

# Michigan Journal of International Law

---

Volume 20 | Issue 2

---

1999

## Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity

Marc I. Steinberg

*Southern Methodist University School of Law*

Lee E. Michaels

*Southern Methodist University School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Comparative and Foreign Law Commons](#), and the [Securities Law Commons](#)

---

### Recommended Citation

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

Available at: <https://repository.law.umich.edu/mjil/vol20/iss2/17>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# DISCLOSURE IN GLOBAL SECURITIES OFFERINGS: ANALYSIS OF JURISDICTIONAL APPROACHES, COMMONALITY AND RECIPROCITY†

*Marc I. Steinberg\* and Lee E. Michaels\*\**

I.	THE EXPANDING GLOBAL MARKETPLACE .....	208
II.	DISCLOSURE RULES AND REQUIREMENTS .....	210
	A. <i>United States</i> .....	210
	B. <i>European Community</i> .....	214
	C. <i>United Kingdom</i> .....	214
	D. <i>France</i> .....	218
	E. <i>Germany</i> .....	221
	F. <i>Italy</i> .....	224
	G. <i>Canada</i> .....	227
	H. <i>Mexico</i> .....	230
	I. <i>Japan</i> .....	231
	J. <i>Australia</i> .....	233
III.	EFFORTS AT HARMONIZATION .....	236
	A. <i>Summary of Different Approaches</i> .....	236
	B. <i>Cooperation/Commonality</i> .....	236
	1. <i>General</i> .....	236
	2. <i>IOSCO</i> .....	238
	3. <i>U.S. SEC Flexibility</i> .....	246
	C. <i>Reciprocity</i> .....	251
	1. <i>General</i> .....	251
	2. <i>Multijurisdictional Disclosure System between U.S. and         Canada</i> .....	251
	3. <i>The European Community</i> .....	255
IV.	PROPOSALS FOR ACCOMMODATION AND REFORM .....	261
	CONCLUSION .....	265

---

† Copyright © 1999 by Marc I. Steinberg. All rights reserved.

The authors express their appreciation to Mads Andenas, Philip Anisman, Douglas Arner, Sabrina Bruno, Werner Ebke, Michael Fammler, Mario Ferrari, Hansjörg Heppe, Elizabeth Jacobs, Hideki Kojima, Hartmut Krause, Rainier Magold, Joseph Norton, Vanina Paoli-Gagin, Jay Pikoff, Frank Razzano, Eugenio Ruggiero, George Walker, Samuel Wolff, and the attorneys at the Australian Securities Commission for their helpful comments.

\* Rupert and Lillian Radford Professor of Law and Senior Associate Dean for Academics, Southern Methodist University School of Law; Visiting Professorial Fellow, Centre for Commercial Law Studies, University of London.

\*\* J.D., Southern Methodist University School of Law; Member, Texas Bar.

## I. THE EXPANDING GLOBAL MARKETPLACE

The 1980s and 1990s have witnessed the advent of a truly global marketplace. As the world's capital markets have become more international, so-called "global" equity offerings occur with regularity.<sup>1</sup> Factors that contribute to this increased internationalization of the world's securities markets include the abandonment of U.S. investment controls; floating interest rates; relaxation of foreign exchange controls; diversification of funding and investment sources by corporations and investors; interest rate differentials; and technological advances in transportation and communications.<sup>2</sup> In addition, enterprises focus on foreign markets for financing based on their desire to expand the geographic base of their investors, to meet certain financing goals which cannot be met within their home countries, and to create a more international presence for strategic or marketing reasons.<sup>3</sup> Other factors that contribute to the globalization of the securities markets include improvements in clearance and settlement systems, new financial instruments and markets, and issuers' need to raise capital at the lowest practicable cost.<sup>4</sup> As discussed later in this article, there have been varied approaches by regulators responding to this rapidly evolving international marketplace.

Generally, most modern securities markets are regulated on a national basis. This practice creates a challenge in light of the increased internationalization of the securities markets and the increasing interdependence among them.<sup>5</sup> Undoubtedly, "regulatory disharmony" remains a significant obstacle to the effectuation of an integrated international market.<sup>6</sup> As the economies of countries diverge in terms of development

---

1. See Daniel A. Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies*, 17 NW. J. INT'L L. & BUS. 30 (1996) (describing a global offering as one that involves simultaneous offerings of shares in a number of countries).

2. See Anna Drummond, *Securities Law: Internationalization of Securities Regulation—Multijurisdictional Disclosure System for Canada and the U.S.*, 36 VILL. L. REV. 775, 776 & n.7 (1991).

3. See *id.* at 776 & n.8.

4. See Samuel Wolff, *Recent Developments in International Securities Regulation*, 23 DENV. J. INT'L L. & POL'Y 347, 350 & n.18 (1995). In addition to benefiting issuers, a global marketplace will also benefit investors by increasing investment opportunities. See also INTERNATIONAL EQUITY OFFERS, REPORT OF THE TECHNICAL COMMITTEE OF IOSCO 7 (Sept. 1989) (manuscript on file with IOSCO) [hereinafter INTERNATIONAL EQUITY OFFERS].

5. See *id.* at 347 & nn.1&2 (describing three primary concepts in the internationalization of securities regulation: national securities regulation has become increasingly international in character, national securities regulators have expanded efforts to address international securities problems and several regional or international organizations are attempting to develop regulatory responses).

6. See Manning Gilbert Warren, III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 186 (1990). In his

and cultural variances, the securities systems, and thus the regulation of those systems, are necessarily different. Because of these differences, reaching a consensus reflecting the optimal approach to implement in developing an international economy is challenging.<sup>7</sup>

Efficient regulation in an expanding global marketplace poses concerns not only for market participants and local securities regulators. Both the increasing integration of the world's financial markets and the presence of systemic risk, referring to a simultaneous collapse of the securities markets worldwide, have been recognized at the highest levels of government.<sup>8</sup> Two key viewpoints have emerged in addressing the challenges associated with regulation of a global marketplace. On one hand, proponents of harmonization of securities regulation argue that standardization of regulatory requirements among countries would enhance protection for investors and level the global playing field in the competition for market share.<sup>9</sup> The opposing view favors regulatory competition, asserting that such harmonization could lead to excessive regulation without sufficient corresponding regulatory benefit.<sup>10</sup> Based upon the foregoing differences, which encompass distinguishing characteristics relating to such qualities as a nation's market maturity, history, and culture, to find a single solution that will be viable for every country is an arduous task.<sup>11</sup>

---

article, Professor Warren discusses regulatory harmonization and two closely related concepts, deregulation and re-regulation. *See id.* at 187-93.

7. One commentator articulated the inherent problems facing regulators in a global economy as follows:

Although international regulators can usually agree on the basic goals and objectives of regulation, there exists fundamental differences in the regulatory approach taken, including the form and content of regulation. Should such systems be harmonized to ensure uniformity of regulatory protection and to prevent the competition for market share resulting in the lowest common denominator of regulation, in effect, causing a race to the bottom? Or, should diversity among international systems be accepted and, indeed, encouraged to ensure that regulation, in addition to being responsible, is innovative and responsive to different evolving market and business conditions?

Jane C. Kang, *The Regulation of Global Futures Markets: Is Harmonization Possible or Even Desirable?* 17 NW. J. INT'L. L. & BUS. 242, 244-45 (1996).

8. For example, at the twenty-second annual meeting of the leaders of the G7 countries, one of the topics of the meeting focused on the opportunities and challenges presented by the increased integration of global capital markets. *See generally* G7 ECONOMIC COMMUNIQUE, MAKING A SUCCESS OF GLOBALIZATION FOR THE BENEFIT OF ALL (1996). The G7 countries are Canada, Italy, France, Germany, Japan, the United States, and the United Kingdom.

9. *See* Kang, *supra* note 7, at 245.

10. *See id.*

11. *See id.* "[I]n view of fundamental differences in the legal, cultural and business conditions of different jurisdictions, no one system is likely to work across all jurisdictions." *Id.*

This article presents a summary of the regulatory systems currently in place in the world's major markets. This summary focuses primarily on the disclosure rules that must be followed by a company undertaking an equity offering in each country. Certain significant accounting standards also are discussed. After comparing the different disclosure frameworks, the article addresses efforts that have been made to regulate or standardize the world's markets on a more international level. Finally, the article discusses where we should go next in the quest to create greater harmony in a truly global marketplace.

## II. DISCLOSURE RULES AND REQUIREMENTS

### A. *United States*

Two basic tenets of securities regulation in the United States are full and fair disclosure and the concept of registration.<sup>12</sup> The primary focus of the U.S. securities laws is on full disclosure.<sup>13</sup> The theory of disclosure assumes that if the business and financial condition of an enterprise are adequately and accurately disclosed in a publicly available document, then an investor can make an informed determination regarding whether to engage in the prospective transaction.<sup>14</sup> Based upon this concept of disclosure and the underlying assumption that an investor can make up his own mind if he has all the material facts, the U.S. securities system does not address the fairness of a transaction.<sup>15</sup> Nonetheless, several of the state securities statutes, known as "blue-sky" laws, are based on merit regulation, and in effect, can require that a securities offering be fair.<sup>16</sup>

A second cornerstone of the U.S. securities system is the concept of registration. The Securities Act of 1933 (the "Securities Act") requires that, absent an exemption, every offer and sale of a security through in-

---

12. See Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From a Legal Perspective*, 17 *FORDHAM INT'L L.J.* at S26-27 (1994). The prevention of fraudulent practices in the offer and sell of securities is also a key goal of securities regulation in the United States. See MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* 89 (2d ed. 1996).

13. See Jensen, *supra* note 12, at S25, S27 & n.9.

14. *Id.* at S27 & n.9. While there are several state securities law regulations that are concerned with the fairness of a transaction, in most cases issuers involved in equity offerings are exempt from state registration requirements and, thus, disclosure remains the primary focus.

15. See *id.* at S27. For a summary of the history of the disclosure rules, see Note, *The Basic Rules of Disclosure*, 62 *ST. JOHN'S L. REV.* 704 (1988); see also David S. Ruder, *Prologue: Securities Regulation—1968 to 1990 and Beyond*, in 1 *GLOBAL CAPITAL MARKETS & THE DISTRIBUTION OF SECURITIES* 1 (Franklin E. Gill, ed., 1991).

16. See *infra* notes 23-27 & accompanying text.

terstate commerce must be registered with the U.S. Securities and Exchange Commission (the "SEC") by filing a registration statement.<sup>17</sup> In addition, at the time of a public offering of securities, the issuer must deliver a prospectus (that is part of the registration statement) to potential investors in the subject securities.<sup>18</sup>

The system of securities regulation in the United States also includes the Securities Exchange Act of 1934 (the "Exchange Act") which requires all companies listing securities on a national securities exchange, traded on the NASDAQ, or having a public offering to register the security with the SEC.<sup>19</sup> In addition, pursuant to the requirements of the Exchange Act, companies that have had a public offering or that have registered a security under the Exchange Act must file annual and periodic reports with the SEC.<sup>20</sup>

After a registration statement is filed, particularly in the context of an initial public offering, the registration statement is reviewed by the SEC.<sup>21</sup> SEC review does not attest to the veracity of a registration statement. Neither does the SEC evaluate the fairness of the offering. By its review, the SEC seeks to facilitate the full and fair disclosure of all material facts about the issuer and the offering.<sup>22</sup> In addition to filing a registration statement with the SEC, filing requirements exist in the applicable state(s) where the securities will be offered for sale.<sup>23</sup>

17. See 15 U.S.C. § 77e(a)(1988). The statute states:

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

- (1) to make use of any means or instrument of transportation or communication in interstate commerce or of the mails to sale such security through the use or medium of any prospectus or otherwise; or
- (2) to carry or cause to be carried through the mails or interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

18. See *id.*; see also Regulation C, 17 C.F.R. § 230.04 (1998). The registration statement is an "expansive and complex document requiring extensive disclosures." Marc I. Steinberg & Daryl L. Lansdale, Jr., *Regulation S and Rule 144A: Creating a Workable Fiction in an Expanding Global Securities Market*, 29 INT'L L. 43, 44 & n.13 (1995).

19. 15 U.S.C. §§ 78a-78ll (1988 & Supp. IV 1992).

20. See generally 10 INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION 3-70 (Bloomenthal & Wolff, eds., 1996) [hereinafter INTERNATIONAL CAPITAL MARKETS]; see also *infra* notes 33-35 & accompanying text.

21. See 15 U.S.C.A. § 77h.

22. See Jensen, *supra* note 12, at S27 & n.9. Registration statements are reviewed by the SEC only to determine the adequacy and accuracy of the information within such registration statement. See *id.*

23. See Iain Mickle et al., *Securities Law in the United States of American*, in INTERNATIONAL SECURITIES LAW HANDBOOK 227 (Karl-Eduard von der Heydt & Keller, eds., 1995) [hereinafter HANDBOOK].

Unlike the SEC, many state securities statutes historically have authorized the appropriate state regulator to assess the merits of an offering in determining whether such offering will be allowed to go forward.<sup>24</sup> In 1996, however, the National Securities Markets Improvement Act of 1996 ("NSMIA") was enacted.<sup>25</sup> The NSMIA preempts certain state securities laws, including the ability of states to require merit review of securities that are offered in certain contexts and markets. As amended by the NSMIA, Section 18 of the Securities Act provides that with respect to such securities "no law, rule, regulation, or order, or other administrative action of any State . . . shall directly or indirectly prohibit, limit, or impose conditions, based upon the merits of such offering or issuer."<sup>26</sup> These securities, termed "Covered Securities," are defined to include securities offered pursuant to specified SEC exemptions from registration or traded on the New York Stock Exchange, American Stock Exchange, NASDAQ National Market System, or other national securities exchanges with similar standards.<sup>27</sup>

Hence, a public offering of securities in the United States requires the issuer to file a registration statement with the SEC and to deliver a disclosure document, known as a prospectus, to potential investors.<sup>28</sup> The SEC has prescribed several different registration forms depending upon the type of offering that is being conducted and the circumstances surrounding such offering. Each of the forms sets forth mandated disclosure that the respective company must make for a particular type of registered offering. Normally, companies involved in initial public offerings will be required to use Form S-1, which requires the disclosure as prescribed in SEC Regulation S-K as well as specified audited financial statements.<sup>29</sup> Alternatively, the SEC has promulgated registration forms (SB-1 and SB-2),<sup>30</sup> which can be used by issuers meeting the requirements of small business issuers and which generally call for less onerous disclosure.<sup>31</sup> Generally, the applicable SEC registration state-

---

24. *See id.*

25. *See* Pub. L. No. 104-290, 110 Stat. 3416 (1996).

26. NSMIA § 102(a), 15 U.S.C.A. § 77r(a)(3) (West Supp. 1997) (amending Securities Act of 1933 § 18); *see also* Kenneth I. Denos, *Blue and Gray Skies: The National Securities Markets Improvement Act of 1996 Makes the Case for Uniformity in State Securities Law*, 1997 UTAH L. REV. 101 (1997).

27. *See* NSMIA § 102(a), 15 U.S.C.A. § 77r(b).

28. *See* Jensen, *supra* note 12, at S29.

29. *See* 17 C.F.R. § 229.10 *et seq.* (1998).

30. *See* 17 C.F.R. § 239.90 and 17 C.F.R. § 239.10 (1998).

31. *See* 17 C.F.R. § 230.405. A small business issuer is defined as an entity that has revenues of less than \$25 million; is a U.S. or Canadian issuer; and is not an investment company. If the entity is a majority owned subsidiary, the parent corporation must also meet the definition of a small business issuer. One additional stipulation states that an entity cannot be a small business issuer if that entity has public float, defined as the aggregate market

ment must include specified financial statements, information focusing on the offering itself, and information pertaining to the company and the securities offered.<sup>32</sup>

Once a company registers securities for a public offering in the United States, the company becomes subject to the periodic reporting requirements as set forth in Sections 12 and 15(d) of the Exchange Act.<sup>33</sup> In general, the company is required to file with the SEC an annual report containing audited financial statements within ninety days after the end of each fiscal year, a quarterly report within forty-five days after the end of each of the first three fiscal quarters of the company's fiscal year, and a report of the occurrence of certain specified events within five to fifteen days after their occurrence.<sup>34</sup> These documents are not required to be distributed directly to investors but must be made available for review by interested persons.<sup>35</sup>

Finally, companies that have securities registered under the Exchange Act also are subject to the proxy rules.<sup>36</sup> The proxy statement sent to shareholders in connection with the annual meeting must be pre-

---

value of the outstanding voting and nonvoting common equity held by non-affiliates, of \$25 million or more.

32. Generally, the following information is required:

- (a) a description of the company;
- (b) a description of the securities;
- (c) the terms of the offering;
- (d) the capitalization of the company;
- (e) market and dividend information;
- (f) the compensation to be paid to underwriters of the issue;
- (g) risk factors associated with the offering;
- (h) a detailed description of the business;
- (i) an identification of the directors and executive officers;
- (j) related party transactions;
- (k) the principal stockholders;
- (l) management's discussion and analysis of the company's financial condition and results of operations;
- (m) the financial statements of the company; and
- (n) selected financial information for the last five years.

Iain Mickle et al., *Securities Law in the United States*, in HANDBOOK, *supra* note 23, at 228. Public companies with an adequate reporting history with the SEC are eligible to use a simplified short form disclosure document under Form S-2 or Form S-3, which incorporates by reference much of the required information.

33. See 17 C.F.R. § 240.13a and 17 C.F.R. § 240.15d (1998).

34. See Iain Mickle et al., *Securities Law in the United States*, in HANDBOOK, *supra* note 23, at 236-37; see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-92.

