

GLOBALIZATION'S CHALLENGES TO THE UNITED STATES SECURITIES LAWS

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For decades, the United States securities laws have buffered their home markets from the ill-effects of foreign securities bought and sold in markets that provide much less protection than do U.S. securities laws. Indeed, the U.S. securities laws have not only been the ramparts that separate its avaricious investors from foreign securities, but also the cannon from which its chief securities policeman, the Securities and Exchange Commission, has fired shots across the bow of foreign regulators exhorting them to steel their resolve and tighten up their own regulatory provisions. Globalization — a phenomenon fed by technology, the inter-connectiveness of the world economy, and simply a broader perspective of commercial interests than once prevailed — has placed great stress on the ability of U.S. securities laws to maintain a protective wall between its citizens and less regulated foreign markets.

This paper examines three quite different areas where globalization challenges U.S. securities law orthodoxy. Not surprisingly, each area elicits a very different regulatory response. Part I reviews the U.S. courts' grappling with the jurisdictional reach of the U.S. securities laws. Whether by private agreement between investor and issuer, or the court's interpretation of the jurisdictional scope of the securities laws, the extraterritorial application of the regulatory and antifraud provisions of the securities laws are much influenced by the challenges posed by globalized markets. Part II examines the recent amendment of the U.S. securities laws' antimanipulation rules so as to exclude large international issuers from their demands. Finally, Part III addresses the most controversial and important question facing the SEC: by what criteria will the SEC decide to accept financial statements that are not prepared or reconciled to U.S. accounting and auditing standards.

I. PRIVATIZING THE PEACH OF THE U.S. SECURITIES LAWS

The jurisdictional scope of the U.S. securities laws is territorial. More frequently this is satisfied by emphasizing where the conduct of the parties occurred, rather than the locus of the effects of their misbehavior. In the case of the antifraud provision, most courts continue to be influenced by Judge Friendly's formulation in *Bersch v. Drexel Firestone, Inc.*² whereby much more conduct must occur within the U.S. for foreign nationals to obtain damages under the U.S. securities laws than if the aggrieved investors are U.S. citizens. Under this formulation, mere preparatory acts in the

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2 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

U.S. are insufficient for jurisdiction in a case involving foreign nationals where the fraudulent acts themselves occurred outside the U.S.³

The territorial approach also is the cornerstone of the SEC's interpretation of the reach of the registration provisions of the Federal Securities Act of 1933. The crucial determinant in deciding whether securities must be registered is whether a security will be offered or sold "in interstate commerce." The latter is defined to include "trade or commerce in securities or any transportation or communication relating thereto . . . *between any foreign country and any State . . .*"⁴ The SEC has provided a narrow safe harbor from registration for foreign issuers under its Regulation S⁵ which requires that no offer or sale occur within the U.S.⁶

The U.S. approach toward the reach of its antifraud rule raises several interesting questions. As will be seen, courts have customarily taken an all or nothing approach. When there is sufficient conduct within the U.S. to justify applying the antifraud provision to the dispute, the courts have customarily assumed jurisdiction over the parties and applied the U.S. securities laws in resolving their dispute. Conversely, cases are dismissed when there is insufficient U.S.-based conduct on the part of the defendant. Professor Hillman has asked why there needs to be such an all or nothing approach.⁷ He counsels that it would be far more useful to separate the inquiry into two separate inquiries. On the one hand, the court should consider whether it has jurisdiction over the parties and most particularly over the defendant. On the other hand, the court should determine what country's laws should apply to resolve the dispute before it — this is the classic choice of law inquiry. Thus, Hillman envisions cases in which the U.S. court would retain jurisdiction of the dispute, but apply the law of another jurisdiction.

Recently a decision was reached which is consistent with this approach. In *Robinson v. TCI/U.S. West Communications*,⁸ the Court of Appeals for the Fifth Circuit held that the defendant had committed culpable failures

3 See e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017-1018 (2d Cir. 1975). In *Itoba Limited v. LEP Group, PLC*, 54 F.3d 118 (2d Cir. 1995), this criteria was satisfied where the foreign purchasers established that the fraudulent representation was the failure to correct representations in an SEC filing which was viewed as having facilitated further trading in London. For evidence that courts are most willing to characterize acts as being more than mere preparatory acts, see *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 419-420 (8th Cir. 1979).

4 Section 2(7) of the Securities Act, 15 U.S.C. § 77b(7) (1992).

5 See Rules 901-904 of the Rules and Regulations Under the Securities Act of 1933, 17 C.F.R. §§ 230.901-904 (1996). In 1998, the SEC amended Regulation S to address abuses of Regulation S by some U.S. issuers under the safe harbor's original provisions. Securities Act Release No. 7505 (February 17, 1998). The cumulative effect of the amendments is to restrict the freedom of U.S. issuers to raise capital outside the U.S. in reliance upon Regulation S. This occurs because the amendments impose on U.S. issuers that are reporting companies the same demanding limitations that previously applied only to nonreporting issuers when making an offering of their equity securities. No change was introduced by the amendments for foreign issuers or debt offerings by U.S. issuers. The most significant amendment to Regulation S occurred in Rule 903(b)(3) which now requires that any equity security sold in reliance upon the safe harbor is subject to offering and resale restrictions for one year. Previously reporting companies selling securities were subject to a forty-day restricted period (now called the "distribution compliance period"). After the amendment, equity security offerings of *all* U.S. issuers made in reliance upon Regulation S cannot be resold in the United States for a one-year period absent registration or an exemption for such resale.

6 *Id.* at Rule 903(c)(1)(a)(b).

7 See generally Robert W. Hillman, "Cross-Border Investment, Conflict of Laws, and Privatization of Securities Laws", (1992) 55 *Law & Contemp. Prob.* 506.

8 [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,495 (Fifth Cir. 1997).

within the United States that directly caused the foreign plaintiffs' losses. The substantial U.S.-based acts involved a materially misleading letter that induced the plaintiffs to purchase the securities which later declined in value. The defendants had prepared the letter in the United States but it was relied upon by the plaintiffs in England. Despite finding that the antifraud provision applied to the dispute, the court nevertheless dismissed the action, reasoning that England was the more convenient forum for resolving the dispute since all the facts and litigants were based there. The result reached in *Robinson* is consistent with the bifurcated approach recommended by Professor Hillman, assuming the English court applies U.S. law to resolve the dispute. If the English court applies its home country law, then *Robinson* would appear to be no different than the all or nothing approach customarily taken in other U.S. decisions that have deflected disputes to a foreign country's law and court system.

