ST. J., Feb. 1, 2007, at A4.

317. The SEC has recently taken some steps at this by limiting the scope of Section 404 of the Sarbanes-Oxley Act as it applies to small issuers. *See* Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, Securities Act Release No. 8760, Exchange Act Release No. 54,942, 71 Fed. Reg. 76,580 (Dec. 21, 2006). For non-U.S. issuers, the SEC has adopted liberal rules to permit non-U.S. issuers to leave the U.S. markets and de-register their securities with the SEC. *See supra* note 43.

318. *See supra* Parts IIIA.1 & 2.

319. *See* Palmiter, *supra* note 123, at 48 (finding that the "SEC's explanations for its remarkable regulatory dispensations to foreign issuers . . . have been terse").

320. While investor protection is part of the SEC's statutory mandate, it has also been instructed by Congress to consider other market interests. *See supra* note 166. Additionally, what constitutes "investor protection" obviously is subject to wide interpretation and has been influenced by the SEC's own interests.

V. REGULATING LISTINGS IN A GLOBAL MARKET

A. *First Principles and the Regulatory Model*

The fundamental interests of the actors in the global markets for listings were teased forth in Part II in an attempt to delineate the underlying architecture of the global listings market. Investors generally desire a regulatory regime that provides global diversification opportunities, basic protective rights, enforcement capability, and efficient capital markets.[321] Issuers are more heterogeneous; each uniquely desires its own type of regulatory scheme keyed to its own unique characteristics and dependent upon its own endogenous preferences.[322] Meanwhile, stock markets desire the highest number of listings and trading volume.[323]

The current U.S. regulatory regime does not take full account of these interests. It does not fulfill U.S. investor needs by allowing diversification, it does not account for the specific regulatory desires of issuers, and it does not satisfy the U.S. stock markets' need to respond competitively and attract the highest number of listings and trading volume to their exchanges.[324] Rather, the current market is a product of SEC interests and focus. The SEC has fulfilled a regulatory mandate to protect U.S. investors with a singular vision and likely in accord with its own monopolistic interests, promulgating arguably overbroad issuer regulation in furtherance of this goal without due regard to the full needs of issuers, investors, and other actors.[325] This focus, however, has led to misregulation and both over- and under-regulation, which has hampered U.S. competitiveness in the global listings market.

A more globally competitive U.S. market system could be built upon the actual array of investor needs—the demand side—rather than one premised simply on protection of investors and SEC interests through issuer-focused regulation. This shift would provide a principled world view in order for the SEC to regulate non-domestic issuers consistently and coherently. In building such a regulatory scheme, the SEC would still take into account the core protective needs of this interest group. The SEC would also regulate based on all of the interests of U.S. investors. The SEC would consequently build a regulatory regime that, subject to the fulfillment and weighing of all investor interests, would incentivize global

321. *See supra* Part II.A.
322. *See supra* Part II.B.
323. *See supra* Part II.C.
324. For a discussion of stock markets' competitive interests, see *supra* notes 184–95 and accompanying text.
325. *See supra* Part III.A.

issuers to list in the United States. This would pay heed to principles of equality for U.S. investors, as well as provide them the diversified choice they desire.

This proposal is also one that is likely to dominate a regulatory regime structured upon supply-side issuer interests. There are at least three reasons for this. First, the heterogeneity of issuer interests in the global listings market is likely to make any coherent regulatory norm difficult to establish. Second, issuer desires for a low regulation option are likely to heighten management rent seeking and potentially spur a regulatory race to the bottom in conflict with the interests of investors. Finally, the desire of issuers for low regulation regimes is often likely to diverge from the base-level interests of investors. An issuer-focused norm is therefore prone to reconcile conflicts in favor of issuers to the economic detriment and unequal treatment of investors. In contrast, as will be detailed in the next subsection, a regulatory system built on a full array of investor interests better matches the needs and wants of issuers and investors, has the potential to better account for their interests, and provides a more coherent regulatory norm.