35. See 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 3-737.

36. See *id.* at 3-2048. These rules require the publication and delivery of a proxy statement whenever an issuer is electing directors or taking some other shareholder action.



ceded or accompanied by an annual report to shareholders which contains certain prescribed information including financial statements.<sup>37</sup>

### B. European Community

As will be discussed in detail in Part II of this article, the European Economic Community (the "EEC") was established in 1957<sup>38</sup> in order to develop economic and political harmonization among its Member States. The EEC along with the European Coal and Steel Community and the European Atomic Energy Community form the "European Communities."<sup>39</sup> In 1987, the Treaty of Rome was amended by the Single European Act of 1987, and the EEC became the European Community (the "EC").<sup>40</sup> In 1994, the European Union (the "EU") was formed by the Treaty of Maastricht.<sup>41</sup> States are Member States of the EU.<sup>42</sup>

The EC's work in the area of securities regulation is accomplished through the implementation of Directives which, along with regulations, are promulgated under the EC authority.<sup>43</sup> The primary Directives in the area of admission to stock exchange trading are the Admissions Directive, the Listing Particulars Directive and the Interim Reports Directive. These Directives establish requirements that must be met by Member States before companies may offer or sell securities. The Directives are binding on all Member States and are implemented by each Member State as part of that country's securities regime.<sup>44</sup>

### C. United Kingdom

The primary statute for the regulation of the securities markets in the United Kingdom (the "U.K.") is the Financial Services Act 1986

---

37. *See id.*

38. *See* David Barnard, *Developments in the European Community and the United Kingdom*, in INTERNATIONAL SECURITIES MARKETS 175 (1991).

39. 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-6.

40. *See generally* Single European Act, (1986), *reprinted in* 29, 1987 O.J. (L 169) 1 (1987). The Single European Act eliminated the requirement of unanimous voting for most directives and changed the goal of the EC from a system based on strict harmonization to one based on common minimum standards requiring mutual recognition. *See* 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20 at 9A-8; *see also* Douglas Arner, Comments to Prof. Marc Steinberg (Sept. 10, 1998) (unpublished manuscript on file with author).

41. *See* Renaud Dehousse, *From Community to Union*, in EUROPE AFTER MAASTRICHT—AN EVER CLOSER UNION? 5 (Renaud Dehousse ed., 1994); *see also*, EUROPEAN LAW GROUP OF CAMERON MCKENNA, 4 CORPORATE COUNSEL'S GUIDE: LAWS OF INTERNATIONAL TRADE, DOING BUSINESS IN EUROPEAN COMMUNITY 1100.002 & 1100.005 (1998).

42. *See generally* Arner *supra* note 40.

43. *See* 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-10; *see also* Warren, *supra* note 6, at 196.

44. *See* 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-10.

(the "Act").<sup>45</sup> In 1997, the British government announced that the Act would undergo major reform.<sup>46</sup> Although enactment of the new legislation has not been finalized, this section will outline the proposed changes that are expected to be implemented.<sup>47</sup>

Like the Securities Act in the United States, the Act, at least in part, is based upon the premise that the most feasible way to protect investors is through full disclosure.<sup>48</sup> The Act requires any firm carrying on "investment business" to obtain either authorization or exemption.<sup>49</sup> Since its enactment, the Act has provided for a multi-tiered system of securities regulation. At the top of this regulatory scheme was the Treasury. Under the original system of securities regulation established under the Act, the Treasury delegated specified regulatory powers to a private sector designated agency, the Securities and Investment Board (the "SIB").<sup>50</sup> The SIB, in turn, authorized a number of self-regulatory agencies ("SROs"), each of which was responsible for a particular sector of investment activity.<sup>51</sup> In addition, the SIB also had the responsibility of promulgating rules for, and regulating the activities of, persons engaged in the investment business who did not wish to become members of an SRO.<sup>52</sup>

Under the new legislation, two primary changes will occur. First, the responsibility for banking will be transferred from the Bank of England to the Financial Services Authority (the "FSA," formerly the SIB).<sup>53</sup> Second, the FSA will assume responsibility for the functions that have been carried out by the SROs. Thus, the FSA will become the sole financial services regulator.<sup>54</sup> In addition, the FSA's role regarding the stock exchanges and the securities markets may be expanded under the proposals. For example, when enacted, the reform legislation may em-

---

45. *See id.* at 6-4.

46. *See id.*

47. All reforms are expected to be completed by the end of 1999. *See* FINANCIAL SERVICES AUTHORITY, PLAN & BUDGET 1998-99 8-9 (1998) [hereinafter FSA].

48. *See* STEPHEN W. MAYSON, ET AL., MAYSON, FRENCH & RYAN ON COMPANY LAW 185 (1996).

49. Barnard, *supra* note 38, at 200 & n.60.

50. *See* 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-55 & nn. 54-55. The Treasury oversaw the activities of the SIB and had the power to resume the powers delegated.

51. *See id.* at GEN 3-55. Generally, only SROs that have been recognized by the SIB may engage in investment activity. *See id.* at GEN 3-57 & n.59.

52. *See* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 6-4.

53. The SIB transferred all assets and responsibilities to the FSA on October 27, 1997. *See* 10D INTERNATIONAL CAPITAL MARKETS *supra* note 20, at 6-4.

54. *See* FSA, *supra* note 47, at 8; *see generally* WILLIAM BLAIR ET AL., BANKING AND FINANCIAL SERVICES REGULATION (1998).

power the government to make the FSA responsible for listing requirements.<sup>55</sup>

The primary stock exchange in the U.K. is the International Stock Exchange of the United Kingdom and the Republic of Ireland Limited (the "London Stock Exchange").<sup>56</sup> The primary market of the London Stock Exchange is known as the "Official List."<sup>57</sup> Because the U.K. is a Member of the European Union (composed of three "pillars," of which the most important for legal purposes is the EC<sup>58</sup>), listing securities on the Official List is subject to minimum standards determined by three EC Directives: the Listing Particulars Directive, the Admissions Directive, and the Interim Reports Directive.<sup>59</sup> These Directives have been implemented into U.K. law by Part IV of the Act. The London Stock Exchange has been delegated the authority by the U.K. government to promulgate rules to ensure that the EC Directives are followed.<sup>60</sup> The EC Directives establish only the minimum standards; Member States may impose more stringent rules provided they are applied uniformly.<sup>61</sup>

Pursuant to the Listing Particulars Directive, a company desiring to trade its securities on the Official List must submit certain disclosure information known as the "listing particulars."<sup>62</sup> The London Stock Exchange has implemented the provision of the Listing Particulars Directive through the Listing Rules.<sup>63</sup> Description concerning the necessary disclosure is found in Sections 5 and 6 of the Listing Rules, also known as the *Yellow Book*.<sup>64</sup>

---

55. See FSA, *supra* note 47, at 8–9.

56. See MAYSON ET AL., *supra* note 48, at 183.

57. See James, *Securities Law in The United Kingdom*, in HANDBOOK, *supra* note 23, at 209; see also 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 6–13.

58. See generally Arner, *supra* note 40.

59. For a discussion of the EC Directives, see *infra* text accompanying notes 335–79.

60. See MAYSON ET AL., *supra* note 48, at 188.

61. See *id.*

62. Caird Forbes-Cockell, *United Kingdom, Exemptions for Institutional Investors or Concepts of Non-Public Offerings: A Comparative Study*, 13 U. PA. J. INT'L BUS. L. 615, 623–24 (1993); see also 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 6-12 to 6-13.

63. See Forbes-Cockell, *supra* note 62, at 624.

64. The Listing Rules are known as the *Yellow Book* based on the color of the binder in which the rules were first published. When the current version of the rules was published in 1993, the yellow binder (and the name) were retained. See MAYSON ET AL., *supra* note 48, at 188. Generally, the following information is required:

- (a) the company name;
- (b) its registered office;
- (c) the date of incorporation;
- (d) the company number;
- (e) the names and addresses of persons giving a declaration as to accuracy of the disclosure document;

In order for a company to offer shares to the public for the first time in an EC Member State, the Prospectus Directive requires that a prospectus be produced and made available to investors.<sup>65</sup> If the company has made an application for the shares to be listed, the prospectus must contain the same information as is required by the Listing Particulars. If the shares are not to be listed, the company must publish a prospectus containing certain information about the shares as set forth in the Prospectus Directive<sup>66</sup> and as implemented in the U.K. by the Public Offers of Securities Regulation 1995.<sup>67</sup> The U.K. does not require the separate registration of securities except in connection with stock exchange listings.<sup>68</sup>

In addition to the initial disclosure obligations of companies offering securities on the Official List, there are also ongoing disclosure requirements. These obligations are set forth in Chapters 9-16 of the Listing Rules. The Listing Rules provide that any information that will lead to substantial movement in the price of the listed securities must be immediately released.<sup>69</sup> A company must also publish a semi-annual report on its operations and results that discloses, inter alia, profits and losses for the first six months of each financial year.<sup>70</sup>

- 
- (f) a declaration as to the accuracy of the disclosure document;
  - (g) the names of the company's auditors, their addresses and qualifications;
  - (h) the name and address of the company's bankers;
  - (i) the sponsoring member firm;
  - (j) the name of the company's solicitors;
  - (k) details of the shares for which admission is sought;
  - (l) the company's objects;
  - (m) the company's authorized/issued capital;
  - (n) a summary of operations during the preceding three years;
  - (o) details of any group to which the company belongs;
  - (p) the company accounts;
  - (q) financial information for the last three years; and
  - (r) details about company management.

LONDON STOCK EXCHANGE, THE LISTING RULES (1995) [hereinafter *THE YELLOW BOOK*].

65. See MAYSON ET AL., *supra* note 48, at 191.

66. See Council Directive 89/298, 1989 O.J. (L 124) 8.

67. See MAYSON ET AL., *supra* note 48, at 196.

68. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 6-13 & n.1 (noting that although prospectuses used in connection with a public offering in the United Kingdom must be filed with the Registrar of Companies, this is a procedural step only); see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-60.

69. See James, *Securities Law in the United Kingdom*, in HANDBOOK, *supra* note 23, at 215. These rules incorporate the requirements of the Admissions Directive and the Interim Reports Directive. See MAYSON ET AL., *supra* note 48, at 188-89.

70. Specified information must be presented in table form including: net turnover, profit or loss, tax on profits, minority interests, profit or loss attributable to shareholders, both

### D. France

The French stock exchanges are supervised by the *Commission des Opérations de Bourse* (the "COB").<sup>71</sup> In addition to supervising exchanges and brokers, the COB is responsible for enforcing regulations relating to disclosure requirements and for verifying that the required information has been provided in the disclosure documents.<sup>72</sup> As in the U.S. system, regulation of public offerings of securities in France is based on information disclosure.<sup>73</sup> Issuers may list securities either on the official list of the Paris Stock Exchange (*cote officielle*) or on the Secondary Market (*Second Marché*), a market created for medium sized companies.<sup>74</sup>

Pursuant to regulations under the COB,<sup>75</sup> a securities offering in France is deemed a public offering if any one of the following criteria is met: (1) the securities are offered to more than 300 persons; (2) the securities are placed through a financial institution; (3) the offering is advertised to the public; or (4) customer solicitation is used in an attempt to place the securities.<sup>76</sup> In addition, any offering in which the securities are listed on a French stock exchange is deemed a public offering.<sup>77</sup> Prior to any public offering of securities, whether the securities are listed or unlisted, a company must prepare and submit to the COB a

---

before and after extraordinary items, extraordinary items, dividends paid, earnings per share, and comparison of the above information to the corresponding period in the preceding year. See James, *Securities Law in The United Kingdom*, in HANDBOOK, *supra* note 23, at 215.

71. The COB was created by Ordinance 67-833 of September 28, 1967 and modified in 1970. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 7-4.

72. See Jean-Luc Soulier & Yves Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 64. The structure of the COB was modeled on the SEC; however, the COB's powers are not as extensive as those of the SEC. See *id.*

73. See *id.* at 64.

74. See GLOBAL OFFERINGS OF SECURITIES: ACCESS TO WORLD EQUITY CAPITAL MARKETS, 37 (Meridith M. Brown & Alan Paley eds., 1994) [hereinafter GLOBAL OFFERINGS]. The Secondary Market was created in 1983 for companies that are not large enough to have their securities traded on the official stock exchange. Issuers often list a security on the Secondary Market as an interim step to listing on the Official List. See Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 61-62 (stating the requirements to be listed on either the Official Market or the Secondary Market).

75. For a general discussion of statutes and regulations governing securities in France, see 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 7-8 to 7-15.

76. Olivier d'Ormesson & Astrid R. Baumgardner, *France, Exemptions for Institutional Investors*, 13 U. PA. J. INT'L BUS. L. 509, at 509, 514-18. The regulations have been interpreted to include any offering made through stock brokers. See *id.* at n.19; see also 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-4 & n.3.

77. See Ormesson & Baumgardner, *supra* note 76, at 509, 514 & n.18; see also Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 64. Several exemptions from the requirement to file a prospectus exist with respect to listed securities. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 7-14.

prospectus (*note d'information*) that contains information necessary for an investor to make an informed investment decision.<sup>78</sup>

If the securities to be offered are not listed on a French stock exchange, the offering is regulated by COB Regulation No. 92-02 ("Regulation No. 92-02").<sup>79</sup> Regulation No. 92-02 lists the criteria which define a public offering in France;<sup>80</sup> sets forth the requirements of a prospectus and other information to be provided in a public offering; and describes the types of public offerings that are exempt from the prospectus requirement.<sup>81</sup> For public offerings of securities that are listed on a French stock exchange, other COB regulations apply. For example, COB Regulation No. 91-02 sets forth the prospectus and information requirements for securities listed on the Official Stock Exchange.<sup>82</sup> COB Regulation No. 88-04 applies to securities listed on the Secondary Market. Before securities are admitted for trading, issuers of the securities must file an application to list the securities and obtain authorization from the *Conseil des Bourses de Valeurs*, a professional entity that regulates the activities of the French stock markets.<sup>83</sup>

Notice of the proposed offering must be published at least six days before the offering in the *Bulletin d'Annonces Légales Obligatoires* ("BALO"), a journal of legal notices.<sup>84</sup> After the prospectus has been

---

78. See Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 64-65.

79. See Ormesson & Baumgardner, *supra* note 76, at 510.

80. See *supra* notes 75-77 & accompanying text.

81. See Ormesson & Baumgardner, *supra* note 76, at 510. Examples of public offerings not requiring the preparation of a prospectus include an offering in which the aggregate amount of the offering is less than FF 250,000, an offering in which the price of each security offered exceeds FF 1 million and an offering which is made only to persons in the exercise of their professional activities. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-33. Note, however, that these examples apply to securities that are not listed on one of the French stock exchanges. See *id.*

82. Generally, the prospectus to be submitted to the COB must include the following types of information about the issuer: (a) the name and purpose of the company, (b) information about the company's registered capital, (c) information about the company's business activity, (d) employee information, (e) the identity of all subsidiaries, (f) financial information about the company, including its balance sheets, profit and loss statements and consolidated accounts for the three preceding fiscal years, (g) information concerning the names of the directors and the principal shareholders of the company, (h) information about the issuer's recent business history and a statement concerning its business prospects, (i) the purpose of the offering and the intended use of the proceeds, and (j) the names of the persons or legal entities responsible for distributing the prospectus. See Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 65; see also Ormesson & Baumgardner, *supra* note 76, at 511 & n.7.

83. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-4. The *Conseil des Bourses de Valeurs* governs the admission of securities for trading and decides upon their removal. See *id.* at GEN 3-31.

84. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 7-15.

submitted to the COB, the COB may (1) approve the prospectus, (2) require the company to submit additional information, or (3) initiate an investigation.<sup>85</sup> Once the COB has determined that the prospectus is in compliance with the applicable disclosure requirements, the COB will grant a visa to the issuer,<sup>86</sup> at which time the prospectus may be distributed to the public. The company must make the prospectus available to the public at the registered office of the issuer, at all locations where purchasers may buy the securities, and at the stockbrokers' association if the securities are listed on a stock exchange.<sup>87</sup>

A company that is listed on the Official Market "must publish in BALO the following annual financial information: (1) draft unaudited annual financial statements and, if available, draft unaudited consolidated financial statements, within four months from the end of the fiscal year and no later than fifteen days before the date of the company's annual shareholders' meeting; and (2) within forty-five days of the approval of the annual financial statements at the annual general shareholders' meeting, the audited annual financial statements must be published."<sup>88</sup> The company also must publish certain consolidated financial information on a semi-annual and quarterly basis.<sup>89</sup> "Finally, a [listed] corporation . . . must disclose all major structural changes and transactions likely to affect the price of its shares."<sup>90</sup>

The EC Admissions Directive has been implemented in France. Thus, the requirements set forth in that Directive apply to offerings in France.<sup>91</sup> France also has adhered to the EC Mutual Recognition Directive, but this Directive extends only to companies that have their registered office in the EC and then only if the Listing Particulars Directive has been implemented in that Member State.<sup>92</sup> Moreover, pursuant to the French adherence to the EC Directives, only a public offer prospectus issued by a company registered in an EC Member State

---

85. See Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 64–65.

86. The issuance of a visa does not signify anything about the merits of the offering. Instead, it only represents that the necessary disclosure has been made. In this regard, however, the pertinent regulators provide no assurance that the disclosures made are accurate. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 7–18.

87. See *id.*

88. *Id.* at GEN 3-41. If there are no material changes between the unaudited and the audited statements, the company only needs to file a notice referring to the first publication. See *id.* at n.40.

89. See *id.*

90. Soulier & Reinhard, *Securities Law in France*, in HANDBOOK, *supra* note 23, at 67.

91. See GLOBAL OFFERINGS, *supra* note 74, at 38. For a discussion of the Admissions Directive, see *infra* notes 336–41 & accompanying text.