An important component in the courts' approach to deciding which country's law should apply to such a securities dispute is to inquire into the competing social interest served by each choice facing the court. In the more typical securities case, the social interest is in the state's quest to preserve the integrity of its securities markets and protecting its residents from the harmful effects of a want of full disclosure in securities transactions. To be sure, the misconduct sued upon in *Robinson* posed neither of these threats. Because the fraudulent letter was prepared in the U.S., there is a separate policy basis for applying the U.S. antifraud provision to the letter. There is a fairly well recognized social interest associated with avoiding the U.S. becoming something of a Barbary Coast from which the unscrupulous could launch their assaults on foreign investors.⁹ Unfortunately, however, this objective may ultimately not be served in *Robinson* because the referent English court may well not apply U.S. law to the dispute. One may even imagine instances where the foreign court applies its home country law with the effect that investors are not protected to the same extent as they would be under U.S. securities laws. At the same time, *Robinson* was much influenced by the policy that litigation is better conducted on the soil of the country where the evidence continues to be located.

The preceding well illustrates the important public character of the securities laws. As seen, the courts' willingness, indeed their power, to preside over securities law claims are guided by the conducts test. This test itself reflects important public policy considerations. Simply put, the U.S. does not make its courts available to investors solely because the U.S. Marshall has served process on the defendant. In stark contrast to such considerations is the heavy commitment most courts have made to parties entering into agreements setting forth not only the means (commonly arbitration) and venue (other than the U.S.) for resolving any dispute arising from their securities transaction, but specifying the body of law under which the claim is to be decided. Here our concern is the power of the parties to essentially privatize the regulation of securities transactions through their contractual agreement to be bound by the choice of a specific country's laws to their transaction.

⁹ See e.g., *Securities and Exchange Commission v. Kasser*, 548 F.2d 109, 116 (3d Cir), cert. denied, 431 U.S. 938 (1977) ("We are reluctant to conclude that Congress intended to all the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'").

There is now a substantial body of case law, most of it established by the Supreme Court, upholding the validity of arbitration, forum selection, and choice of law clauses among private parties. As early as 1973, the Supreme Court dismissed a suit filed under the antifraud provision of the federal securities laws, because the parties to that action had earlier agreed to arbitrate any dispute between them.¹⁰ The suit arose from the sale of a foreign business to a U.S. buyer; in the absence of an agreement to arbitrate under Illinois law any dispute arising from their contract, the federal courts would have had exclusive jurisdiction over the antifraud action pursued by one of the parties to the agreement. The Supreme Court's most sweeping commitment to private arrangements to arbitrate occurred with its decision in *Shearson/American Express Inc. v. McMahon*,¹¹ which reversed four decades of precedent by upholding agreements to arbitrate between customers and their broker.¹² Indeed, the Supreme Court's acceptance of agreements to arbitrate and choice of law clauses is so sweeping there appears to be no apparent limit on their use.¹³ In the wake of this jurisprudence, the courts of appeal have enforced agreements to arbitrate securities claims under foreign law, even though the securities transaction unquestionably occurred within the U.S. Much of this law has been created in the wake of the financial difficulty experienced by the English insurer, the Society of Lloyds. Because of an unusually large number of natural disasters for which Lloyds was the insurer, it became necessary for the first time in its history to call upon its members ("Names") to fulfill their commitment to underwrite the risks insured by the syndicate. The agreement between the Names and Lloyds contained a forum selection clause, an agreement to arbitrate, and a choice of law clause. Several U.S. Names brought actions in the U.S. under the securities laws alleging material misrepresentations had been committed by Lloyds regarding the risks posed by the Names' investment in the insurance pools. Relying on the Supreme Court's holding in *M/S Bremen v. Zapata Off-Shore Co.*,¹⁴ that forum selection clauses are valid unless proven to be unreasonable, all the U.S. circuit courts of appeal that have dealt with the various actions involving Names' suits against Lloyds have concluded that the choice of law clauses are binding on their Names so that arbitration in England under English law must occur.¹⁵ The litmus test for assessing reasonableness is as follows:

[F]orum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the contract was the result of fraud, undue influence or overwhelming bargaining power; (2) if the selected forum is so "gravely difficult and inconvenient that [Names] will for all practical purposes be deprived of its day in court"; or (3) if enforcement of the

10 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1973).

11 482 U.S. 220 (1987).

12 In its first treatment of the subject, the Supreme Court held that agreements to arbitrate claims under the Federal Securities Act of 1933 violated that act's antiwaiver provision. *Wilco v. Swan*, 345 U.S. 427 (1953). *McMahon*, though involving a claim under the Securities Exchange Act of 1934, nevertheless cast doubt regarding *Wilco*'s continuing vitality due to *McMahon*'s sweeping acceptance of arbitration. *Wilco* was soon formerly overruled. See *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989).

13 For a wide-ranging critique of the Court's jurisprudence on this matter, see Paul D. Carrington & Paul H. Haagan, *Contract and Jurisdiction*, (1997) 1996 Sup. Ct. Rev. 331.

14 407 U.S. 1 (1972).

15 For cases upholding the clauses, see *Richards v. Lloyds of London*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 90,134 (9th Cir. 1998) (en banc); *Bonny v. The Society of Lloyds*, 3 F.3d 156 (7th Cir. 1993), cert. denied, 114 S. Ct. 1057 (1994); *Roby v. Corporation of Lloyds*, 996 F.2d 1353 (2d Cir.), cert. denied, 114 S. Ct. 1057 (1993); and *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.¹⁶

