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COMMENTS

Internationalization of Stock Markets: Potential Problems for United States Shareholders

I. INTRODUCTION

Despite considerable advance publicity, the internationalization of the world's stock markets remains in the incipient stage of development. Nonetheless, the exchange of capital across international borders through the purchase and sale of equity securities is likely to continue. This Comment will explore the potential problems faced by United States shareholders when the corporations in which they own stock list and offer equity securities on stock exchanges in foreign countries.

In some ways, the Comment is in search of a question. It must be noted at the outset that no case law and very little commentary currently exist on this topic.[1] Consequently, much of the analysis may be regarded as speculative, expressing anxiety over conflicts which may not materialize. The Comment is also in search of an answer. Solutions to some problems resulting from the internationalization of stock markets have already been suggested.[2] Unfortunately, these recommendations do not

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[1] The monthly periodical *Euromoney* provides perhaps the most complete regular coverage on the subject of internationalization. *See, e.g.*, *The Corporate List*, EUROMONEY, May 1986, at 123; *The One-World Capital Market*, EUROMONEY, Oct. 1984, at 106; *The Surge in International Equities*, EUROMONEY, May 1984, at 121.

[2] *E.g.*, Facilitation of Multinational Securities Offerings, 50 Fed. Reg. 9281 (1985)(to be codified at 17 C.F.R. pt. 230) [hereinafter Facilitation of Offerings]. The SEC suggested two alternative proposals to harmonize disclosure and distribution practices between the United States, the United Kingdom, and Canada. Under the "reciprocal proposal," the three countries would agree that a prospectus meeting certain standards and prepared in the issuer's country would be accepted by the other countries for a stock offering. *Id.* at 9283. The "common prospectus proposal" would establish a uniform prospectus for stock offerings which would be filed simultaneously with the securities administrators in each country. *Id.*

solve shareholder problems resulting from corporate financing activity outside the United States. Clearly, other alternatives must be explored.

Despite the relative lack of source material, several trends indicate that the process of internationalization will continue. One harbinger of this global market is the establishment of dual- and multi-exchange linkages for information transferal and trading.[3] Multimarket offerings of equity securities, primarily in Europe and the United States, are also becoming more frequent.[4] Additionally, the level of purchases and sales of United States securities by foreign individuals and entities continues to rise.[5]

Another indicator is the recent move by United States corporations to list and offer equity securities on foreign stock exchanges. Unlike the other trends noted, relatively little attention has been paid to this facet of global market development.[6] The subject is no less important, however, for it raises new concerns. As United States stocks are increasingly offered and traded on stock markets in foreign countries, conflicts may arise which will adversely affect the value of investments held by United States shareholders.

Potential problems for United States shareholders may have repercussions for all players in the internationalization process. For the individual investor, possible losses may lead to greater investment evaluation, investment through institutions, and, in the extreme, heighten the prospect of securities litigation. The Securities and Exchange Commission ("SEC" or the "Commission") may seek to promulgate additional rules and regulations in order to insulate United States markets from possibly adverse spillover effects. United States corporations will likely continue

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[3] The electronic linkage of the Boston and Montreal stock exchanges was the first tie between a United States stock exchange and a foreign-based counterpart. Phase II of this link provides for the one-way flow of purchase orders from Canada to the United States. 50 Fed. Reg. 14,480-81 (1985); Securities Exchange Act Release No. 21,925, 32 SEC Docket (CCH) 1152 (Apr. 8, 1985). The Securities and Exchange Commission ("SEC") subsequently approved an electronic linkage between the American ("Amex") and Toronto stock exchanges. 50 Fed. Reg. 39,201 (1985); Securities Exchange Act Release No. 22,442, 34 SEC Docket (CCH) 105 (Sept. 20, 1985). The Amex-Toronto link permits the routing of dually-listed securities between the two trading floors. Additionally, several European stock exchanges employ an electronic linkage to provide for information transferal. Lim, *Trading Across Frontiers*, EUROMONEY, May 1984, at 110.

[4] Donnelly, *The Perils of Multimarket Offerings*, INSTITUTIONAL INVESTOR, Oct. 1984, at 287, 288.

[5] In 1970, gross foreign purchases and sales of corporate stocks in the United States amounted to $17.2 billion. U.S. TREAS. BULL., Jan. 1980, Table CM-VI-1. By 1980 that figure had jumped to $75.2 billion. U.S. TREAS. BULL., Winter Issue, Fiscal 1985, Table CM-V-1. Totals for 1985 amounted to $158.157 billion. U.S. TREAS. BULL., Winter Issue, Fiscal 1986, Table CM-V-1.

[6] *See generally More U.S. Concerns Seek to be Listed Overseas*, Wall St. J., June 10, 1985, at 6, col. 1 [hereinafter *More U.S. Concerns*]; *Buying Binge: Japanese Investors Turn More and More to Foreign Equities*, Wall St. J., Sept. 6, 1985, at 1, col. 6 [hereinafter *Buying Binge*].

to seek a larger market for their stock in order to maximize financial gains. At the same time, foreign securities companies and stock market representatives will attempt to lure new entrants by minimizing the potential risks inherent in foreign listings and security offerings. Detailed analyses of these repercussions must await future commentaries. It is hoped that this article will provide a starting point for a continuing discussion of the internationalization process and its effects on United States shareholders.

The Comment begins with a critique of the current regulation paradigm and its shortcomings. The Comment continues with a description of the trend toward and motivation of United States corporations listing shares and issuing new equity on stock markets located in foreign countries. Next, the Comment identifies several problems caused by the internationalization movement. Emphasis is placed on determining who is harmed by United States corporate activity on foreign stock exchanges, which party is liable for such harm, and whether preventing such harm is possible. The Comment concludes by suggesting a shift in the regulatory paradigm currently employed. It will not be argued that additional regulation of the securities market is the only panacea. Rather, it will be suggested that a new paradigm will resolve current regulatory failures and result in greater cooperation and flexibility in the internationalization of stock markets.

II. CURRENT PARADIGM

It is not surprising that little attention has been paid to the potential problems faced by United States shareholders as a result of foreign listings and stock offerings by their corporations. This is a consequence of the market-oriented paradigm in which many in the United States view the securities markets.[7] Under the market-oriented paradigm, inquiry is centered at the general level of market functioning rather than at the more discrete level of investors and securities companies. Consequently, analysis of market operatives is of secondary importance, dependent upon the functioning of the larger market.

The purpose of this section is to analyze two of the major premises of this paradigm: 1) that regulation of the market protects the investor; and 2) that regulation serves a beneficial function to the market. Attention will be paid to defining the limitations of these component structures. In particular, the incidence of international trading and offering of

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[7] Endorsement of the market-oriented approach is not limited to United States regulators. *See World Securities Officials Agree to Promote Integrity of their Markets*, 17 Sec. Reg. & L. Rep. (BNA) 1183-84, 1186 (July 5, 1985) [hereinafter *World Securities Officials*].

equity securities will be analyzed within the current conceptual framework.

A. Investor Protection

The first premise of the paradigm establishes that market regulation exists to protect the investor and to fulfill the need for fair and efficient access to and exit from the market. Given that premise, the role of the SEC is to "protect investors (principally, but not exclusively, U.S. investors) and the U.S. securities markets, and in the performance of that role the Commission seeks to protect U.S. residents from fraud and also to prevent fraudulent activities from occurring in the U.S."[8] The implicit assumption in this statement is that a regulated market protects the investor. In practice, the regulatory activity of the SEC may actually supersede the goal of investor protection. Shareholders enter the market for investment reasons. Their concerns are generally to gain financially and to maintain control over management activity, not to seek regulation of the market. Hence the shareholder has an effective voice in the operation of the corporation, not market activity. Consequently, the market-oriented paradigm does not reach the level of the investor. The shareholder is not affected by additional or alternative regulations generally because they address problems directed at market functioning, not a market player.

This premise of the paradigm is also justified by the converse of the previous argument: that investor confidence is maintained through the integrity of the markets. "The Commission believes that the maintenance of investor confidence is critical to the continued strength of the securities markets, both in the United States and globally."[9] Once again the paradigm focuses on the market and not the investor. The presumption is that, if United States markets are well regulated, shareholders will continue to invest and new players will be added. Shareholder confidence does not rest solely with anticipated dividends and capital gains. Rather, confidence is provided by the regulation of the market in which the stock is traded.