92. See GLOBAL OFFERINGS, *supra* note 74, at 38. For a general discussion of the EC directives, see *infra* notes 330–68 and accompanying text.

will be recognized as listing particulars in France and only if such prospectus meets the requirements of the Listing Particulars Directive.<sup>93</sup>

### E. Germany

Securities law in Germany is regulated principally by federal law. Most important are the Securities Trading Act, the Sales Prospectus Act, and the Stock Exchange Act.<sup>94</sup> The Securities Trading Act of 1994 established a German securities commission, the Federal Securities Supervisory Office (the *Bundesaufsichtsamt für den Wertpapierhandel* or "BAWe"), as an independent federal authority under the auspices of the Ministry of Finance.<sup>95</sup> Although the BAWe operates as the federal tier of a three-tier market regulatory structure, it does not directly oversee the public offering of securities that are listed on a German exchange or for which application for listing has been made.<sup>96</sup> Under the Sales Prospectus Act, however, the BAWe directly supervises all public offers of unlisted securities.<sup>97</sup>

There are eight German stock exchanges (*Wertpapierbörsen*), the most important of which is the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*).<sup>98</sup> Similar to the French stock markets, each of the

---

93. See GLOBAL OFFERINGS, *supra* note 74, at 38.

94. See *Gesetz über den Wertpapierhandel* (WpHG) (Securities Trading Act) v. 26.7.1994 (BGBl. I S.1749), BGBl. III 4110-4; *Wertpapier-Verkaufsprospektgesetz* (VerkProspG) (Sales Prospectus Act) v. 17.7.1996 (BGBl. I S.1047), together with *Verordnung über Wertpapierverkaufsprospekte* (VerkProspVO) (Sales Prospectus Regulation) BGBl. III 4110-3-1; and *Börsengesetz* (BörsG) (Stock Exchange Act) v. 17.7.1996, BGBl. III 4110-1, together with *Verordnung über die Zulassung von Wertpapieren zur amtlichen Notierung an einer Wertpapierbörse* (BörsZulVO) (Stock Exchange Admission Regulation) v. 17.7.1996 (BGBl. I S. 1052), BGBl. III 4110-1-1.

95. Securities Trading Act, *supra* note 94, §§ 3–11. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-44. The Securities Trading Act became fully effective as of January 1, 1995. *Id.*

96. Securities listed on either the Official Market (*amtlicher Handel*) or the Regulated Market (*geregelter Markt*) segments of a German exchange are considered to be listed securities. See Stock Exchange Act, *supra* note 94, §§ 36–49 [Official Market] & §§ 71–77 [Regulated Market]. The stock exchange continues directly to supervise listing and trading of such securities. See *id.* §§ 7, 36–49, 71–77, and §§ 1a, 1b, respectively. For regulation of derivative securities, see *id.* §§ 50–70. On German exchange segments, see *infra* notes 99–101 & accompanying text. The other two tiers of the German regulatory structure are the state stock exchange authorities (the state tier) and the disciplinary bodies of the stock exchanges (the stock exchange tier). See INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at Gen. 3-44 to 3-45.

97. Sales Prospectus Act, *supra* note 94, § 1; see also *Verordnung über Wertpapier-Verkaufsprospekte* (Sales Prospectus Regulation), v. 17.12.1990 (BGBl. I S.2869) BGBl. III 4110-3-1.

98. See Robert J. Dilworth, *Germany; Exemptions for Institutional Investors*, 13 U. PA. J. INT'L BUS. L. 529, at 529. This figure does not include the derivatives exchange Eurex or the Hannover Commodity Futures Exchange (*Hannover Warenterminbörse*). The Frankfurt



German stock exchanges has three different market segments: the Official Market (*amtlicher Handel*), the Regulated Market (*geregelter Markt*), and the Free Market (*Freiverkehr*). There are differences in disclosure requirements depending upon the market in which the securities are being offered. The primary market is the Official Market. The Regulated Market allows smaller companies to access the securities markets. The Free Market is essentially a broker-dealer market conducted in association with an exchange.<sup>99</sup>

For admission to either the Official Market or the Regulated Market, the issuer, together with a sponsoring financial institution that is a member of the stock exchange, must submit an admission application.<sup>100</sup>

The application for admission must include either a listing prospectus (for the Official Market) or a business report (for the Regulated Market).<sup>101</sup> The listing prospectus for the Official Market must contain a broad range of issuer information.<sup>102</sup> The business report for the Regu-

Stock Exchange is itself a subsidiary of *Deutsche Börse AG* ("German Stock Exchange, Inc."). See generally *Willkommen* (visited Mar. 29, 1999) <<<http://www.exchange.de>>>.

99. See generally 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-45. In theory, the *Freiverkehr* is not an over-the-counter ("OTC") market. Although securities traded in the *Freiverkehr* are not listed on a German exchange, they must be approved for trading by the members of the relevant German exchange in accordance with Stock Exchange Act § 78 and are subject to ongoing exchange oversight. See Stock Exchange Act, *supra* note 94, § 78. Consequently, while the *Freiverkehr* does not constitute a part of on-exchange trading, it cannot accurately be described as wholly off-exchange or OTC.

100. The application requirements for the Official Market and the Regulated Market have been harmonized. See Stock Exchange Act, *supra* note 94, § 71(2), 36(2); Stock Exchange Admission Regulation, *supra* note 94; see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-45; INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 8C-69.

101. See Stock Exchange Act, *supra* note 94, §§ 71(2), 36(2); see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-45.

102. See Stock Exchange Act, *supra* note 94, §§ 13-42. The listing prospectus required for the Official Market must contain the following information:

- (a) the persons or companies responsible for the contents of the prospectus;
- (b) information about the securities to be admitted;
- (c) information about circumstances surrounding the issue;
- (d) information about the issuer;
- (e) information about the capital of the issuer;
- (f) information about the business activities of the issuer;
- (g) information about the assets, liabilities, financial position and profitability of the issuer;
- (h) information about the executive board and supervisory board of the issuer;
- (i) information about the recent business development and business forecast of the company; and
- (j) the names, addresses, and professional qualifications of the auditors.

Stock Exchange Act, *supra* note 94, §§ 13-42.

lated Market must contain the type of information required for the unlisted securities prospectus.<sup>103</sup> The application is examined by either the Admissions Board (*Zulassungsstelle*) (if application is made to the Official Market) or the Admissions Committee (*Zulassungsausschuß*) (for the Regulated Market) of the relevant exchange.<sup>104</sup>

Registration of securities is not required in Germany. However, unless an exemption is available, an issuer must publish a selling prospectus.<sup>105</sup> In cases where an issuer is applying for admission to the Official Market or the Regulated Market, the requirements for the selling prospectus are identical to, and are satisfied by, the listing prospectus or business report discussed above. After the prospectus or business report is approved by the Admissions Board or Admissions Committee, the prospectus or business report must be published by the issuer in designated publications at least one business day prior to the introduction of the securities on the market.<sup>106</sup>

For unlisted securities, the requirements for the selling prospectus are specified in the Sales Prospectus Act and the Sales Prospectus Regulation.<sup>107</sup> No exchange approval is required. The prospectus must be submitted to the BAWe for completeness review, however, and may be published only upon approval by the BAWe or passage of ten business days without enforcement action, whichever is sooner.<sup>108</sup> The offeror of the unlisted securities must publish the prospectus in desig-

---

In addition, if there are share certificates, a copy of the share certificates must be submitted along with the prospectus. See Dr. Ulrich Koch, *Securities Law in Germany*, in HANDBOOK, *supra* note 23, at 75-77. These requirements meet the requirements of the EC Prospectus Directive and are entitled to mutual recognition of other Member States under Articles 20 and 21 of the Prospectus Directive in appropriate circumstances. See 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 8C-82.

103. See Stock Exchange Act, *supra* note 94, § 73(1)(3). This provision incorporates the requirements of the Sales Prospectus Act, *supra* note 94, § 7 and the Sales Prospectus Regulation, *supra* note 94, § 2 ff.

104. See Stock Exchange Act, *supra* note 94, §§ 36, 37. Although the application is reviewed primarily for the adequacy of disclosure, the Admissions Board (or Admissions Committee) is also empowered to review the application and deny a listing if the issuance would harm substantial public interests or operate as a fraud upon the public. See *id.* § 36(3)(3); see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-46. For application procedures for the Freiverkehr, see generally *supra* note 99.

105. See Stock Exchange Act, *supra* note 94, §§ 36-38 (dealing with listed securities); Sales Prospectus Act, *supra* note 94, § 1 (dealing with unlisted securities).

106. See Stock Exchange Act, *supra* note 94, §§ 36-38; Regulation on Admission of Securities to Official Quotation on a Stock Exchange, *supra* note 101, § 43; 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-46 & n.46.

107. See Sales Prospectus Act, *supra* note 94, § 1; Sales Prospectus Regulation, *supra* note 97, §§ 2-11.

108. See Sales Prospectus Act, *supra* note 94, §§ 8, 8a. In cases of noncompliance, the BAWe is authorized under Sales Prospectus Act § 17 to impose fines of up to DM 1,000,000 and under Sales Prospectus Act § 8b to prohibit commencement of a public offer.

nated publications at least one day prior to introduction of the securities on the market.<sup>109</sup>

In 1997, *Deutsche Börse AG* launched a new trading segment of the Frankfurt Stock Exchange, the New Market (*Neuer Markt*).<sup>110</sup> This segment is designed to facilitate greater access to the equity markets for small- and medium-sized businesses with high growth potential.<sup>111</sup> The New Market mandates further standards for admittance. The statutory minimum requirements of the Regulated Market apply in addition to other requirements.<sup>112</sup> A sizable number of German companies are now listed on the New Market.<sup>113</sup>

All listed corporations registered in Germany must disclose or publish their annual financial statements.<sup>114</sup> In addition, all companies that have shares listed on the Official Market must publish a semi-annual report, or publish a notice that such report will be made available to the public upon demand.<sup>115</sup> These companies must also announce significant shifts in voting rights.<sup>116</sup> Issuers whose securities have been admitted to the Official Market or Regulated Market are subject to ad hoc reporting obligations requiring them to disclose without delay any information that may be material to their share prices.<sup>117</sup> Finally, issuers of listed securities must publish all notices relating to rights attaching to the securities.<sup>118</sup>

### F. Italy

Until recently, public offerings of securities in Italy were governed by Law No. 216 of June 1974<sup>119</sup> and regulations issued thereunder. In

---

109. See Sales Prospectus Act, *supra* note 94, § 9.

110. On Deutsche Börse AG, see *supra* note 98.

111. See Thomas Emde, *German Capital Markets*, INT'L FIN. L. REV. 50 (1998). The author compares the New Market to the NASDAQ in the United States.

112. For example, an issuer's financial statements must comply with International Accounting Standards or U.S. GAAP, and the prospectus is similar to U.S. SEC Form 20-F. See "Hohe Publizität der Emittenten," *Willkommen beim* (visited Mar. 29, 1999) *Neuer Markt* <<[<http://www.neuer-markt.de/INTERNET/NM/nm3.nsf>>](http://www.neuer-markt.de/INTERNET/NM/nm3.nsf)>>.

113. See "Die Unternehmen des Neuen Marktes," in *id.* (listing 74 companies now listed on the New Market); see also Peter Scherer, *Capital Markets*, 17 INT'L FIN. L. REV. 10-15 (1998).

114. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-52.

115. See *id.*

116. See Securities Trading Act, *supra* note 94, §§ 21 ff. Thresholds considered significant are set at five percent, ten percent, twenty-five percent, fifty percent, and seventy-five percent. *Id.* § 21.

117. See Securities Trading Act, *supra* note 94, § 15.

118. See Stock Exchange Act, *supra* note 94, § 44; Stock Exchange Admission Regulation, *supra* note 94, at §§ 63-70; 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-52.

119. See Law Decree No. 216 of June 7, 1974.

1998 Italy passed new legislation in the area of securities regulation, Law No. 58 of February 24, 1998,<sup>120</sup> which became effective in July 1998 and superseded Law No. 216. The general regulatory framework, however, remains the same.<sup>121</sup> The key agency regulating securities offerings is the *Commissione Nazionale per la Società e la Borsa* (“CONSOB”).<sup>122</sup> Prior to a public offering of securities in Italy, the issuer must file a registration statement with CONSOB and submit a prospectus to be published.<sup>123</sup> The principal Italian securities market for trading in equity securities is the Italian Automated Quotation System (“*Telematico*”).

Certain information concerning the issuer, the issuer’s business, and the transaction, among other things, must be disclosed in all prospectuses. Generally, the prospectus must contain “all information necessary for the investors to come to a founded judgment on the economic and financial situation and the solidity of the issuer, on the evolution of the activity of the issuer, and on the securities being issued and inherent rights.”<sup>124</sup> In addition, the company must file annual accounts and, if applicable, consolidated accounts for the last fiscal year.<sup>125</sup> If the securi-

120. See Law Decree No. 58 of Feb. 27, 1998.

121. See Dott. Eugenio Ruggiero, Letter to Prof. Marc I. Steinberg, 1 (June 30, 1998) (unpublished manuscript on file with author); see also Mario Ferrari, Letter to Prof. Marc I. Steinberg (July 17, 1998) (unpublished manuscript on file with author).

122. See PHILIP R. WOOD, *INTERNATIONAL LOANS, BONDS & SECURITIES REGULATION* 274 (1995).

123. See *GLOBAL OFFERINGS*, *supra* note 74, at 50.

124. Ruggiero, *supra* note 121, at 1. The detailed information to be set out in the prospectus is established by regulations promulgated by the CONSOB. Pursuant to Law No. 216, generally, the following items must be included in a prospectus:

- (a) information concerning the risks involved in the transaction;
- (b) information about the issuer;
- (c) information about the issuer’s capital structure;
- (d) information about the issuer’s managing and supervising bodies (its board of directors and board of statutory auditors);
- (e) information about the issuer’s outside auditors;
- (f) information about the issuer’s business (for example, its intellectual property, the nature of any pending litigation and its tax position);
- (g) information about the financial situation of the issuer, including copies of key accounting documents;
- (h) information about the person effectuating the offer of the securities;
- (i) information about the underwriters;
- (j) information about the securities to be offered;
- (k) information about the proposed transaction; and
- (l) the identity of the persons responsible for the prospectus.

Francesco Gianni & Bruno Bartocci, *Securities Law in Italy*, in *HANDBOOK*, *supra* note 23, at 120–21.

125. See Ruggiero, *supra* note 121.

ties are to be listed on one of the exchanges, consolidated accounts for holding companies for the most recent fiscal year also must be filed.<sup>126</sup>

The EC Mutual Recognition Directive has been implemented in Italy. Therefore, a prospectus meeting the requirements of another Member State (or a third country that has concluded an agreement in this field with the EC) can be used in Italy and must be recognized by CONSOB.<sup>127</sup>

Once a company has issued listed securities, it is subject to CONSOB's ongoing supervision and must comply with applicable regulatory and reporting requirements. For example, proposals for shareholder votes to approve the company's financial statements, amend its bylaws, issue bonds, participate in mergers and spin-offs or purchase or sell the company's own shares must be submitted to CONSOB thirty days prior to the date of the shareholders' meeting. In this regard, all shareholder resolutions concerning the aforesaid matters must be filed with CONSOB within thirty days of their adoption.<sup>128</sup>

All issuing companies (listed or unlisted) are required to provide annual and periodic reports that must be available to the public on demand at the company's head office and with the competent Italian authority.<sup>129</sup> Announcement of the availability of these reports must be published in at least one daily national newspaper.<sup>130</sup> Moreover, issuers and their holding companies must inform the public, the competent authority in Italy, and at least two national press agencies of any facts regarding the company's business that are not publicly known and that, if made public, are likely to have a significant effect on the price of the securities.<sup>131</sup>

---

126. See Francesco Gianni & Bruno Bartocci, *Securities Law in Italy*, in HANDBOOK, *supra* note 23, at 125. Pursuant to the new legislation, the accounts must have been audited by an independent auditing company. See *id.*

127. See *id.* at 125–26. The prospectus must be translated into Italian, and the related offering must be made simultaneously with, or within a short period after, the offer in the jurisdiction responsible for first approving the prospectus. See *id.* CONSOB may require the insertion in the prospectus of information specific to the Italian market—*e.g.*, concerning the taxation of income deriving from the securities and the entities. See *id.*

128. See Gianni & Bartocci, *Securities Law in Italy*, in HANDBOOK, *supra* note 23, at 123. In addition, CONSOB may require that financial statements be audited by outside auditors until the solicitation activity ends. See *id.*

129. See art. 31–36 of Regulation 11520/1998; see also GLOBAL OFFERINGS, *supra* note 74, at 52.

130. See GLOBAL OFFERINGS, *supra* note 74, at 52.

131. See *id.*; Sabrina Bruno, Letter to Prof. Marc I. Steinberg (Aug. 27, 1998) (unpublished manuscript on file with author).

### G. Canada

There is no federal securities commission in Canada. Instead, the responsibility for the administration and enforcement of securities legislation in Canada rests with provincial regulatory agencies in each of Canada's ten provinces and two territories.<sup>132</sup> The provinces and territories each have administrative agencies or officials responsible for securities legislation.<sup>133</sup> The Ontario legislation provides an exemplar for provincial securities regulation in Canada and will be used as the basis for discussion in this section.

The principal securities regulator in Ontario is the Ontario Securities Commission (the "OSC"). The securities laws of Ontario are currently contained in the Securities Act and rules and regulations promulgated under the Securities Act,<sup>134</sup> the National Policies of the Canadian Securities Administrators consisting of all of the provincial securities regulators, including the OSC; the Uniform Act Policies of the securities regulators; and the rules of The Toronto Stock Exchange and the Investment Dealers Association of Canada.<sup>135</sup>

In order to sell securities to the public in Canada, both disclosure and registration requirements must be met. A prospectus must be prepared in accordance with the laws of the applicable province and must contain "full, true, and plain disclosure of all material facts relating to the securities issued."<sup>136</sup> In addition, the prospectus must comply as to form and content with the requirements of the legislation and the regulations.<sup>137</sup> Upon filing, the prospectus usually will be reviewed by the

---

132. See generally Kenneth G. Ottenbreit, *Canada, Exemptions for Institutional Investors*, 13 U. PA. J. INT'L BUS. L., 477.

133. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 9-6. "The majority of the systems consist of a two-tiered structure, with the upper level comprised of an appointed commission and the lower level made up of the staff." *Id.* at 4-4.

134. See Securities Act, R.S.O. 1990, ch. 5 & R.R.O. 1990, Reg. 1015.

135. See Ottenbreit, *supra* note 62, at 479 & nn. 1 & 3.

136. R.S.O. 1990, Sec. 56. See generally Anisman, *The Proposals for a Securities Market Law for Canada: Purpose and Process*, 19 OSGOODE HALL L. J. 330 (1981).

