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The SEC's Role in the Global Era: How the SEC Will Protect U.S. Investors in Foreign Markets

DEREK W. KACZMAREK*

INTRODUCTION

Globalization has affected the political, economic, social, and technological spheres of the Earth.¹ Globalization's reach is also extending to and transforming the world's financial sector, creating² the potential for a redistribution of wealth among countries throughout the world³ by enabling people to invest in, and profit from, other countries, regions, and continents. Up to this point, corporations have been the primary international investors and have accomplished this through direct foreign investment.⁴ With the growth of

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1. See David Held & Anthony McGrew, *The Great Globalization Debate*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 3* (David Held & Anthony McGrew eds., 2000).

2. See *The Emerging Structure of U.S. Securities Markets and the Appropriate Role for Regulation: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 106th Cong. 21 (2000) [hereinafter *Hearings*] (opening statement of Richard A. Grasso, Chairman and CEO, New York Stock Exchange) (noting how globalization, among other factors, is having a profound effect on financial markets).

3. Held & McGrew, *supra* note 1, at 57.

4. See, e.g., Robert T. Kudrle, *Market Globalization and the Future Policies of the Industrial States*, in *GLOBALIZATION AND GOVERNANCE* 213, 218 (Aseem Prakash & Jeffrey A. Hart eds., 1999)

The flow [of transborder financial activity] now exceeds \$1 trillion a day. While that growth has been encouraged by volatile exchange rates and largely made possible by the communications revolution, the virtual unanimity with which the industrialized countries have abolished capital controls (France and Italy as recently as 1986) provided the necessary policy conditions. The actions were taken to complement the commitment to the globalization of trade. Direct investment provides the vehicle for much international production and exchange, and the increasingly frictionless exchange of currencies facilitates such activity.

Id. (citations omitted); see also STEPHEN GILL & DAVID LAW, *THE GLOBAL POLITICAL ECONOMY: PERSPECTIVES, PROBLEMS, AND POLICIES* 92 (1988) (discussing the ease with which capital flows between the major capitalist economies).

technology and simplification of trading due to the Internet,⁵ individual investors are clamoring for the opportunity to reach beyond their native country and benefit from the world's economy.⁶ The world's securities markets are one of the primary mechanisms for individuals to invest in foreign countries. Arthur Levitt, former Chairman of the United States Securities and Exchange Commission (SEC), predicted, "[t]he marketplace of the future will almost certainly be more global and more electronic. I have said over and over again that I fully expect within the next 5 years that we will be part of a global electronic market."⁷

One of the potential pitfalls for U.S. investors in this future global market, however, is a lack of understanding of foreign countries' securities markets and the different rules used by their respective regulatory agencies.⁸ As Senator McLaughlin noted, "[t]he globalization of capital markets has raised a host of regulatory and accounting issues."⁹

The purpose of this paper is to analyze the different ways in which the SEC and other world regulatory agencies can protect U.S. investors as they enter into the unfamiliar markets of foreign countries.¹⁰ Primarily, how will the SEC

5. See Laura S. Unger, *The Global Marketplace, Ready or Not Here It Comes*, Remarks at the Third National Securities Trading on the Internet Conference (Jan. 24, 2000), at <http://www.sec.gov/news/speech/spch344.htm> ("Telecommunications networks have extinguished any truly discernible differences between sending an order from New York to Chicago, London, or Tokyo. . . . The only real impediments to a global market are regulatory, not technological.").

6. These benefits include "providing new savings pools, reducing capital costs, and furnishing new investment opportunities." A.B. Krongard, Chairman, Securities Industry Association Task Force on Alternative Trading System Concept Release, Comments to SEC Concept Release File No. S7-16-97, at <http://www.sec.gov/rules/concept/s71697/krongar1.htm> (last visited Apr. 29, 2002).

7. *Hearings*, *supra* note 2, at 173 (opening statement of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission).

8. The primary difficulties are the individual investor's assumptions that the foreign securities market will follow the same rules as the markets in the United States, which are regulated by the SEC in a more stringent manner than most other markets. A few of the differences are the lack of a "fair playing field" in terms of a greater acceptance of insider trading or the lack of transparency and full disclosure by corporations (compare the United States to Japan, although the differences have decreased after the Asian market crisis). This is not a problem limited to unsophisticated investors. Kenneth Kaoma Mwenda details some of the problems sophisticated multinational corporations face when deciding on foreign direct investment into Third World countries like Zambia. See KENNETH KAOMA MWENDA, *CONTEMPORARY ISSUES IN CORPORATE FINANCE AND INVESTMENT LAW* 34-42 (2000).

9. Reid Anthony Muoio, *An Independent Auditor's Suit for Wrongful Discharge*, 58 ALB L. REV. 413, 420 n.41 (1994) (referring the reader to Joseph McLaughlin, *Listing Foreign Stocks on U.S. Exchanges: Time to Confront Reconciliation?*, 24 REV. SEC. & COMM. REG. 91, 91 (1991) (arguing that "the SEC's requirement that foreign issuers reconcile their financial disclosures to U.S. GAAP has impeded internationalization of U.S. markets. . . ."))).

10. The motivations of the different regulatory organizations, including the SEC and foreign exchange regulators, will be discussed in Part III.

protect U.S. investors as they invest in foreign markets while, presumably, expecting those markets to operate in the same manner as the U.S. securities markets?

Three different proposals were put forth by the SEC in a concept release paper in 1997 and, to this date, the SEC has taken no further steps to implement any of the proposals. Each of the proposals will be analyzed for strengths and weaknesses as viewed through the lens of globalization theories.