The investor protection premise of the current paradigm is inadequate to deal with shareholder problems resulting from foreign listings

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[8] Loomis & Grant, *The U.S. Securities and Exchange Commission Financial Institutions Outside the U.S. and Extraterritorial Application of the U.S. Securities Laws*, 1 J. COMP. CORP. L. & SEC. REG. 1 (1978).

[9] Request for Comments on Issues Concerning Internationalization of the World Securities Markets, 50 Fed. Reg. 16,302, 16,309 (1985)(to be codified at 17 C.F.R. pt. 240)[hereinafter Request for Comments].

and stock offerings by United States corporations. The framework has two essential shortcomings. First, if the goal of regulation is to protect investors in United States markets, then SEC regulation provides incomplete protection. Domestic regulations are applicable to foreign trading and offerings either by United States corporations or to United States nationals.[10] The Commission, however, cannot regulate the activity of stock exchanges, securities companies, or market participants in other countries which may act independently to influence the value of the United States securities. Second, the confidence of United States shareholders may be eroded despite continued or increased regulation of domestic markets. As the current paradigm concentrates on market-oriented solutions, United States shareholders may not feel they are receiving sufficient protection. Exiting the market or investment through institutional investors may be the only viable alternatives. As a result, investor confidence may be undermined and the number of investors, particularly individual investors, may decline.

B. Benefits of Regulation

The second premise of the current paradigm is that regulation of the securities markets is beneficial and that United States regulations are particularly effective. Such regulation is seen as encouraging a greater exchange of foreign capital in United States markets.

> The [former] Chairman of the SEC, John S. R. Shad, has said that the United States has "by far the best capital markets the world has ever known—the broadest, the most active and efficient, and the fairest." They are also well managed and policed. These factors have attracted capital to the U.S. capital markets from foreign and domestic investors and have encouraged foreign issuers and governments to register and sell their securities in the United States.[11]

This benefit of regulation premise reinforces the investor protection premise discussed earlier. This second aspect is especially important because it rests on two critical assumptions. The first assumption is that the United States securities market is large and growing because it is regulated. This directed approach avoids an analysis of the inverse proposition: that the United States market is successful despite extensive regulation. Even if regulation creates conditions beneficial to the influx of foreign capital, other independent variables may contribute significantly to the overall success of the market. For example, foreign investors may

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[10] *See infra* notes 25-36 and accompanying text.

[11] Fedders, Wade, Mann, & Beizer, *Waiver by Conduct — A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAPITAL MARKET L. 1, 2 (1984)(citation omitted)[hereinafter Fedders, *Waiver by Conduct*].

channel their capital into the United States because of lower rates of inflation, higher rates of return, the relative strength of the dollar as compared with foreign currency, and the pool of capital available from United States banks to finance international transactions. The suggestion that shareholders are motivated by the protections provided by government regulation may be overly simplistic. A high rate of return on a stock investment may be an equal, if not greater, shareholder stimulus.

The benefit of regulation premise rests on a second asssumption. As regulation has established a successful United States securities market, the expectation is that this country will be at the forefront of regulating the trend toward international markets. Indeed, the SEC has expressed its general approval of global market development[12] and has already sought to control its direction.[13] It is problematic that the SEC perceives additional regulation as the solution to potential conflicts arising from internationalization. As will be discussed below, an influx of foreign capital is not a phenomenon unique to the United States. More importantly, United States regulations have limited impact outside the domestic market.

The shortcomings of this premise of the current paradigm are threefold. First, statistics do not indicate that foreign stock markets are failing to benefit from internationalized stock trading.[14] Available figures contradict the presumption that the United States regulated market is necessarily superior. In fact, stock trading in the United Kingdom, Japan, and Switzerland has increased significantly in recent years.[15] The

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[12] Request for Comments, *supra* note 9, at 16,302.

[13] Facilitation of Offerings, *supra* note 2, at 9261.

[14] Many stock exchanges have recently experienced substantial increases in the number of foreign companies newly authorized to list equity securities as compared with their new domestic listings. In 1983, for example, the Luxembourg Bourse added 18 foreign corporations, 17 listed in 1984; the Zurich Stock Exchange ("ZSE") added 12 foreign listings in 1983, 14 more joined the following year. The London Stock Exchange ("LSE") experienced the greatest increase in new foreign listings — 36 in 1983 and 80 in 1984. FÉDÉRATION INTERNATIONALE DES BOURSES DE VALEURS, FIBV ACTIVITIES AND STATISTICS, 1983-1984 REPORT 12, Table 3 (1985) [hereinafter FIBV 1985]. Of the world's stock exchanges, the LSE has the greatest number of foreign-listed companies with 582 in 1984, up from 515 the previous year. The Amsterdam Effectenbeurs ranked second with 300, up from 256 in 1983. Seven other European stock exchanges, including the ZSE, plus the Singapore Stock Exchange listed over 150 foreign companies each year. In comparison, the New York Stock Exchange ("NYSE") had only 53 foreign listings in 1984, up three from the previous year, while the Tokyo Stock Exchange ("TSE") remained unchanged at 11. *Id.* Table 2.

[15] The FIBV annually ranks the leading stock exchanges based on volume of trading in equity shares. In 1984, the seven largest exchanges were: NYSE — $765 billion; TSE — $285.5 billion; ZSE — $130.5 billion; Geneva — $71 billion; Osaka — $52 billion; LSE — $48 billion; and German Association — $35.5 billion. *Id.* at 14, Table 4C. These figures contrast with the top seven exchanges only four years earlier: NYSE — $375 billion; TSE — $161 billion; ZSE — $79 billion; LSE — $36 billion; Amex — $35 billion; Toronto — $25 billion; and Osaka — $19 billion. FÉDÉRATION

securities markets in these countries are also highly regulated, but in significantly different ways.[16] Such advances provide little incentive for these countries to establish more highly-regulated markets.

A second shortcoming of the benefit of regulation premise is that it focuses on a limited set of solutions. Essentially the current regulatory system is directed at solving problems resulting from foreign investment in the United States.[17] For example, the SEC has sought to facilitate

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INTERNATIONALE DES BOURSES DE VALEURS, FIBV ACTIVITIES AND STATISTICS, 1981 REPORT 9, Table 4C (1981).

The nearly doubling of the NYSE trading volume is without parallel. Nonetheless, with comparatively fewer foreign company listings, the percentage of this volume increase attributable to trading in foreign stocks should not be overstated. *See supra* note 14. (The NYSE does not provide statistics showing the volume of trading in foreign company stocks.) Not to be overshadowed are the relatively large volume increases in the other exchanges given their size. The replacement of two North American stock exchanges with two from Europe is also significant. The statistics tend to support a conclusion that, despite varying regulatory systems, foreign stock markets are capturing a larger proportion of the capital exchanged through the trading of stocks on international markets. Internationalization of the world's stock markets, therefore, appears to be occurring more quickly outside the United States.

[16] In England, for example, the LSE is largely self-regulating. Enforcement of LSE rules prohibiting unauthorized activity is carried out by the LSE and only secondarily through public prosecution by the Department of Trade and Industry ("DOT"). The interrelationship between the LSE and the DOT is evidenced by the passage of the Restrictive Trade Practices (Stock Exchange) Act of 1984. Faced with a lawsuit, the LSE reached an agreement with the Director General of Fair Trading to adopt certain changes in LSE rules in exchange for the removal of LSE rules and usages from the scope of the Restrictive Trade Practices Act of 1976. Restrictive Trade Practices (Stock Exchange) Act, 1984, ch. 2. Consequently, it is not possible to suggest that increased government regulation will be a new trend in England. *See infra* notes 124-31 and accompanying text.

In comparison, Japan has a relatively developed body of securities laws. For texts of some of these laws, see JAPANESE SECURITIES REGULATION 233-400 (L. Loss, M. Yazawa, & B. Banoff eds. 1983); *see generally* Hamada & Matsumoto, *Securities Transaction Law in General*, in 5 DOING BUSINESS IN JAPAN VIII 1-6 to 1-26 (Z. Kitagawa ed. 1984). The centerpiece of Japanese securities regulation is the *Shōken torihikihō* (Securities and Exchange Act), Law No. 25, 1948, *reprinted in* JAPANESE SECURITIES REGULATION, *supra*, at 233-320. Despite the promulgation of these laws, "[t]he Bureau rarely takes any action against specific corporations or securities companies. . . ." Repeta, *Declining Public Ownership of Japanese Industry: A Case of Regulatory Failure?*, 17 LAW IN JAPAN 153, 158-59. *See infra* notes 132-39 and accompanying text.