137. See 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 3-75, 4-15. The following general information about the issuer is required to be disclosed in a prospectus:

- (a) the capital structure of the issuer;
- (b) full corporate name and place of incorporation of the issuer;
- (c) a description of the issuer's business;
- (d) description of the material acquisitions and dispositions by the issuer during the past two years;
- (e) explanation of substantial variations in operating results over the preceding three years;
- (f) a description of the property, including buildings and plants, of the issuer;

applicable regulator to help ensure compliance.<sup>138</sup> Hence, similar to the United States, a preliminary prospectus must be filed with, and is reviewed by, the relevant securities regulator prior to the final prospectus being filed. The preliminary prospectus must meet the same requirements as those for the final prospectus with several exceptions.<sup>139</sup> There

- 
- (g) a description of anything of value received by any promoters of the issuer within the preceding five years;
  - (h) pending legal proceedings material to the issuer;
  - (i) the description of the shares offered;
  - (j) a record of dividends paid by the issuer during the last five completed years;
  - (k) names and addresses and remuneration of directors and senior officers, and indebtedness of directors and senior officers;
  - (l) details of options to purchase securities from the issuer;
  - (m) details of equity shares held in escrow;
  - (n) details of holdings of the issuer's securities by persons or companies directly or indirectly holding greater than 10 percent of the equity shares, plus the percentage of shares of each class of equity shares held directly or indirectly by all the directors and senior officers of the issuer as a group;
  - (o) ownership and intercorporate relationship with subsidiaries and parent corporations;
  - (p) prices at which securities of the shares being offered have been sold in the preceding twelve months by the issuer if different from that being offered and number of shares sold;
  - (q) a brief description of any interest of management, or shareholders with more than 10 percent equity, or their associates or affiliates, in any transaction within the past three years or any proposed transaction that has materially affected or will materially affect the issuer or its subsidiaries;
  - (r) names and addresses of auditors, transfer agents, and registrars;
  - (s) a description of every material contract entered into with the last two years by the issuer; and
  - (t) any other material facts not already disclosed.

*See id.* at 4-33 to 4-35. In addition, information about the offering itself including risk factors, net proceeds, and plan of distribution must be contained in the prospectus. Ontario legislation also requires certain financial information including an

income statement, a statement of surplus, and a statement of changes in financial position for each of the last five completed financial years (or such shortened period as is permitted), together with a balance sheet as of a date of not more than 120 days prior to the filing of the preliminary prospectus of the issuing company and as of the corresponding date of the previous financial year, be included in the prospectus.

*Id.* at 4-31.

138. *See id.* Upon filing, a review team consisting of at least one lawyer and accountant is selected to review the prospectus. *See id.* OSC now has a selective review system, however, so that review may be quite cursory for some seasoned issuers.

139. For example, the auditors' reports and the prices do not need to be included in the preliminary prospectus. *See id.* at 4-30.

is a required waiting period of at least ten days before the final prospectus can be approved during which indications of interest may be solicited as long as a preliminary prospectus is sent to any person responding.<sup>140</sup>

After a final prospectus has been accepted for filing, the issuer becomes a reporting issuer and is obligated to meet continuous disclosure and ongoing reporting requirements.<sup>141</sup> The reporting issuer must file unaudited quarterly financial statements and audited annual financial statements. All filed financial information is open for public inspection at Commission offices. An annual information form or AIF (which is similar to an annual report on U.S. SEC Form 10-K) and a management's discussion and analysis of financial condition and results of operation also must be filed annually.<sup>142</sup>

In addition to interim and annual financial statements, an issuer must make timely disclosure of any material change which occurs by issuing and filing a press release disclosing the nature and substance of the change.<sup>143</sup> A material change is defined as a "change in the business, operations or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer."<sup>144</sup>

Because there is no federal system of securities regulation, cooperation among the provinces and administrative integration have been necessary to ensure the orderly distribution of securities in Canada.<sup>145</sup> The prospectus review and clearance process is applied on a national basis through cooperation among the provincial securities regulators and the use of national policy statements.<sup>146</sup> One province is selected as the "principal jurisdiction" and is responsible for reviewing the prospectus,

---

140. As in the U.S., the requirement of a waiting period ensures that the necessary information is disseminated to the market. *See* Securities Act, R.S.O. ch. S.5 § 65 (1990), amended by ch. 18 (1992) [hereinafter Ontario Securities Act]; *see also* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4-29.

141. *See* Ottenbreit, *supra* note 132, at 479 & n.6; *see also* GLOBAL OFFERINGS, *supra* note 74, at 109.

142. *See* GLOBAL OFFERINGS, *supra* note 74, at 109. Pursuant to the MD&A requirements, an issuer must discuss historical factors as well as prospective matters. *See id.*

143. *See* Ontario Securities Act, *supra* note 140, at § 75(1) ¶ 450-751. In addition, a report of the material change must be filed with the securities regulators within ten days of the date of the change. *See id.*

144. 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4-59. (quoting OSA § 1(1)21.) Canadian securities regulators have extended the obligation to make timely disclosure to encompass disclosure of "material information" which is broader than "material change." GLOBAL OFFERINGS, *supra* note 74, at 110.

145. *See* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4-3; *see also* GLOBAL OFFERINGS, *supra* note 74, at 100.

146. *See* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4-3.



collecting comments from the securities regulators of the other jurisdictions and resolving such comments with the issuer.<sup>147</sup>

### H. Mexico

The principal securities law in effect in Mexico is the Securities Market Law,<sup>148</sup> which is administered by a federal banking and securities commission, the *Comisión Nacional Bancaria y de Valores* (“*Comisión Nacional*”).<sup>149</sup> The Securities Market Law is a comprehensive statute regulating the public offering of securities as well as the operations of brokers and the activities of the *Comisión Nacional*.<sup>150</sup> In addition, there is a body of administrative law consisting of internal rules and regulations of the *Comisión Nacional* that supplements the Securities Market Law.<sup>151</sup> The principal securities market in Mexico is the stock exchange, *La Bolsa Mexicana de Valores, S.A. de C.V.* (the “*Bolsa*”).<sup>152</sup>

The Securities Market Law defines a public offering as one “which is made through some means of mass communication or to an unspecified person in order to subscribe, sell or acquire securities.”<sup>153</sup> The registration provisions are contained in Articles 2 and 11 of the Securities Market Law. First, an issuer is required to file a registration application with the *Comisión Nacional*.<sup>154</sup> In the application, the issuer must provide detailed information about the company, its assets, opera-

---

147. GLOBAL OFFERINGS, *supra* note 74, at 100–01. The issuer may be eligible to file on a basis of a national receipt system pursuant to which the principal jurisdiction can issue a final “receipt” on behalf of all the provinces to permit an issue to “go effective” on a national basis and commence distribution of the securities without having to physically obtain final receipts from each of the provinces in which the offering is proposed to be made. *See id.*

148. For information on amendments to the Securities Market Law, see 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4A-11 & n.2.

149. *See* Wood, *supra* note 122, at 281; *see also* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4A-2 to 4A-3, 4A-11.

150. *See* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4A-11 & n.1.

151. *See id.* at 4A-12 & nn. 8–11.

152. *See* International Capital Markets, *supra* note 20, at 4A-16.

153. 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4A-37 & n.1 (quoting Securities Market Law, art. 2). Notwithstanding the definition of public offering contained in the Securities Market Law, the *Comisión Nacional* has interpreted the provisions flexibly by requiring transactions that formerly would have been viewed as private placements to be subject to regulatory oversight by the *Comisión Nacional*. In many cases, the *Comisión Nacional* has focused on the term “unspecified persons” to support a narrow interpretation by requiring that even in circumstances where an offering is made to a specific number of investors, if the purchasers are not precisely named, the offer is deemed a public offer. *See* Thomas S. Heather, *Global Equity Offerings: A Mexican Perspective*, in GLOBAL OFFERINGS, *supra* note 74, at 201.

154. *See* 10C INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 4A-38.

tions, related financial data, the securities to be offered, and other matters.<sup>155</sup> The *Comisión Nacional* reviews the information and may request additional information or clarification of issues presented.<sup>156</sup>

In addition to the requirements stated above, the issuer must structure the offering in such a way that the “characteristics of the securities and the terms of their placement must permit significant circulation that will not prejudice or disrupt the market.”<sup>157</sup> After the securities have been registered in the National Registry of Securities, they may be listed for trading on the *Bolsa*. Listing may occur upon application if the securities are registered in the National Registry and they meet the requirements of the *Bolsa*.

In order to maintain registration of the securities, issuers are required to furnish information specified by the *Comisión Nacional* in its general rules and regulations to the *Comisión Nacional*, the exchanges, and the public.<sup>158</sup> The *Comisión Nacional* has issued “*circulares*” requiring corporations to provide the *Comisión Nacional* and the public with periodic financial, legal, accounting, and other information.<sup>159</sup> One such circular, Circular 11-11, requires corporations to provide annual reports that contain audited financial statements and unaudited quarterly reports that include specified financial information.<sup>160</sup>

### I. Japan

The Securities and Exchange Law (the “SEL”), as amended, is the basic securities law of Japan and regulates, among other things, the offering and trading of securities.<sup>161</sup> The Ministry of Finance (the “MOF”) administers the SEL and is responsible for the issuance and sale of secu-

---

155. *See id.* at 4A-38 & n.10. The application generally must include legal, economic, and financial information as well as information about the offering. *See id.* at 4A-38 to 4A-39 & nn.11-14.

156. *See id.* at 4A-39 & n.15. The review process takes approximately two months and is similar to the process in the United States. *See id.* at 4A-39.

157. *Id.* at 4A-40 & n.25 (quoting Securities Market Law, art. 14, Sec. II).

158. *See id.* at 4A-40 & n.28.

159. *Id.* at 4A-43 & n.2.

160. Circular 1-11 (1985) requires reporting of economic, legal, administrative, and accounting information. This information must be presented on an annual and quarterly basis and, in certain cases, within a short period after the occurrence of certain events. *See id.* at 4A-43 & n.3.

161. Shokentorihikiho, Law No. 25 of 1948. In 1992 an amendment to the SEL was passed (the “SEL Amendment”), which became effective on April 1, 1993. The SEL Amendment includes substantial amendments to disclosure regulations. *See* GLOBAL OFFERINGS, *supra* note 74, at 91; *see also* 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 11-9.

rities.<sup>162</sup> Also of importance in the Japanese securities regulatory scheme are the ordinances, regulations, rules, guidelines, and policy statements written under or pertaining to the SEL. The principal markets in Japan are the Tokyo Stock Exchange and the Osaka Stock Exchange.<sup>163</sup> The Tokyo Stock Exchange is the most influential.<sup>164</sup>

The primary objective concerning the regulation of the securities markets in Japan is timely disclosure of information.<sup>165</sup> SEL disclosure requirements apply to both initial and secondary public offerings.<sup>166</sup> “Pursuant to the SEL, in order to make a public offering in Japan, an issuer must file a SRS [Securities Registration Statement] with the MOF unless” the issuer meets certain exceptions.<sup>167</sup> After examination by the MOF, the SRS is made available to the public.<sup>168</sup>

An issuer subject to the SRS registration requirement also is required to prepare a prospectus.<sup>169</sup> The prospectus is substantially a reproduction of Parts I, II, and III of the SRS. For companies not subject to Japanese continuous disclosure, the SRS must include financial statements for the five most recent fiscal years, including an auditor’s

162. See GLOBAL OFFERINGS, *supra* note 74, at 91. The Securities Bureau and the International Finance Bureau of the MOF have authority in securities regulation. *See id.*

163. See, e.g., Tsuneo Sato et al., *Securities Law in Japan*, in HANDBOOK, *supra* note 23, at 129; see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 11-4 to 11-5.

164. See, e.g., Sato et al., *Securities Law in Japan*, in HANDBOOK, *supra* note 23, at 129; see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 11-4 to 11-5.

165. See Sato et al., *Securities Law in Japan*, in HANDBOOK, *supra* note 23, at 133. For discussion of the goals of Japanese securities regulation, see John Palenberg & Alan L. Beller, *Japan, Exemptions for Institutional Investors*, 13 U. PA. J. INT’L BUS. L. 547, at 547.

166. See GLOBAL OFFERINGS, *supra* note 74, at 91.

167. *See id.* at 93. The SEL provides that unless certain disclosure exceptions, such as the “qualified institutional investors” exceptions and de minimus exceptions, apply an issuer must file with the Minister of Finance before making a public offering of new or outstanding securities. *See id.* at 90–93. A public offering is defined as either (1) a solicitation made to “many persons, which means 50 or more, in Japan, unless the solicitation is made exclusively to qualified institutional investors,” or (2) a solicitation made to persons generally, unless certain conditions are met concerning the sophistication of the offeree or the number of offerees. *See id.* at 91–92.

168. See GLOBAL OFFERINGS, *supra* note 74, at 93.

169. *See id.* The prospectus must include the following general categories of information:

- (a) matters relating to the public offering or distribution;
- (b) matters relating to the issuer and its business (its history, the objective of the company, its stocks, shareholders, officers, employees, assets, material contracts, research and development, etc.); and
- (c) matters relating to the financial condition of the issuer.

report on such financial statements for the last two fiscal years.<sup>170</sup> The auditor's report "must be prepared either by certified public accountants (CPA) who are qualified in Japan or by an auditing corporation organized in Japan."<sup>171</sup> A foreign corporation may issue financial statements not audited by either a qualified Japanese CPA or auditing organization if the following two requirements are met: (1) the financial statements are prepared in a manner similar to SEL standards; and (2) the audited statements were prepared by a person or entity deemed by SEL similar to a Japanese auditor.<sup>172</sup>

Issuers of securities listed on a stock exchange and companies who previously filed an SRS must file a yearly securities report with the MOF.<sup>173</sup> Such securities reports are open to public inspection at the MOF for a certain period.<sup>174</sup> Issuing companies must file semi-annual securities reports in addition to the annual report.<sup>175</sup> Moreover, these issuers must file a current report with the MOF in situations in which material facts have occurred since the last filing.<sup>176</sup>

### J. Australia

Six states, each with its own legislature, make up the federation state of Australia.<sup>177</sup> Although there is also a Commonwealth legislature known as the Commonwealth Government, the Commonwealth has not enacted unified Australia-wide companies and securities industry legislation.<sup>178</sup> Instead, the states agreed to pass their own legislation but to

---

170. For companies that are already making continuous disclosure in Japan, the SRS must include financial statements for the two most recent fiscal years. See GLOBAL OFFERINGS, *supra* note 74, at 95.

171. *Id.* at 95-96.

172. See *id.* at 96.

173. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 11-29; See also Sato et al., *Securities Law in Japan*, in HANDBOOK, *supra* note 23, at 135.

174. See *id.*

175. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 11-30.

176. Situations in which a current report must be filed include, among others, an offering abroad of securities of the issuer in an amount greater than 100 million yen; changes in the parent company or subsidiaries having at least a ten percent relationship with the issuer in terms of sales, assets or capital; changes in shareholders having at least ten percent or more shares in the issuer; and where a material "calamity" has occurred. See *id.* at 11-31 to 11-32 & n.1; see also Hideki Kojima, Letter to Prof. Marc I. Steinberg (Sept. 1, 1998) (unpublished manuscript on file with author).

177. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 10-4. The states include New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania.

178. See Wood, *supra* note 122, at 274; see also 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 10-4 to 10-6 (explaining the division of power between the Commonwealth Government and the states).

make it uniform.<sup>179</sup> Australia Corporations Law is governed principally by the regulating of the issuance of securities.<sup>180</sup> The Corporations Law is in effect throughout Australia but made applicable locally by various State and Territory legislation.<sup>181</sup> “The regulation of public offers is undertaken primarily by the Australian Securities Commission (ASC), established in 1990 to oversee the administration and enforcement of the Corporations Law.”<sup>182</sup> The members of the ASC are appointed by the states.<sup>183</sup> Australia’s principal stock exchange is the Australian Stock Exchange (the “ASX”). A branch operates in each state capital.<sup>184</sup>

The Corporations Law requires that, unless there is an applicable exemption, a person may not offer for sale the securities of a corporation unless a prospectus has been produced.<sup>185</sup> “A copy of the complying prospectus, together with an application to issue securities, must be lodged with the ASC and registered, when registration is required.”<sup>186</sup> Unless an exemption applies, prospectus registration is required under the Corporations Law.<sup>187</sup> After due diligence is conducted by statutorily prescribed persons, the prospectus must contain:

all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the corporation and the rights attaching to the securities.<sup>188</sup>

The ASC has established limited guidelines concerning what must be contained in a prospectus. With certain exceptions (such as director interests), there are no mandatory items to be disclosed in the prospectus. Instead, the general “reasonable investor” disclosure standard

---

179. See Wood, *supra* note 122, at 274.

180. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-20.

181. See Ian R. Davis & Marcus Best, *Securities Law in Australia*, in HANDBOOK, *supra* note 23, at 16.

182. *Id.* at 17. The ASC is responsible for protecting, facilitating, and improving the performance of companies and securities and futures markets. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-20.

183. See Wood, *supra* note 122, at 274.

184. See 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-20.

185. See *id.* at GEN 3-21 & n.20. An issuer cannot “make invitations or offers for subscription or purchase of securities of an existing corporation without issuing a prospectus that complies with the Corporations Law.” Davis & Best, *Securities Law in Australia*, in HANDBOOK, *supra* note 23, at 17.

186. *Id.* at 18.

187. See *id.* Exemptions are available for a prospectus relating to an offering of shares listed on the ASX, offerings to employees and offerings to certain institutional investors. See *id.* at 18.

