Regulation of International Securities Issues

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Like bank regulators, securities regulators around the world have become increasingly preoccupied with the internationalization of markets. Lenders and borrowers alike find it easier than ever to move from one capital market to another in search of the most attractive terms. This trend should be encouraged because it both lowers borrowers' cost of capital by making new sources of funds available and reduces lenders' risk by increasing opportunities for diversification. Because many of the remaining barriers to cross-border investment are regulatory, the pace of further development depends in part on the reactions of regulators. In particular, will they view internationalization as a beneficial dose of competition for the regulated markets and market participants or as a most unwelcome dose of competition for the regulatory agencies themselves?

Regulators, like businessmen, may dislike competition. Securities regulators may therefore have an incentive to argue that the reduction of regulatory barriers to international investment could also reduce the protections available to investors. This article concludes that competition among markets and their regulatory schemes will provide adequate protection to investors, even if regulators take a more flexible stance toward cross-border investment. Accordingly, national securities authorities should construct a multinational regulatory system based on the mutual recognition of regulatory standards. Such a system should be based on the proposition that the rules of the market having the closest connection to a transaction will govern that transaction, and other affected markets will recognize and give effect to those rules instead of asserting concurrent regulatory jurisdiction. While it may be appropriate for national securities authorities to negotiate uniform minimum disclosure standards and other rules, that effort should not interfere with the broader goal of reciprocity and avoiding overlapping regulatory jurisdiction. It should be noted that this argument is aimed at the regulation of new securities issues. The oversight of broker-dealers, exchanges, and clearing agencies, for example, presents entirely separate issues from those addressed here. In fact, some of those issues might be appropriately resolved through coordinated international standards.

The U.S. Securities and Exchange Commission (SEC) has taken several significant steps in response to the growth in cross-border investments, and some of these cede small bits of regulatory jurisdiction. Unfortunately, the SEC's initiatives to date have been a series of ad hoc responses to pressing problems of overlapping or overreaching regulation rather than a comprehensive framework for avoiding such problems. The scope of these initiatives has been constrained by the SEC's preference for "harmonization," or convergence of national standards, over

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reciprocal treatment. By contrast, the European Community (EC) has recognized the need for, and has taken important steps in the direction of, a comprehensive system based on reciprocity. The SEC may reasonably feel that the sweeping language of the statutes it administers limits its ability to grant reciprocal treatment. It is not a purpose of this article to apportion blame for the inadequate U.S. response to internationalization among the SEC, Congress, and other U.S. policymakers. I do wish to suggest, however, that as these policymakers contemplate the effects of a more integrated European market on the competitive position of the U.S. financial services industry, they would do well to consider the differences between the U.S. and EC approaches.

Background

Few financial topics have received as much recent attention as internationalization. The flow of capital across national boundaries has increased dramatically over the past decade. Many factors have contributed to this phenomenon, including current-account imbalances among the major industrialized nations, advances in communications technology, the growth of international trade and the concomitant need for businesses to manage foreign-currency exposure, the general trend away from exchange controls and restrictions on foreign ownership of assets (with the distressing exception of the Exon-Florio amendment in the United States), and increased awareness of the benefits of broader portfolio diversification. As the above list shows, internationalization is a market response to the needs of both issuers and investors.

This trend has put a tremendous strain on securities statutes and regulations that were generally written in contemplation of self-contained national markets. U.S. investors, in particular, now find that their own securities laws represent one of the most vexing barriers to international diversification. The disclosure regime for new issues mandated by the federal Securities Act of 1933 makes significant concessions to foreign governments and their political subdivisions, but treats foreign nongovernmental issuers the same as U.S. corporate issuers. While the SEC has used its rulemaking authority to make minor adjustments to the disclosure scheme for the benefit of foreign private issuers, a foreign corporation that offers securities to the public in the United States becomes subject to extensive disclosure and ongoing reporting requirements under U.S. law while remaining subject to the laws of its home country. SEC standards of accounting, auditor independence, and general disclosure are sufficiently different from (and generally more onerous than) those applicable to most foreign corporations that compliance with U.S. law is a costly undertaking that may require keeping two separate sets of accounting records. Moreover, the SEC regulates the manner of conducting securities offerings, and its rules conflict with market practices and regulations in many foreign markets. For the vast majority of foreign issuers, these costs and conflicts have been sufficient to deter any attempt to enter the U.S. public markets.