Forum selection and choice of law clauses such as those at issue in the Lloyds disputes always pose two quite independent questions. The threshold issue is always whether the clauses reflect a meeting of the minds between investor and issuer. In the Lloyds disputes this may well be answered affirmatively due to the presumed sophistication of the Names. Their dispute is not that of the parking patron who learns that the small print on the back of her ticket limits the garage's negligence in the bailment of her automobile. By far the more fundamental question posed by the choice of law clause is the power of the parties, through the mechanisms of their arms-length agreement, to remove their securities transactions from the regulatory scope of the U.S. securities laws. Arguments against their power to do so takes two forms. First, there is the need to protect investors from themselves. This concern applies equally to the sophisticated as well as the unsophisticated. Each are subject to the same pressures to take advantage of the offer before them which is not available absent the clauses requiring disputes be resolved under another country's laws. Importantly, from the securities perspective, the offending act — the offer of the securities with insufficient or misleading information — occurred before the investor agreed to resolve any dispute under another country's laws. Thus, the agreement can be seen as not a *waiver* of the protection of the U.S. securities laws, but a post-violation agreement how the parties choose to resolve any claim arising from the violation. So viewed, the contract partially overcomes the orthodox interpretations of the antiwaiver provisions contained in both the Securities Act and the Exchange Act.¹⁷ The parties' power to identify the venue for resolving their dispute and their agreement to submit the dispute to arbitration is clearly permissible, but different from their agreement to a choice of law clause. The choice of arbitration and choice of forum clauses do not waive substantive protections intended for their benefit. On the other hand, upholding a choice of law clause is inconsistent with the very purpose for which the U.S. securities laws makes available to investors private rights of action. The purpose underlying the securities laws' express and implied causes of action is to assure compliance with the fundamental requirements of full and fair disclosure. Consider how this objective is disserved if a choice of law clause was upheld in the extreme situation where the parties agree that their rights will be determined under the law of a country that does not require publicly offered shares to first be registered with a governmental agency as is required in the U.S. If such a clause were valid it would relegate the security's U.S. purchasers to a foreign law; whereas, if decided according to U.S. law, the issuer and its underwriters must rescind the sale if they have offered a security for sale in the U.S. without either registering the offering or qualifying for an exemption.¹⁸ Clearly the foreign land, even if it be England, would not demand the same level of disclosure or afford the same limited exemptions as exist under the Securities Act. Though this may well be the basis for concluding the investors would face "unreasonable" burdens in the foreign

16 *Bonny v The Society of Lloyds*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994).

17 The Securities Act's antiwaiver provision is section 14, 15 U.S.C. §77n (1992) and the Exchange Act's antiwaiver provision is section 29(a), 15 U.S.C. §78cc(a) (1992).

18 Section 12(a)(1) of the Securities Act, 15 U.S.C. § 77(a)(1) (1992).

land, this is by no means clear in the case of England or many other countries that provide reasonably comprehensive securities regulatory schemes. This concern for the exact content of the foreign country's laws draws attention to the fact that fundamental and unique policies are embedded in the U.S. Securities Act that are not replicated under the laws of, for example, England, and vice versa. It is for the fulfillment of such policies that the Securities Act provides sweeping rescission rights to investors who purchase securities that were neither registered nor qualified for an exemption from registration. Similar policy rationales underlie the protection that investors enjoy under both the Securities Act and the Exchange Act when their sellers commit fraud in the sale of the security. The unknowing waiver of their rights through acceding to the demands of a choice of law clause, therefore, can hardly be seen as fulfilling the policies sought to be served by providing investors with private causes of action when those underlying policies are violated.

A second policy argument against any sweeping acceptance of a choice of law clause is the macro economic effects of doing so. The purpose of securities laws transcends the protection of widows, widowers and orphans. The U.S. securities laws were enacted in the aftermath of the Great Depression and their history and content were much influenced by our earlier experiences and faith that fair and orderly markets are a cornerstone for economic stability and social stability. This grand vision is broader than the individual claims or needs of investors. It implicates as well the even handedness of the regulator over its subjects — the capital hungry issuers fishing in its markets. For example, a major focus of capital market regulation is to enhance allocational efficiency within the economy. Thus, disclosure assumes importance not just because it will protect the investor from the unscrupulous issuer, but also because it protects other issuers who may be less favored in the market place because they choose to play by the rules whereas those competing against it for capital do not. Thus, a major focus of disclosure is to provide a basic information package about issuers so that investors may wisely compare, if they choose, the promise of one against that of another. Similarly, sharp practices by promoters of securities are condemned because they raise the cost of capital for all issuers. This occurs in the now familiar scenario where investors, who cannot *ex ante* identify the scrupulous from the unscrupulous, will discount each security by the estimated cost of fraud averaged across all issuers. The securities laws seek to reduce the amount of this discount by reducing the number of unscrupulous promoters, issuers, and the like. Private arrangements that remove parties and transactions from the U.S. securities laws are very much in conflict with the purposes for which the securities laws were created. Stated differently, a country's securities laws seek to provide uniform rules so that all those competing for the investor's funds meet on a level playing field. A necessary impact of a choice of law clause is they Balkanize that playing field — U.S. capital markets — so that some transactions are regulated with the more demanding standards of the U.S. securities laws and others are not. When normative standards cease and private arrangements prevail, it is hard to understand how any uniform judgment can thus be made of the integrity of such a market.

II. THE TOO BIG TO FAIL APPROACH TO SECURITIES REGULATION

The U.S. securities laws have for many years treated large, established issuers quite differently than smaller firms. To be sure, the relative size of a *domestic* company determines whether it is subject to the rigors of the Exchange Act's continuous reporting requirements.¹⁹ These requirements apply generally to all firms, domestic and foreign, if they choose to have their securities listed on a national securities exchange²⁰ or, in the case of firms whose equity securities are traded over the counter, certain minimum asset and holder requirements are satisfied.²¹ Foreign issuers are treated somewhat more liberally; foreign issuers are subject to formal continuous reporting requirements if they list securities on a U.S. national exchange, but if their securities are traded only in the over-the-counter market such requirements need be complied with only if a class of its equity security is held by 300 or more U.S. residents.²² The most apparent distinction in the treatment of issuers because of their relative size is the relative regulatory demands imposed upon them when registering their securities under the Securities Act.

Under the integrated disclosure procedures adopted by the SEC in the early 1980s, larger, and more seasoned issuers are permitted to fulfill their Securities Act disclosure requirements by incorporating by reference information already on file with the SEC in connection with that issuer's periodic disclosure requirements under the Exchange Act.²³ This privilege is only available for firms that meet certain eligibility requirements. For foreign issuers, this privilege is limited to issuers whose common stock held by nonaffiliates has a market value of at least \$75 million²⁴ or has been a reporting company for at least three years.²⁵ Foreign issuers not meeting either of these two size or experience requirements,²⁶ must comply with the more burdensome registration process. Indeed, the SEC amended the eligibility requirements for foreign issuers so that the common shares

19 Section 13 of the Securities Exchange Act, 15 U.S.C. § 78m (1992), requires the filing of quarterly reports as well as an annual report by domestic issuers. Certain foreign issuers fulfill their periodic reporting requirements with an annual report prepared on Form F-20 and others may merely satisfy this requirement through submitting to the SEC reports the issuer is required under its home country laws to file with domestic exchanges or regulators. *See* Rule 12g3-2b, 17 C.F.R. § 240.12g3-2b(1997).