188. 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-24.

governs.<sup>189</sup> Under this standard, those involved in the preparation of a prospectus (rather than the legislature or the regulator) are responsible for determining the information necessary to be provided in such prospectus for potential investors and their advisers.<sup>190</sup> An issuer must file a supplementary prospectus or a replacement prospectus with the ASC if the issuer becomes aware of any material deficiency or omission in, any significant change affecting any matter contained in, or any significant new matter that should be contained in, the prospectus.<sup>191</sup> A prospectus may not be used to issue securities more than twelve months after the date of issue of such prospectus.<sup>192</sup>

In Australia, periodic disclosure requirements are imposed on corporations rather than on registered securities.<sup>193</sup> In 1994, the Corporate Law Reform Act became effective. One of the primary goals of this Act is to require entities that meet certain requirements detailed below ("disclosing entities") to disclose material information on a periodic and continuous basis so as to enable investors to make informed investment decisions.<sup>194</sup> Under the new law, disclosing entities are required to notify the ASX (if listed on the ASX) or the ASC (in other cases) of material matters as they occur and also are required to file annual and half-yearly financial reports.<sup>195</sup> A disclosing entity is an entity that has "ED Securities" (short for "enhanced disclosure securities"), which include securities of a class quoted on the ASX and shares issued under a prospectus where there are at least 100 security holders of that class of securities.<sup>196</sup> Furthermore, a listed company must file with the ASX annual and periodic reports.<sup>197</sup>

A listed company must notify the ASX of any information likely to materially affect the value of the company's securities. Moreover, "an issuer of securities must notify the ASX of any 'alterations' to the securities, including new issues, capital reductions and reconstructions."<sup>198</sup>

---

189. *See id.*

190. *See id.*

191. *See id.* at GEN 3-24 to 3-25. Supplementary prospectuses are not required to be registered. *See id.* at GEN 3-25.

192. *See id.*

193. *See id.* at GEN 3-27 & n.28.

194. *See id.* at GEN 3-28.

195. *See id.*

196. For other types of ED securities, *see id.*

197. *See id.* at GEN 3-28. The ASX listing rules require that a company file its annual report with the ASX and distribute the annual report to shareholders within four months of the company's fiscal year end. In addition, listed companies must file half-yearly accounts within seventy-five days of the end of the period. *See id.* at GEN 3-28 to 3-29.

198. Ian Davis & Marcus Best, in HANDBOOK, *supra* note 23, at 23. 10E INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at GEN 3-29.

### III. EFFORTS AT HARMONIZATION

#### A. *Summary of Different Approaches*

In general, two approaches have been advocated in order to harmonize securities markets regulation on an international basis. The first approach, termed cooperation or commonality, has as its objective the development of a common set of regulations, including a standardized disclosure document, to be used by all participants involved in international offerings.<sup>199</sup> The second approach, reciprocity, has as its goal the mutual recognition by one country of the regulatory scheme and related documents of another country as long as certain minimum standards are met.<sup>200</sup> Arguably, harmonization through reciprocity is easier to achieve, particularly in view of the fact that there is not a single international regulator charged with overseeing global offerings. There have been attempts to achieve harmonization through cooperation or commonality, however, in spite of the obstacles. This section of the article will discuss the various approaches that have been taken in response to the overriding goal: harmonization in a global marketplace.

#### B. *Cooperation/Commonality*

##### 1. General

In an increasingly global economy, it may not be beneficial for regulators in every country where an offering occurs to demand access to information and exercise the powers needed to achieve the perceived regulatory goals of that jurisdiction. This is particularly true in more complex public offerings that may take place in several jurisdictions. Therefore, under one approach, as mentioned above, regulators are beginning to cooperate internationally on both a bilateral and multilateral basis in order to carry out their regulatory and enforcement objectives.<sup>201</sup> The challenge in this global arena, as in a domestic securities market, is to strike a balance between adequate regulation in order to protect investors, facilitation of the capital raising process, and maintenance of

---

199. See Warren, *supra* note 6, at 191. A regulatory structure based on a theme of commonality would have many benefits including the use of uniform information in making global investment decisions, the lowering of transaction costs, the facilitation of cross-border offerings, and the ability to establish an international database. See *id.*

200. See *id.*

201. See Kang, *supra* note 7, at 265. For example, regulators have agreed to cooperate in order to "promote the efficient allocation of regulatory responsibilities when one regulator has agreed to defer to the regulatory oversight activities of another regulator whether in the context of linkage arrangements between two markets or when registration and other rules are sufficiently comparable to permit reliance on the other system." *Id.*

acceptable levels of risk.<sup>202</sup> In response, international organizations such as the International Organization of Securities Commissions (“IOSCO”) have attempted to develop international consensus on certain key issues, such as disclosure and insider trading. Through this process, IOSCO plays a key role in recommending minimum standards of acceptable conduct and deterring the emergence of unchecked regulatory competition that would result in a race to the bottom.<sup>203</sup>

Unfortunately, there are often problems in harmonizing international regulatory systems from jurisdiction to jurisdiction based on differences among the various markets, including:

- historical and cultural differences;
- differences in customs and practices;
- legal or judicial distinctions among jurisdictions;
- differences in banking regulations;
- differences in the development and maturity of markets;
- differences in goals and objectives of the regulatory system;
- differences in the role of markets, the type of market and the market participants; and
- differences in market structure.<sup>204</sup>

There are also differences in staffing, resources and sophistication of personnel.

Furthermore, the role that competition plays in a regulatory system becomes important. While regulatory competition can be beneficial to the extent that it encourages innovation and diversity in the securities arena, such competition must be kept within certain limits. Under such circumstances, competition may discourage regulators from adopting rules that are too stringent, while at the same time allowing market participants to select the most appropriate regulatory levels.<sup>205</sup> The foremost

---

202. Most regulators in the international arena agree on the components of a balanced regulatory system—the system must have rules addressing “market integrity and efficiency, financial integrity and customer protection.” *Id.* at 268–69.

203. *See id.* This phrase has been used to describe the absence of minimum regulatory standards that would occur if countries competed with each other for capital with total disregard for the protection of investors. The fear is that in a totally unregulated global market, individual countries would lower or dissolve regulatory requirements in order to attract investors.

204. *See id.* at 269.

205. *See id.* at 270. Additionally, this framework will provide regulators with a means through which they can incorporate certain features of other regulatory systems into their own systems, thus further developing their regulatory schemes. *See id.* at 270–71.



player in encouraging and implementing cooperation in the international market while attempting to maintain market competition is IOSCO.

## 2. IOSCO

In 1974, several Western nations organized the Inter American Association of Securities Commissions today known as IOSCO. IOSCO was initially formed in order to provide a setting in which representatives of the member countries could meet to discuss securities regulation matters. An additional goal of IOSCO in the early years after its inception was to assist capital formation in the Western Hemisphere.<sup>206</sup> By 1983, the organization had become a worldwide organization and was incorporated by an act of the Quebec Parliament as a non-profit corporation under Quebec law.<sup>207</sup> In 1987, in response to concerns raised by the increasing internationalization of the securities markets, the Technical Committee of IOSCO established a Working Party on Multinational Equity Offers (later renamed the Working Party on International Equity Offers) to perform a study of the world's capital markets and the issues related thereto.<sup>208</sup> At the November 1988 meeting of IOSCO, the U.S. SEC released a policy statement entitled *Regulation of the International Securities Markets*.<sup>209</sup> The policy statement identified three areas of regulation that should be addressed in an effective international securities market regulatory system: efficient structures, sound disclosure systems, and fair and honest markets.<sup>210</sup> In its statement

---

206. See A. A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. INT'L L. & BUS. 15, 15-16 (1996).

207. The charter members of IOSCO are the countries of the North American continent, Quebec and Ontario. The non-charter members are the other countries that have since joined the organization. See Wolff, *supra* note 4, at 400.

208. See INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 8. The following goal of the Working Party was established:

to make a study of the emerging methods of offering securities on a multinational basis . . . and of the problem of multiple listings; to define the categories of issuers involved; to define the regulatory problems encountered; and so far as is consistent with maintaining the quality of regulation necessary for the protection of investors, actively to promote regulation which facilitates the process whereby world class issuers can raise capital in the most cost effective and efficient way in all capital markets where investor demand exists.

*Id.* at 7.

209. Regulation of International Securities Markets, Exchange Act, Release No. 6807, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,341, at 89,576 (Nov. 14, 1988) [hereinafter Release No. 6807]; see also David S. Ruder, *Reconciling U.S. Disclosure Policy with International Accounting and Disclosure Standards*, 17 NW. J. INT'L L. & BUS. 1, 1 & n.1 (1996).

210. See Release No. 6807, *supra* note 209, at 85,576-77. The SEC further advised that "securities regulators in each nation should work closely with their foreign counterparts and seek coordinated international solutions to world market problems." *Id.*

the SEC said that “in seeking solutions to common problems, securities regulators should be sensitive to cultural differences and national sovereignty concerns. As regulators seek to minimize differences between systems, the goal of investor protection should be balanced with the need to be responsive to the realities of each marketplace.”<sup>211</sup>

IOSCO’s annual conference brings together governmental securities regulators, self-regulatory organization personnel, as well as private-sector observers with an interest in international securities regulation.<sup>212</sup> The Preamble to the By-Laws of IOSCO states:

Securities authorities resolve to cooperate together to ensure a better regulation of the markets, on the domestic as well as on the international level, in order to maintain just and efficient markets:

- to exchange information on their respective experiences in order to promote the development of domestic markets;
- to unite their efforts to establish standards and an effective surveillance of international securities transactions; and
- to provide mutual assistance to ensure the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.<sup>213</sup>

Although the size and diversity of IOSCO allow for contributions from virtually all players in securities regulation, IOSCO has no authority to impose its recommendations on regulators and frequently finds it difficult to obtain a consensus amongst regulators.<sup>214</sup> Solutions are often worked out informally before being drafted as agreements between the concerned parties.<sup>215</sup> Discussions at IOSCO conferences often can result in bilateral or multilateral solutions to regulatory problems.<sup>216</sup>

---

211. *See id.*

212. *See* Roberta Karmel, *Securities Regulation: The IOSCO Venice Conference*, N.Y.L.J., Oct. 19, 1989, at 3. Professor Karmel notes that although many organizations have been formed in response to the globalization of the capital markets, IOSCO’s membership includes the securities regulators of scores of countries, thus making it the most important of these organizations. *See id.*

213. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PREAMBLE TO BY-LAWS; *see also* Sommer, *supra* note 206, at 16 & n.2.; Kang, *supra* note 7, at 266 (stating that IOSCO’s primary objective is to “develop, on a global basis, high standards of financial market regulation, minimize systematic risk and facilitate cross border transactions”).

214. *See generally* Karmel, *supra* note 212, at 3.

215. There are approximately 465 agreements in place in fifty-two jurisdictions. *See* Kang, *supra* note 7, at 266 n.61.

216. *See* Karmel, *supra* note 212, at 3.

The organizational structure of IOSCO includes the General Assembly, a General Secretary (and General Secretariat located at the Quebec Securities Commission), and various committees. The Presidents Committee is the most powerful committee and consists of the presidents of all of the regular and associate members.<sup>217</sup> The Presidents Committee meets once a year at the annual conference. It is responsible for approving all resolutions; such resolutions then become policies and pronouncements of IOSCO. The Presidents Committee also elects members of the Executive Committee.<sup>218</sup>

The Executive Committee is the principal governing body and consists of twelve representatives elected by the Presidents Committee; the chairs of the Emerging Markets and Technical Committees; and a representative from each of the regional standing committees.<sup>219</sup> The Executive Committee meets throughout the year, focusing primarily on governance and management issues.<sup>220</sup>

The Technical Committee is responsible for the promoting of "regulation which facilitates the process whereby world class issuers can raise capital in the most cost effective and efficient way in all capital markets."<sup>221</sup> Its members are the representatives of sixteen securities agencies of the larger and more developed markets in the world.<sup>222</sup> The Technical Committee operates through five Working Groups, each of which is responsible for reviewing issues related to international securities regulation in a defined area and for making recommendations to the Technical Committee. The Technical Committee in turn forwards the recommendations to the Presidents Committee and Executive Committee for approval and promulgation.<sup>223</sup> The defined areas for which the Working Groups are responsible include: (1) multinational disclosure and accounting; (2) regulation of secondary markets; (3) regulation of market intermediaries; (4) enforcement and exchange of information; and (5) investment management.<sup>224</sup>

---

217. See Sommer, *supra* note 206, at 18.

218. See *id.* at 18 & n.12.

219. See Sommer, *supra* note 206, at 18 & n.13.

220. See *id.* at 18. Although the Executive Committee is apparently not charged with the formulation of policy statements, all Technical Committee statements and actions must be approved by the Executive Committee. See *id.*

221. INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 4. It was intended that the Technical Committee primary objective was "to summarize the key problems in regard to a number of regulatory frictions . . . affecting international equity offers." *Id.*

222. See Sommer, *supra* note 206, at 19 & n.15. The member regulatory bodies are from the following countries: Australia, Canada, France, Germany, Hong Kong, Italy, Japan, The Netherlands, Sweden, Switzerland, the United Kingdom, and the United States. See generally INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 4.

223. See Sommer, *supra* note 206, at 19.

224. See *id.* at 19 & n.18.

IOSCO has three classes of membership: regular, affiliate and associate. Regular members consist of either governmental regulators of securities markets, or a self-regulatory agency, such as a stock exchange.<sup>225</sup> Associate members are made up of associations of public regulatory bodies having jurisdiction in the subdivisions of a country when the national regulator is a member, such as the North American Securities Administrators Association.<sup>226</sup> Affiliate members include international organizations whose goal is the regulation or the development of capital markets, or any other organization recommended by the Executive Committee.<sup>227</sup> While affiliate members are not given voting privileges and may not attend meetings of the Presidents Committee or the Executive Committee, they are allowed to be members of the Technical Committee and its working parties.<sup>228</sup>

Particularly relevant for purposes of this article is the area of international equity offers. In 1989, IOSCO published a report focusing on this issue entitled *International Equity Offers* (the "Report").<sup>229</sup> This Report, prepared by the Working Party, was adopted at IOSCO's 14th annual meeting.<sup>230</sup> The Report recommended development of a regulatory scheme that would allow use of a single disclosure document in multijurisdictional offerings.<sup>231</sup> The Report discussed two principal options for developing a single prospectus: (1) harmonization of disclosure standards and (2) reciprocity (acceptance of home country or predominant market requirements).<sup>232</sup> The Report also recommended the development or recognition of internationally acceptable accounting and auditing standards that would "greatly facilitate the development of the use of a single disclosure document."<sup>233</sup> The Report further recommended that an annual survey be performed of changes that have been made in each jurisdiction that could affect multinational offers and sug-

---

225. See *id.* at 17 & n.5.

226. See *id.* at 17 & n.6.

227. See *id.* at 17 & n.7.

228. See Wolff, *supra* note 4, at 400 & n.367.

229. See generally INTERNATIONAL EQUITY OFFERS, *supra* note 4.

230. See Wolff, *supra* note 4, at 402 & n.377.

231. See INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 75; see also Wolff, *supra* note 4, at 402 & n.378.

232. INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 75; see also Wolff, *supra* note 4, at 402 & n.379. International Equity Offers recommended that "regulators be encouraged, where consistent with their legal mandate and the goal of investor protection, to facilitate the use of single disclosure documents, whether by harmonization of standards, reciprocity or otherwise." *Id.*

233. INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 75. "It is recommended that timeliness and the period of financial reporting should either be harmonised or accommodations made to foreign issuers." *Id.*

gested that such changes be reported by each jurisdiction represented on the Technical Committee.<sup>234</sup>

Other recommendations included in the Report were:

- (1) Development of an annual report format which would serve as the basis for a universal prospectus;
- (2) Coordination of procedures among regulators to facilitate multijurisdictional offerings and listings;
- (3) Seeking closer alignment of stabilization and other practices relating to controls in the primary international markets;
- (4) Codification of principles among regulators to limit the extra-territorial application of domestic statutory and regulatory provisions governing offerings; and
- (5) Increased standardization of major capital markets with respect to restrictions on resales of non-publicly sold securities.<sup>235</sup>

Perhaps the greatest obstacle facing multinational offerings in developed markets has been accounting practices.<sup>236</sup> As recognized in the Report, harmonization of international disclosure regulations through use of a single disclosure document cannot be achieved without establishing international accounting and auditing standards.<sup>237</sup> From its inception, IOSCO has supported the International Accounting Standards Committee ("IASC"). IASC was organized in 1973 in order to develop internationally acceptable accounting standards.<sup>238</sup> The IASC is not an IOSCO organization, but rather an arm of the International Federation of Accountants. By 1992, IOSCO's Working Party on Multinational Disclosure and Accounting had completed a review of the IASC auditing standards. The Presidents Committee of IOSCO adopted a resolution urging members of IOSCO to recognize International Accounting Standards ("IASS") for use in international offerings as well as continuous reporting by foreign issuers.<sup>239</sup> In 1993, the Presidents Committee passed a resolution directing that members accept cash flow

---

234. *See id.* at 76.

235. *Id.* at 75-76; *see also* Sommer, *supra* note 206, at 23 & n.36.

236. *See* Sommer, *supra* note 206, at 23.

237. *See* Karmel, *supra* note 212, at 3.

238. *See* Sommer, *supra* note 206, at 23 & n.38.

239. *See* Wolff, *supra* note 4, at 403 & n.387.

statements prepared in accordance with IAS 7 in connection with international offerings and reporting by foreign issuers.<sup>240</sup>

At the 1995 annual meeting, IOSCO and IASC published a communique that they had reached an agreement regarding accounting practices.<sup>241</sup> According to this agreement, by 1999 the IASC plans to develop a comprehensive set of core principles. The IOSCO Technical Committee thereafter will recommend that these principles be implemented for cross-border offerings in all global markets.<sup>242</sup>

Although IOSCO and IASC had reached an agreement, the question still remained as to whether the U.S. SEC would endorse the international accounting standards. In 1996, the SEC published a release applauding the IASC for its efforts with respect to the contemplated core principles but stated that those principles would be acceptable to the SEC "only if they constituted a comprehensive, generally accepted basis of accounting, were of high quality that would result in compatibility and transparency, provided for full disclosure, and were rigorously interpreted and applied."<sup>243</sup> The SEC's expressed reservation raises uncertainty whether the IASC principles will be accepted by the SEC as international standards.<sup>244</sup> Although IASC standards are comparable to U.S. generally accepted accounting principles ("U.S. GAAP"), they are not presented in the same detail as are U.S. GAAP.<sup>245</sup> Nonetheless, as discussed later in this article, the SEC thus far has cooperated with IASC in certain accounting matters.<sup>246</sup>

---

240. See *id.* at 403 & n.389.

241. See Sommer, *supra* note 206, at 24–25 & n.43. In 1994, a disagreement arose between IOSCO and IASC threatening to undermine all prior steps taken in the field of international accounting. IOSCO had stated that it had identified a set of "core" accounting principles and would withhold action on individual standards until all of the core principles were promulgated. Evidently, the IOSCO Technical Committee had considered and generally found to be satisfactory, but would not formally approve, approximately fourteen principles proposed by the IASC. In response, the chairman of IASC strongly criticized IOSCO's methods. See Sommer, *supra* note 206, at 24 & n.40.