B. *Towards a Demand-Side Regulatory Model*

The scope of the SEC's shift in regulatory focus still remains open. The nature of this new regulatory regime rests upon its fulcrum; more specifically, the parameters of this regulation will lie in the balance the SEC sets between regulatory relaxation and the holistic needs of U.S. investors. The product of this weighing should provide not only a guiding principle for U.S. regulation in the global listings market, but also the specifics of such regulation. However, any such regulation would be from the perspective of U.S. investors, the demand side, and should therefore strive to secure satisfaction of base-level investor interests. The scope of these interests is obviously debatable, and I would argue that they are limited to the investor interests outlined in Part II.A. But, by defining a bundle of minimum and desired necessary investor interests in whatever measure, the SEC can set a minimum threshold of preferred regulation. The SEC regulatory process would then attribute strong weight to these base-level interests against the needs of the other primary actors in the market—issuers and stock markets—when determining the proper scope of non-U.S. issuer regulation.

The SEC should consequently craft a regulatory norm that simultaneously fulfills investors' base interests and maximally frees the U.S. stock markets to compete and attract non-U.S. issuers. This would generally result in the following conclusion: for non-U.S. issuers who already are regulated by middle or high regulatory regimes, the SEC should

adopt a free-listing regime. Non-U.S. issuers who are so regulated should be permitted to list without significant regulation in the U.S. market. The reasons are simple. These issuers are already regulated in their home market to a sufficient degree. Their home country regulation and the existence of a substantive enforcing regulator provide the core rights that investors desire. Therefore, any significant SEC regulation over and above this threshold may inhibit listings by these non-U.S. issuers.[326] U.S. investors would be deprived of investing opportunities they would otherwise be willing to take,[327] and discrimination among U.S. investors would result as sophisticated investors would still maintain the opportunity to invest abroad in these issuers. Accordingly, the strong weight to be granted fundamental investor interests and principles of investor equality, as well as issuer and stock market interests, outweigh the benefits of any additional protective regulation in this circumstance.

The SEC should therefore promulgate bare-bones compliance obligations for non-U.S. issuers raising capital or listing in the U.S. market when the non-U.S. issuer is subject to middle or high regulation in another jurisdiction. These requirements would primarily encompass the furnishing of translated home country materials to the SEC and submission to U.S. jurisdiction. All other regulation, including the antifraud provisions of the U.S. securities laws, would be inapplicable, provided that the non-U.S. issuer discloses in the United States the material differences between its regulatory regime and the U.S. one. Moreover, the SEC would not conduct its regular and periodic review of such materials, instead deferring to the non-U.S. issuer's home country regulator.

Relief from the antifraud provisions of the U.S. securities laws is likely to be the most controversial element of this proposal. It is also expected to meet the fiercest SEC resistance as contrary to the agency's own monopolistic interests; enforcement is one of the primary activities of the SEC. However, liability exposure under the U.S. antifraud regime, particularly in private civil actions, is often cited by non-U.S. issuers as the primary reason why they choose not to list on the U.S. markets. Moreover, similar disclosure protections are now available in middle regulation regimes meeting core U.S. investor interests. The big difference between the United States and other regimes here is in the level of regulator

326. *Cf.* Larry E. Ribstein, *International Implications of Sarbanes-Oxley: Raising the Rent on U.S. Law*, 3 J. CORP. L. STUD. 299, 299 (2003) (arguing that the substantive scope of Sarbanes-Oxley could "deter foreign firms from listing in the US").

327. This reflects the global outlook of U.S. investors as supported by current finance theory. *See supra* notes 112–22 and accompanying text.

enforcement and the availability of private enforcement mechanisms.[328] In the United States, the SEC is more vigorous in enforcement, and private enforcement options are available, including class actions and the award of attorneys' fees. Yet, even here, other middle regulation markets are beginning to provide a private enforcement class action mechanism, including Australia, the Netherlands, and Germany.[329] Further, SEC antifraud enforcement actions against non-U.S. issuers are few and far between.[330] In this light, I would argue that the need for U.S. investor access and equality outweighs the additional protection, if any, provided by the U.S. antifraud scheme. But, if this proposal proves too controversial or contrary to SEC interests, a compromise could preserve the SEC's ability to bring antifraud actions and limit only private litigation to punish fraudulent conduct. This then becomes an empirical question: do recoveries from private antifraud securities law actions against non-U.S. issuers outweigh the benefits to market actors if this Article's proposal is adopted? This is also a question that cannot be answered at this time. Ultimately, though, the designation of any non-U.S. securities law regime as a qualifying one would be monitored by the SEC and subject to requalification if that regime's own enforcement mechanisms did not continue to fulfill U.S. investors' minimum protective interests.[331] This may provide significant and hopefully sufficient comfort to both the SEC and investors.