The London securities markets provide an interesting contrast. British regulators decided at the outset to permit the Eurodollar market, which serves a sophisticated international investor base, to operate from London on a self-regulated basis. As barriers to capital flows fell, the amount of capital raised in the Eurodollar market grew from US$18.8 billion in 1980 to US$ 175.6 billion in 1988, and London consolidated its position as the principal center for international securities trading. Indeed, London's securities markets may be the largest beneficiary to date from internationalization. The importance of the Eurodollar market and the success of its self-regulatory scheme are such that the EC, like the London regulators, has essentially declined to regulate it.

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SEC Initiatives

The reluctance of foreign companies to enter the U.S. securities markets became a matter of concern for the SEC as U.S. investors became increasingly able to move capital overseas and to invest directly in foreign markets outside the SEC's jurisdictional reach. Of equal concern was the possibility that the U.S. new-issues market, as a consequence of regulatory barriers, would benefit relatively little from the substantial increase in cross-border securities offerings. The SEC responded with a set of measures aimed at capturing a greater share of international securities trading for the United States while at the same time acknowledging the legality of the widespread participation by U.S. issuers and investors in overseas markets.

The SEC recently adopted and proposed several regulatory reforms designed to facilitate both U.S. investors' investing in foreign securities and U.S. corporations' raising money overseas. While the SEC has in the past been willing to grant case-by-case relief from particular regulatory requirements to facilitate cross-border securities offerings, the recent measures represent a more significant attempt to come to grips with internationalization.

The most important SEC initiatives are Rule 144A, Regulation S, and the U.S.-Canadian Multijurisdictional Disclosure System. Rule 144A, adopted in April 1990, permits certain secondary sales of privately placed securities to large, sophisticated institutions (generally those with securities portfolios of at least $100 million) without SEC registration. While securities of both domestic and foreign issuers fall within the scope of Rule 144A, the remarks made by SEC Chairman Richard Breeden at the time of the rule's adoption make it clear that an important purpose of the rule was to encourage foreign corporations to raise capital in the United States. Regulation S, adopted in April 1990, confirms that the requirement of U.S. law to register public securities offerings is not applicable to offers and sales of securities outside the United States. Regulation S provides detailed guidance to companies offering securities offshore on how to structure these offerings so that they will be deemed to take place solely outside the United States. U.S. issuers and investors are already significant participants in the Euromarkets; Regulation S clarifies the boundaries of the SEC's sphere of interest. The U.S.-Canadian Multijurisdictional Disclosure System proposal is in response to comments the SEC requested in 1985 on a system for permitting multijurisdictional securities offerings. In 1989 the SEC proposed such a system that would be limited to the United States and Canada, while expressing the hope that it could be expanded to other countries. The SEC recently proposed a revised version of the system that would allow certain Canadian issuers to register securities for sale in the United States by using disclosure documents prepared primarily in accordance with Canadian law, rather than preparing a Canadian-law prospectus for use in Canada and a U.S.-law prospectus for use in the United States. The proposal contemplates similar privileges for U.S. issuers in Canada.

European disclosure systems are generally less intrusive than the U.S. disclosure system and permit issuers greater flexibility in determining which matters are material to investors. European markets tend to emphasize self-regulation and to rely on market forces to produce incentives to disclose important information.

The SEC chose Canada as the initial partner in this proposal in part because of the similarities between U.S. and Canadian securities laws, and the SEC's negotiations with Canadian authorities have sought to increase these similarities. The SEC's 1985 request for comments noted the difference between a "harmonization" approach to the regulation of cross-border offerings and a "reciprocal" approach, which would require each participating nation to grant mutual recognition to the others' disclosure standards. The SEC describes its proposed system in its current form as a "hybrid" of the harmonization and reciprocal approaches. Although at the date of this writing the proposal has not been approved by the SEC or the Canadian authorities, Chairman Breeden has stated that adoption of the proposal is high on the SEC's agenda.

EC Initiatives

The disclosure systems of European nations, as a general matter, are less intrusive than the U.S. disclosure system and permit issuers greater flexibility in determining which matters are material to investors. European markets also tend to emphasize self-regulation and to rely on market forces to produce incentives to disclose important information. As noted above, this trend is especially characteristic of the Eurodollar market and has been perceived by participants in that market as highly successful. Reciprocal treatment, therefore, may be easier to reconcile with the European philosophies of securities regulation than with their American counterpart. In any event, the principle of reciprocal treatment has made it possible to eliminate substantial barriers to multinational securities offerings within the EC.