242. See *id.* at 25 & nn.44 & 45. As noted in the Final Communique of the Twenty-Third Annual Conference of the International Organization of Securities Commissions, the "core standards" work program is still proceeding and IOSCO is preparing to assess the core standards developed by IASC upon the completion of the standards. Moreover, IOSCO is reviewing the International Auditing Practice Committee Standards in order to establish a process to comment on the standards prepared by IASC. See generally INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, FINAL COMMUNIQUE OF THE 23RD ANNUAL CONFERENCE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (1998) [hereinafter FINAL COMMUNIQUE].

243. *Id.* at 25 & n.46.

244. See Ruder, *supra* note 209, at 11.

245. See *id.*

246. See *infra* notes 291–293 and accompanying text.

In May 1998, following the meetings of the Executive and Technical Committees in Paris, IOSCO released for public consultation four documents relating to global securities regulation. Two of those documents are particularly relevant to issues discussed in this article. The first, entitled *Objectives and Principles of Securities Regulation* (“*Objectives*”), sets forth thirty fundamental principles of securities regulation. According to an IOSCO spokesperson, “[a] country’s adherence to these 30 principles will install confidence in international investors and enhance that country’s participation in the global financial community.”<sup>247</sup> The second, entitled *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers* (“*International Disclosure Standards*”), presents a set of non-financial statement disclosure standards aimed at facilitating cross-border offerings through the use of a single disclosure document. Both of these documents were adopted by IOSCO at the 1998 IOSCO Annual Conference in Nairobi, Kenya in September 1998.<sup>248</sup>

*Objectives* sets out three objectives of securities regulation and, as noted above, presents thirty principles for the practical implementation of the objectives. As stated in the introduction to the document, “[s]ound and effective regulation and, in turn, the confidence it brings is important for the integrity, growth and development of securities markets.”<sup>249</sup> The three core objectives of securities regulation as set out in *Objectives* are:

- to protect investors;
- to ensure that markets are fair, efficient and transparent; and
- to reduce systemic risk.<sup>250</sup>

According to the IOSCO document, the most important way to ensure investor protection is through full disclosure of information deemed material to an investor’s decision.<sup>251</sup> One key component of dis-

---

247. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRESS COMMUNIQUE 1 (1998) [hereinafter MAY COMMUNIQUE].

248. See generally FINAL COMMUNIQUE, note 242 *supra*, at 1. As noted by the Minister of Finance of Kenya who opened the 23rd Annual Conference, “the increasing globalization of financial markets demands close cooperation between financial regulators.” *Id.* He stressed that financial regulators must take responsibility for promoting just, fair and efficient markets. See *id.*

249. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (1998) at *IOSCO Document Library*, (visited Apr. 14, 1999) <<http://www.IOSCO.org/docs-public/1998-objectives.html>> [hereinafter OBJECTIVES AND PRINCIPLES].

250. See *id.*

251. See *id.* at 6.

closure in this context is adherence to internationally accepted accounting and auditing standards.<sup>252</sup> Second, regulators should help to ensure fair markets through the approval and supervision of those persons providing investment services. In addition, regulation should ensure that all investors have fair access to market facilities and market or price information. Markets should not allow unfair advantage to some investors over others.<sup>253</sup> Finally, regulation should aim to reduce the risk of market failure.<sup>254</sup>

The second document, *International Disclosure Standards*, prepared by the Technical Committee of IOSCO, identifies disclosure standards for foreign companies entering a host-country market. The standards set forth in this report relate to non-financial statement disclosure requirements and do not address accounting or auditing issues. The Press Communique published in May 1998 states that "the adoption of these standards will allow issuers to prepare a single disclosure document that will serve as an 'international passport' to capital raising and listing in more than one jurisdiction at a time."<sup>255</sup> *International Disclosure Standards* is divided into two parts. Part I includes the introduction and sets out the disclosure standards (the "Standards") for use by companies in connection with cross-border public offerings. Part II discusses additional disclosure issues that are outside the scope of the Standards but that still may need to be addressed.<sup>256</sup>

The introduction to *International Disclosure Standards* discusses the role of securities regulators in facilitating cross-border offerings while ensuring investor protection. It states that a factor in achieving this balance is the "development of a generally accepted body of non-financial statement disclosure standards that could be addressed in a single disclosure document to be used by foreign issuers in cross-border offerings and initial listings, subject to the host country review or approval processes."<sup>257</sup>

The report then discusses exceptions to the application of the Standards, including offerings between the U.S. and Canada that are governed by the Multijurisdictional Disclosure System between the U.S.

---

252. *See id.*

253. *See id.* at 7.

254. *See id.* at 8.

255. MAY COMMUNIQUE, *supra* note 247, at 2.

256. *See generally* INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS INTERNATIONAL DISCLOSURE STANDARDS FOR CROSS-BORDER OFFERINGS AND INITIAL LISTINGS BY FOREIGN ISSUERS (1998) at *IOSCO Document Library* (visited Mar. 29, 1999) <[http://www.IOSCO.org/doc-public/1998-intnl\\_disclosure\\_standards\\_html](http://www.IOSCO.org/doc-public/1998-intnl_disclosure_standards_html)> [hereinafter INTERNATIONAL DISCLOSURE STANDARDS].

257. *Id.* at 3.



and Canada as well as offerings made within the EC.<sup>258</sup> The report then discusses other issues including, but not limited to, materiality, the possibility that additional information may need to be disclosed beyond what is required by the Standards, and information presentation, including a requirement that the document must be written in a language acceptable to the host country.<sup>259</sup> Finally, Part I lists the Standards that should be included in all disclosure documents including prospectuses and registration statements. The Standards are divided into ten categories, each containing one or more detailed Standards.<sup>260</sup>

As noted above, Part II discusses additional issues outside the scope of the Standards such as materiality, incorporation by reference, and forward-looking information. Many of these issues are discussed in terms of exceptions or differences in individual countries and identify the specific requirements for each country.<sup>261</sup> Finally, Part II contains a paragraph discussing mutual recognition within the EC and basically provides that offerings or listings which take place within the EC Member States by a company that has its registered office in a Member State will be subject to the mutual recognition provisions of the EC Directives.<sup>262</sup>

### 3. U.S. SEC Flexibility

The internationalization of the securities markets poses a difficult question for the U.S. SEC: how adequately to balance investor protection, accommodate diversification by U.S. investors in the global

---

258. Other exceptions include offerings by companies incorporated in New Zealand that are listed or seeking to be listed on an Australian Securities Exchange, certain offerings in Hong Kong, and companies organized in a foreign country wishing to make an offering in the U.S. who do not meet the SEC's definition of a "foreign private issuer." *Id.* at 4.

259. *See id.* at 5-6.

260. The major categories for the Standards are: Identity of Directors, Senior Management, and Advisers; Offer Statistics and Expected Timetable; Key Information; Information on the Company; Operating and Financial Review and Prospects; Directors, Senior Management, and Employees; Major Shareholders and Related Party Transactions; Financial Information; the Offer and Listing; and Additional Information. Each category then contains one or more Standards with a description of the information required to be presented. For example, the category labeled "Information on the Company" lists four Standards: History and Development of the Company; Business Overview; Organizational Structure; and Property, Plants, and Equipment. Under the Standard History and Development, there are seven items that must be disclosed; such as the legal name of the company and the date of incorporation. *See generally* INTERNATIONAL DISCLOSURE STANDARDS, *supra* note 256.

261. *See id.* at II-3. For example, Paragraph I of Part II of *International Disclosure Standards* discusses materiality and sets forth an explanation of the materiality concept as it applies in certain countries. *See id.*

262. *See id.* at II-36 to II-37.

markets, and facilitate foreign issuer use of the U.S. capital markets.<sup>263</sup> Historically, the SEC has focused on increasing market integrity and investor protection through increased issuer disclosure requirements.<sup>264</sup> However, it has become increasingly clear to foreign issuers that U.S. disclosure requirements are more onerous than the requirements of their home countries.<sup>265</sup> As perceived by critics, the information called for is unduly extensive, going well beyond what is required by regulators in most other countries.<sup>266</sup> In response to the increased competition among securities markets, the SEC evidently is acquiescing in the notion that the disclosure requirements must be relaxed somewhat in order to increase foreign investment in the United States. Nevertheless, the perceived complexity of the U.S. regulatory system, coupled with concerns about the level of disclosure required, have made the U.S. securities markets somewhat less attractive to foreign issuers.<sup>267</sup>

Thus, the SEC is beginning to recognize that strict adherence to its disclosure standards may result not only in making the U.S. markets less competitive, but also in disadvantaging domestic investors.<sup>268</sup> Accordingly, the SEC recognizes to some extent the need to harmonize the requirements of the U.S. securities laws with those of other jurisdictions.<sup>269</sup> In addition, the SEC acknowledges that it must allow non-U.S. issuers greater flexibility in meeting U.S. disclosure requirements in

---

263. See Bevis Longstreth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319, 320 (1995).

264. See Jorge Gonzalez, Jr. & Christopher D. Olive, *Foreign Issuer Disclosure and Accounting Compliance in U. S. Public Offerings and Securities Listings*, 1 NAFTA: L. & BUS. REV. AMERICAS, Summer 1995, at 39, 40-41 & n.9.

265. See *id.* at 41.

266. See Braverman, *supra* note 1, at 37. "[F]oreign firms cannot reap the benefits of the American capital markets without complying with the United States' complex system of securities regulation." Merritt B. Fox, *Bridging the GAAP: Accounting Standards for Foreign SEC Registrants*, 29 INT'L L. 875, 875 (1995).

267. See Andreas J. Roquette, *New Developments Relating to the Internationalization of the Capital Markets: A Comparison of Legislative Reforms in the United States, the European Community, and Germany*, 14 U. PA. J. INT'L. BUS. L. 565, 569 & n.12 (1994); see generally Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997). Professor Fox notes that under the current U.S. approach to regulation of the securities markets, the U.S. regulatory scheme considers such factors as the nationality of the investors and the location where the transaction occurs in determining mandatory disclosure requirements. As a result, issuers are sensitive to the level of U.S. disclosure when they decide whether or not to make an offering in the United States and the greater the sensitivity, the less willing the issuer will be to offer shares in the U.S. Based on this approach, increased globalization of the securities markets will likely cause a reduction in the amount of disclosure required, primarily as a result of increasing political pressure from members of the U.S. securities industry whose goal is to increase the number of securities transactions in the U.S. See *id.*

268. See *id.* at 570.

269. See *id.*

order to provide U.S. investors with more opportunities to invest in foreign securities.<sup>270</sup> This movement towards cooperation in the securities field has resulted in new measures as discussed below.<sup>271</sup>

In 1979, the SEC adopted Form 20-F, an integrated registration statement and annual reporting form for use by foreign issuers under the Exchange Act.<sup>272</sup> In adopting Form 20-F, the SEC noted that the increased disclosure requirements prescribed by the form placed the amount of information required by foreign issuers on a level closer to that required by domestic issuers.<sup>273</sup> At the same time, the adoption of Form 20-F demonstrates that the SEC is aware of the differences in various national laws and business customs as exemplified by the reduced level of disclosure required in certain areas such as the description of business, industry segment disclosure, and management remuneration.<sup>274</sup> Shortly after Form 20-F was adopted, the SEC adopted three simplified Securities Act registration forms (Forms F-1, F-2 and F-3)<sup>275</sup> as the basis of an integrated disclosure system for foreign issuers.<sup>276</sup> By these actions, the SEC somewhat reduced the disclosure regimes for foreign issuers.<sup>277</sup>

The foreign issuer forms differ primarily in the extent to which they permit information about the company to be incorporated in the prospectus by reference from previous reports filed under the Exchange Act.<sup>278</sup> Not permitting incorporation by reference, Form F-1 mandates disclosure of specified financial information and also requires certain non-financial disclosure.<sup>279</sup> All three forms refer to Regulation S-X un-

---

270. *See id.* at 570 & n.20. As Sara Hanks, former Chief of the Office of International Corporate Finance at the SEC, stated: "[T]he SEC wants to meet the demands of U.S. investors to invest in foreign securities . . . [W]hile the SEC does not want to 'engage in a race to the bottom' or lowering of standards, it is willing to be more flexible to increase the attractiveness of U.S. markets." *Id.* at 570 & n.21.

271. *See infra* notes 272–293 and accompanying text.

272. *See* Exchange Act Release No. 16,371, [1979–1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,363, at 82,548 (Nov. 29, 1979).

273. The SEC stated that "the amendments consolidate the registration and annual report forms into a single form and increase the disclosure requirements presently applicable to foreign private issuers." *Id.*

274. *See id.*

275. *See* 17 C.F.R. §§ 239.31 to 239.33.

276. *See* Securities Act Release No. 6437, ¶ 72407, 1982 SEC LEXIS 355 (Nov. 19, 1982). At that time, the SEC also made revisions to Form 20-F.

277. *See* Roquette, *supra* note 267, at 573 & n.39.

278. *See* Gonzalez & Olive, *supra* note 264, at 50. Form F-1 is a full-disclosure long-form registration statement, comparable to an S-1 for domestic issuers, and is the form most often used in initial public offerings by foreign issuers. *See id.*

279. The types of non-financial disclosure required by Form F-1 include business segment information (if situations in which a foreign issuer has more than one line of business),

der the Securities Act for the requirements regarding financial statements and to Form 20-F for the other disclosure requirements.<sup>280</sup> Based upon these forms, foreign issuers have the option not to disclose certain categories of information or to have less stringent disclosure obligations.<sup>281</sup>

In a 1994 release entitled "Simplification of Registration and Reporting Requirements for Foreign Companies," the SEC listed the areas in which it previously had provided accommodations to foreign issuers, including the following:

- interim reporting on the basis of home country regulatory and stock exchange practices; quarterly reports are not required from foreign issuers;
- exemption from the proxy rules and Section 16 insider stock reports and short-swing profit recovery;
- executive compensation disclosure requirements that allow disclosure of compensation for executives on an aggregate basis, if so reported in the issuer's home country; and
- offering document financial statements that are required to be updated principally on a semi-annual, rather than quarterly, basis.<sup>282</sup>

In the 1994 release, the SEC adopted additional revisions designed to further streamline the registration and reporting process for foreign companies entering the U.S. securities markets. As stated by the SEC, "[t]hese provisions are part of the ongoing efforts of the [SEC] to ease the transition of foreign companies into the U.S. disclosure system, enhance the efficiencies of the registration and reporting processes and lower costs of compliance, where consistent with investor protection."<sup>283</sup> Based on the amendments, Form F-3, which incorporates Form 20-F disclosures by reference, can be used if the issuer's Form 20-F reports are current, provided that such issuer meets a float test of US \$75 million,<sup>284</sup> has been subject to the periodic reporting requirements of the

---

disclosure of material contracts, disclosure of risk factors pertinent to the offering, executive compensation, and management discussion and analysis. *See id.* at 50–51.

280. *See Braverman, supra* note 1, at 39 & n.33; *see also Gonzalez & Olive, supra* note 264, at 52–53.

281. *See id.* at 574 & n.40.

282. Securities Act Release No. 7053, [1993–1994 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 85,331, at 85,203–04 (April 19, 1994) [hereinafter Release No. 7053].

283. *Id.* at 85,203.

284. Pursuant to the definition of float in Form F-3, in order to be eligible to use Form F-3, an issuer must have common stock held by non-affiliates of at least \$75 million.

Securities Exchange Act for twelve months and has not defaulted on certain payments.<sup>285</sup> The amendments are based on the same eligibility criteria applicable to domestic companies using Form S-3.<sup>286</sup> In its release proposing the change to the criteria for Form F-3, the SEC noted that "foreign issuers with a public float of US \$75 million or more have a degree of analyst following in their worldwide markets comparable to similarly-sized domestic companies."<sup>287</sup> The revised Form F-3 eligibility provisions require the issuer to have filed at least one annual report prior to the first use of Form F-3.<sup>288</sup>

The SEC also has relaxed requirements for preparation of financial statements for foreign issuers. For reporting purposes under the Exchange Act, foreign companies that are listed and traded on U.S. stock exchanges or NASDAQ are allowed to file an annual report on Form 20-F. Form 20-F permits use of home country GAAP in the preparation of financial statements.<sup>289</sup> Whether or not the financials must be reconciled to U.S. GAAP is based upon whether the disclosures are being made for reporting purposes or in connection with the public offerings of securities.<sup>290</sup>

As a further example, as part of its rulemaking action in the 1994 release, the SEC adopted amendments to accept cash flow statements prepared in accordance with International Accounting Standard No. 7, without reconciliation to U.S. GAAP.<sup>291</sup> As noted in the proposing release, IAS 7 was amended in 1992 as part of IASC's project.<sup>292</sup> The differences between a cash flow statement prepared in accordance with IAS 7 and one prepared in accordance with U.S. GAAP will not impact an investor's understanding of cash flows in any significant manner.

---

285. See Ruder, *supra* note 209, at 6. In order to be eligible to use Form F-3, an issuer must not have failed to pay any dividend or sinking fund installment on preferred stock or any installment on indebtedness for borrowed money, which amount is material to the financial position of the issuer. See 17 C.F.R. § 239.33(3).

286. See Release No. 7053, *supra* note 282, at 85,204.

287. Securities Act Release No. 7029, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,252, at 84,685 (Nov. 15, 1993) [hereinafter Release No. 7029].

288. See Release No. 7053, *supra* note 282, at 85,204.

289. See Ruder, *supra* note 209, at 6.

290. See *id.* Professor Ruder notes the differences between disclosures on Form 20-F for reporting purposes and disclosures for public offerings. For example, foreign issuers must meet the disclosure requirements under Item 18 of Form 20-F, if Form 20-F filings will be incorporated by reference in Securities Act Form F-3 filings in connection with a public offering. Item 18 requires reconciliation to U.S. GAAP. See *id.* at n.21.