Part I will examine globalization's influence on the flow of capital and the differences between regulations in the United States and in foreign countries. Part II will look at the SEC's specific role in the regulation of securities and will explain why the SEC can and should be involved in the global regulation of securities when U.S. investors are involved. Part III will look at where U.S. investors fit into this equation. Specifically, I will explain why foreign markets would be willing to follow SEC guidelines to gain U.S. investment dollars. Part IV will provide an analysis of the three SEC proposals: mutual recognition, exchange regulation, and access regulation.¹¹ Each of these proposals will be described and then analyzed for advantages and disadvantages. After looking at the pros and cons, I will discuss the problems the SEC may face in implementing the plans. Finally I will assess the likelihood of success of each proposal by placing each of the proposals into the applicable globalization theories.

I. GLOBALIZATION'S EFFECT ON THE WORLD'S SECURITIES MARKETS

A. *How Globalization Influences the Flow of Capital*

While the world shrinks because of globalization, the flow of capital has become more rapid. This is due to improving technology like the Internet, fiber optics, satellites, and cellular communications,¹² the increase in investment opportunities worldwide,¹³ and an overall improvement in the dissemination of information and news through sources like CNN and the Internet. In fact, some theorists point out that money can flow so quickly as to impact an individual

11. These three terms will be adequately explained in the body of the paper. For definitions of the individual terms mutual recognition, exchange regulation, and access regulation, see *infra* Part IV.A-C.

12. See Unger, *supra* note 5 (discussing the improvement in worldwide telecommunications networks that has led to the ability to trade securities on a global basis).

13. See GILL & LAW, *supra* note 4, at 92 (discussing investment opportunities on a worldwide basis, especially between the major capitalist economies).

country's governmental policies in that country's effort to gain more investment dollars.¹⁴

B. How Are the World's Securities Markets Different from Those of the United States?

There are significant differences between the securities markets of the United States and those of foreign countries.¹⁵ The particular differences are dependent upon the individual countries and their regulations and structure. The SEC, the regulator of the securities industry in the United States, attempts to ensure fair and honest markets in the United States by requiring markets to operate under full and fair disclosure and in a transparent manner.¹⁶ Other

14. *See id.* at 93.

15. Harold S. Bloomenthal & Samuel Wolff, *Introduction*, 10 INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 1.04, at 1-39 (Harold S. Bloomenthal & Samuel Wolff eds., 2001).

There is great disparity as to how securities business is conducted around the world. In the United States, the Glass-Steagall Act forced the separation of commercial banking and investment banking. . . . This was also the pattern in Canada, Japan, Hong Kong, Singapore, Australia, and, to a degree, the United Kingdom. On the other hand, in Germany and the remainder of continental Europe and in most other parts of the world, the securities business is an integral part of the banking business. . . .

Id. at 1-39 to 1-40. Another example is the manner in which insider trading is policed on a global basis.

Securities regulation including prohibition of insider trading varies by country. Regulatory regimes run the gamut, including no prohibition, statutory prohibitions which are not enforced, prohibitions based on voluntary cooperation, and highly developed statutory systems enforced by criminal and civil sanctions. Even slight differences in regulatory schemes can produce dramatically different results.

Lynda M. Ruiz, Note, *European Community Directive on Insider Dealing: A Model for Effective Enforcement of Prohibitions on Insider Trading in International Securities Markets*, 33 COLUM. J. TRANSNAT'L L. 217, 219 (1995); *see also* Bernard Asher, *The Development of a Global Securities Market, in THE FUTURE FOR THE GLOBAL SECURITIES MARKET* 3, 9-10 (Fidelis Oditah ed., 1996) ("Regulators and governments lay down rules for investment and to protect investors. Depending on how this is done, it can do much to encourage, or slow down, the globalisation process."). Asher also says that the differences in regulations across countries may actually prevent corporations from seeking investment in certain countries due solely to these differences. *See id.*

16. This includes mandatory filings by corporations listed in the United States. These filings include financial data and other information used to ascertain the financial health of the listed corporation. In their treatise, Loss and Seligman summarize the disclosure rules in saying "[t]hen, too, there is the recurrent theme throughout these statutes of disclosure, again disclosure, and still more disclosure. Substantive regulation has its limits. But '[t]he truth shall make you free.'" LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 8 (4th ed. 2001). In the 1934 Act, "Congress extended the 'disclosure' doctrine of investor protection to securities listed and registered for public trading. . . ." MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* 9 (2d ed. 1996).

In the securities context, a transparent manner is one in which investors can see the most recent trades in a timely manner (timely transaction reporting), as well as having access to the rules of the market and its internal operating structure.

markets may operate pursuant to a similar general principle, but adopt less stringent regulations. For example, some markets may require disclosure of certain financial documents, but not to the same extent the SEC requires of U.S. corporations. These differences are the reason the SEC is concerned with individual U.S. investors trading on foreign exchanges.

II. THE SEC'S ROLE IN THE REGULATION OF U.S. SECURITIES MARKETS

A. Mission of the SEC

The SEC was created and had its powers enumerated by Congress through the Securities Act of 1933,¹⁷ Securities Exchange Act of 1934,¹⁸ and subsequent legislation. Its mandate concerns oversight of "[t]he distribution of securities, the activities of brokers and dealers, the operations of stock exchanges and numerous other activities related to the operation of the securities markets. . . ."¹⁹ Although not explicitly stated in the mandate, the SEC is primarily concerned with the protection of U.S. investors, although foreign investors, when trading on U.S. markets, are protected as a byproduct of the actions taken by the SEC to protect U.S. investors.