The 1957 Treaty of Rome, which created the European Economic Community (now the EC), authorizes the EC's Council of Ministers to adopt "directives," or mandatory instructions to the EC's 12 member states to enact legislation that achieves a specified goal. Pursuant to this authority, the council adopted in 1980 a directive (the 1980 Directive) concerning the documentation that must accompany applications for listing securities on a European stock exchange. The 1980 Directive requires member states to condition stock exchange listings, with certain exceptions, on the publication of an information sheet, known as the "listing particulars," which contains specified information about the securities and the issuer. The 1980 Directive provides minimum standards for listing particulars but did not, at the time of its adoption, require either uniformity or mutual recognition of national standards.

After the approval of the EC Commission's "1992 program" for the creation of a single European market, the EC Council amended the 1980 Directive to provide for mutual recognition of listing particulars. The amendments provide that once listing particulars have been approved in one member state, those listing particulars must be accepted for listing purposes by all other member states without additional approval or alteration other than translation. The other member states may require only certain limited supplemental information regarding procedures for payments and notices to foreign holders and the tax consequences to such holders.

In 1989 the EC Council adopted a directive (the 1989 Directive) regarding the publication of prospectuses in connection with public offerings of securities, whether or not listed on an exchange. The 1989 Directive instructs member states to require publication of a prospectus containing specified information in connection with public offerings of securities, subject to certain exceptions. In the case of listed securities the listing particulars are to serve as the basis for the prospectus. The mutual recognition provisions of the 1989 Directive state that a prospectus approved by one member state is entitled to recognition in other member states with respect to contemporaneous public offerings, subject to provision of the same supplemental information applicable to listing particulars. The 1989 Directive also holds out the possibility of granting recognition throughout the EC to prospectuses prepared under the auspices of a nonmember state, so long as that state provides reciprocal treatment to the EC prospectus. Because the United States does not provide such reciprocal treatment, a U.S. company will not be eligible to sell securities in Europe by using a single EC prospectus, but instead will have to comply with the disclosure standards and filing requirements of each European country in which it sells securities.

From the standpoint of facilitating cross-border financings, the 1989 Directive has stopped somewhat short of the mark. It exempts broad classes of securities; the mutual recognition provisions are limited to contemporaneous offerings and require advance approval by at least one member state; and the coordination of enforcement and civil liability provisions is not addressed. Nevertheless, the 1989 Directive is an immense accomplishment. With one stroke, it has created a multinational disclosure system for public offerings based on reciprocity and requiring only a single prospectus. European issuers and investors will surely benefit from the resulting increase in cross-border financings.

The SEC and EC Approaches Contrasted

To generalize, the EC approach to cross-border securities offerings is based on reciprocity and is comprehensive, in that it seeks to treat in a coordinated fashion a broad range of conflicting and overlapping regulations applicable to primary securities offerings in the member states. The SEC approach, by contrast, is based primarily on harmonization and is ad hoc, in that various pressing issues have been dealt with as they have arisen and not according to a single regulatory philosophy. On both counts the EC approach represents a more desirable path to the common objective of reducing barriers to multinational investment while assuring the provision of adequate information to investors.

The EC approach to cross-border securities offerings is based on reciprocity and is comprehensive. The SEC approach is based on harmonization and is ad hoc. The former approach tends to reduce barriers to multinational investment while affording investors adequate information.

The SEC's internationalization initiatives are a series of responses to problems of particular urgency. The principal reforms—Rule 144A, Regulation S, and the U.S.-Canadian Multijurisdictional Disclosure System proposal—do not reflect a single theory for treating regulatory conflicts and redundancies.

Indeed, as Professor and former SEC Commissioner Roberta Karmel has pointed out, Rule 144A and Regulation S are philosophically in conflict with the disclosure system proposal. The latter takes at least timid steps towards recognizing another country's regulations, while Rule 144A and Regulation S define a U.S. sphere of interest that is based not on the avoidance of overlapping jurisdiction

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but on an updated theory of the purposes of the federal securities laws. Although the SEC may believe that its hands are tied by the U.S. statutory framework, the failure even to articulate a uniform analytic approach is inconsistent with the SEC's stated desire to take a leading role in regulating international markets. This failure puts the SEC in a reactive posture that is not conducive to identifying and solving future regulatory conflicts.

The SEC's most serious attempt to articulate a general theory of international securities regulation is its 1988 Policy Statement on Regulation of International Securities Markets. The policy statement identified harmonization as a guiding principle by declaring that the SEC's goal is to "minimize differences between systems." The policy statement enumerates certain fundamental features of the desired international norms; not surprisingly, these are derived from U.S. law. Therein lies the practical objection to harmonization. It necessarily requires either that countries begin with substantially similar securities laws (which is not currently possible) or that some nations agree to subordinate their regulatory philosophies to those of other nations.