The regulatory scheme proposed in this Part is also in greater accord with conflict-of-laws principles than the one currently in existence. The *Restatement Second of Conflict of Laws* largely provides that the governing law is that of the jurisdiction having a more "significant relationship" to the transaction and the parties.[332] In the international law realm, the United States has paid heed to this deference in a number of instances. For example, the United States is a signatory to the Hague Convention on the

---

328. *See* Coffee, *Impact of Enforcement*, *supra* note 16, at 2 (examining "several explanations and prefer[ring] the hypothesis that enforcement intensity is a product of the level of retail ownership in the jurisdiction").

329. *See* S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289, 289–90 (2001); Christopher Hodges, *Europeanisation of Civil Justice: Trends and Issues*, 26 CIV. JUST. Q. 96, 114–20 (2007). France is also considering adopting laws facilitating class action litigation. *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 297 (2006).

330. *See* Siegel, *supra* note 301, at 335–49 (finding evidence that the SEC has not fully enforced the U.S. securities law against non-U.S. issuers listed in the United States).

331. This could spur further foreign enforcement and cooperation with the SEC as non-U.S. regulators become incentivized to retain their designation.

332. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146–50, 175, 189–96 (1971).

Civil Aspects of International Child Abduction.[333] By executing this multilateral treaty with a particular country, the United States recognizes and enforces the laws of that foreign jurisdiction as sufficient to properly award custody rights to a child.[334] There is also limited precedent under the U.S. securities laws for this practice. Under the Multijurisdictional Disclosure Regime, the SEC has provided comity to Canadian securities regulators and their securities disclosure and offering laws.[335] The United States has thus, when the interests of its citizens dictated, taken steps to recognize generally the legitimacy and acceptability of foreign law in countries meeting pre-specified legal standards, including the enforcement of such standards. Because the interests of the U.S. actors in the global listings market militate, the United States should recognize a middle or high regulatory jurisdiction's securities laws and regulator as governing due to that jurisdiction's more significant relationship with the regulated issuer.

Moreover, adoption of this norm will permit stock markets to better compete for non-domestic issuers in the global listings market.[336] Non-U.S. issuers would now be able to choose to list under this lower-regulation regime, subject to a higher one in their home market. Otherwise, they could voluntarily comply with U.S. domestic or foreign private issuer standards to receive the benefits of cross-bonding to a more highly regulated U.S. market. In either case, non-U.S. issuers would receive market benefits tailored to their own desires within the middle and high regulation markets while more particularly fulfilling U.S. investor interests.[337]

Increased utility for all of the relevant actors in the global listings market would be produced by this shift. U.S. investors would achieve a positive gain as the increased choice would outweigh any lost regulatory protection. Non-U.S. issuers would benefit since they would now have a greater array of regulatory choices better suited to their individualized needs. U.S. stock markets and other U.S. market actors such as investment

---

333. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

334. *Id.* at art. 8.

335. *See* Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, Exchange Act Release No. 29, 354, Investment Company Act Release No. 18, 210, 56 Fed. Reg. 30,036 (July 1, 1991).

336. *See* Steinberg & Michaels, *supra* note 153, at 261–65 (arguing that "regulators should compromise to achieve basic goals focusing on adequate disclosure, investor protection, and facilitation of cross-border offerings").

337. Moreover, the erection of a mutual recognition regime should engender regulators in other jurisdictions to adopt a similar approach. They would competitively respond to the SEC's position by erecting similar regimes. A virtuous circle of mutual recognition is likely to result.

banks, attorneys, and accountants would gain due to the increased revenue produced by increasing the number of global U.S. listings, a historically important growth segment. U.S. stock markets would also gain the competitive ability to establish graduated levels of regulation and better compete with other non-U.S. stock markets that currently provide such products. Moreover, this shift would fulfill SEC needs by attracting non-domestic issuers to the U.S. market and SEC oversight rather than leaving them and U.S. investments therein unregulated.