The SEC has not received specific power from the legislature to regulate international trades; however, this power is assumed in securities sales involving U.S. investors and foreign exchanges because of the SEC's regulatory power and the interpretation of "interstate commerce."²⁰ Up to this point, the SEC has been able to prevent U.S. investors from trading directly on

17. Securities Act of 1933, 15 U.S.C. §§ 77a-aa (2000). "This Act is concerned by and large with the initial distribution of securities rather than with their subsequent trading. Securities that are offered to the public through the mails or the channels of interstate commerce must be registered with the SEC by the issuer." LOSS & SELIGMAN, *supra* note 16, at 38; *see also* U.S. GOVERNMENT MANUAL 659 (1999-2000).

18. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-mm (2000).

The Securities Exchange Act of 1934 was addressed to postdistribution *trading*. The static disclosure of the 1933 Act was thus transposed into a philosophy of continuous disclosure through the registration of all securities traded on exchanges, with rulemaking authority in the Commission to require the filing of periodic reports by both issuers and certain insiders. . . .

LOSS & SELIGMAN, *supra* note 16, at 38.

19. Edward F. Greene et al., *Concepts of Regulation—The U.S. Model*, in THE FUTURE FOR THE GLOBAL SECURITIES MARKET, *supra* note 15, at 157, 157.

20. 15 U.S.C. § 77b(a)(7) (2000); *see also* Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 932 (1994) ("The key jurisdictional phrase is 'interstate commerce' which is defined to include among other things '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. . . .").

foreign exchanges.²¹ In addition, “[t]he lack of regulatory guidance in this context has discouraged other parties from offering U.S. persons foreign market access.”²² As I will demonstrate, however, the time when the SEC will be forced to make a regulatory decision draws near.

B. The SEC's Problems Related to Globalization

1. Difficulty in Regulating the Flow of Capital outside the United States

Globalization has led to a number of problems for the SEC, particularly in its attempts to regulate securities transactions involving United States citizens.²³ Currently, the only way U.S. investors can invest in foreign securities is via pass-through arrangements.²⁴ This limitation has simplified the SEC's job as securities regulator. In the future, the number of U.S. investors investing in foreign securities may become even greater as the popularity of online investment increases.²⁵ The primary force preventing U.S. investors from becoming more active in foreign markets is the SEC. Foreign markets' fear that the SEC will require them to register as U.S. national securities exchanges, and

21. See Unger, *supra* note 5 (discussing the SEC's role in the prevention of foreign trading despite the existing technology that would enable this type of trading were it not for the SEC's regulatory rules preventing foreign exchanges from accepting U.S. investors' transactions).

22. Regulation of Exchanges, Exchange Act Release No. 34-38,672, 64 S.E.C. Docket (CCH) 1631, 1692 (May 23, 1997), available at 1997 WL 276278 [hereinafter Regulation of Exchanges].

23. See *Hearings*, *supra* note 2, at 239-40 (prepared statement of Scott Gordon, Chairman, Chicago Mercantile Exchange) (discussing the current regulatory environment and the impact on the U.S. and world's financial markets).

24. Unger, *supra* note 5 (“Investors can link to a foreign market by ‘*passing through*’ a member of that market—typically the investor’s broker-dealer—using either a proprietary system or the Internet.”). For a full discussion of the steps necessary to trade on a foreign market via the “pass through” approach, see Regulation of Exchanges, *supra* note 22, at 1690-92. This pass-through investment arrangement in foreign securities should not be confused with foreign companies choosing to list on a U.S. stock exchange, thus subjecting themselves to certain U.S. regulations, through vehicles like American Depositary Receipts (ADRs).

An ADR is a negotiable receipt, usually issued by a U.S. bank, which certifies that a stated number of shares of a foreign private issuer have been deposited in the bank or in its foreign affiliate or correspondent. Form F-6 is available if (1) the ADR holder may withdraw the deposited securities at any time (subject to a few mechanical exceptions), (2) the deposited securities are offered pursuant to a 1933 Act registration or in transactions that would be exempt if effected in the United States, and (3) *the issuer of the deposited securities reports under the 1934 Act.*

LOSS & SELIGMAN, *supra* note 16, at 185 (emphasis added).

25. Unger, *supra* note 5 (“The Internet potentially puts access to foreign markets a URL and a couple of mouse clicks away from any investor with a PC and an on-line brokerage account—and that population of investors grows daily.”).

are therefore wary of U.S. investors.²⁶ With existing technology, the only requirement for greater U.S. participation without the SEC's intervention is a foreign securities market willing to accept U.S. investment capital.²⁷ Thus, if the foreign markets begin to accept U.S. investment and the SEC hopes to protect U.S. investors, a policy to regulate these trades must be established and applied on a global scale.

2. *Inherent Dangers for U.S. Investors Dealing with Non-U.S. Markets*

The primary concern for the SEC, in terms of U.S. citizens trading on foreign exchanges, is that U.S. citizens will expect the markets to operate in a manner similar to the markets the investors typically deal with—U.S. markets regulated by the SEC. The SEC noted,

Because foreign securities laws are generally not designed to provide these protections [“assurances that markets and intermediaries will disclose information regarding the rules governing trading operations, as well as requirements regarding transaction reporting and issuer disclosure practices”] to U.S. investors that directly trade on their markets, in the absence of disclosure these differences have the potential to mislead U.S. investors that have come to rely on the U.S. securities laws.²⁸

As previously noted,²⁹ there are many differences between the U.S. markets and other equity markets. The markets discussed in Part I B, particularly the markets in Japan, Germany, and the United Kingdom, are considered to be similar to U.S. markets.³⁰ As investors wander into truly foreign markets, the

26. Regulation of Exchanges, *supra* note 22, at 1692.

[T]he lack of regulatory guidance in this context has discouraged other parties from offering U.S. persons foreign market access. Similarly, foreign markets have been reluctant to permit U.S. persons to become members of their markets without assurances from the Commission that they would not be required to register as national securities exchanges.