Seen from this perspective, the SEC's failure to adopt comprehensive measures and its preference for harmonization are related phenomena. Harmonization of regulatory standards is probably an unrealistic basis for a comprehensive solution to the problem of unnecessary regulatory barriers. The major market centers are starting from very different regulatory structures. Converging those structures on a single point would require substantial concessions by almost all countries, and achieving the desired level of cooperation seems highly unlikely. The difference between the EC and SEC experiences in coordinating regulatory treatment of multinational securities offerings provides compelling, if still preliminary, evidence in support of this view. Between 1987 and 1989 the EC Council set the ground rules for a reciprocity-based disclosure system covering twelve separate nations while the SEC has been working for more than five years on a partially reciprocal and partially harmonized multinational disclosure system with Canada—a single neighboring country with a similar set of securities laws, and the largest single source of foreign investment in and trade with the United States.

The differences in outcomes result at least in part from the SEC's insistence on a substantial degree of harmonization and its parallel insistence that its own rules constitute the standard with which others must harmonize. As mentioned earlier, Canada is the sole initial participant in the multijurisdictional disclosure system in large measure because Canada's regulations were already similar to those of the United States. The SEC's original proposal contemplated that the United Kingdom might be an initial participant, but its regulatory structure proved a more substantial hurdle than the Canadian one, particularly where accounting rules are concerned. Although both the SEC and British regulators continue to express hope that the United Kingdom will in time participate in the system, commentators remain skeptical that the goal can be achieved.

Even the Canadian multijurisdictional disclosure system proposal falls short of its stated goal of permitting the use of a common prospectus prepared in accordance with home-country law. The reason, which does not bode well for future expansion of the disclosure system, is the SEC's refusal to compromise on certain disclosure issues. Perversely, the primary area of SEC intransigence is accounting standards, the field that has posed perhaps the greatest obstacle to foreign issuers' complying with SEC registration procedures. For example, the disclosure system proposal requires, for a broad range of securities issuances, that the prospectus used in the United States include a reconciliation of the issuer's financial statements to U.S. accounting principles. The proposal also denies recognition to the most recent year's financial statements of an issuer if those statements were certified by accountants that did not meet the SEC's auditor independence standards. Under SEC rules, accountants that engage in specified transactions or relationships with a client are not "independent" with respect to that client and, accordingly, may not certify financial statements that are included in a prospectus. Because SEC registration forms typically require certified profit and loss statements for three years and certified balance sheets for two years, the consequence to an issuer of having nonindependent accountants is disastrous—it must hire a new accounting firm to carry out a costly reaudit of past years' financial statements. Under the 1989 disclosure system proposal, these auditor independence rules would have applied with full force to Canadian issuers, even though the rules went beyond what is required under Canadian codes of professional ethics. The Canadian accounting profession, among others, protested that an issuer that did not anticipate, years in advance, an offering in the United States could find itself forced into a reaudit although its accountants had complied throughout with their ethical obligations under Canadian law and practice.

The SEC's most recent disclosure system release responds to these protests with the churlish statement, "The Commission continues to believe that all auditors reporting on financial statements filed in its jurisdiction should be independent in fact." The proposal in its most recent form retains the auditor independence standards but applies them only beginning with the financial statements for the year immediately preceding the offering, which is still scant help to the nonprescient issuer. The message to other potential participants in the disclosure system seems obvious—the powerful SEC accounting staff is still far from converted to the gospel of facilitating access to the U.S. markets for foreign issuers. From a broader perspective, the U.S.-Canadian experience demonstrates the practical limitations of harmonization as the theoretical underpinning of international securities regulation.

A reciprocity-based approach is preferable to harmonization not only on these pragmatic grounds, however. Reciprocity avoids conflicting regulations while sparing issuers the time and expense of preparing multiple regulatory filings and complying with two or more sets of rules. Perhaps more important, it provides a degree of market discipline to regulators by encouraging competition among regulatory systems.

Reciprocity avoids conflicting regulations while sparing issuers the time and expense of preparing multiple regulatory filings and complying with two or more sets of rules. It also provides a degree of market discipline to regulators by encouraging competition among regulatory systems.