20 Securities Exchange Act Section 12(a), 15 U.S.C. § 78l(a) (1992).

21 These requirements are set forth in Securities Exchange Act Section 12(g), 15 U.S.C. § 78l(g) (1992), subject to the exemption provided in Rule 12g-1 of the Exchange Act, 17 C.F.R. § 240.12g-1 (1997), so that firms whose business or securities are traded in interstate commerce, with 500 or more holders of a class of its securities, and with assets in excess of \$10 are subject to the periodic reporting requirements under Section 13 of the Exchange Act, 15 U.S.C. § 78m (1992).

22 Even if the foreign issuer's equity securities are held by 300 or more U.S. residents the issuer is permitted to satisfy the Exchange Act's continuous reporting requirements through so-called "home country" filings, provided the issuer has not qualified its securities for trading on NASDAQ. *See* Exchange Act Rule 12g3-2(a)(b) & (d), 240 C.F.R. § 240.13g3-2(a)(b) & (d) (1997).

23 *See* S.E.C., Adoption of Integrated Disclosure System, Sec. Act Rel. No. 6383 (1982).

24 This requirement applies for registering securities on Form F-3. *See* Form F-3, General Instructions I B.

25 This is the requirement for registering securities on Form F-2. *See* Form F-2, General Instructions, I B 1.

26 In addition to meeting the two above requirements, foreign issuers seeking to register securities on either Form F-2 or Form F-3 must also have been subject to the Exchange Act's reporting requirements for at least one year, must have been current in making those reports for the 12 month period preceding filing the registration statement, and must not have failed to pay a fixed dividend, interest, debt or rental payment since the end of the fiscal year for which it has filed certified financial statements. *See* Form F-2 General Instructions I B & C and Form F-3 General Instructions I A 2 & 3. These same requirements apply to domestic issuers. *See* Form S-2 General Instructions I B-D and Form S-3 General Instructions I A 2 -A5.

used in calculating the minimum public float requirement no longer must be voting shares; in doing so, many foreign issuers became somewhat larger from a regulatory perspective.

The overall effect for a firm qualifying for the SEC's integrated disclosure mechanisms is not that the scope of the information that must be disclosed is reduced or that its liability will be less for omissions or misstatements in the disclosures that it does make. Qualifying issuers are still required to assemble the same basic information package and remain strictly liable²⁷ for any material misstatements or omissions in their registration statement. The principal advantages are in the "ease" of incorporating information from the Exchange Act reports and more importantly in the abbreviated prospectus that they can then circulate to potential purchasers of the security. The overall regulatory philosophy for firms qualifying for such integrated disclosure is that their size assures that they are sufficiently in the eye of the investment community that the rather formal distribution process for circulating a prospectus is unnecessary to inform potential investors of the information contained in the registration statement. Though this process borrows heavily from the teachings of the efficient market hypothesis, the integrated disclosure system is agnostic on whether the prices in the securities markets are fundamentally accurate. Integrated disclosure appears to imply no more than that for such large firms information that is of record with the SEC is as sufficiently available to investors as it would be if that information were circulated through the more formal distribution methods that apply to registrants who cannot qualify their securities for integrated disclosure.²⁸

Though discriminating judgments have been made by the SEC regarding which firms are traded in informationally efficient markets and which firms are not, in the practical world of regulatory policy making we must recognize that such judgments are inherently only rough estimates. On this point, consider the following. At the time the SEC adopted its integrated disclosure mechanism, the agency estimated that 17.6 percent of all reporting companies would meet its requirements.²⁹ In absolute terms, this represented at that time about 1,600 companies. But consider here an earlier SEC study that not more than 1,000 issuers are closely followed by national or regional brokerage research departments and that large institutional investors prefer firms with a minimum market capitalization of \$100 million.³⁰ Though these numbers have certainly changed in the intervening two decades, this data, understood in the contemporary regulatory context of the SEC's adoption of integrated disclosure, breeds

27 The issuer's liability under Section 11 of the Securities Act, 15 U.S.C. 77k (1992), is in contrast to the liability of its senior officers, directors, underwriters and those who expertise any portion of the registration statement. These individuals are liable unless they fulfill their due diligence defense as provided under the statute. See Section 11 (a)(b), 15 U.S.C. 77k (a)(b) (1992).

28 Commentators, however, are not uniform in their analysis of which form market efficiency the SEC invoked when it inaugurated its integrated disclosure system. Compare Donald C. Langevoort, "Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited", (1992) 140 U. Pa. L. Rev. 851, 881 (market efficiency was unnecessary to the SEC's adoption of integrated disclosure as same result could be justified by finding that markets are inefficient) with James D. Cox, "The Fundamentals of an Electronically-Based Securities Act", (1997) 75 Wash. U. L.Q. 857 (integrated disclosure soundly based on finding that markets are informationally efficient for some qualifying firms, even though their securities prices may not reflect the firm's underlying value).