This is a better solution for the U.S. market than creating a qualifying brokerage regime that permits all U.S. investors to invest freely in non-U.S. issuers outside the United States on foreign stock markets through foreign brokers or trading screens.[338] In such an alternative regime, the SEC and other U.S. regulators would not maintain any oversight capability over such non-domestic issuers, however limited. Concomitantly, U.S. investors would not receive the filtering and reputational benefits that even a lower-threshold regulatory scheme provides, and they may therefore unwittingly or irrationally be led into investments which do not meet their minimum interests.[339] Moreover, the other actors in the U.S. market—stock markets, attorneys, investment banks, and accountants—would lose market share under such a regime. A free-brokerage regime as opposed to a free-listing regime would therefore not produce effective economic results in the interests of investors and other actors in the U.S. market.

Setting the regulatory balance is harder for non-U.S. issuers who do not have a home market listing or maintain one in a low regulation regime.[340] But low regulatory regimes are unlikely to provide the minimum protections necessary to satisfy investor interests. Therefore, continuance of the foreign private issuer regime in some form would set an optimal balance between U.S. investor and others' interests.[341] This would provide minimum protections to U.S. investors, and it would satisfy their interests

---

338. *See, e.g.*, Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 32 (2007) (advocating SEC revision of its regulations to permit foreign stock exchanges and broker-dealers to "apply for an exemption from SEC registration based on their compliance with substantively comparable foreign securities regulations and laws and supervision by a foreign securities regulator with oversight powers").

339. *See* George W. Madison & Stewart P. Greene, *TIAA-CREF Response to* A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework, 48 HARV. INT'L L.J. 99, 100–02 (2007).

340. *Cf.* Edward F. Greene et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 416–18 (1995) (arguing for a home country disclosure scheme when such jurisdiction meets minimum regulatory standards).

341. The foreign private issuer scheme would likely function more appropriately if the SEC acknowledged that it should apply in varying degrees depending upon the quality of law of the non-domestic issuer's home country.

while permitting non-U.S. issuers listed in low regulation markets who desire to cross-bond the continuing opportunity to comply with this regulation or voluntarily adhere to even higher U.S. domestic regulations.[342]

Nonetheless, failure to offer a low regulation regime to these non-U.S. issuers would likely result in a competitive loss for the U.S. markets.[343] The loss here is likely to be minimal. The type of non-U.S. issuer who lists in this regulatory regime is likely to be a smaller capitalized one.[344] These smaller capitalized issuers are unlikely to legitimately cross-list for anything other than cross-bonding purposes since, due to otherwise high transaction costs, they typically seek a primary trading market in their home country.[345] And the possible benefits to market actors other than investors are low. For example, it is estimated that the market fees derived from all AIM listings in 2005 were approximately $700 million,[346] compared to the roughly $400 million in investment banking fees derived from the largest initial public offering of 2006, the one of Industrial and Commercial Bank of China.[347] The failure of the United States to offer a low regulation regime is unlikely to affect its competitive status in the global listings market or with the actors in that market.[348]

This is also true of primary listed issuers; while their listing choices are more fractured than cross-listing issuers, they tend to display similar listing characteristics as domestic issuers.[349] Here, providing a low regulation regime would fail to meet the goals of many issuers who seek out a primary listing for rule-of-law reasons. Rather, a low regulatory option for primary listing issuers would principally cater to rent-seeking executives making the listing choice for non-U.S. issuers. Again, these do not appear to be the type of issuers desirable for the U.S. market or who satisfy minimum investor interests. Thus, continuation of the foreign

342. Thus, the list of qualifying regulatory regimes under this proposal would be a much shorter one than the one defining a "designated offshore securities market" for purposes of Regulation S. *See* 17 C.F.R. § 230.902(a) (2007) (encompassing almost all of the foreign stock exchanges).

343. Approximately half of the issuers listed on the AIM would fail to meet Nasdaq's lowest initial market capitalization requirement. *See* MCKINSEY REPORT, *supra* note 42, at 50–51.

344. *See supra* Part IV.B.

345. *Id.*

346. MCKINSEY REPORT, *supra* note 42, at 51.

347. Tom Mitchell & Geoff Dyer, *ICBC Set to Price Mega IPO at Top of Range*, FT.COM, Oct. 19, 2006, http://search.ft.com/ftArticle?queryText=icbc+set+to+price+mega+ipo&aje=true&id=061019005947&ct=0.