That such competition is advantageous is, oddly enough, a controversial proposition. It has become fashionable for regulators, academics, and policymakers to warn about the dangers of "regulatory arbitrage," the supposed process by which issuers search out markets with lax rules and shun those with strict rules. Regulators thus face competitive pressure to relax their own regulations—to the ultimate detriment of investors. This argument is a variant of the "race to the bottom" objection to the existence of multiple regulatory systems in, for example, corporate law. The argument is faulty in the present context on at least two counts. First, absent the reintroduction of exchange controls or other restrictions on international funds transfers, investors will continue to invest in foreign markets and to rely on foreign law for protection. It is therefore largely academic whether foreign standards are "better" or "worse" than U.S. standards; the real issue is whether the United States should decrease the cost of such investment by making it easier for foreign issuers to make offers and sales of securities directly to U.S. residents.

The regulatory arbitrage argument also ignores the benefits to be gained by forcing regulators to convince investors and issuers that their rules provide a fairer game, given their cost, than competing sets of rules. Securities regulation is not a simple zero-sum game in which any decrease in the cost of regulatory compliance to issuers must be offset by an increase in the risks to investors. On the contrary, both issuers and investors suffer when regulations force issuers to incur costs out of proportion to the benefit provided to investors; as those costs are passed on to investors, marginal investors drop out and the remainder suffer a reduction in yield. Between markets offering equivalent investor protection, therefore, investors will prefer the one that imposes the lowest cost on issuers. The regulatory arbitrage proponents have not satisfactorily explained why investors would willingly follow issuers to a market that, according to the theory, makes the issuers better off and the investors worse off. The reason usually asserted is that issuers have greater resources and a greater stake in finding favorable rules than small, apathetic, far-flung investors. To the extent that this argument holds any weight in markets populated in substantial part by large, repeat-player, institutional investors, the solution to the problem is obvious. Regulators have resources, access to information, and a large incentive to promote their own rules; they should take on the task of convincing investors that their rules are fairer than the competitions'.

The goal of easy comparability of financial statements is probably unachievable and should not stand in the way of reducing barriers to investment. The more important, achievable goal is transparency, a detailed description of the accounting standards applied.

Another argument advanced in favor of harmonization is that deliberately coordinated disclosure requirements will aid investors by presenting information, particularly accounting information, in a standardized format that will facilitate company-to-company comparisons. The gains from such standardization, however, are overstated. Like any one-size-fits-all product, an inflexible set of accounting rules fits no issuer perfectly and therefore provides only limited insights into the differences between issuers. Investment analysts historically have complained about the shortcomings of the SEC's procrustean insistence on a standardized format for the disclosure of financial information. Indeed, much of the job of a financial analyst is to ferret out the story that a given company may not tell under the SEC's accounting rules—perhaps that its assets are worth more than historic cost, or that many of its expense items consist of noncash depreciation and amortization charges, or any of a variety of particularized information that shows up indistinctly, if at all, in the standard format. If inflexible accounting principles do not make it easy to compare two U.S. companies, they offer little hope for comparisons of U.S. and foreign companies. To take an obvious example, a look at the financial statements of a U.S. bank, a German bank, and a Japanese bank, all prepared under the SEC's guidelines for financial reporting of banking organizations, could not begin to provide a simple comparison of the three institutions, which operate under different regulatory structures, engage in different lines of business, and face different monetary, tax, and competitive environments. The goal of easy comparability is probably unachievable; in any event its attainment is so problematic that it should not stand in the way of reducing barriers to investment. The more important and achievable goal is transparency, which means that financial statements should describe in detail the particular accounting standards applied so that investors who are so inclined can compare accounting standards.

The Hidden Dangers of the SEC Approach

While an ad hoc, harmonization-based approach to international securities regulation is not so desirable as a comprehensive, reciprocity-based system, the former is still preferable to the status quo. The SEC has taken the critical first step of recognizing the existence of unnecessary regulatory barriers to cross-border investment. Even a second-best method of reducing those barriers is better than no method at all. That fact, however, should not be cause for complacency, because the SEC's second-best approach creates two significant dangers. The first is that U.S. regulatory barriers to international investment will be reduced more gradually than they should, and will thus provide an opportunity for other markets, particularly in Europe, to capture a larger share of cross-border financing. The second, less obvious danger is that ceding regulatory jurisdiction grudgingly and incrementally rather than pursuant to a long-term plan can create unintended incentives that produce disruptions in the affected markets. Securities regulators need only consider the recent history of banking and thrift regulation to recognize that piecemeal regulatory reform can have adverse effects.