29 See Securities Act Release No. 6331 (1981).

30 See Report of the Advisory Committee on Corporate Disclosure to the Securities Exchange Commission, H.R. Rep. No. 29, 95th Cong., 1st Sess. 41-42 (1977).

a good deal of disquiet regarding whether regulatory criteria have been matched with market realities. Simply stated, the data available in 1981 when the SEC embraced integrated disclosure did not support the breadth of the exemption being afforded many registrants. Moreover, there is no data set since that time that has been invoked in the SEC's progressive relaxation of registration criteria for either domestic or foreign issuers. Another area in which significant exemptions have been afforded issuers based on their size is that of the distribution rules that accompany public offerings of securities. Acting pursuant to its authority under Section 10(b) of the Exchange Act,³¹ to proscribe "manipulative or deceptive devices or contrivances" in connection with the purchase or sale of securities, the Commission has since 1955 proscribed bids and purchases of distributed securities by the issuer and key participants in its distribution. These regulations now appear in the recently promulgated Regulation M.³² The SEC's long-standing position has been that its distribution rules applied as well to global offerings, provided a tranche of the offering was within the U.S. This posed serious problems for market making activities of foreign distribution participants because many foreign exchanges require market makers to stand ready to buy and sell securities at all times.³³ Since a security's major market makers are logical, if not necessary, participants in any global offering of its securities, a strict application of the SEC's distribution rules posed serious conflicts for such participants with their local market making responsibilities. On the other hand, the trading, and potential artificial impact, in a foreign issuer's home market by its local market maker raised questions whether U.S. prices for that issuer's securities would be similarly artificially supported.³⁴

Much of the regulatory impetus for new Regulation M is to reduce the conflicts between the foreign market maker and the SEC's regulatory treatment of the purchases by a distribution's participants. Of great significance is Regulation M's exemption from its requirements of a distributed security for issuers with a public float of \$150 million and whose average daily trading volume is at least \$1 million.³⁵ Moreover, Regulation M's stabilization rules do not apply to foreign purchases that comply with the requirements of the foreign market.³⁶

Overall, these exemptions to Regulation M's otherwise broad regulatory reach reflect the belief that such actively traded securities are widely followed by analysts so that any artificial or aberrational influences on their price would be discovered and quickly corrected.³⁷ Their discovery

31 15 U.S.C. § 78j(b) (1992).

32 Formerly the distribution rules appeared in Rules 10b-6, 10b-7 and 10b-8. *See* 240.10b-6, -7 & -8 (1995).

33 *See generally* No-Action Letters ¶ 96,821 (Oct. 6, 1993) and ¶ 76,825 (Oct. 14, 1993)(providing an in-depth description of offering methods by foreign underwriters for global securities involving sales into German and French markets).

34 The Commission's response initially was to invoke its exemption authority, first granting broad exemption to English, French, German and Dutch issuers of fairly sizable market capitalizations. *See e.g.*, Securities Act Release 7127 (Jan. 18, 1995)(granting class exemption for firms with aggregate market capitalization of 660 million pounds sterling).

35 Rule 101(c)(1), 17 C.F.R. § 242.101(c) (1997).

36 *Id.* Rule 104(g), 17 C.F.R. § 242.104(g) (1997). Regulation M also allows facilitates stabilization by broadly permitting the stabilizing price to be determined by a market other than its principal market when the principal market is closed; more particularly, Rule 104(f)(ii), 17 C.F.R. § 242.104(f)(ii) (1997), permits stabilization in the U.S. market at the lower of the closing price in the principal market or the most recent independent price in the market where stabilization is to occur.

37 *See* Securities Act Release No. 7375 (1996) at 29.

is all the more likely by the fact that such actively traded securities are listed on exchanges or organized markets where there are high levels of transparency and surveillance. The \$150 million public float requirement thus reflects the SEC's judgment of the type of firm for which such conditions are likely to exist.³⁸ Worth separate consideration here is the necessity of an exemption based on the sheer size of a firm's public float since Regulation M also provides a *de minimis* exemption such that purchases not in excess of 2 percent of an issuer's average daily trading volume by distribution participants do not violate its provisions.³⁹

The most significant policy implication of Regulation M is the SEC's willingness to defer to the regulatory safeguards provided by other markets. The SEC's deferral in Regulation M to the transparency of the market in which a security trades, and the likely enforcement surveillance efforts of that market's officials, as well as recognizing the regulatory demands applicable to off-shore stabilization efforts that will influence the price in all markets for global offerings, are important deregulatory steps by the SEC. As the SEC grows more comfortable with its new deference to both sister country regulatory requirements and the greater visibility with which the largest issuers conduct their business, we may well find similar deference with disclosure-based issues, a subject examined below.

III. WHO'S RULES APPLY? AN AWKWARD QUESTION POSED BY INTERNATIONAL ACCOUNTING STANDARDS

Foreign registrants are required to reconcile their financial statements to U.S. generally accepted accounting standards (GAAP) when registering securities for public offerings in the U.S. or to list their securities on a U.S. exchange or NASDAQ.⁴⁰ No regulatory requirement poses as significant a hurdle in the path of the foreign issuer entering U.S. capital markets than does this requirement. It is also this issue that poses the greatest regulatory challenge to the SEC which is confronted daily by the question when, if ever, and under what conditions, statements that conform to International Accounting Standards (IAS) but not to GAAP will satisfy SEC disclosure requirements. This portion of the paper considers the various approaches the SEC may follow to resolve this question.

A. The Politics of Accounting — U.S. Style

It comes as something of surprise to the newly initiated students of accounting that the process of double-entry bookkeeping created by 16th Century Italian monks would become a matter of great social importance and public debate. After all, some have referred to accounting as "merely babble of mutually unintelligible dialects."⁴¹ But accounting standard setting in the U.S. has throughout its life been filled with hopes followed

38 The number of such issuers so qualifying was estimated to be approximately 1900 domestic companies and a substantial number of foreign issuers. *See Id.* at 30.

39 *See* Rule 101(b)(7), 17 C.F.R. § 242.101(b)(7) (1997).

40 On the subject of the demands of foreign issuers to reconcile their financial statements to U.S. GAAP and limited concessions accorded them in doing so, *see* James D. Cox, Donald C. Langevoort and Robert W. Hillman, *Securities Regulations* (2nd ed. 1997) 322-323.

41 David Waller, "A Babble of Dialects Confuses Global Decisions", *Financial Times* 15 (Apr. 19, 1990).

by disappointments followed by condemnation of the bodies established accounting standards.⁴²

The most important professional U.S. accounting organization, the American Institute of Certified Public Accountants (AICPA), in 1938 created within itself the Committee on Accounting Procedures for the purpose of promulgating accounting principles. Prior to the committee's creation, principles were not established or recognized in any systematic fashion; they arose out of practice and informal acceptance by members of the profession. Over the next 20 years the Committee issued 51 Accounting Research Bulletins.⁴³ The Committee's influence over standardization of accounting principles and conventions, however, was greatly eroded by their being merely recommendations for good accounting practices. Accountants, in rendering their audit opinions, could opine their client's statements were in conformity with GAAP, even if the procedures used were inconsistent with that recognized in an applicable ARB, provided the reporting method used had some acceptance in practice. Thus, GAAP under the ARBs depended more on the accountants' and their clients' acceptance of the recommended methods than on the force of the standard setter itself.