Id.; see also Roger W. Robinson Jr., *Are You Investing in Rogue States?*, WALL ST. J., July 6, 2001, at A8.

27. See Unger, *supra* note 5. (“The only real impediments to a global market are regulatory, not technological.”)

28. Regulation of Exchanges, *supra* note 22, at 1692.

29. See *supra* Part I.B.

30. See Bloomenthal & Wolff, *supra* note 15, at 1-40.2 to 1-52 (discussing the general characteristics of these stock markets along with the similarities and differences in the operation of the markets).

uncharted waters may become treacherous.³¹ Thus, the SEC, in an effort to fulfill its mandate “to provide protection for [U.S.] investors”³² feels it should regulate U.S. investors’ dealings with foreign equities markets.

3. *The SEC’s Jurisdiction Over Global Securities Transactions Involving U.S. Investors*

The jurisdiction of the SEC is broad in scope. A speech by SEC Commissioner Laura Unger addressed the SEC’s view of international regulations, stating, “[t]he obstacles to be overcome in developing a global regulatory framework for securities trading don’t involve any lack of jurisdiction on the Commission’s part. Quite the contrary. The Exchange Act gives the Commission ample authority over the activities of foreign markets and broker-dealers in the United States.”³³ Specifically, the SEC’s jurisdiction is derived from the phrase “interstate commerce.” “Interstate commerce” encompasses among other things “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” and would therefore seemingly cover all trades involving U.S. investors.³⁴

31. Bloomenthal & Wolff, *supra* note 15, at 1-69 (“Investing in the stock market (Bolsa) in Mexico is like riding a roller coaster, the ups and downs of which are affected by volatile stock prices, repeated devaluations of the peso, and some of the highest interest rates in the world.”). The authors also noted “irregularities” in trading in that market. *Id.* at 1-70.

32. U.S. GOVERNMENT MANUAL *supra* note 17, at 659; *see also* Securities and Exchange Commission, *The Investor’s Advocate: How the SEC Protects Investors and Maintains Market Integrity* (Dec. 1999), at <http://www.sec.gov/about/whatwedo.html> [hereinafter *Investor’s Advocate*].

33. Unger, *supra* note 5; *see also* Securities Exchange Act of 1934 § 5, 15 U.S.C. § 78e. Loss & Seligman conclude that U.S. securities regulations and the SEC’s authority extend to international markets because “whether the seller [of a security] has agents within the United States or whether the mails are used, by hypothesis it is impossible to make an offering in the United States from a point outside the country without using some facility of ‘interstate commerce’ as that phrase is defined in the statutes.” LOSS & SELIGMAN, *supra* note 16, at 181.

34. 15 U.S.C. § 77b(a)(7); *see also* Testy, *supra* note 20, at 932.

The express provisions of the federal securities laws establish an extremely broad jurisdictional net. The key jurisdictional phrase is “interstate commerce,” which is defined to include among other things “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. . . .”

III. THE U.S. INVESTOR'S ROLE IN THE WORLD SECURITIES MARKETS

A. What Is the Financial Strength of the United States in Relation to World Markets?

The United States has long been considered an economic superpower. U.S. capital markets are massive and receive new investment dollars every day.³⁵ One example of foreign markets' desire to gain U.S. investment dollars is found in Quebec's recent agreement with the Nasdaq. "Nasdaq and the Quebec government are aiming to 'provide Quebec and Canadian companies with better access to huge pools of capital, and provide investors with the opportunity to trade as many securities as possible at the best price.'"³⁶ In the process of negotiating the agreement, the Canadian government agreed to strengthen the securities laws of Canada. The first phase [in the summer of 2000] of this agreement will allow Canadians to trade U.S. listed stocks in Montreal.³⁷ The second stage will "establish a Canadian market on the Nasdaq trading platform by March 2001."³⁸ Canada's acceptance of U.S. companies into their country and their agreement to follow more U.S.-like securities laws indicates how strong the lure of U.S. investment dollars can be, even to an industrialized country with a strong economy like Canada.

B. Why Do Foreign Markets Want to Attract U.S. Investors? (Why Would Foreign Markets Agree to SEC Regulation?)

Money is a highly liquid asset that countries can use to build up infrastructure and improve their economy. Reuven S. Avi-Yonah emphasized the length nations will go to attract capital, stating, "In the current age of globalization, capital is much more mobile than labor . . . sovereign countries aim to attract both portfolio and direct [foreign] investment by lowering their

35. "U.S. pension fund holdings in foreign shares are expected to grow substantially over the next few years from approximately \$475 billion in 1996 to \$940 billion by 2001." Douglas M. Atkin, *Instinet*, Comment on Securities and Exchange Commission File No. S7-16-97 (Oct. 3, 1997), at <http://www.sec.gov/rules/concept/s71697/atkin1.htm>.

36. *Quebec bringing Nasdaq to Canada*, LETHBRIDGE HERALD, Apr. 27, 2000 (quoting Lucian Bouchard, Quebec Premier), available at 2000 WL 16481643.

37. *Id.*

38. *Id.*

tax rates on income earned by foreigners.”³⁹ With the advent of the Internet and improving communications, once the regulatory barriers are removed, anyone could invest in a foreign country, as long as the investor has access to a computer and a modem.⁴⁰ Thus, by gaining SEC approval, foreign markets can instantly gain access to massive amounts of foreign capital.⁴¹ Not only will this capital be invested in a foreign country’s corporations, but the government will receive tax dollars from U.S. investors and, presumably, a boost in the foreign market’s stock valuations due to the increase in demand.