348. There is also the risk of losing the next Google or Microsoft, but these issuers are likely to list in their domestic markets due to other external forces discussed in Part II.B.

349. *See supra* Part IV.C.

private issuer scheme in some form for these non-domestic issuers would also seem appropriate.

CONCLUSION

Recent European and Asian successes with initial public offerings in their own domestic markets have spurred a common perception in the United States that the U.S. capital market is losing the competitive race for global listings. The reasons most often cited are overregulation of the U.S. market and the excessive propensity in the United States towards private securities litigation. Yet, this explanation ignores the natural comparative growth of Asia and Europe, the maturation of the U.S. market, and the historical failure of non-U.S. stock exchanges to meaningfully compete for cross-listings. It also ignores the structure of the global listings market where domestic issuances in the developed world are largely captive of their home country market. Rather, the global listings market is a competition confined largely to cross-listings and primary listings by issuers from developing nations. Accordingly, talk of losing the race when it includes domestic issuers fails to recognize the market's nature and merely acknowledges the internal growth and increasing strength of capital markets outside the United States.

Moreover, non-domestic issuers express no uniformity of taste for a certain level of regulation when deciding to list abroad. The individualized interests of non-domestic issuers dictate their preference for a cross-listing or a non-domestic primary listing in a particular type of regulatory regime. For example, small capitalized issuers are likely to prefer low regulation regimes, larger capitalized ones are likely to prefer middle regulation regimes, and very few issuers are likely to prefer high regulation regimes. In such a world, it is hard to attribute the recent relative U.S. decline to a single reason such as overregulation. This is particularly true since markets outside the United States have also experienced recent declines in the number of non-domestic listings or otherwise failed to attract such listings competitively. Nonetheless, it is apparent that the U.S. capital markets are deficient. They fail to meet non-issuer desires and offer the tailored regulatory product that non-U.S. issuers require in today's competitive global listings market. Instead, the U.S. market offers one-size-fits-all securities regulation that is not compatible with the individualized needs of non-U.S. issuers, and lags behind the regulatory choice offered by other markets. This is a sounder explanation for the recent decline in non-U.S. listings on the U.S. market, one that takes into account the overregulation thesis but pays heed to other factors that have influenced this downward listing trend.

Yet, proposals to ameliorate this problem have all suffered from the same analytical flaw: they have approached this issue from the perspective of the supply side—arguing that regulation should be structured to meet the desires of issuers. A more sustainable regulatory norm could be reached if we instead look to the full array of U.S. investor interests. The SEC should define the minimum bundle of U.S. investor interests to set a threshold level of preferred regulation. It should then strongly weigh these interests against the needs of other actors in the global listings market to establish not only a guiding principle for U.S. regulation in the global listings market, but also the specifics of such regulation. This SEC weighing would conclude that the U.S. investor interest in diversified investments should be fulfilled so long as remaining base-level investor interests were also met.

The SEC would consequently create a free-listing regime that would permit non-U.S. issuers listed in regulatory regimes sufficiently equivalent to the U.S. market to list on U.S. stock markets without additional substantive U.S. regulation. This scheme would permit issuers already listed in most middle regulatory regimes—that is, in the developed world—to list on a U.S. stock market with only bare-bones compliance obligations. In comparison, non-U.S. investors without a primary listing in the United States or with a home country listing in a low regulation regime are typically not regulated in their home country to a level satisfactory to U.S. investor base-level interests. These non-U.S. issuers would therefore still be regulated to a higher level that would be substantially similar to, but more contoured than, the current foreign private issuer scheme. Finally, those non-issuers wishing to cross-bond or otherwise desiring a higher level of U.S. regulation could still voluntarily elect for such higher regulation to apply or otherwise demand such higher regulation from U.S. stock markets.

The adoption of such a regulatory norm by the SEC would establish a non-monopolistic general principle for future SEC regulation of non-U.S. issuers which encompasses notions of investor equality and access. It would be a more coherent norm for regulating and structuring a U.S. capital market, creating a regulatory scheme better able to compete in the global market for listings and meet the individualized nature of the non-domestic listing decision. This approach would therefore not simply benefit investors, but would take into account all of the interests of the main actors in the global listings market to arrive at Pareto efficient outcomes for all. In other words, everyone wins.