Over time, dissatisfaction with the Committee grew because it failed to conduct research or detailed analyses in support of its bulletins; recommendations were instead reflections of its members' views of desirable reporting methods. This dissatisfaction ultimately gave rise to the AICPA creating the Accounting Principles Board (APB) to replace the Committee. The APB's members were selected from large accounting firms, but with token representation from business, government and even the academy. Addressing the Committee's perceived weaknesses, the APB was empowered with a budget sufficient to retain a modest full-time staff, who researched and prepared research reports in connection with leading academics or practitioners as background for standards promulgated by the APB. During its existence, the APB issued 31 opinions and 4 statements. The influence of the APB was enhanced in 1964 when it finally resolved that financial statements prepared using methods embraced by the APB were in accordance with GAAP. Other reporting methods, however, satisfied GAAP, provided they had "substantial authoritative support."⁴⁴

Throughout its life, the APB encountered unrelenting criticism. Complaints included that it produced too little work, that it failed to concern itself with the broad objective of financial statements and the underlying principles for their preparation, and that its positions reflected the desires of the accountants' clients. Concern was also expressed that the APB's procedures and organization did not insure participation in its processes

42 The historical review of accounting standards setting that is set forth in this subsection is adapted from James D. Cox, *Financial Information, Accounting and the Law* (1980) 7-8.

43 The first 42 of the ARB's were restated in ARB No. 43 in 1953 which in many respects continues to be the bedrock of GAAP.

44 Such support existed when the method employed is, for example, "practices commonly found in business," requirements and views of stock exchanges, "the views of commercial and investment bankers," "regulatory commissions' uniform systems of accounts and accounting rules," "the regulations and accounting opinions of the Securities and Exchange Commission," and finally, "affirmative opinions of practicing and academic . . . accountants." AICPA, *Establishing Financial Accounting Standards, Report of the Study of Accounting Principles* (1972). Today, accountants may use a method that departs from that adopted by either the FASB or the AICPA only upon demonstrating such departure is justified by unusual circumstances. Rule 203 of the AICPA Code of Professional Ethics.

by nonaccountants or elicit the views of the users of financial statements; the groups most frequently found absent at the APB's high table were security analysts and financial executives whose views the APB's critics argued were as relevant as the independent accountants.

The death knell for the APB was the blue ribbon committee report chaired by former SEC Commissioner Francis M. Wheat. The "Wheat Report" detailed the above criticisms of the APB and called for a more independently structured accounting standard setter. In response to this recommendation, the APB was disbanded and the Financial Accounting Standards Board (FASB) was created in July, 1973. The FASB's organization is essentially that recommended in the Wheat Report: its decisions are rendered by its seven members who are required to sever all ties with their former employers and no more than 4 of its members can be from public accounting. The FASB enjoys extensive research and technical support from a large permanent staff that is frequently augmented by leading academics who oversee its research studies.⁴⁵ Financial support for the FASB is derived from a separate entity,⁴⁶ the Financial Accounting Foundation, which raises funds from all sectors of the financial community to support the FASB's activities. The FAF's trustees also fill vacancies that arise on the FASB's board.

Though the SEC has deferred to the private sector — the FASB and AICPA — as the principal authoritative accounting standard setter, there is little doubt regarding its ultimate authority to prescribe accounting and auditing standards for SEC documents.⁴⁷ In a sense, the SEC's power over accounting standards is consistent with the broader philosophy of the U.S. securities laws to elicit self regulatory organizations into the regulatory process. This philosophy was crisply summarized by former SEC Chairman, later Supreme Court Justice, William O. Douglas, remarking on the Exchange Act allowing self regulatory organizations to take the lead in establishing rules for the industry, observed that nonetheless, "government would keep the shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, ready for use but with the hope that it would never have to be used."⁴⁸

B. Approaches To Accepting Non-U.S. Standards

The pressures to permit standards other than U.S. GAAP for public offerings and listings within the U.S. are immense. Consider the likely eagerness of the NYSE for such a regulatory change; if the 20 largest foreign companies were to list on the NYSE it would double the Exchange's current market capitalization of \$7.4 billion.⁴⁹ The following examines several approaches by which the SEC may invoke to assess the acceptability of IAS for SEC regulatory purposes.

45 For a more detailed description of the FASB's procedures, see Armstrong, "The Work and Workings of the Financial Accounting Standards Board", (1974) 29 *Bus. Law.* 145 (Supp.).

46 Five FAF trustees can be from public accounting, at least three must be from the finance-corporate sector, such as financial analysts, business executives, or bankers) and the ninth trustee is an educator.

47 The SEC's "delegation" to the private sector was made in Accounting Series Release No. 150 (SEC 1973) and was upheld in *Arthur Andersen & Co. v. SEC*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,374 (D.C. N.D. Ill. 1978). For more about the power of the SEC over accounting, see Strother, "The Establishment of Generally Accepted Accounting Principles and Generally Accepted Auditing Standards", (1975) 28 *Vand. L. Rev.* 201.

48 W.O. Douglas, *Democracy and Finance* (J. Allen, Ed., 1940) 64-65.

49 See Lee Berton, "International Standards Threaten U.S. Companies", *Accounting Today* (Feb. 10, 1997) 14.

1. Too Big to Fail

As seen above, the SEC has frequently provided more relaxed regulatory treatment to its larger registrants. The most recent evidence of this is the dispensations from its various trading practice rules that it accords large issuers under Regulation M. More sweeping relaxation occurs in its integrated disclosure forms for certain large established registrants. Though each of these actions have a separate practical basis, either because there is limited likelihood that underwriters could or would manipulate the shares of the company engaged in a large global offering or that traditional prospectus delivery requirements are believed unnecessary for company's followed closely by analysts, there is also in each a good deal of practical political judgment. Each of these actions can equally be seen as highly pragmatic accommodations to industry concerns that failure to relax the regulatory treatment for such global companies necessarily would cause financial transactions and their investor participants to cross their orders abroad. There is little doubt that the SEC's adherence to U.S. GAAP is producing the same effects both for offerings and trading transactions in foreign issuers' securities. But this does not resolve the most difficult issue, namely whether domestic registrants meeting the same size criteria should also be free to comply with IAS. This issue leads us to the next possible rationale for recognizing IAS for SEC registrants.