291. See Release No. 7053, *supra* note 282, at 85,205; see also Wolff, *supra* note 4, at 403 & n.390.

292. See Release No. 7029, *supra* note 287; see also *supra* notes 239-240 and accompanying text.

Thus, the SEC believes that statements prepared in accordance with IAS 7 should provide an investor with adequate information.<sup>293</sup>

### C. Reciprocity

#### 1. General

A second approach to the issues relating to an increasingly global marketplace is often referred to as reciprocity. This approach has been widely implemented throughout the world.<sup>294</sup> The EC and its Directives in the area of securities regulation provide an excellent example. Acceptance of this approach, however, has been more difficult for the U.S. SEC to accept. To date, the only clear application of this approach by the United States involves the Multijurisdictional Disclosure System ("MJDS") between the U.S. and Canada. Based upon the difficulties encountered by the SEC in adopting the MJDS,<sup>295</sup> it remains uncertain, if not unlikely, that this approach will be expanded by the U.S. to include any other countries. Both the EC and the MJDS are discussed below.<sup>296</sup>

#### 2. Multijurisdictional Disclosure System between U.S. and Canada

The SEC and the Canadian Securities Administrators ("CSA"), comprised of all of the securities regulatory authorities in Canada, adopted the MJDS "[i]n an effort to facilitate cross-border securities

---

293. See Release No. 7029, *supra* note 287, at 84,687.

294. See Longstreth, *supra* note 263, at 328. Mr. Longstreth, a former SEC Commissioner, notes, by way of example, that all major markets, other than the U.S., allow issuers to offer securities using their home country financials, prepared in accordance with the home country's auditing standards. See *id.*

295. For example, although the original proposal for a system for multinational offerings included the United Kingdom; as adopted, the system applied only to the United States and Canada. See *infra* note 306 and accompanying text. As stated by the SEC, Canada was a good partner for the MJDS because of the "similarities between the U.S. and Canadian investor protection mandates and disclosure requirements." Securities Act Release No. 6879, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,701, at 81,112 (Oct. 16, 1990); see also Securities Act Release No. 6568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743 (Feb. 28, 1985) (comparing the distribution and disclosure systems of the United States, Canada and the United Kingdom) [hereinafter Release No. 6568]; see also *infra* note 298 & accompanying text. Notwithstanding the similarities between the systems and the SEC's overall goal to "facilitate the free flow of capital," Canadian issuers who are making equity offerings under the MJDS and are thus required to use Form F-10 and 40-F must reconcile the financial statements contained therein to U.S. G.A.A.P. See Securities Act Release No. 6902, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,812 at 81,861 (June 21, 1991) [hereinafter Release No. 6902]; see also Securities Act Release No. 7004, 58 Fed. Reg. 35,367 (1993) (adopting SEC amendments to retain the financial statement reconciliation requirement for Form F-10).

296. See, e.g., Longstreth, *supra* note 263, at 329.

transactions between the U.S. and Canada.”<sup>297</sup> The purpose of the MJDS was to provide an easier and more flexible set of requirements for those companies wishing to undertake cross-border financing.<sup>298</sup> The agreement was based upon the premise that “Canadian and U.S. accounting, disclosure, supervisory, and enforcement standards are so similar that each country’s documents can be used in the other country without harm to investors.”<sup>299</sup>

The concept of the MJDS was originally proposed in a 1985 SEC release entitled “Facilitation of Multinational Securities Offerings.”<sup>300</sup> Interestingly, the release proposed two approaches for creating a system for the facilitation of multinational securities offerings: the reciprocal approach and the common prospectus approach.<sup>301</sup> Under the reciprocal approach, each participating country would agree to adopt a system whereby a disclosure document used in one country would be accepted for offerings in other countries as long as certain minimum standards were met. Thus, an issuer interested in a cross-border financing would initially comply with the disclosure requirements of its home country; thereafter, such disclosure documents would be recognized by a participating foreign country as complying with such foreign country’s disclosure requirements.<sup>302</sup> Under the common prospectus approach, countries would agree on a minimum level of securities regulation and would develop a mutually acceptable disclosure statement meeting those standards.<sup>303</sup>

In 1989, the SEC, the Ontario Securities Commission (“OSC”) and Quebec’s securities commission (the *Commission des Valeurs Mobilières du Québec* (“CVMQ”)) released a proposal for a multijurisdictional system between the CSA and the SEC.<sup>304</sup> The proposal was to develop a system which would be based primarily on reciprocity but would combine elements of both the reciprocal and the common prospectus approaches. As stated by the SEC, “[w]hile it is

---

297. Drummond, *supra* note 2, at 775.

298. *See id.* The MJDS was also created to *encourage* cross-border financing. *See id.*

299. Ruder, *supra* note 209, at 8. Professor Ruder notes that while the system will work in Canada because of the similarities between Canada and the U.S., the differences in the regulatory systems in most other countries are so great that this type of model cannot be implemented between the U.S. and other countries. *See id.*

300. Release No. 6568, *supra* note 295, at 87,318.

301. *See id.*; *see also* Drummond, *supra* note 2, at 782–83 & n.30. For a discussion of the advantages and disadvantages of both approaches, *see* Release No. 6568, *supra* note 295, at 87,322–23.

302. *See* Drummond, *supra* note 2, at 783.

303. *See* Release No. 6568, *supra* note 295, at 87,322; *see also* Drummond, *supra* note 2, at 783.

304. *See* Securities Act Release No. 6841, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,432, at 80,281 (July 26, 1989) [hereinafter Release No. 6841].

based on the concept of mutual recognition, the participants will be those jurisdictions whose disclosure systems, while different in detail provide investors with information to make an informed investment decision and financial statements of relevance and reliability."<sup>305</sup> Although initially the project was intended to include the United Kingdom, as adopted in 1991, the only participants were the United States and Canada.<sup>306</sup>

The MJDS is comprised of two different systems that work together. The system as implemented in the United States relates to Canadian issuers while the system as implemented in Canada relates to U.S. issuers. The MJDS, as adopted in Canada (the "Canadian MJDS"), permits U.S. issuers who meet certain requirements to make offerings in Canada using the disclosure documents prepared in satisfaction of U.S. SEC requirements.<sup>307</sup> The regulatory authorities in Canada review the documents to help ensure compliance with specific requirements of the MJDS, but do not review the substance of the disclosure unless they are aware of problems with the offering or a related disclosure.<sup>308</sup> The U.S. SEC reviews the filings in the same way it normally reviews domestic offerings.<sup>309</sup> Generally, the Canadian MJDS requires reconciliation to Canadian Generally Accepted Accounting Principles ("Canadian GAAP") for certain types of transactions including equity offerings of common stock. However, "in view of the underlying goal of the MJDS to facilitate global capital formation," under the Canadian MJDS, the CSA will accept reconciliation to IAS as established by the IASC in lieu of Canadian GAAP.<sup>310</sup>

Initially, in order for an issuer to use the Canadian MJDS, the issuer must have been incorporated or organized under the laws of the United States and have a thirty-six-month Exchange Act reporting history with the SEC.<sup>311</sup> In 1993 the Canadian MJDS was amended to make it more accessible to U.S. issuers.<sup>312</sup> The amendment reduced the reporting his-

---

305. *Id.* at 80,289.

306. *See* Drummond, *supra* note 2, at 784 & n.35.

307. *See id.* at 785 & n.41.

308. *See id.* at 785 & n.42.

309. *See id.* at 785 & n.43.

310. *See id.* at 785-86 (quoting Notice of National Policy Statement No. 45, 14 OSC Bull. 2844, 2847 (1991) [hereinafter Policy Statement 45]). Because the financial statements of many U.S. issuers that are making offerings under the Canadian MJDS are prepared in accordance with U.S. GAAP they will already comply with IAS and no reconciliation will be required. *See id.*

311. *See id.* at 786 & n.48 (citing Policy Statement 45, *supra* note 310, at 2900). Additionally, the issuer must plan to offer securities in compliance with certain transaction requirements under the MJDS (now reduced to 12 months). *See id.* at 286-87; *see infra* notes 312-313 and accompanying text.

312. *See* Wolff, *supra* note 4, at 368 & n.124.



tory requirement for U.S. issuers to twelve months. In addition, the US \$300 million market value requirement for offerings of certain securities, including common shares, was eliminated and instead, the amendment requires that the issuer's equity shares have a public float of not less than US \$75 million. Finally, under the amendment, the CSA will accept determinations of investment grade status by SEC-recognized rating agencies.<sup>313</sup>

Generally, once an issuer files a prospectus in Canada, the issuer becomes a reporting issuer and is thereby subject to the continuous disclosure, proxy and shareholder communication requirements of each of the provinces and territories of Canada.<sup>314</sup> The rules of the MJDS state that U.S. issuers who comply with U.S. requirements relating to periodic reports and proxy statements are in compliance with Canadian requirements for such information, as long as (1) such documents are provided contemporaneously in Canada, and (2) such documents are provided to Canadian residents in the same manner and at the same time as provided to U.S. residents under U.S. law.<sup>315</sup>

The MJDS as adopted by the SEC (the "U.S. MJDS") is almost identical to the Canadian MJDS, but is for the use of Canadian issuers offering securities in the United States. Thus, in order to register securities for an offering under the U.S. MJDS, a Canadian issuer can use an offering document prepared under Canadian law and file it with the SEC along with a cover page, certain legends, and various exhibits.<sup>316</sup> Unless the SEC has reason to believe there is a problem with the filing, it will not review the offering documents but will rely on the review conducted in Canada.<sup>317</sup> Although most of the Securities Act rules under Regulation C regarding the preparation and the form of the prospectus do not apply to Canadian issuers under the U.S. MJDS, other Securities Act rules regarding other aspects of the U.S. sale of securities generally continue to apply unless specifically exempted.<sup>318</sup> Like the Canadian MJDS, the eligibility requirements under the U.S. MJDS were amended in 1993 in order to make the U.S. MJDS more accessible. The reporting history requirement was reduced from thirty-six months to twelve months.<sup>319</sup> In

---

313. *See id.* at 368.

314. For a discussion of offering requirements in Canada, see *supra* notes 136–144 and accompanying text.

315. *See* Drummond, *supra* note 2, at 793 & n.75.

316. *See* Securities Act Release No. 6902, *supra* note 295, at 81,865.

317. *See id.* at 81,877; *see also* Drummond, *supra* note 2, at 794 & n.81.

318. *See* Release No. 6902, *supra* note 295, at 81,872. Examples cited by the SEC include requirements for prospectus delivery, safe harbor provisions relating to advertisements and other notices regarding MJDS offerings.

319. *See* Securities Act Release No. 7025, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,246, at 84,643 (Nov. 3, 1993) [hereinafter Release No. 7025].

addition, the market capitalization threshold was eliminated and a public float requirement of not less than US \$75 million was established.<sup>320</sup> As a result of the 1993 amendments, the U.S. MJDS imposes transaction eligibility requirements similar to those under the Canadian MJDS.

Importantly, the MJDS is one of the first multilateral approaches to the internationalization of the securities markets.<sup>321</sup> Perhaps even more significantly, under the MJDS the SEC has agreed for the first time, to accept disclosure documents that meet the standards of a foreign issuer's home country. The SEC perceives the implementation of the MJDS as a first step in creating a global playing field for securities transactions.<sup>322</sup> Nonetheless, it bears emphasis that the SEC's acceptance of this reciprocal approach was largely based upon the similarity of the regulatory systems and the accounting and auditing standards of Canada and the United States and by the large numbers of Canadian issuers investing in the U.S. markets.<sup>323</sup>

### 3. The European Community

The EEC was established by the 1957 Treaty of Rome.<sup>324</sup> As discussed in the first part of this article,<sup>325</sup> in 1987 the EEC became the European Community ("EC") under the Single European Act of 1987. The EC now consists of fifteen Member States: Belgium, Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Sweden, and Finland.<sup>326</sup> The goal of the EC is the "economic integration and close political cooperation" of its Member States.<sup>327</sup> In fact, it may be said that the EC is the "world's primary actor in accomplishing regulatory harmony in the field of securities regulation."<sup>328</sup> The EC's work in the securities fields has focused on three principles: (1) mutual recognition; (2) harmonization of minimum standards; and (3) coordination of regu-

---

320. *See id.*

321. *See* Drummond, *supra* note 2, at 802. "[T]he implementation of the MJDS is important because it has resulted in the significant harmonization of a substantial segment of securities regulation between two sovereign nations." *Id.* at 802-03.

322. *See* Roquette, *supra* note 267, at 576 & n.47.

323. *See id.* at 576-77 & n.49 (summarizing his discussion of the MJDS by questioning whether this "first step" really indicates a willingness by the U.S. to be more flexible in international offerings).

324. *See* Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

325. *See supra* notes 38-40 & accompanying text.

326. *See* 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-6.

327. Barnard, *supra* note 38, at 175.

328. Warren, *supra* note 6, at 193.

lation between regulatory authorities on the basis of home country control.<sup>329</sup>

The four principal institutions responsible for the EC are the European Parliament, the Council of Ministers (the "Council") (the only EU institution since the others are EC institutions), the European Commission (the "Commission"), and the Court of Justice.<sup>330</sup> The primary means by which the EC's policies are implemented in the securities regulation arena is through Council Directives.<sup>331</sup> Directives are binding on the Member States but each country can decide the method of implementation.<sup>332</sup> Directives accordingly require specific legislative measures in each Member State in order to be implemented.<sup>333</sup> As will be discussed below, the securities law Directives reflect the EC's basic philosophy of disclosure.<sup>334</sup>

Three Directives cover the admission to trading on the stock exchanges in Member States: the Admissions Directive, the Listing Particulars Directive, and the Interim Reports Directive.<sup>335</sup> They establish mandatory prerequisites which must be met in order to list securities across Europe, requirements to publish listing particulars, and periodic disclosure requirements that must be met once the securities have been listed.<sup>336</sup> The Admissions Directive<sup>337</sup> was adopted in 1979 and defines the minimum requirements for the listing of equity and debt securities on Member State stock exchanges in the EC.<sup>338</sup> Generally, the minimum requirements are to ensure "equivalent protection for investors" throughout the EC.<sup>339</sup> In addition, the Admissions Directive imposes continuing obligations, such as reporting requirements.<sup>340</sup> The

---

329. See generally David Reid & Andrew Ballheimer, *European Community, Exemptions For Institutional Investors*, 13 U. PA. J. INT'L BUS. L. 495. As noted by one commentator, because harmonization through reciprocity is an easier approach, the EC's efforts have shifted from commonality to reciprocity. See Warren, *supra* note 6, at 192 & n.34; see also Warren, *supra* note 6, at 209.

330. See Barnard, *supra* note 38, at 175.

331. See *id.* A Directive is an act adopted by the Council or the Commission. See 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-10 & n.35.

332. See 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-10 & n.37.

333. See Reid & Ballheimer, *supra* note 62, at 495.

334. See *infra* notes 335-362 and accompanying text.

335. See Barnard, *supra* note 38, at 179 & nn.7-9.

336. See *id.* at 179.

337. See Council Directive No. 79/279, 1979 O.J. (L 66) 21 [hereinafter Admissions Directive].

338. See Wood, *supra* note 122, at 268; Roquette, *supra* note 267, at 589 & nn.94 & 95.

339. Admissions Directive, *supra* note 337, at 21.

340. See Admission Directive, *supra* note 337, Schedule C §§ 2(a), 2(b), 4(a), 6(a), at 30-31. Schedule C of the Admission Directive, applicable to equity securities, requires, among other things, that

information required by Schedules C and D of the Admissions Directive must be published in one or more newspapers widely distributed in the relevant market.<sup>341</sup> Finally, the Admissions Directive requires each Member State to designate a “competent authority” to administer the Directive.<sup>342</sup>

The Listing Particulars Directive,<sup>343</sup> adopted in 1980, addresses the contents of documents to be published in connection with a listing on a Member State’s stock exchange.<sup>344</sup> The purpose of the Listing Particulars Directive is to “coordinate the differences in member state disclosure requirements applicable to stock exchange listing.”<sup>345</sup> Purposes of this Directive, as expressed in its preamble, are to “provide equivalent protection for investors throughout the common market, to facilitate cross-border exchange listings, and to promote greater interpenetration of national securities markets within the EC.”<sup>346</sup> The admission of securities to official listing on a stock exchange must be conditioned upon the publication of an “information sheet” (called the “listing particulars”), which must contain the information set out in the Listing Particulars Directive.<sup>347</sup> The listing particulars

(1) the issuer ensure equal treatment for all shareholders in the same position; (2) the issuer provide information and facilities to enable shareholders to exercise their rights; (3) the issuer makes its annual financial statements and annual reports available to the public; (4) the issuer inform the public as soon as possible of material current developments; and (5) that the issuer ensure that equivalent information is made available to other markets where its securities are listed.

*Id.*; see also Roquette, *supra* note 267, at 589 & n.96.

341. See Admission Directive, Schedule C, *supra* note 337, Article 17.

342. Warren, *supra* note 6, at 211.

343. See Council Directive No. 80/390, 1980 O.J. (L 100) 1 [hereinafter Listing Particulars Directive].

344. See Forbes-Cockell, *supra* note 62, at 616.

345. 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-13.

346. Manning Gilbert Warren III, *Regulatory Harmony in the European Communities: The Common Market Prospectus*, 16 BROOKLYN J. INT’L L. 19, 26-27 (1990).