IV. THE SEC’S PROPOSALS TO REGULATE INVESTMENTS

In 1997 the SEC issued a concept release recognizing the changes in the world’s securities markets brought about by globalization.⁴² In the release, the SEC proposed three potential solutions to the problems associated with regulation of international securities markets. The proposals were: (1) a mutual recognition approach,⁴³ (2) a direct exchange regulation approach,⁴⁴ and (3) an access regulation approach.⁴⁵ As viewed through the lens of globalization theory, each of these proposals has some advantages as well as some

39. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1575, 1575-76 (2000). Indeed, some developing countries, in an effort to attract foreign investment, have lowered tax rates on foreign nationals to levels lower than the tax rates of citizens.

What has not been subjected to legal test, however, is the issue of tax discrimination which favours aliens and operates against indigenous people. As a result of this gap in jurisprudence, the leaders of a number of developing countries recognize the need to exploit the above sovereign right in international law in order to attract foreign investors through lofty fiscal incentives. In pursuance of this effort, a number of governments in developing countries have enacted legislation which offers generous fiscal incentives to foreign investors.

MWENDA, *supra* note 8, at 8 (citations omitted).

40. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (defining cyberspace as “a unique medium . . . located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet”); Unger, *supra* note 5 (“The technological underpinnings of a global securities market already are in place. . . . The only real impediments to a global market are regulatory, not technological.”).

41. For example,

U.S. pension funds have more than doubled their international investments over the past five years. These investments are expected to increase further from 8% of assets in 1994 to 12.5% by the end of 1999. This would increase overseas funds to \$725 billion from \$300 billion, 19.3% compound growth rate during the period.

Asher, *supra* note 15, at 4.

42. Regulation of Exchanges, *supra* note 22.

43. See *id.* at 1693-94.

44. See *id.* at 1694-95.

45. See *id.* at 1695-1702.

disadvantages. The remainder of this note will weigh the pros and cons of the SEC's three proposals to determine which plan would most effectively regulate securities markets in this era of globalization.

A. Mutual Recognition

The first proposal, dubbed the mutual recognition approach, allows the SEC to "rely on a foreign market's primary regulatory authority if [the SEC] determined that the foreign authority provided 'comparable' regulation to U.S. exchange regulation."⁴⁶ After the SEC has determined that the foreign market has sufficiently similar regulations and enforcement mechanisms, the SEC will take a hands-off approach and let the local regulatory agency protect U.S. investors by enforcing the local regulations.

1. What the SEC Will Look for to Determine "Comparable" Exchanges

Obviously, the first difficulty faced by the SEC is determining what factors lead to having regulations "comparable" to U.S. securities regulations. Some of the factors the SEC will look at include "efficient structures," "sound disclosure systems," and "fair and honest markets."⁴⁷ Efficient structures include "quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards. . . ."⁴⁸ Sound disclosure systems would include "accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants. . . ."⁴⁹ The third factor, fair and honest markets, would ensure "regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation."⁵⁰ Just because a country can demonstrate that its market has all of these regulations, however, does not mean that it will receive

46. Unger, *supra* note 5.

47. Regulation of International Securities Markets, Securities Act Release No. 33-6807, 34-26284, 42 S.E.C. Docket (CCH) 284, 284 (Nov. 14, 1988), *available at* 1988 WL 902407.

48. *Id.*

49. *Id.*

50. *Id.*

approval. Most markets have similar mechanisms; the only difference is the degree of disclosure, fairness, and efficient markets.⁵¹

2. *Advantages to SEC's Plan*

Due to the SEC's lack of direct intervention under the mutual recognition approach, some of the groups favoring this plan include foreign exchanges, regulators, and firms.⁵² The foreign regulators' preference to retain their autonomy⁵³ while gaining U.S. investment capital makes the mutual recognition approach a foreign country's ideal solution. This approach would also lead to internal advantages for the SEC, such as the ability to focus on domestic markets once a foreign market has received the SEC's approval.

One of the more difficult tasks facing the SEC is to regulate the world's securities markets. The difficulty lies in the massive amount of manpower required to police domestic as well as foreign markets—not to mention foreign-relation problems. By relying on foreign regulatory agencies to regulate their individual markets, the SEC is able to lessen its already imposing burden by focusing solely on the United States.⁵⁴

In addition, by requiring a certain level of regulation in order to receive U.S. investment dollars, the SEC would be able to raise the standards of global regulation. One of the primary concerns for globalists is a "race to the bottom,"⁵⁵ a race that will be halted before it begins if the SEC mandates global standards in order to receive the SEC's blessing.

51. See *supra* Part II.B for further discussion of the degree of differences between U.S. markets and their foreign counterparts.

52. See Jorg Franke, Comment on Securities and Exchange Commission File No. S7-16-97 (Oct. 3, 1997), at <http://www.sec.gov/rules/concept/s71697/franke1.htm>. Franke, Executive Board member of Deutsche Borse, the operating company for Germany's leading securities exchange, noted, "Deutsche Borse believes that foreign exchanges contemplating limited activities and maintaining a limited physical presence in the United States should generally be permitted to offer membership to registered broker-dealers and to other highly sophisticated investors in the United States on the basis of their home country regulation. . . ." *Id.*; see also Unger, *supra* note 5.

53. Enrico Colombatto & Jonathon R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 926 (1996) ("All else equal, regulators would prefer not to cede or to share authority with their counterparts from other countries.").

54. For further discussion on the SEC's difficulties in regulating the world's securities markets, see *infra* Part IV.B.3.b detailing the inherent problems with policing the world's markets.