A third approach is employed in Switzerland. Certain shareholder protections in *Aktiengesellschaften* (joint stock companies) are provided at the confederation level. SCHWEIZERISCHES OBLIGATIONENRECHT [OR] 646-49, 660-97. The operation and functioning of stock exchanges, however, is established by each canton. Kleiner, *Banking Law*, in INTRODUCTION TO SWISS LAW 179 (F. Dessemontet & T. Ansay eds. 1981). In the Canton of Zurich, the controlling statute is the Law on the Professional Trading of Securities. Gesetz betreffend den gewerbmassigen Verkehr mit Wertpapieren, 3 ZÜRCHER GESETZESSAMMLUNG 159-68 (1961). The ZSE itself is largely self-regulating. In 1932, the ZSE submitted the Regulations Governing the Admission of Securities for Trading and Listing on the Zurich Exchange to the Executive Council of the Canton of Zurich. The Council approved the resolution and amended the regulations in 1975. SWISS-AMERICAN CHAMBER OF COMMERCE, SWISS SECURITIES LAW 118-34 (1982).

[17] "The [Tokyo Stock] Exchange has found that many of the issues on which the Securities and Exchange Commission solicits comments seem to be directed at persons involved in securities mar-

securities offerings between the United States, the United Kingdom, and Canada because "issuers from these countries use the United States' capital markets frequently and their disclosure requirements are more similar to the United States' requirements than those of other countries."[18] While a unitary prospectus between the three countries is a laudable goal, the SEC has sought to correct an obvious problem. As the United States is the world's leader in securities trading, the growth of international markets should prompt the SEC to confront the potentially greater difficulties between the United States and those countries with markedly dissimilar regulatory systems.[19]

A final limitation to this premise is that it suggests a socio-economic arrogance on the part of the United States. By establishing regulations to solve internationalization problems, the SEC erects additional barriers which other countries must surpass in order to participate in the United States corner of the global market. This approach overlooks the fact that most other countries eschew securities regulation. Indeed, the reason most European countries have few, if any, securities regulations is that they do not want any.[20] It appears that other countries wish least of all to duplicate an enormous bureaucracy such as the SEC.[21] More important, the benefit of regulation component fails to account for traditional local practices which differ significantly from those in the United States.[22] It is naive to assume that foreign countries will adopt quickly, if at all, complicated securities regulations.[23] Faced with domestic needs to balance complex commercial and political interests,[24] foreign corporations may choose to avoid the United States and list and offer securities on stock exchanges outside this country.

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kets in the United States." Letter from Soichi Suzuki to Richard G. Ketchum (June 29, 1985)(response to SEC Request for Comments). *See supra* note 9.

18 Facilitation of Offerings, *supra* note 2, at 9281.

19 The United States has sought to reduce certain conflicts associated with the extraterritorial application of its securities laws in insider trading investigations. The willingness of the Swiss government to seek accommodation on this subject has been of particular importance. Both countries entered into the Treaty of Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302, in which the Swiss made concessions to United States law. Additionally, both countries signed a Memorandum of Understanding to facilitate insider trading investigations. 22 INT'L LEGAL MATERIALS 1-12 (1983).

20 Widmer, *The U.S. Securities Laws — Banking Law of the World?*, 1 J. COMP. CORP. L. & SEC. REG. 39, 40 (1978).

21 *Id.*

22 *Id.*; *see also* Hamada & Matsumoto, *supra* note 16, at VIII 1-25 to 1-26.

23 *See* Hamada & Matsumoto, *supra* note 16, at VIII 1-25 to 1-26.

24 *Id.*; Widmer, *supra* note 20, at 40.

C. Regulation under the Current Paradigm

The Securities Act of 1933[25] establishes registration requirements pertaining to the offering or sale of securities in interstate commerce. Under the Act, interstate commerce includes "trade or commerce in securities or any transportation or communication relating thereto . . . between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia."[26] The scope of this provision would appear to include offerings by United States corporations on stock exchanges in foreign countries. Nonetheless, the SEC has interpreted the Act to protect only United States shareholders.[27] At the same time, the Commission has not foreclosed the possibility of extending jurisdiction to the protection of foreign nationals purchasing shares of United States corporations on foreign stock exchanges.[28]

An administrative rule which is particularly important to the internationalization of stock exchanges is the so-called flow-back prohibition.[29] Under this rule, the SEC has purposefully limited its jurisdiction to foreign distributions of securities which will result "in the securities coming to rest abroad."[30] Such distributions do not require United States corporations to register the securities.[31] Exceptions exist for offerings directed to United States military personnel residing abroad and for offerings made on Canadian stock exchanges.[32] The likelihood that such

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25 15 U.S.C. § 77a.

26 15 U.S.C. § 77b(7).

27 Interpretative Releases Relating to the Securities Act of 1933 and General Rules and Regulations Thereunder, 29 Fed. Reg. 9828 (1964)(codified at 17 C.F.R. 231.4708). A United States corporation is permitted to offer shares and limited partnership interests to foreign investors without having to fulfill the 1933 Act registration requirements, if the offerings are made to non-United States citizens, nationals, or residents. Sanchez-O'Brien Oil and Gas Corp., 1981 Fed. Sec. L. Rep. (CCH) ¶ 76,734 (1980). The SEC specifically stated that this no-action letter did not apply to the reoffer or resale of the securities in the United States. *Id.* The Commission reached a similar decision in 1971, but expressed the warning that if a foreign securities offering which created domestic interest resulting in a United States market, the corporation should take the precaution and register the securities. Frederick's of Hollywood, Inc., 1971-72 Fed. Sec. L. Rep. (CCH) ¶ 78,569 (1971).

28 29 Fed. Reg. 9828. The extraterritorial application of United States securities laws has caused considerable controversy. *See infra* notes 114-20 and accompanying text. In one case, a court assumed jurisdiction over securities regarding the sale in Canada of shares of a Canadian corporation which conducted business exclusively in that country because the sale involved stock registered and listed on a United States stock exchange. Schoenbaum v. Firstbrook, 268 F. Supp. 385 (S.D.N.Y. 1967). In Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446 (S.D.N.Y. 1974), the court distinguished between sales of securities to United States citizens residing abroad and those residing in this country. The court determined that the transaction fulfilled enough of the essential elements to consider it as having occurred in the United States. *Id.*

29 29 Fed. Reg. 9828.

30 *Id.*

31 *Id.*

32 *Id. See* Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960).

securities could eventually be traded on a United States stock exchange requires their registration.

The essential flaw in the flow-back prohibition is that it fails to provide adequate protection to United States shareholders in a securities market no longer restricted to United States borders. Except for the two situations noted above:

> it is immaterial whether the offering originates from within or outside of the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States, so long as the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States.[33]

It is questionable whether such a general prohibition can effectively prevent a flow-back of securities onto United States stock exchanges. The ease of multinational trading now makes it difficult to gauge the future activity of foreign traders who may decide, at some point, to forego the risks of foreign stocks.

A flow-back of securities onto United States stock exchanges could create lower share prices as the stock glut would have to be reabsorbed by the domestic market. As a result, the corporation would have to buy back the shares in order to maintain prices. In addition, the psychological impact of a flow-back in shares could result in a selling trend of the corporate stock on a United States stock exchange, further reducing share value. For large corporations with millions of shares of stock outstanding, the flow-back of securities, even if it contravenes the law, may not have a significant effect on share values. At the very least, however, such an occurrence could disrupt long-range financial goals and planning.

Cross-border games are not just speculation. Documented examples of flow-back situations have existed since the 1960s.[34] One example is that of Sears, Roebuck and Company stock on the Tokyo Stock Exchange ("TSE"). Daiwa Securities, which sponsored Sears' offering, claimed that Japanese investors held one million shares as of June 1984.[35] Only one year later, a report indicated that only 50,000 shares remained in Japan.[36]

While SEC disclosure requirements and proxy rules assure United States shareholders of corporate management accountability, the uncer-

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33 29 Fed. Reg. 9828.