347. Wood, *supra* note 122, at 269. The disclosure requirements of the Listing Particulars Directive for equity securities are set forth in Schedule A and include, among other items, information concerning:

- the parties responsible for preparing the listing particulars and for auditing the financial statements;
- the securities and the listing application;
- the capitalization of the issuer;
- the issuer’s principal business activities;
- the issuer’s assets and liabilities, financial position, and profits and losses;
- the issuer’s administration, management, and supervision, including remuneration, unusual transactions, and equity interests; and
- recent developments and prospects of the issuer.

shall contain the information which, according to the particular nature of the issuer and of the securities for the admission of which application is being made, is necessary to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities.<sup>348</sup>

The Listing Particulars Directive provides that when applications for listing the same securities on stock exchanges in several Member States are made within short intervals of each other, the authorities in each state should cooperate with each other "to avoid a multiplicity of formalities and to agree to a single text," where appropriate.<sup>349</sup> Like the information required by the Admissions Directive, the Listing Particulars must be published within a reasonable time before the date on which the securities will be listed.<sup>350</sup>

The Interim Reports Directive,<sup>351</sup> adopted in 1982, sets forth certain periodic reporting requirements, adding to the annual and current reporting requirements of the Admissions Directive.<sup>352</sup> The Interim Reports Directive defines certain minimum financial information that must be disclosed. In addition, pursuant to the Interim Reports Directive, a company must publish an explanatory statement along with required financial information that must refer to the company's financial prospects for the remainder of the fiscal year.<sup>353</sup>

The Public Offering Prospectus Directive (the "Prospectus Directive") was adopted by the EC in 1989.<sup>354</sup> The Prospectus Directive has been referred to as the Integration Directive<sup>355</sup> because it "integrates disclosure in the listing and public offering process."<sup>356</sup> The Prospectus Directive may be viewed as "advanc[ing] the EC's objectives of finan-

---

Council Directive 80/390, *supra* note 336 at 11; *see also* Warren, *supra* note 346, at 27-28 & nn. 50-56.

348. Wood, *supra* note 122, at 269.

349. 10D INTERNATIONAL CAPITAL MARKETS, *supra* note 20, at 9A-14.

350. *See* Warren, *supra* note 346, at 271.

351. *See* Council Directive 82/121, 1982 O.J. (L 48) 26 [hereinafter Interim Reports Directive] (discussing regular reporting requirements of companies whose shares list on official stock exchanges).

352. *See* Roquette, *supra* note 267, at 590 & n.101. The Interim Reports Directive applies only in cases in which shares are listed on a Member State's stock exchange and sets forth the form and content of interim reports. *See* Wood, *supra* note 122, at 272.

353. *See* Roquette, *supra* note 267 at 590; *see also* Warren, *supra* note 6, at 214-15.

354. *See* Council Directive 89/298, 1989 O.J.(L 124) 8 [hereinafter Prospectus Directive].

355. *See* Wolff, *supra* note 4, at 374.

356. *Id.*

cial integration and investor protection through the principles of harmonization and mutual recognition.”<sup>357</sup> The Prospectus Directive requires parties involved in a subject offering of securities to publish a prospectus containing specified information when the securities are first offered to the public.<sup>358</sup> The Prospectus Directive does not apply to securities that are already listed on a stock exchange situated in the Member State in which the offer is being made.<sup>359</sup> If the security is to be listed on an exchange, the prospectus requirements are fulfilled by the requirements of the Listing Particulars Directive.<sup>360</sup> The minimum requirements set by the Prospectus Directive are similar to those of the Listing Particulars Directive and thus eliminate disclosure disparities that may discourage listing on a stock exchange.<sup>361</sup> If the security is not to be listed on an exchange, the prospectus must comply with the requirements of the Prospectus Directive.<sup>362</sup>

The Mutual Recognition Directive was adopted in 1987.<sup>363</sup> It amended the Listing Particulars Directive and requires enhanced reciprocity when applications are made to list securities on two or more exchanges located in the EC.<sup>364</sup> In such a case, listing particulars are prepared in accordance with home state rules and approved by home state authorities. Once approved,

listing particulars must, subject to any translation, be recognized by the other Member States in which admission to official listing has been applied for, without it being necessary to obtain the approval of the competent authorities of those States and without their being able to require that additional information be included in the listing particulars.<sup>365</sup>

---

357. Anthony Fama & Soo Jung Im, *Recent Securities Regulations in the European Community and the Integration of European Capital Markets*, 32 HARV. INT'L L. J. 553, 557 (1991).

358. See Reid & Ballheimer, *supra* note 329, at 497; see also Wood, *supra* note 122, at 272. The Prospectus Directive provides for the Member States to set the standard for what constitutes a public offer. As a result, the implementation of the Prospective Directive may vary from country to country. See Barnard, *supra* note 38, at 180.

359. See Reid & Ballheimer, *supra* note 329, at 497.

360. See Roquette, *supra* note 267, at 591.

361. See *id.* at 591 & n.106.

362. See *id.* at 591. The issuer may prepare a prospectus in accordance with the Listing Particulars Directive, even though an application for listing is not being made, as long as the prospectus is subject to pre-vetting. See Reid & Ballheimer, *supra* note 329, at 500.

363. See Council Directive 87/345, 1987 O.J.(L 185) 81 [hereinafter Mutual Recognition Directive] (amending the Listing Particulars Directive).

364. See *id.*

365. Wolff, *supra* note 4, at 373 n.158. The prospectus may have to include some additional information relevant to the country in which recognition is being sought. See Reid & Ballheimer, *supra* note 329, at 501 & n.22; see also Fama & Im, *supra* note 357, at n.20.

In 1991, the Listing Particulars Directive was again amended by the Second Mutual Recognition Directive.<sup>366</sup> The Second Mutual Recognition Directive provides that an issuer may use a prospectus approved by one Member State as its application for listing on a stock exchange in another Member State, so long as the approval of the prospectus occurs within three months of the subsequent application for listing and the public offering prospectus conforms with the minimum standards of the Listing Particulars Directive.<sup>367</sup>

In 1994, the EC adopted another amendment to the Listing Particulars Directive, the intent of which was to further facilitate stock exchange listings in one Member State by companies listed in other Member States.<sup>368</sup> The amendment provides for the exemption of companies that have been listed in other Member States for at least three years from the requirement of publishing full listing particulars as long as an abbreviated disclosure document is published.<sup>369</sup>

Generally, the Directives referred to above (as amended) provide for listing particulars or prospectuses published in one Member State to be used freely in another, based on the principles of mutual recognition. There are several caveats to the mutual recognition principles, however. For example, mutual recognition is not required if an exemption or partial release from the requirements of the Listing Particulars Directive (or Prospectus Directive) has been granted in one Member State, if such an exemption is not allowed in the Member State in which recognition is sought.<sup>370</sup> In addition, recognition is not required if the conditions under which such an exemption has been granted in one Member State are not met in the other Member State.<sup>371</sup>

In addition to the requirements set forth in the foregoing Directives concerning mutual recognition between Member States, the EC may extend mutual recognition to include prospectuses and listing particulars drawn up and approved in accordance with the rules of non-member countries. Two conditions must be met, however, before mutual recognition is extended. First, the non-Member State's disclosure rules must give investors protection equivalent to that provided for in the Prospec-

---

366. See Directive 90/211, 1990 O.J. (L 112) 24 [hereinafter *Second Mutual Recognition Directive*].

367. See Fama & Im, *supra* note 357, at 559 & n.34. This is similar to the mutual recognition provided by the Prospectus Directive.

368. See generally Council Directive 94/18, 1994 O.J. (L 112) [hereinafter *Exemption Directive*].

369. See Wolff, *supra* note 4, at 371.

370. See Roquette, *supra* note 267, at 593.

371. See *id.*

tus Directive.<sup>372</sup> Second, the non-Member State must allow for reciprocity for prospectuses approved by Member States.<sup>373</sup> Additionally, even if these conditions are met, the Prospectus Directive permits a Member State in its discretion to deny mutual recognition of prospectuses prepared by issuers located in non-member states.<sup>374</sup>

As discussed below, there are problems with EC harmonization efforts. For example, under the 1992 harmonization framework, only minimum standards accompanied by mutual recognition were established.<sup>375</sup> Thus, many regulations have the character of a compromise.<sup>376</sup> In addition, the minimum standards approach does not preclude some Member States from imposing more strict standards when enacting the Council Directives in their national laws.<sup>377</sup> Although Directives are binding on each Member State, Member States can choose the form and method of implementation into national law, thereby introducing an additional discretionary element in their day-to-day operations.<sup>378</sup> Also, the fact that there is no central regulator for the coordination and enforcement of these regional provisions may reduce the likelihood of efficient and effective harmonization.<sup>379</sup>

#### IV. PROPOSALS FOR ACCOMMODATION AND REFORM

Globalization of securities markets, allowing for enhanced mobility of capital, requires disclosure regimes that impose minimal costs while providing adequate investor protection. For each country to establish unique standards, with which it is costly for foreign issuers to comply, drives a wedge into unified global capital markets. Clearly, significant steps have been instituted to ameliorate this incongruity. Efforts by IOSCO and the Member States of the EC illustrate that some progress has been made.<sup>380</sup>

---

372. See Fama & Im, *supra* note 357, at 559.

373. See *id.* at 559–60.

374. See *id.* at 560.

375. See *id.* at 557.

376. See *id.* at 597 (pointing out that commentators have criticized the EC for choosing “harmony now” at the price of “discord later”).

377. *Id.* at 597 & n.131. For example, a Member State may impose greater disclosure requirements on issuers in its own country. This could lead to issuers listing only outside its own market in order to avoid these greater requirements. This is probably not likely, however, based on the wider acceptance of securities in its own market. See Warren, *supra* note 346, at 30; see also *infra* notes 380–383 & accompanying text.

378. See Roquette, *supra* note 267, at 597–98 & n.133.

379. See *id.* at 598 & n.135.

380. See *supra* notes 206–262, 324–379 & accompanying text.



Nonetheless, the disclosure systems currently in effect, viewed from an international offering perspective, are burdened with excessive costs and inefficiencies. Rather than clinging to the sanctity of every facet of their respective regimes, regulators should compromise to achieve basic goals focusing on adequate disclosure, investor protection, and facilitation of cross-border offerings. This has been difficult, especially for the U.S. SEC.

The proffered solution is straightforward. Functioning through IOSCO, a common prospectus (or disclosure document) should be promulgated. The disclosure document should include all material information related to the subject offering (or other transaction). Thus, for example, disclosure would be mandated with respect to such items as the corporation's operations, management, profits, losses, earnings, revenues, and other factors relating to financial condition, as well as use of proceeds from the offering, and rights (and conditions) respecting the securities being offered. Adequate financial information, including provision for certified financial statements, would be required. Disclosure of so-called "soft" information, such as earnings projections, would be left to the issuer's sound discretion.

Each nation's antifraud provisions would apply to enable regulators (and where authorized aggrieved investors) to pursue relief where alleged disclosure deficiencies or other wrongs exist. In addition, where certain executives or enterprises have been the subject of serious enforcement sanctions, they may be barred by the relevant jurisdictions from seeking to raise capital (or conducting other securities-related business) therein.

The EC approach seeks to combine elements of harmonization and reciprocity. However, the regime adopted focuses largely on reciprocity among Member States. This reciprocity is premised on a common prospectus that satisfies only minimum standards. Each country, although obligated to permit cross-border offerings of foreign issuers from Member States in its respective market (based on a disclosure document prepared in compliance with the EC standards), may impose additional requirements on issuers from its jurisdiction.<sup>381</sup>

This approach is subject to two key criticisms. First, because the EC approach in theory allows each Member State to adopt standards more stringent than those formerly required, the standards agreed upon as the minimum requirements may be too lax, thereby failing to provide adequate investor protection. Second, if a Member State were to apply more rigorous standards in the disclosure context under EC Directives,

---

381. See *supra* notes 354–379 & accompanying text.

it generally could impose such standards only upon domestic or "home" companies; enterprises situated in other Member States would be entitled to conduct offerings that met only the minimum standards. Obviously, implementation of more onerous standards would impair capital raising by the subject country's home companies, thereby rounding to the economic detriment of that nation. Consequently, a Member State, seeking to favorably treat its home enterprises in the quest to raise capital, causes the minimum standards to prevail.

Therefore, a "race to the bottom" may emerge. Recognizing that adoption of stricter standards would impair their own economies and would allow foreign issuers from Member States to raise capital on more favorable terms, the respective Member States frequently refrain from promulgating substantively stricter standards. The ultimate result is implementation of EC minimum standards that may impair market integrity and provide insufficient investor protection.

The proffered solution is that IOSCO should continue its efforts to devise a common disclosure document to be used for both domestic and international offerings. Otherwise, the problems generated by the EC's Directives also will surface in this setting. To encourage the development of a disclosure document that meets the needs and realities of every jurisdiction, in actuality, three different common disclosure documents prepared by three working groups should be adopted. The first working group should be comprised of jurisdictions that have developed markets, the second working group of nations having semi-developed markets, and the third working group of countries that have emerging markets.

The following illustrates how the process would function. A company from a first working group jurisdiction that met the requirements set forth in the common disclosure document devised by that working group would be entitled to make its offering in all markets—developed, semi-developed, and emerging—within the IOSCO framework. A company from a semi-developed jurisdiction that met the standards for the prospectus formulated by the second working group could offer its securities in both the emerging and semi-developed markets. A company from an emerging jurisdiction that met the disclosure regimen set forth by the third working group could make its offering only in countries that have emerging markets. On the other hand, a company from an emerging country that met the disclosure standards promulgated by the first working group, representing the developed markets, could conduct its offering in all markets—developed, semi-developed, and emerging.

This system makes a good deal of sense. As a general proposition, enterprises situated in countries having more sophisticated markets are

capable of greater substantive disclosure than enterprises from less developed capital markets. For example, in emerging capital markets, the procurement (and related costs) associated with a financial audit that satisfies standards required by developed markets often will be prohibitive. The narrative disclosure mandates may prove nearly as problematic. On the other hand, certain seasoned issuers from emerging markets may be able to comply with the more rigorous standards set forth by the first working group. In such event, such issuers, having met the highest level of disclosure, should be entitled to make offerings in all markets, including the developed markets, of the world.

On their own accord, countries should select which working group (and consequent market) they opt to join. Under the proposed approach, a country that becomes a member of a working group that exceeds the actual sophistication of its markets would harm its "home" enterprises. For example, a country whose own markets are still emerging but which nonetheless elects to join the second working group representing countries from semi-developed markets, will subject its home enterprises to heightened disclosure standards that such enterprises may be unable to meet. This eventuality would cause economic hardship to the affected nation and its home enterprises. Thus, a key incentive exists for a country to select the appropriate working group (and consequent market) wisely.

Nonetheless, to deter countries from opting for grouping in a more sophisticated market than they properly belong, two suggestions are offered. First, to counter certain jurisdictions' inappropriate attempts to lower the disclosure standards for a working group to which it should not in fact belong, standards generally should be adopted by a majority vote of the members. Second, for justifiable cause, such as for not enforcing the subject working group's disclosure standards, the delinquent jurisdiction may be suspended or expelled by the other members of the working group upon a two-thirds majority vote, or, alternatively, delegated to a "lower" working group.

To induce key players to enter into this framework, such as the United States, Canada, Japan, and the Member States of the EC, these countries should have veto power with respect to certain significant standards. Such veto rights may be unilateral or may be contingent upon obtaining the support of a certain percentage (*e.g.*, twenty-five percent) of other key countries. The details of this veto process would be a subject of delicate negotiation in establishing the framework for each working group.

The determination whether a disclosure document satisfies the applicable IOSCO requirements for the particular market (*e.g.*, developed

market) would be made by the "home" country where the issuer is situated, provided that the home country is a member of the appropriate working group. If such is not the case, then another country within the appropriate working group would make that assessment. That country may serve by region, in seriatim, or for a specified period of time.<sup>382</sup>

Issuers from countries that are not in any of the IOSCO working groups would be required to meet the standards established by the appropriate working group to make its offering. Thus, if an issuer situated in Macedonia (not an IOSCO member) desires to make an offering in Hungary (*e.g.*, a member of working group three), such issuer would have to meet the disclosure standards set forth by IOSCO working group three for emerging markets.

The United States, namely, the U.S. SEC, in particular, has been criticized for its perceived unduly rigid interpretation of U.S. disclosure mandates for global offerings.<sup>383</sup> While the SEC's approach makes sense in a more localized marketplace, strident embracement of SEC disclosure standards in global offerings by sophisticated and seasoned issuers should be viewed from a different perspective. This is not to suggest that the SEC should not insist on meaningful disclosure. Rather, through dialogue and compromise, the SEC has the leverage to induce the adoption of significant disclosure mandates. While these standards may not be ideal for the SEC, they should satisfy key concerns focusing on investor protection and market integrity.

## CONCLUSION

Although the regulatory systems addressed in this article are based primarily on the goal of providing full and fair disclosure to investors, jurisdictions embrace their own parameters that determine more precisely what constitutes adequate disclosure. Whether based on the sophistication of the particular market, the acumen of market participants, cultural differences or other factors, countries frequently have different requirements for securities offerings. Not surprisingly, efforts at international harmonization have been challenging and thus far largely unsuccessful.

Two approaches designed to achieve worldwide regulatory harmonization have emerged: (1) commonality and (2) reciprocity. While

---

382. It may be asserted that this proposed framework would function more efficiently and fairly if there were a single overseer with sufficient authority to make and enforce its determinations. In theory, this point has merit. Nonetheless, in view of the present political realities, the approach advanced herein potentially offers the most feasible alternative.

383. See *supra* notes 263-67 & accompanying text.

these approaches have met with some success, disagreement frequently prevails. For example, although the U.S. SEC has made significant strides in allowing more flexibility for foreign issuers, it often mandates greater disclosure than the regimes adhered to by other countries. Moreover, IOSCO, while enjoying increasing acceptance by the global securities community, is still held back by its lack of authority to impose its mandates and the diversity among its members which often leads to disagreements concerning standards.

The EC and the MJDS have had greater international acceptance, possibly because a system based on reciprocity may be more feasible to implement.<sup>384</sup> In fact, although IOSCO's efforts may be reviewed in terms of developing a single disclosure document, one of the recommendations made in *International Equity Offers* is for regulators to "facilitate the use of single disclosure documents, whether by harmonization of standards, *reciprocity* or otherwise."<sup>385</sup> Given the many differences existing between regulatory systems and markets, it may well be that international accommodation premised on reciprocity will emerge as the guiding principle.<sup>386</sup>

---

384. See Warren, *supra* note 6, at 192 ("Because of its ease of implementation, reciprocity based on substantial equivalence may prove a necessary first stage in the harmonization process).

385. INTERNATIONAL EQUITY OFFERS, *supra* note 4, at 11 (emphasis added).

386. See Warren, *supra* note 6, at 192.