55. The Race to the Bottom theory indicates that, in the competition for global business, countries will lower their standards in an effort to gain business. For example, if a country wishes to attract heavy industry, it may lower the pollution standards so more corporations will look at the country as a place where it is cheaper to do business.

Foreign exchanges have expressed interest in teaming up with the United States in order to gain a competitive edge in the fight for investment dollars. The effect of foreign investments extends even to markets considered to be primarily domestic. "The dynamism of domestic markets depends ultimately on the capacity of domestic firms and networks of firms to compete globally."⁵⁶ The recent agreement between the Nasdaq and Montreal's exchange is one example of how the SEC's proposal will raise the level of regulation up to United States standards.⁵⁷ Countries realize that a failure to gain the SEC's approval will result in the loss of potential foreign investment.⁵⁸ Thus, rather than the feared "race to the bottom," the potential to gain the SEC's approval will result in a race to the top, or at least a race to the SEC's minimum standards. The Mutual Recognition proposal, and the minimum standards it will create, is similar to the European Union's current attempt at harmonization.⁵⁹

3. Potential Problems Facing the SEC

The potential pitfalls of the SEC's plan are numerous and likely to prevent the enactment of this approach. The first difficulty is that of losing exchanges to foreign countries. With the growth of technology and the elimination of the necessity of a physical trading floor, exchanges are not tied to one particular location. Therefore an exchange seeking a less restrictive set of regulations

56. Manuel Castells, *The Global Economy*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 1, at 259, 260 (discussing the worldwide competition brought about by globalization.).

57. "'This tells us we were right to go ahead with Nasdaq because in a globalizing world, Quebec would have been left in a less competitive position,' said Hubert Bolduc, spokesman for Bernard Landry, Quebec's Finance Minister." Kathryn Leger, *Quebec Was "Right" to go with Nasdaq: But Province Says TSE Move Positive for Investors*, NATIONAL POST, June 8, 2000, at C3, available at 2000 WL 21838485.

58. *See id.*

59. *See* Todd A. Sulger, Comment, *Harmonization of Securities Market Regulations in the European Union: Is the Price Tag Too High?*, 29 CAL. W. INT'L L.J. 221 (1998).

[T]he EU has attempted to harmonize the security regulation requirements of each member state by establishing minimum security information disclosure standards. Although the minimum standards in most cases may not be lowered by a member state, the standards generally can be raised. Each member state must adopt these binding regulations into legislation; however, each member state retains the choice as to the form and method of implementation it wishes to employ to move the directive into national law. Ultimately, the EU expects to achieve a minimum standard of quality and accessibility in the securities markets by fostering a level of cooperation among national supervisory bodies.

Id. at 224.

could move to an “approved” country and still retain access to U.S. investors.⁶⁰ The advantage to the exchanges and corporations that decide to move is a lessening of regulations and the avoidance of the SEC’s watchful eye.

The second problem lies in the approval process. Certain governments would press for their exchanges to be recognized despite significant shortcomings. This could result in a political rather than a regulatory decision due to the impact that the U.S. investment dollar could have on an exchange.⁶¹ An example of a potential problem is the found in different disclosure requirements in Japan and the United States. One of the SEC’s mandates is to “ensure that securities markets are fair and honest,”⁶² something that a lack of disclosure prevents. The choices faced by the SEC would be to solicit a change in Japan’s corporate secrecy laws; deny the Japanese markets approval for securities trading with U.S. investors, or accept Japan’s differences, even though these differences tilt the playing field in favor of Japanese nationals and against U.S. investors. It is conceivable that the U.S. government would pressure the SEC simply to accept Japan’s differences and issue approval to the markets.

4. *Why the Mutual Recognition Solution Will Work*

The predicted results of the SEC’s first proposal can best be viewed through a variation of the hyper-globalist theory.⁶³ However, rather than a race to the bottom, foreign markets desiring increased foreign investment dollars will raise their standards to meet the SEC’s more stringent requirements because of the desirability of U.S. investment dollars.

The use of the Mutual Acceptance model would result in higher standards throughout the world, standards similar to U.S. standards. The uniformity of the securities markets would result in an ease of trading on markets throughout the globe. The Mutual Recognition proposal is an application of “mandated reciprocity”⁶⁴ that could lead to “global public policy” similar to the banking

60. See Unger, *supra* note 5.

61. See *id.*

62. U.S. GOVERNMENT MANUAL, *supra* note 17, at 659; see also *Investor’s Advocate*, *supra* note 32.

63. “For the hyper-globalisation school, global markets are now perfectly integrated—even for non-tradable goods and services multinational corporations can enter domestic markets. With consumers able to buy products from around the globe and producers able to locate in or source from any site, the notion of a national economy becomes redundant.” Jonathan Perraton et al., *Economic Activity in a Globalizing World*, in THE GLOBAL TRANSFORMATIONS READER 287, 287 (David Held & Anthony McGrew eds., 2000).

64. WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT? 110 (1985).

industry in the 1980s. If the SEC were to combine with other regulatory agencies in order to ensure similar regulations, it is possible that a new global agency would be formed. David Lake noted this trend, "As globalization occurs, states lose control over their destinies, problems become 'bigger' than the capacities of individual governments, and states must delegate and possibly abdicate political authority to supranational entities with powers that more nearly coincide with the scope of the issues and actors to be managed."⁶⁵ Once it becomes apparent that individual countries do not have the capacity to regulate the international transactions of their citizens, this new agency will be necessary. The mutual recognition approach will have laid the groundwork for global securities regulations and this approach could succeed.