34 Osborn, *The Rise of the International Equity*, EUROMONEY, May 1984, at 63, 68.

35 DAIWA SECURITIES CO. LTD., WHY LIST ON THE TSE? 12 (1985)[hereinafter DAIWA SECURITIES].

36 *More U.S. Concerns*, *supra* note 6, at 6.

tain application of the current law and the loophole in the flow-back regulation could have serious legal ramifications. But before dismantling the current market-oriented paradigm, it is first necessary to examine the trend toward internationalization. In so doing it is possible to gauge the effect of this development on the securities markets and to justify the establishment of a new framework of regulation and cooperation.

III. International Markets

The participation of United States corporations in the internationalization of the world's stock markets typically occurs in one of two ways. First, a company may list its stock on a foreign stock exchange. Such a listing serves two different functions for the corporation. Listing on a foreign stock exchange is used to develop a secondary market for a company's stock. If a developed secondary market exists, investors are more likely to purchase the stock at a public offering. This helps the corporation financially by making it more likely that the corporation will also receive a larger sum for its shares. Additionally, a listing on a foreign stock exchange creates greater demand for a security, thereby making the shares more marketable and, hence, more valuable. In this way a foreign listing improves shareholder confidence with management because the value of the investment is increased.

A second way in which United States corporations participate in foreign stock exchanges is by offering for public sale shares of the company's stock. Public offerings serve directly to increase the corporation's equity. It should be noted that the purposes of foreign listings and offerings are not necessarily exclusive. "A company may seek a listing on an overseas exchange to obtain greater exposure in that country in the hope of eventually raising capital there."[37] While listings and offerings may serve various functions, their use by a corporation will depend on its specific financial goals.

More United States corporations have listed their shares on foreign stock exchanges than have made public offerings of stock.[38] In addition to the reasons listed above, another factor leading to this result is cost. Typical fees paid to Japanese securities houses, for example, consist of a listing examination fee, a listing fee, and a continuing annual fee.[39] As foreign equity offerings require more legal and financial preparation, they

[37] Request for Comments, *supra* note 9, at 16,303.

[38] *See infra* notes 41-54 and accompanying text.

[39] DAIWA SECURITIES, *supra* note 35, at 10.

cost more.[40] Consequently, a United States corporation may first want to establish a strong presence in a foreign market in order to increase the likelihood that the corporation will make money from the public sale of shares.

This section of the Comment explores the trend and motivations of United States corporations to list and offer shares on foreign stock exchanges. While an attempt has been made to analyze various corporate motivations discretely, it must be recognized that this is an artificial division. Further, as more United States corporations assume a greater presence in foreign markets, their motivations will likely become more varied and interrelated.

A. Quantifying the Trend

The increase in the number of listings by foreign companies on various stock exchanges is the most visible trend of the internationalization process.[41] One recent account named 472 international equities — corporations whose stock is so internationally acceptable that it is "traded on a daily basis on at least one centre outside its domesitc stock market."[42] Of this total, eighty-eight are United States corporations — the largest concentration of any one country.[43] Other statistical data, while not singling out United States corporations, indicate a strong trend toward corporations listing in foreign markets. The Fédération Internationale des Bourses de Valeurs ("FIBV") listed 126 companies worldwide which had purchased new listings in 1983 for equity shares on member exchanges outside the country of their incorporation.[44] One year later, the number of companies rose to 179.[45] FIBV statistics indicate that 2,455 companies worldwide had equity shares listed on member exchanges as of 1983; by 1984 that number increased to 2,610.[46]

Certain stock exchanges have been particularly successful in at-

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[40] Telephone interview with Shuji Nishiyama, Vice President, Daiwa Securities America, Inc. (Nov. 5, 1985).

[41] Internationalization of the world's stock markets is not a phenomenon easy to measure. Statistical data identifying specifically which United States corporations have obtained listings and have offered equities on foreign stock markets is not readily available. Quantifying these trends is possible at best by using aggregate data covering the activity of both United States and foreign corporations. Nonetheless, the data which is available provides sufficient information with which to trace the development of global markets.

[42] *The Corporate List*, *supra* note 1, at 123. In 1984, the list only named 236 stocks. *The Corporate List*, EUROMONEY, May 1984, at 71.

[43] *The Corporate List*, *supra* note 1, at 123. During this period the number of United States stocks named to the list remained static.

[44] FIBV 1985, *supra* note 14, at 12, Table 3.

[45] *Id.*

[46] *Id.* at 14, Table 2; *see supra* note 14. The totals reflect new listings, delistings, and mergers.

tracting foreign company listings. In 1984, six stock exchanges — Brussels, Geneva, London, Basel, Paris, and Zurich — actually attracted more new foreign listings than domestic listings.[47] Two United States stock exchanges had poorer showings even taking into account their comparative size. The New York Stock Exchange garnered only six new foreign listings in 1983 and three more in 1984; the American Stock Exchange gained two each year.[48] The contrast between the increase in foreign listings on foreign stock exchanges and United States stock exchanges provides additional support for the conclusion that the trend toward global markets is occurring more rapidly outside the United States.[49]

Statistical data showing the number and value of new share offerings by United States corporations on foreign stock exchanges is even more difficult to obtain than information concerning listings. Research in this area failed to discover any compiled data showing the number and value of offerings by corporations outside their country of incorporation. The only data readily available concerns the trading of foreign equities on FIBV member exchanges. These limited statistics reveal that, as compared with 1983, 1984 was a disappointing year for the trading of foreign-listed stocks. Of the thirteen FIBV member exchanges which track volume trading in foreign-listed companies, nine showed reduced volumes,[50] only three had more active trading, and one stood unchanged.[51] The total value of trading in foreign shares on these thirteen exchanges amounted to $10.67 billion in 1984, down from $12.85 billion in 1983.[52]

Unfortunately, these figures provide no insight into the trading volume of United States corporations on these stock exchanges. However, it is reasonable to assume that, given the number of United States companies listed on some of these exchanges, trading in United States equities did occur.[53] Despite the absence of aggregate data quantifying the

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[47] The comparison between new domestic listings to new foreign listings is as follows: Brussels — 4:5; Geneva — 6:15; London — 76:80; Basel — 2:14; Paris — 3:5; Zurich — 2:14. *Id.* at 14, Table 3. The stock exchanges located in Amsterdam, Basel, Geneva, Luxembourg, Singapore, and Zurich all have more foreign listed companies than domestic listed companies. *Id.* at 12, Table 2.

[48] *Id.* at 14, Table 3.

[49] *See supra* note 15 and accompanying text.

[50] The nine stock exchanges were: Amsterdam, Brussels, Copenhagen, German Association, Johannesburg, Kuala Lumpur, Luxembourg, Paris, and Tokyo. FIBV 1985, *supra* note 14, at 14, Table 4C.

[51] The Stockholm, Toronto, and Montreal stock exchanges all registered modest increases in trading volumes between 1983 and 1984. The Osaka Stock Exchange remained unchanged. *Id.*

[52] *Id.*

[53] United States corporations are listed on at least seven of these thirteen stock exchanges: Amsterdam — 62; Brussels — 1; German Association — 38; Luxembourg — 1; Paris — 31; Tokyo — 8;

number and value of share offerings by United States corporations on foreign markets, certain specific cases have been noted and are discussed below.[54]

B. Motivations

1. Broaden Shareholder Base

The desire to broaden the corporation's shareholder base is a compelling motivation for United States corporations to list and offer shares on foreign stock exchanges. "In theory, at least, foreign listings can help push up the price of a stock by increasing its availability to foreign investors."[55] In practice, a corporation may become active on a foreign stock exchange in various ways. First, the foreign securities company sponsoring the corporation may purchase outstanding shares for the purpose of foreign trading. Second, the corporation may transfer available treasury shares for the same purpose. Finally, the corporation may fulfill all foreign registration requirements and offer shares on a foreign stock exchange for the purpose of raising new equity. Regardless of the way in which a corporation enters a foreign stock market, the motivation to broaden the shareholder base carries with it the presumption that a listing or offering will increase the value of the stock by increasing the number of potential shareholders.[56] The ultimate goal is that foreign investors will find the United States corporation so attractive that they become purchasers and equity owners.

Decisions to broaden the shareholder base may be particularly rewarding. In one instance, foreign investors actually approached a United States corporation and encouraged it to list on foreign stock exchanges. A Swiss bank informed Walt Disney Productions that a listing on a Swiss stock exchange would permit certain bank clients to diversify their portfolios by reinvesting petrodollars in an entertainment industry company.[57] Following up on the request, Disney listed on the Zurich, Basel, and Geneva stock exchanges.[58] Subsequent trading on those exchanges proved successful as Disney stock tripled in value.[59]

Toronto — 22. *The Corporate List, supra* note 1, at 122-64. These figures are not complete and represent only minimum figures at best.