2. Comparability or GAAP Lite?

Though full and fair disclosure is the credo of the U.S. securities laws, an even more precise summary of their orientation is comparability. Disclosure assumes significance not solely because investors can avoid questionable ventures, but to facilitate investors making the type of comparative judgment necessary for capital markets to fulfill their allocative functions. Thus is founded the notion that public companies present a "basic information" package to investors whether the company's security regulatory transaction is that of raising funds or listing its securities.⁵⁰ Investors in this way can exercise discrete judgments whether that judgment occurs in the context of purchasing a security being offered by the issuer or being sold by another investor in an organized securities market.

Thus, much energy has been expended examining the comparability of IAS with U.S. GAAP. Consider here the subtle attack levied by the FASB against IAS in its 1996 report detailing 255 differences between U.S. GAAP and IAS.⁵¹ Though the differences between the two groups have narrowed, there is little doubt that U.S. GAAP remains much more rigorous than IAS. How many fewer differences between IAS and GAAP will make IAS acceptable for U.S. regulatory purposes invites an obviously interesting but indeterminant answer. If we accept part of the learning of market efficiency, the inquiry into relative comparability should look beyond blunt inquiries that list the number of instances in which IAS departs from U.S. GAAP. The more important question is whether either reporting method

⁵⁰ This is the core concept underlying the SEC's integrated disclosure format.

⁵¹ See FASB, *The IASC-US Comparison Project: A Report On The Similarities And Differences Between IASC Standards* (1996).

provides enough information so that informed traders can determine approximately what assets, liabilities, revenues, expenses and income would be under the other body's rules. On this point the transparency of accounting choices becomes crucial. The worst condemnation of non-GAAP standards are choices that are not so identified, such as those that can occur in many countries involving hidden reserves, foreign exchange translations, and the movement of income from partially owned subsidiaries to their parent's income statement.⁵² It is regarding such practices that the critics of non U.S. GAAP continue to hold the high ground in this debate.

Thus, if comparability is to be invoked, it would not require that IAS be the mirror image of U.S. GAAP. This could never be the case for the very practical reason that the source of the debate is that one standard setter's rules are fundamentally different from those of the host country. Hence, some, and most likely many, differences will be inherent with any resolution of the debate. It should also be borne in mind that as the substantive differences between IAS and GAAP become less and less the burdens faced by foreign issuers to reconcile to GAAP are incrementally reduced. Thus, the comparability argument that is invoked by those arguing for IAS to be substitutable for GAAP may well be the basis for arguing that GAAP should continue to be the required basis for satisfying SEC disclosure requirements.

The greatest friction in accepting IAS that are different than those under U.S. GAAP will come from domestic issuers who will legitimately complain that the information costs incurred by their foreign counterparts are less than those imposed for U.S. issuers.⁵³ On this matter, there is much evidence that for some matters IAS in fact imposes greater disclosure demands than do comparable FASB statements. On this point it is instructive to consider the serious challenges to the FASB authority to establish accounting standards that are launched periodically when the FASB's announcements introduce unwanted changes on managers. For example, currently there is legislation pending before the Congress to overrule the FASB's proposed accounting treatment of derivatives. The FASB's proposed standard would require banks to report gains and losses due to fluctuations in the fair market value of the derivatives they hold in their investment portfolio; banks oppose the change because it will make their earnings fluctuate greatly from period to period due to the inherent volatility of derivatives. The banks have won the ear of several important members of the Congress who support legislation to overturn the FASB's standard.⁵⁴ The political problems the FASB has encountered with its proposed accounting standards for derivatives demonstrate that any SEC or FASB action accepting IAS for foreign issuers will not likely be argued in the macro sense but will be focused on particularly sensitive areas close to management's heart — the volatility of their earnings and their (cost for) stewardship of the firm.

The questions of comparability are not, therefore, laid to rest once the SEC accepts IAS. This will be an on-going source of friction, being invoked not to raise the walls around U.S. capital markets but to lighten the burdens

52 See James D. Cox, "Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies", (1993) 16 *Hastings Int'l and Comp. L. Rev.* 149, 167-173.

53 See e.g., Donald J. Moulin & Morton B. Solomon, "Practical Means Of Promoting Common International Standards", (Dec. 1989) *CPA Journal* 38.

54 See Senate Bill S-1560 reported in *BNA, Sec. Reg. & L. Rep.* No. 29 at 1652 (1997).

of its domestic participants. I have written elsewhere that such regulatory competition is healthy in providing an important wake up call for policy makers not to be too lax or too demanding in the content of their domestic laws.

Such differences as exist between the United States and any other country do not necessarily mean one country's disclosure requirements are either unworthy or socially wasteful. Investors considering investing in two competing markets will not be neutral to the otherwise equal risks and returns posed by the investments if they recognize that the incidence of fraud, manipulation, and unfairness is significantly lower in one market than another because of the differences in the two countries' securities laws. Ex ante, the investor will discount the price of the security in each market by the combined value of the average likelihood and magnitude of the feared misconduct posed by all securities traded on that exchange. Hence, the securities traded on a market which enjoys a lesser overall likelihood of abusive practices will ex ante trade at prices slightly higher than they would in a less regulated market.⁵⁵

The question posed to the SEC by IAS is whether U.S. markets should be fragmented by permitting some publicly traded firms to report their financial performance and position according to IAS and others to do so pursuant to GAAP, leaving it up to investors to discriminate, if they need to, between the two reporting groups. On this we must recognize the strategic advantage enjoyed by those seeking to weaken the content of U.S. securities laws once we allow the Trojan horse to enter the U.S. fortress. It is one thing to argue that countries can exercise dispassionate judgments regarding the relative stringency of their disclosure demands for any company entering their markets. Under this formulation, a country exacting greater disclosure may well attract fewer issuers to its markets, but the qualifying issuers can expect their securities to trade at a premium vis à vis comparable firms who prefer the laxer regulatory treatment in a foreign market.⁵⁶ This has been the rallying cry for continuing the imposition of U.S. GAAP. The resilient efforts of the SEC have had a positive impact on the quality of disclosure practices worldwide and heightened awareness on the part of foreign regulators of the importance of fair and complete financial reporting. Indeed, adherence to GAAP has been something of a bully pulpit for the SEC and other policy makers to champion improving regulatory developments in many foreign markets.