The SEC's recent initiatives have already created some risk of market distortions. Rule 144A provides an example. The premises underlying the rule are that substantial institutional investors are better able to fend for themselves than small investors, and therefore that permitting foreign and domestic issuers to reach institutional investors at low cost is an easy way to aid the process of capital formation without unduly compromising investor protection. The theory has a great deal of internal logic, but the resulting rule creates an incentive for high-quality issuers to ignore individual investors because of the relatively high cost of reaching them. The issuers who then have the greatest incentive to seek out small investors are low-quality issuers who are unable to attract the interest of institutions. This tendency exists already in the fraud-ridden "penny stock" market, which consists of low-capitalization companies selling inexpensive securities that have relatively little appeal for institutional investors. Rule 144A could easily exacerbate the problem by creating separate institutional and noninstitutional markets. To the extent that a rigid, two-tier market develops, small investors will also lose the opportunity to free-ride on the efforts of institutional investors to monitor and to restrain the behavior of managers of the companies in which the institutions invest. That ability to free-ride may be of more value to small investors than the SEC registration and disclosure requirements. By encouraging the creation of a two-tier market, Rule 144A could harm the small investors the SEC is mandated to protect.

In the course of proposing and adopting Rule 144A, the SEC concluded that the danger of a two-tier market was overstated. One might also argue that Regulation D, which provides a safe-harbor exemption from registration for private placements, has already created incentives for a two-tier structure and that Rule 144A will increase those incentives only modestly. Even if a strictly delineated two-tier market does not develop, Rule 144A could harm small investors. Foreign and domestic issuers not already subject to SEC reporting but able to provide adequate assurances of quality to attract sophisticated institutions will presumably rely heavily on relatively low-cost unregistered securities offerings in which Rule 144A will permit free resale among institutional investors. The rule will consequently make diversification, particularly international diversification, easier for institutional investors than for small investors. It may also give substantial investors an advantage over small investors in obtaining the full value of their investment. Foreign issuers and third parties often take actions that benefit the holders of an issuers' securities, such as offering newly issued securities to current shareholders at a discount, or offering to exchange shares of an acquiring company for shares of a target company at a premium. Such lucrative offers generally cannot be extended to U.S. resident shareholders absent compliance with the registration requirements of U.S. law. Foreign companies have often responded to that problem by denying their U.S. shareholders the right to participate in these offerings. Rule 144A may make it possible in some circumstances to extend participation to institutional investors while excluding only small investors and thereby denying the latter the opportunity for a profit. The SEC cannot possibly have intended that result.

The small investor can avoid all of these disadvantages by abandoning direct investment in the stock market in favor of buying shares in mutual funds which are, generally speaking, eligible to purchase Rule 144A securities. Indeed, the mutual fund industry could be the principal unintended beneficiary of Rule 144A if small investors react rationally to the rule by relying more heavily on mutual funds. One could undoubtedly argue that small investors should be given incentives to diversify through mutual funds rather than doing so directly and, perhaps, unsuccessfully. But the SEC has never advanced such an argument in favor of any of its initiatives, nor has it expressed any desire to influence investors' choices among competing investment alternatives. The entire structure of the federal securities laws makes sense only if viewed in connection with the paradigm of the small investor who is imperfectly diversified and therefore

The entire structure of U.S. securities laws makes sense only for the paradigm of the small investor who is imperfectly diversified and therefore in need of information about firm-specific risks. If that paradigm vanishes, the structure should vanish with it.

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Conclusion

Participants in international capital markets can be grateful that local markets around the world are vying for their business and that regulators have declared their willingness to facilitate the competition. International securities regulation is at an important crossroads, however. To date various groups of regulators have managed to form small cooperative ventures, but much greater advances are necessary to create a truly global market. The only avenue that holds out a realistic hope of achieving that goal is mutual recognition of regulatory standards. An insistence on uniform international standards is not only unrealistic; it may put in motion the types of rivalries and self-interested bickering that result in closed markets. The SEC should recognize this, particularly in light of the relative success of the EC directives, and eschew any desire to play global securities cop.

An insistence on uniform international standards is not only unrealistic; it may put in motion the types of rivalries and self-interested bickering that result in closed markets.

Selected Readings

International Monetary Fund. *International Capital Markets: Developments and Prospects*. Washington, D.C.: April 1989.

Mahoney, P. "Securities Regulation by Enforcement: An International Perspective." *Yale Journal on Regulation*, Vol. 7 (1990).

"International Securities Regulation: Recent Developments in the United States, United Kingdom, and European Community." *Brooklyn Journal of International Law*, Vol. 16 (1990).