[54] *See infra* notes 83-104, 109-13 and accompanying text.

[55] *More U.S. Concerns, supra* note 6, at 6.

[56] *Id.*

[57] Telephone interview with Luther R. Marr, Vice President, Corporate and Stockholder Affairs, Walt Disney Productions (Nov. 25, 1985).

[58] *Id.*

[59] Listing in Switzerland created "lots of profit" for Disney. Stock initially traded for $29 per share and subsequently rose to $97 per share. *Id.*

2. Balancing Debt Rates

Foreign listings and offerings also serve indirect purposes by helping United States corporations improve their fixed-to-floating debt mix. By establishing a presence in the equity securities market, corporations establish the respectability necessary to induce foreign investors to purchase corporate debt. This theory has proven itself in at least two documented cases. Great Western Financial Corporation listed on the London Stock Exchange ("LSE") because federal regulations limit the way in which Great Western (and all savings and loans) may raise capital.[60] Faced with a lower bond rating, Great Western decided to attract additional European investors as they already held up to ten percent of the company's equity and debt.[61] Following its LSE listing, Great Western sold $50 million in convertible debentures in 1983 and $100 million in floating-rate notes in 1984.[62] With conversion rates at twenty percent over market price, the company declared the sales worthwhile.[63] Another success story linked to a foreign listing is claimed by Sears which listed on the TSE in June 1984.[64] Sears sought the listing as part of its effort to attract investors to purchase its floating-rate debt securities.[65] The company believes that its TSE listing directly contributed to Sears' goal of readjusting its debt mix.[66]

3. Stock Market Attraction

The motivations discussed thus far have centered on corporate motivation for activity on foreign stock exchanges. An equally important analysis reverses that approach — focusing on the attraction of certain stock exchanges to foreign-based corporations. The stock exchange with the greatest potential in attracting United States corporate activity may be the TSE.[67] Latent interest in the TSE has recently been revived. In

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60 Telephone interview with Monroe Morgan, Senior Vice President, Great Western Financial Corporation (Nov. 25, 1985).

61 *Id.*; *London Debutantes*, THE ECONOMIST, Mar. 31, 1984, at 85.

62 Telephone interview, *supra* note 60.

63 *Id.*

64 DAIWA SECURITIES, *supra* note 35, at 12. As part of its overall goal, Sears purchased listings on the Paris, Frankfurt, and London stock exchanges plus four more on Swiss stock exchanges. Telephone interview with Lawrence Raymond, Manager of International Financing, Sears, Roebuck and Company (Nov. 25, 1985).

65 Telephone interview, *supra* note 64.

66 Sears sought to reduce its fixed-to-floating debt ratio of 7:3 to 1:1. The company believes foreign stock listings have contributed to this goal. *Id.*

67 Since the end of World War II, the TSE has outperformed every major stock market in the world. Repeta, *supra* note 16, at 160. Recent trading in foreign stocks on the TSE has been brisk. *See infra* note 68. In January 1984, the total volume of foreign traded stock stood at 588,110 shares. Following a year of mixed results, the volume jumped to 950,440 shares in January 1985. One

1985, three entities — Sears, Disney, and Security Pacific National Bank — each listed on the TSE.[68] These represent the first new listings by United States corporations in Tokyo in over ten years.[69] New equity offerings have yet to be made on the TSE, yet there is precedent for this activity as well. GTE Corporation made the first public offering on the TSE by a foreign company in 1972, followed by IU International Corporation the following year.[70] After the TSE permitted the listing of foreign stocks for the first time in 1973,[71] BankAmerica Corporation listed and sold 400,000 shares of stock exclusively in Japan as part of a seven-million-share multinational offering.[72]

United States corporations may be encouraged in the future to offer more equity securities on the TSE partly in response to the dynamic Japanese economy. The long-term strength of the yen against foreign currency has resulted in an influx of foreign capital and the creation of a vast pool of investment capital. According to the Bank of Japan, as of the final quarter of 1985 the total assets of Japanese financial institutions amounted to ¥ 286 billion.[73] As the ratio of business loans to total assets by Japanese corporations continues to decrease, the demand for loans correspondingly decreases.[74] Institutional investors, therefore, have greater ready assets with which to make investments.

The TSE is also attractive to United States corporations as a result of the apparent shift away from Japanese investors' preference for holding fixed-term debt securities to equities.[75] In Japan the satisfactory rate of return on investments is eight percent.[76] Falling interest rates, however, do not make corporate debt purchases attractive. Japanese investors traditionally purchase stock not for dividend earnings, but for

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month later, trading skyrocketed to 5,305,380 and peaked in March at 11,588,380. DAIWA SECURITIES, *supra* note 35, at 14. *Cf. Why the Tokyo Market Fell from the Stratosphere*, BUSINESS WEEK, Apr. 29, 1985, at 43; *The Rite of Spring*, THE ECONOMIST, Apr. 7, 1984, at 78. Nonetheless, the TSE volume for foreign listed stocks remained high: 5,425,350 shares in April and 3,825,380 shares in May 1985. DAIWA SECURITIES, *supra* note 35, at 14.

68 As of September 1986, there were 21 United States companies on the TSE. This represents an increase of nine United States entities listed on the TSE in less than one year. Telephone interview with Yutaka Asai, Assistant Vice President, Daiwa Securities America, Inc. (Sept. 30, 1986).

69 *More U.S. Concerns*, *supra* note 6, at 6; DAIWA SECURITIES, *supra* note 35, at 13.

70 Masuda, *Public Offering and Listing of Foreign Stock*, in 5 DOING BUSINESS IN JAPAN VIII 5-6 to 5-7.

71 *Id.* at VIII 5-7.

72 *Id.*

73 61 KEIZAI TOKEI GEPPO (Economics Statistics Monthly) No. 6, June 1986, at 111-12.

74 DAIWA SECURITIES, *supra* note 35, at 3. The TSE is also well capitalized at $600 billion. *More U.S. Concerns*, *supra* note 6, at 6. Such stability favors institutional investors as it decreases investment risks and makes margin trading less frequent.

75 *Buying Binge*, *supra* note 6, at 1.

76 *Id.*

capital gains, as these are tax exempt.[77] With annual dividend returns for Japanese stocks averaging only one percent of value[78] — the lowest of any equity market in the world — Japanese stocks cannot make up the differential caused by the drop in interest rates on debt securities. In contrast, stocks of United States corporations yield an average annual dividend of five percent or more.[79] Japanese investors may soon find United States stocks more attractive than low-yield domestic stocks and the corporations may begin listing and offering more shares on the TSE in order to capitalize on this desire for greater return.

4. *Freedom from Regulation*

Another motivation for United States corporations to list and to offer shares on foreign stock exchanges is the comparative advantage of various forms of regulation used in foreign markets. In this regard, the trend toward internationalization may be nothing more than an attempt by United States corporations to enter foreign markets and reach goals which they cannot achieve in this country.[80] Both the LSE and the TSE are regulated in significantly different ways than are United States stock exchanges and provide certain advantages over domestic listings and offerings.

In Japan, for example, passage of the Foreign Exchange Law[81] proved to be a boon to foreign corporations entering the securities markets. This law effectively removed all restrictions on the import and export of foreign exchange. The government took an additional step, albeit a small step, by making the ownership of foreign stocks more attractive to Japanese investors. As of January 1, 1986, annual dividend earnings on foreign and domestic stocks are taxed at the same rate.[82] By eliminating a tax disincentive, the enactment may induce Japanese investors to consider purchasing and trading the shares of United States corporations.

The TSE may still be over regulated according to some analysts[83] thereby making it difficult for United States corporations to enter the Japanese market. For example, the Japanese Securities and Exchange

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77 Repeta, *supra* note 16, at 180.

78 *Id.* at 163; *Buying Binge, supra* note 6, at 1.

79 *Buying Binge, supra* note 6, at 1.

80 Telephone interview with Harold Day, New York Stock Exchange, Washington, D.C. (Nov. 11, 1985).

81 *Gaikoku Kawase oyobi Gaikoku Boeki Kanrihō* (Foreign Exchange and Trade Law), Law No. 65, 1979.

82 *Buying Binge, supra* note 6, at 1. *But see supra* note 76 and accompanying text.