The position of the SEC as a standard setter changes dramatically if it were to accept foreign-based standards (or more specifically, IAS) as an alternative to GAAP when those standards are perceived as being even moderately weaker than GAAP. Though theorists may well make the valid point that issuers securities that comply only with IAS will be discounted moderately from those that comply with GAAP, we should expect any such discount is likely to reflect only the average risk posed by all such foreign issuers so that less well diversified investors will be insufficiently protected. Investors owning the securities of only a few such companies will not expect the discounts to compensate for the greater than average disclosure-based losses they experience. Their small unbalanced portfolio

55 James D. Cox, "Rethinking U.S. Securities Regulation in the Shadow of International Regulatory Competition", (1992) 55 *Law & Contemp. Prob.* 157, 159.

56 *See Id.* at 161.

necessarily means their risk will, if the SEC were to recognize IAS, vary from that of the market as a whole. But the greatest cause for concern will be from both the U.S. regulated and the regulator.

U.S. firms can be expected to argue they should have the choice of complying only with IAS. Their argument is that they should have the freedom to decide whether to incur the “arguable” discounting for weaker accounting standards, believing they can overcome this risk (which they, in the first place, likely do not believe in fact exists) by signalling the trustworthiness of their accounting statements by means other than their being certified to be in conformity with U.S. GAAP. How then could the SEC argue the wisdom of permitting foreign issuers to make that choice but deny red blooded U.S. firms the same choice?

With choice or regulatory treatment well established, where then is the SEC’s position at the high table of international accounting standard setting? Having accepted the theory of relative discounting among investors based on alternative regulatory choices, the SEC’s moral authority or regulatory experience, in either case, would appear to be seriously weakened in such discussions.

3. *The Hidden Agenda- Auditing Standards*

It may well be that the debate is not truly about accounting principles, but rather auditing standards. Certainly the SEC in recent years has done much to focus its regulatory energies on the auditors being independent from their clients. For example, there have been important regulatory developments expanding the role of U.S. auditors to detect and report illegal activities by their clients⁵⁷ and the SEC has been extremely active in its enforcement actions against accountants who failed to comply with generally accepted auditing standards (GAAS).⁵⁸

There is evidence that concerns with auditing standards are not isolated to the U.S. Many regulatory groups around the world are studying or calling for tightening their prevailing auditing standards. Not to be overlooked here is the effect of U.S. antifraud provisions on the auditing procedures that would be followed by foreign auditors preparing financial statements their clients intend to use when accessing U.S. capital markets. Bare compliance with contemporary auditing standards does not insulate the auditors from liability.⁵⁹ Questions of oversight, failing to pursue suggestions the statements were incomplete or otherwise misleading, the completeness with which an item is reported, or simply clumsy treatment all are the grist which feeds the avaricious class action lawyer. Nevertheless, the threat of liability is not likely to be invoked as the sole bulwark against any perceived laxity in foreign-based auditing practices. The SEC would be well advised to consider in tandem not just the acceptability of IAS but also the auditing standards under which the foreign issuer’s statements were prepared. It is entirely possible that there would be acceptance of the former, but not of the latter for many countries in the world.

57 The Private Securities Litigation Reform Act of 1995 amended the Securities Exchange Act to add Section 10A, 15 U.S.C. § 78j-1 (1992), which imposes on the public accountant the duty to report to senior management and/or the board of directors illegal acts they discover; the failure of management to address the accountant’s duty extends to the point that it ultimately giving notice to the SEC of the facts it has discovered.

58 See e.g., *Checkowsky v. Securities and Exchange Commission*, 23 F.3d 452 (D.C. Cir. 1994). See generally Goelzer & Wyderko, “Rule 2(e): Securities and Exchange Commission Discipline of Professionals”, (1991) 85 Nw. U. L. Rev. 652.

59 See *U.S. v. Simon*, 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970).

4. Governance Rules as a Strategy for Regulatory Exemption

As seen above, loud cries of ill-treatment can be expected from U.S.-based registrants if the SEC were to permit foreign issuers to enter U.S. capital markets using accounting and auditing standards less rigorous than those imposed on their U.S. counterparts. One strategy the SEC may consider is imposing governance requirements on such foreign issuers that are different from those that apply to U.S. issuers. For example, the SEC may condition the use of IAS on the company having an audit committee that is composed exclusively of outside directors. Though an audit committee is imposed by the listing requirements of the NYSE,⁶⁰ the SEC's approach here would be more pervasive, believing it is a response to perhaps any existing weaknesses in auditor independence or accounting standards that exist under foreign law.

More sweeping and controversial would be requirements that a certain percentage of the foreign issuer's board of directors represent individuals not identified with management, that the shareholders have the power to cumulate their votes so as to secure proportional representation on the board of directors, or that the audit committee separately report its evaluation of significant accounting policies used by the firm. Here the SEC's power may be more vulnerable, because its focus is less on financial reporting and more on the firm's overall governance. Such a focus in the past has been held to be beyond the SEC's power.⁶¹ Moreover, there is little reason to believe that prescribing a critical mass of independent directors for the board of directors would add any more protection to investors than would a fully independent audit committee that is charged specifically with meeting interacting with the independent accountants. Furthermore, the audit committee's responsibility could easily be detailed by the SEC so that it included matters to assure sufficient transparency of the company's financial statements to permit the types of comparisons, discussed earlier, with U.S. GAAP based statements.

IV. CONCLUSION

U.S. securities laws are facing the greatest strain in their history. The pressures come from foreign shores, but also from within the U.S. investment community. The above examines many of the contemporary responses to these pressures. Regrettably there appears to be no response that is fully satisfactory, some would even say is reasonable. Regrets are felt here because the grand exercise of demanding securities regulation which surely was having its impact on the content of securities regulatory standards around the world, may well be entering a period of eclipse. Though total darkness may not rule the day, there will be a dimmer light on U.S. capital markets.⁶²

60 See New York Stock Exchange Listed Companies Manual § 303. For the requirement of audit committees on NASDAQ listed companies, see Schedule D to the NASDAQ By-Laws.

61 See *Business Roundtable v SEC*, 905 F.2d 406 (D.C.Cir. 1990) (SEC lacks authority to prescribe dual class voting stock).

62 Here we may well find cause for additional concern from Brandeis's insight: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money* (1914), 62.