5. *Why It Won't Work*

The use of the mutual recognition approach could violate the Westphalian model of autonomy and countries may resent the control of the SEC. A similar problem and result can be seen in the harmonization of securities laws in the European Union. Krasner states, "arrangements within the European Union such as mutual recognition, which allows entities operating in one state to be governed by the laws of another, have violated the Westphalian model. Individual states retain the formal right to renounce the Union . . . , but the costs would be very high."⁶⁶

Foreign countries would also resent the Americanization of international securities markets. In *Jihad vs. McWorld*, Benjamin Barber observed the Americanization phenomenon and the resulting feelings toward Americans.⁶⁷ This sentiment and the competitiveness between regulatory agencies will make it difficult for the SEC or any U.S. agency to impose its will on foreign country's securities markets without a backlash.⁶⁸ David S. Pottruck of Charles

65. David A. Lake, *Global Governance: A Relational Contracting Approach*, in GLOBALIZATION AND GOVERNANCE, *supra* note 4, at 31, 42.

66. Stephen D. Krasner, *Compromising Westphalia*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 1, at 124, 127.

67. Benjamin Barber, *Jihad vs. McWorld*, in THE GLOBALIZATION READER 21 (Frank J. Lechner & John Boli eds., 2000) (discussing Americanization and the competing theories).

68. See Colomatto & Macey, *supra* note 53, at 933.

[A]ll regulatory entities will engage in wealth-maximizing behavior. They will attempt to maximize the rough "value of their [bureaucracies], subject to technological, market, and statutory restraints and principal-agent difficulties." Second, any given regulatory authority competes with other regulatory authorities for whatever it is that

Schwab notes, the resentment could also lead to an imposition of increased restrictions on U.S. markets by foreign regulatory agencies.⁶⁹

B. Exchange Regulation—SEC Requires the Foreign Markets Providing Direct Access to the United States to Register as U.S. Exchanges

The SEC's second approach to global regulation is the application of U.S. securities laws to all foreign markets seeking U.S. investment. In this approach, "The Commission could require foreign markets that provide direct access to U.S. investors to register as U.S. exchanges or use our [the SEC's] authority under section 36 of the Exchange Act to provide them with an exemption from exchange registration."⁷⁰ The SEC would be responsible for enforcing its regulations, as opposed to the local government's enforcement of their own securities laws as seen in the mutual recognition approach.

1. What Will Foreign Exchanges Do to Receive SEC Approval?

Although it is not difficult to ascertain what steps an exchange must take in order to obtain approval under the direct regulation proposal, the actual approval process could be a near impossibility, keeping U.S. investors out of foreign markets⁷¹ despite the SEC's best efforts under this proposal. Each exchange would have to examine its current regulations and ensure that each regulation is in conformity with all current U.S. securities laws. This process

they are attempting to maximize. This competitive behavior will occur on a national as well as an international level.

Id.

69. See David S. Pottruck, President and Co-chief Executive Officer, Charles Schwab, Comment on Securities and Exchange Commission File No. S7-16-97 (Oct. 3, 1997), at <http://www.sec.gov/rules/concept/s71697/pottruc2.htm> ("We believe foreign regulators are likely to impose restrictions on the routing of orders to the U.S. equal to or greater than the restrictions the Commission places on orders routed to their countries. This issue of reciprocity should be of significant concern to the Commission.").

70. Unger, *supra* note 5; see also Regulation of Exchanges, *supra* note 22, at 1695 ("Foreign markets that offer their services to U.S. persons would have to comply with the same regulatory obligations as U.S. exchanges.").

71. Franke, *supra* note 52.

[T]he procedural burdens and costs of submitting to a second regulatory regime, with different information disclosure standards and recordkeeping and other regulatory requirements, will deter foreign exchanges that contemplate only limited activities in the United States from offering membership to registered broker-dealers and highly sophisticated investors in the United States.

Id.

could require the foreign exchange to alter its current laws to fit U.S. laws, and thus, in the worst-case scenario, be in violation of contradicting local securities regulations.

2. *Advantages*

Uniformity is the primary advantage of this proposal. As the SEC noted, “[t]his approach also could ensure that any foreign markets that offer services to U.S. investors would provide the same protections as registered or exempted exchanges, such as disclosure of trading rules, transparency, timely transaction reporting, and T+3 clearance and settlement.”⁷²

There are two primary benefits to uniformity. The first advantage is that U.S. investors would understand the foreign market's rules, assuming the investor understands the U.S. regulations. Ensuring that U.S. investors understand the rules of the foreign markets is one of the most cited reasons for establishing international regulation of the securities markets. The second advantage obtained through uniformity is the establishment of world securities regulations. This would eliminate corporations and exchanges from “exchange shopping,” where the entity searches for the country in which the most favorable rules exist, while still retaining access to investor capital.⁷³

3. *Disadvantages*

The disadvantages to this proposal are as numerous as they are serious. Some of the major disadvantages include: (1) the impracticality of the proposal; (2) the potential for regulatory retaliation by foreign agencies; (3) the risk of subjecting exchanges to two, potentially inconsistent, sets of laws; and (4) the existence of statutory limitations that may prevent the SEC from completely regulating foreign securities markets. Charles Schwab's comment to the SEC's proposal summarized the weaknesses best by stating, “this restriction would completely defeat the purpose of cross-border securities trading.”⁷⁴

72. Regulation of Exchanges, *supra* note 22, at 1695.

73. See Unger, *supra* note 5 (“The primary benefit of this approach is that it eliminates the problem of regulatory arbitrage.”).