83 Masuda, *supra* note 70, at VIII 5-8.

Act does not distinguish between domestic and foreign corporations. Consequently, foreign corporations listing or offering shares for sale must complete at least eleven forms requiring detailed financial, managerial, and operational information.[84] It should be noted that the TSE no longer requires a separate audit by a Japanese accounting firm.[85] Whether this one step toward deregulation is sufficient to attract additional United States corporations to the TSE remains to be seen.

The strong desire of United States corporations to avoid securities regulations is best exemplified by the activity on the LSE in 1984. During that year Great Britain agreed to implement several directives of the European Economic Communities ("EEC")[86] to be effective January 1, 1985.[87] Some analysts estimated that the additional financial and legal requirements caused by the directives would raise filing fees from $80,000 to $400,000 and increase the time needed for preparation of documents from two weeks to three months.[88] The new regulations appeared to be particularly onerous for United States corporations which, under the previous rules, had received preferential treatment. Those companies listed on a United States stock exchange did not have to file a separate prospectus to trade on the LSE because SEC filings provided sufficient auditing information.[89]

In order to counteract the new directives, the British government approved certain incentives for foreign listings and offerings by dismantling the schedule of minimum commissions charged by securities houses[90] and by cutting the stamp duty to one percent.[91] The impact of

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[84] *Id.* at VIII 5-10 to 5-11.

> Some difficult disclosure points thus far encountered by foreign corporate registrants are the required description of their production capacity and production achieved during the past two most recent business years (with monthly averages) and the calendar months thereafter; the supply, prices and level of inventory of major raw materials; the levels of orders received; and the description of plants, equipment and other facilities.

Hamada & Matsumoto, *supra* note 16, at VIII 1-35.

[85] *More U.S. Concerns, supra* note 6, at 6. *Cf.* old rules, Hamada & Matsumoto, *supra* note 16, at VIII 1-36.

[86] *Council Directive coordinating the conditions for the admission of securities to official stock exchange listing,* 22 O.J. Eur. Comm. (No. L 66) 21 (1979); *Council Directive coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing,* 23 O.J. Eur. Comm. (No. L 100) 1 (1980); *Council Directive on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing,* 25 O.J. Eur. Comm. (No. L 48) 26 (1982).

[87] The purpose of the new directives is to establish standardized listing procedures for all companies listed on the stock exchanges of member nations. *London Stock Market Tightens Listing Rules for American Concerns,* Wall St. J., Nov. 23, 1984, at 20, col. 2.

[88] *Id.*

[89] *Id.*

[90] *Shareholders Beware,* THE ECONOMIST, Oct. 15, 1983, at 16-17.

[91] *London Debutantes, supra* note 61, at 85.

this deregulation may have been insignificant when compared with the new EEC directives. Nonetheless, the combination of current incentives and future disincentives resulted in nearly twice as many United States corporations listing on the LSE between 1983 and 1984, from 105 to 201.[92]

The advantage of an LSE listing over one on a United States stock exchange may be significant. The relaxed disclosure requirements for an LSE listing proved to be the prime motivation behind International Signal and Control Group's decision to offer shares on the LSE in 1982.[93] Signal is not listed on a United States stock exchange and, therefore, had to pay an additional fee as a nonlisted corporation.[94] The company justified the added expense because British securities laws do not require the disclosure of management and service customers as do United States laws.[95] As a manufacturer of sophisticated security systems and electronic defense equipment, Signal contractually guarantees its customers anonymity.[96] By listing on the LSE, Signal could protect its customers and still obtain its financial objectives.

When Signal offered for sale $56 million in new shares in 1982, it received $2.8 billion in applications — thirty-four times over the subscription.[97] Buoyed by the success of its initial offering, Signal offered a script issue less than one year later.[98] Investors oversubscribed this offering by four times.[99] The success of its LSE offerings surprised the company which is convinced, now more than ever, that the LSE is superior to United States stock exchanges.[100] Moreover, if Signal plans to raise additional equity in the future, the company will likely make an offering on the LSE.[101]

5. *Corporate Ego*

The need to satisfy the corporate ego is the least quantifiable of all variables motivating United States corporations to list and offer shares on foreign stock exchanges. Nonetheless, the value of this factor should not

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92 *More U.S. Concerns, supra* note 6, at 6.

93 Telephone interview with Michael D. Spangler, Manager of Public Relations, International Signal and Control Group (Nov. 25, 1985).

94 The cost of the listing amounted to less than $500,000. *Id. See also London Debutantes, supra* note 61, at 85.

95 Securities Exchange Act of 1934, 15 U.S.C. § 78*l* (b)(1)(G) (1982).

96 Telephone interview, *supra* note 93.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

be underestimated. As one observer has noted, corporate ego may, at times, be the strongest motivation, "meaning the companies' executives are flattered by the idea of an international offering, even when it makes no real business sense."[102] Put in other words, reasons may always be found to justify the decision to enter the global market for equity securities.

The financial expectations created by a foreign listing or offering are not always met successfully. It may be argued that such corporate activity is unnecessary because many foreign institutional investors already traverse domestic borders to purchase and trade United States securities in this country. In response it may be argued that certain countries place restrictions on the export of capital and effectively limit investment in foreign securities.[103] By listing or offering shares in the investor's country, the corporation may be able to attract a greater number of potential shareholders.[104]

United States corporate activity on foreign stock exchanges may also be justified on the basis that it improves public perception of the corporation both in this country and abroad. To shareholders in the United States, the corporation cultivates the image of being on the cutting edge of the internationalization of the world's security markets and provides evidence of the dynamic and expanding corporate presence. The value of a good corporate image may be equally important outside the United States. In theory, the corporation can better achieve its financial goals by first establishing a favorable position in a foreign country. Listing or offering shares on a foreign stock exchange is one of the few ways in which a corporation may gain legitimacy and establish a permanent foothold in the market. In some countries, such a step may even improve relations with government agencies regulating corporate activity.[105]

Some United States corporations appear to place considerable value on the need to project a favorable image even in the face of mistaken business judgment. Disney states that its decision to trade 300,000 shares on the TSE in 1984 was not successful despite its high profile in Japan.[106] The company expects that stabilized prices and trading in the future will reverse its position and permit long-term growth and establish

[102] Donnelly, *supra* note 4, at 288.

[103] "Regulations [in Japan] dictate that a maximum of 50% of assets can be invested in securities (stocks and bonds) and no more than 10% in foreign assets." *Limbering Up: A Survey of Japanese Finance and Banking*, THE ECONOMIST, Dec. 8, 1984, at 21 [hereinafter *Limbering Up*].

[104] *More U.S. Concerns*, *supra* note 6, at 6.

[105] *Id.*

[106] Telephone interview, *supra* note 57. *Cf. supra* notes 58-59 and accompanying text.

a strong Japanese component to Disney operations.[107] Similarly, Sears admits that its decision to list on numerous world stock exchanges concealed two goals which have yet to be achieved.[108] First, the company is seeking to improve its visibility and to establish its name as a household word outside the United States.[109] Second, Sears wishes to prove its dedication to the establishment of a global network. By attracting foreign investors in their own countries, Sears believes that it contributes to the removal of barriers restricting economic cooperation generally and, in the long run, improves the international exchange of capital.[110]

IV. POTENTIAL PROBLEMS

United States shareholders have virtually no voice in the decision-making process of the corporation to list or offer shares on a foreign stock exchange. Such decisions are presumably within the scope of the business judgment rule, meaning that management's fiduciary duties to the shareholder will protect the latter's interests.[111] The division of ownership and control may expose shareholders to additional risks as a result of the internationalization of the world's stock exchanges. While SEC disclosure requirements[112] and proxy rules[113] will assure that management is not abusing its trust, domestic regulations cannot protect United States shareholders from parties and activities beyond the Commission's control — foreign securities companies, the buying and selling habits of foreign shareholders, or technological gaps existing in the international market.

This section outlines several potential conflicts to which United States shareholders will be exposed as a result of corporate activity on foreign stock exchanges. Without regulatory protections, shareholders disgruntled with corporate decisions to become active on foreign stock exchanges and who are averse to risk will have few options other than resorting to the rule of Wall Street: "if you don't like management, sell your stock."[114] This rule reflects the conditions of a unitary market sys-

107 *Id.*

108 Telephone interview, *supra* note 64.

109 *Id.*

110 *Id.*

111 As of this publication date, there has been no shareholder litigation filed in United States courts seeking damages for the dimunition in the value of investments because of corporate activity on foreign stock exchanges.

112 15 U.S.C. § 78*l*.

113 15 U.S.C. § 78n.

114 *Protection of Shareholders' Rights Act of 1980: Hearings on S. 2567 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 132, 135 (1980)(statement of David S. Ruder).

tem in which the SEC strictly monitors corporate securities activity. With the rapid development of international stock markets, the usefulness of the Wall Street rule deserves reassessment.

A. Jurisdiction

The jurisdiction of United States courts to hear complaints regarding United States corporate activity on foreign stock exchanges is open to speculation.[115] Several courts have already considered the extraterritorial application of securities laws with regard to SEC investigations[116] of and enforcement actions[117] against illegal activity by foreigners in United States securities markets. There is no existing precedent to define the extraterritorial application of securities laws to activities of foreign securities companies adversely affecting United States shareholders' interests in another country. Nonetheless, there is authority to suggest that both United States and foreign courts may have jurisdiction.[118]

In at least one situation, United States courts may be able to exercise jurisdiction without stretching even further the extraterritorial application of United States securities laws. A court may establish jurisdiction if a foreign securities company purchases authorized shares on a United States stock exchange or treasury shares from the corporation for the purpose of eventually trading them on a foreign stock exchange. Such activity may be sufficient to meet, "the modern notions that where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction even though he cannot be served with process. . . ."[119]

The question of extraterritorial application of United States securities laws is a controversial subject.[120] It will likely remain so until do-

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[115] *See supra* note 111.

[116] SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981)(concerning a court's ability to obtain discovery material from foreign banks despite existing secrecy laws); SEC v. Certain Unknown Purchaser [sic] [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,951 (Feb. 20, 1985)(concerning Swiss banks' refusals to divulge identities of call option purchasers).

[117] In re Grand Jury Subpoena Directed to Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983)(extending criminal jurisdiction to conspiracies to evade tax laws); In re Grand Jury Proceedings Bank of Nova Scotia, 691 F.2d 1384 (llth Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983)(holding bank in civil contempt for failing to comply with tax and narcotics investigation).

[118] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

[119] Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972). *See also* Straub v. Vaisman & Co., Inc., 540 F.2d 591 (3d Cir. 1976); Travis v. Anthes Imperial, Ltd., 473 F.2d 515 (8th Cir. 1973).

[120] *See* Fedders, *Waiver by Conduct, supra* note 11. In response see: Bschorr, *"Waiver by Conduct": Another View*; Lepine, *A Response to Fedders' "Waiver by Conduct"*; Boyle & Thau, *The*

mestic regulators comprehend the full scope of internationalization problems and regular patterns of international securities transactions are established.

B. Insider Trading

United States shareholders are protected against insider trading on domestic securities markets by federal statute[121] and administrative rules.[122] In contrast, the laws of the United Kingdom and Japan provide shareholders neither with similar protections nor with the opportunity to redress grievances. As more United States corporations list and offer shares on the LSE and TSE, the likelihood of insider trading on these stocks increases, as does the probability that the investments of United States shareholders may be diminished as a result. For example, if a United States corporation offered for sale equity securities on a foreign stock exchange, the foreign-based securities company sponsoring the offering would not necessarily be bound by United States laws. The loophole would leave open the possibility of insider trading or price manipulation of the shares' value.[123]

This risk is not unique to trading on foreign stock exchanges. However, the frequency of insider trading may make the risk more likely. The LSE registered a record number of takeover attempts in 1985 and, not surprisingly, over 2,000 suspicious price movements each month.[124] It is estimated that the typical insider trade results in an increase in share value of twenty to thirty percent during the month before the bid.[125] While higher share values are generally welcomed by investors, the price volatility associated with takeover attempts could result in diminished share values in the long run if the bid is rejected or fails for some other reason.

United States shareholders would also face difficulties in bringing suit against securities companies engaging in unscrupulous activity. Despite the considerable number of suspicious price movements on the LSE, there is almost no enforcement of prohibitions against insider trading.

Newest Configuration of the Ugly American: A Response to Mr. Fedders; Capitani, *Response to Fedders' "Waiver by Conduct"*; Wymeersch, *Response to Fedders' "Waiver by Conduct"*; Singer, *The Internationalized Securities Market and International Law — A Reply to John M. Fedders*, 6 J. COMP. BUS. & CAPITAL MARKET L. 307-54 (1984).

121 15 U.S.C. § 78i(a).

122 17 C.F.R. § 240.10b-5.

123 *See infra* notes 143-51 and accompanying text.

124 *British Authorities Worry About Insider Trades on London Exchanges as they Map Derregulation*, Wall St. J., June 28, 1985, at 22, col. 1 [hereinafter *British Authorities Worry*].

125 *Id.*

The Company Securities (Insider Dealing) Act of 1985[126] merely consolidates provisions of the Companies Acts of 1980 and 1981 and does not provide any tougher enforcement mechanisms than the statutes it replaces.[127] Even if evidence could be produced suggesting insider trading, shareholders could not use the information as there is no private right of action for insider trading in the United Kingdom.[128] The government is forced to rely on the self-regulatory mechanisms of the LSE to monitor insider trading and to report the worst offenders to the Department of Trade which enforces the law.[129] Even if public prosecutors bring charges under the Insider Dealing Act, there is little chance for shareholders to receive redress because successful prosecution is rare.[130] Since the passage of the Companies Act in 1980, the British Government has brought seven prosecutions, only three of which have resulted in convictions.[131]

United States shareholders would confront equally difficult challenges in other countries. For example, the securities laws of Japan make no pretense of prohibiting insider trading. "The Japanese stock market is an insider's paradise. There is no clear rule of law prohibiting insider trades and no public record of efforts to prevent the practice. Most significantly, there is no effective recording system to expose insider trades or active market trades."[132] At one time, the Securities and Exchange Law prohibited insider trading but provided a generous loophole by not

126 The Act received royal assent on March 11, 1985, and went into effect on July 1, 1985.

127 Section 112, International Bonds, of the Companies Act of 1981 became § 6 of the Company Securities (Insider Dealing) Act of 1985. This is the only provision of the 1981 Act consolidated with the 1980 Act to form the new 1985 Act.

128 The Companies Act of 1980, § 72 made insider trading a criminal offense subject only to public prosecution.

129 Rider, *Insider Dealing: Information is Passed to the DOT*, 2 THE COMPANY LAWYER 71-72 (1981).

130 Prosecutors must be able to meet a standard requiring proof that the defendant knowingly obtained price sensitive information and acted upon it knowing that its release would affect the public price of the shares. The Companies Act of 1980 § 68(3)(b)(i-ii). Nonetheless, the defendant can escape prosecution if another reason for making the transaction can be shown. *Id.* at § 68(8)(a-c). Prosecutors are also frustrated in their investigations because they have no subpoena powers and banks may refuse to release information because of secrecy laws. *British Authorities Worry*, *supra* note 124, at 22.

131 *British Authorities Worry*, *supra* note 124, at 22. None of the court decisions are published. For descriptions of the cases, see Chaikin, *Unsuccessful Insider Trading Prosecution*, 6 THE COMPANY LAWYER 97 (1985); Rider, *The First Case of Secondary Insider Dealing*, 4 THE COMPANY LAWYER 117 (1983); Rider, *Determined Efforts Being Made to Enforce Law on Insider Dealing*, 3 THE COMPANY LAWYER 185 (1982); Rider, *Prosecution Pending Over Insider Dealing Allegations*, 3 THE COMPANY LAWYER 133 (1982); Rider, *Insider Dealing: Where Now After a Prosecution and Absolute Discharge?*, 2 THE COMPANY LAWYER 278 (1982); Rider, *Insider Dealing: No Hint yet of an English Prosecution*, 2 THE COMPANY LAWYER 222 (1981); Rider, *supra* note 129, at 71.

132 Repeta, *supra* note 16, at 184. The number of TSE investigations is quite low. *Id.* at 175.

requiring the publication of beneficial owners.[133] Provisions similar to those in the Securities Exchange Act[134] prohibiting short swings by corporate officers still exist, but are not enforced as they require positive action by corporate directors to trigger an investigation.[135] Some analysts still believe that the Securities and Exchange Law prohibits insider trading,[136] but the influential Securities Transaction Council has declared that such actions are not illegal under Japanese law.[137]

Shareholders' actions are also limited in Japan. While class action suits may be filed, suits cannot be considered because there is neither an established procedure for class action nor an established system of discovery.[138] Moreover, the Japanese aversion to litigation and lengthy court procedures make shareholder redress undesirable.[139]

C. Price Manipulation

The manipulation of share pricing is another potential risk for all United States shareholders purchasing or selling shares of United States corporations on foreign stock exchanges. Such practices may take various forms, but create risks which could prove to be significant.

In Japan, for example, price manipulation has been formally outlawed but persists because of traditional practices.[140] Lacking the equivalent of the Glass-Steagall Act,[141] Japan permits brokers to practice bond and share underwriting and to research and sell securities under the same roof.[142] So typical are price manipulations that eight have been identified as common practice.[143] In some cases, Japanese brokers have openly admitted to manipulating prices up and down to create the illu-

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Moreover, the investigations are conducted off the record and provide maximum discretion. *Id.* at 176.

133 Tatsuta, *Proxy Registration, Tender Offers, and Insider Trading*, in JAPANESE SECURITIES REGULATION 194 (L. Loss, M. Yazawa, & B. Banoff eds. 1983). *Cf.* 15 U.S.C. § 78p(c).

134 15 U.S.C. § 78p(b).

135 Repeta, *supra* note 16, at 174-75.

136 *Id.* at 174. Tatsuta, *supra* note 133, at 192. Whether the TSE or securities companies may be sued under the Civil Code (Mimpō) art. 709, pending an action in damages, has yet to be litigated. Kawamoto, *Regulation of Exchange Markets*, in JAPANESE SECURITIES REGULATION 119-20 (L. Loss, M. Yazawa, & B. Banoff eds. 1983).

137 Repeta, *supra* note 16, at 174.

138 *Id.* at 175.

139 *Id.*

140 Kawamoto, *supra* note 136, at 126.

141 Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

142 *Limbering Up*, *supra* note 103, at 17.

143 Kawamoto, *supra* note 136, at 129.

sion of market activity.[144]

Risks to United States shareholders occur when they attempt to sell shares of United States corporations being manipulated on a Japanese stock exchange. A rash of selling on the TSE, for example, could deflate prices on other foreign exchanges by triggering similar selling. The extremes to which this may be taken are evident by the practice of some Japanese brokers to corner the market on a particular corporation's shares and then to dump the shares, resulting in a rapid price drop.[145] Such a situation may have occurred in the trading of Sears stock in 1984.[146]

The manipulation of share prices also occurs on the LSE through the passage of pricing information between parties. In the United Kingdom there is no effective separation between persons who have access to inside information and persons who trade shares. A division of duties exists between brokers, who act as agents for customers, and jobbers, who act as principals and deal only with brokers.[147] This partition provides no protection to shareholders, however, because quoted prices between brokers and jobbers are not revealed publicly. Consequently, there is "no way to know whether the securities are obtained at the best rate available."[148] This loophole may affect share prices in one of two ways. First, for investors purchasing large blocks of shares, not only may the share prices be inflated, but the transaction costs may be significantly higher. Second, the volatility of share prices associated with corporate takeovers may diminish the value of investments if the acquisition fails to go through to completion.

D. Arbitrage

The lack of good price information may adversely affect the amount United States shareholders would receive for the purchase or sale of shares on a foreign stock exchange. Normally, the disparity in prices for shares traded on more than one stock exchange is minimized through arbitrage. This system achieves relatively equal prices for the same shares excluding the transaction costs of purchasing shares on a particular stock exchange.[149] A successful arbitrage system depends upon the

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[144] *Limbering Up, supra* note 103, at 17; *Why the Tokyo Market Fell from the Stratosphere, supra* note 67, at 43.

[145] Kawamoto, *supra* note 136, at 127-28.

[146] *See, e.g., More U.S. Concerns, supra* note 6, at 6.

[147] *World Securities Officials, supra* note 7, at 1185.

[148] *Id.*

[149] The SEC has recognized the problems associated with arbitrage based on incomplete information. "As the international capital markets continue to develop . . . simultaneous international trad-

flow of information between stock exchanges: the better the flow, the lower the transaction costs.[150] Unfortunately for United States shareholders, information transferal has not yet been perfected. The result is that a shareholder in one location selling shares in a second country may not be assured of receiving the best price.

Various linkages used by different groups of stock exchanges[151] do not guarantee the best rates for the purchase or sale of shares on foreign stock markets. The problem is not just the lack of information transferred, but the type of information transferred. The LSE, for example, does not provide individual transaction or volume reports, but quotes a middle price. In contrast, the Amsterdam, Paris, Madrid, and Milan stock exchanges quote only last-done prices.[152] Consequently, electronic linkages are not, by themselves, sufficient. To reduce effectively transaction costs to a minimum and to ensure the best possible rates, shareholders must be provided with compatible information with which to base their buying and selling decisions.

V. TOWARD AN INVESTOR-ORIENTED PARADIGM

The potential problems faced by United States shareholders resulting from the internationalization of the world's stock exchanges require attention by securities regulators, multinational corporations, and the stock exchanges themselves. The position that no action need be taken until problems develop[153] invites the inevitable and fails to recognize that many potential conflicts have already been identified and must be avoided.

The first step toward preventing problems which will affect shareholders is to shift away from the current market-oriented paradigm of securities regulation. It is apparent that the existing framework is inade-

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ing may become more commonplace, possibly giving rise to disparities in prices in different markets, particularly if the same securities are traded in different currencies in each of those markets." Request for Comments, *supra* note 9, at 16,307.

150 The disparity in prices between the Amsterdam Effectenbeurs and the NYSE, for example, is less than $0.25 per share because of the efficient American Shares Amsterdam System ("ASAS"). Letter from Gerrit H. de Marez Oyens to John Wheeler 1, 4 (June 27, 1985)(response to Request for Comments). The possibility of reducing transaction costs is considerable. The trading of United States stocks on the Toronto Stock Exchange currently costs $0.06-0.08 per share. Once Phase III of the Toronto-Amex link is functional, costs are expected to drop to $0.014-0.087 per share. Letter from Keith E. Boast to John Wheeler 8 n.8 (July 5, 1985)(response to Request for Comments).

151 *See supra* note 3. For a discussion of the Interbourse Data Interchange System and Talisman, see Lim, *Trading Stocks Across Frontiers*, *supra* note 3, at 110-11.

152 Letter from Boast, *supra* note 150, at 14 n.14.

153 Letter from the American Bar Association to John Wheeler 2 (Aug. 30, 1985)(response to Facilitation of Offerings).

quate to meet the tasks of adequate protection. A paradigm shift would direct inquiry to the more discrete level of the investor rather than the operation of the market. By concentrating on the needs of the individual and institutional investor, an investor-oriented paradigm would create a conceptual framework with several significant advantages.

First, an investor-oriented paradigm would directly encourage investor participation in the securities market. While the Wall Street rule would still remain operable, shareholders would benefit from a regulatory structure protecting their entrance to and exit from the new international market. Under the current market-oriented paradigm, investors are of lesser concern than United States corporations and securities companies in the global market.

Second, a properly focused regulatory structure for international markets would create the additional advantage of keeping the United States securities markets competitive. Internationalization will continue with or without United States participation. Extensive and misdirected regulation will only slow such development and place domestic stock exchanges at a disadvantage compared with their competition. A continuation of the existing paradigm will increase the likelihood that United States corporations will seek foreign markets in which to trade stock and to raise equity.

Third, an investor-oriented paradigm would be advantageous because it would create a more flexible approach to securities regulation. By concentrating on United States investors' needs on a global scale, the paradigm would prompt the establishment of coordinated systems for information transferal, securities processing, trading, and offering. Such systems could be adopted to account for local regulations and thereby not retard developing securities markets.

While the SEC could employ independent means to establish an investor-oriented paradigm, such work should be carried out internationally. The FIBV, through its member stock exchanges, may be the organization best able to negotiate the various issues raised by internationalization and to ensure equitable consideration. A multilateral agreement could serve as the basis for greater international cooperation in this area. The agreement could establish internationally-recognized standards for the assistance in the investigation of unscrupulous activity on world securities markets. Such an accord could go far in mollifying current controversy over claims of extraterritorial application of securities laws by the United States and improper use of secrecy and blocking laws by other nations. By accounting for various local practices, a multilat-

eral agreement would serve to coordinate and direct the development of international stock markets.

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