74. Pottruck, *supra* note 69.

a. Practicality

Forcing the SEC to patrol the world's securities markets, or at least those markets choosing to register with the SEC, is a monumental task. As SEC Commissioner Laura Unger noted, "[e]ven if [the SEC] had access to unlimited resources, which [it] obviously do[es] not, a U.S. regulator would be hard-pressed to accomplish that task."⁷⁵ Certain foreign exchanges view this proposal as one with flaws that would defeat its primary purpose of creating opportunities for global securities trading.⁷⁶ Additionally, some foreign exchanges also view this as an "impossible burden" to meet.⁷⁷

b. Retaliation by Foreign Governments

"Countries jealously protect their sovereignty, and under international law, have the right to use armed force to do so."⁷⁸ Although this reaction may seem extreme, it is true that the SEC's direct regulation of foreign markets would be seen as an assault on a foreign government. This proposed action by the SEC could warrant a counteraction by a foreign government whose rights have been infringed upon by a U.S. regulatory agency. Additionally, the foreign countries' securities regulation agencies will feel as if their independence has been diminished by an imperialistic U.S. action. "[L]ike dominant firms in any domestic market, a country's dominant financial regulator must worry about foreign competition."⁷⁹ Foreign regulatory agencies will not consider the SEC's enforcement of U.S. securities laws to be particularly helpful. In fact,

75. Unger, *supra* note 5.

76. See Mitsuhide Yamaguchi, President & CEO, Toyko Stock Exchange, Comments on Securities and Exchange Commission File No. S7-16-97, at <http://www.sec.gov/rules/concept/s71697/yamaguc1.txt> (Oct. 3, 1997).

If the SEC requires foreign exchanges or issuers to follow certain procedures to register or to be exempted from such registration, there is a strong possibility of hindering the cross-border transactions of U.S. investors. The introduction of such a registration system would impose temporary and continuous cost increases upon the foreign markets and issuers capable of providing U.S. investors with a variety of investment vehicles.

Id.

77. Franke, *supra* note 52 ("Imposing a U.S. exchange registration requirement on foreign securities exchanges with limited activities in the United States may, as the Commission recognizes, represent an impossible burden for foreign exchanges and their members.").

78. Colombatto & Macey, *supra* note 53, at 925.

79. Edward J. Kane, *Tension Between Competition and Coordination in International Financial Regulation*, in GOVERNING BANKING'S FUTURE: MARKETS VS. REGULATION 33, 36 (Catherine England ed., 1991).

most governments would view this action as a direct assault on the sovereign rights of the government.

Although the reactions of foreign governments would vary, one likely method of retaliation would be to require those U.S. exchanges receiving investments from foreigners to register as an exchange in the foreign country.⁸⁰ This would force the U.S. exchange to comply with the foreign government's regulations, similar to what the SEC would do to the foreign exchanges seeking U.S. investment. The most apparent problem would be if multiple governments placed contradictory or mutually exclusive regulations on the U.S. exchanges, forcing the exchanges to choose specific markets from which to seek investment and spurn some potentially lucrative markets because of the government's securities laws. Other possible government reactions could go so far as the aforementioned military retaliation against the U.S. because of their infringement on foreign governments' sovereignty.⁸¹

c. Markets Would Become Subject to Two Sets of Potentially Inconsistent Laws

The problem that U.S. exchanges might face in registering under the retaliation scenario could also be present for foreign exchanges that need to comply with only two sets of regulations—the SEC's and the host government's. Although most securities regulations attempt to accomplish the same goals, fairness, transparency, etc., the various regulatory agencies tackle this problem under different assumptions and, potentially, different sets of rules.

d. Legal Limits on SEC Regulation of Foreign Markets

In a legal sense, the SEC does not face any restrictions in regulating transactions involving U.S. investors. However, by imposing regulations on a foreign market, the SEC would inadvertently be regulating transactions taking place between two foreign entities, a foreign investor and a foreign market. The SEC lacks the jurisdiction to regulate this type of transaction.

80. See Pottruck, *supra* note 69 (detailing the retaliation that will likely be imposed on those U.S. companies seeking foreign investors for U.S. markets).

81. Colomatto & Macey, *supra* note 53, at 925.

4. *Why the Exchange Regulation Solution Will Work*

The only positive aspect of this approach is that the world will have at least one set of global securities regulations, assuming foreign markets wish to receive U.S. investment dollars. This uniformity will allow investors from throughout the world to invest in foreign markets and understand the rules by which the markets work.

5. *Why It Won't Work*

Having the SEC regulate the world's securities markets will be seen by foreign governments as a gross exercise of U.S. imperialism and by the SEC as a nearly impossible task.

Today, it is argued, imperialism has acquired a new form as formal empires have been replaced by new mechanisms of multilateral control and surveillance, such as the G7 and World Bank. As such, the present epoch is described by many Marxists not in terms of globalization, but instead as a new mode of Western imperialism dominated by the needs and requirements of finance capital within the world's major capitalist states.⁸²

The SEC's proposal would simply result in the elimination of other Western partners and be a U.S. attempt at global era imperialism.

The second difficulty is retaliation, though this need not be direct or overt retaliation. A problem the European Union faces, which will likely be faced by the SEC and U.S. corporations seeking to list their shares in foreign markets, is the minor differences found in each market.

Each time an issuer seeks to list a security in a member state, it must comply with the admissions directive requirements of that member state. Thus, the Stock Exchange Directives do not completely harmonize securities regulation requirements in member states. Rather, the directives set a minimum standard for compliance. Domestic law in each member state where listing is sought must still be consulted to determine any

82. Held & McGrew, *supra* note 1, at 5.

additional requirements the state mandates about the directives' minimum requirements.⁸³

A similar difficulty could face the SEC and the world securities markets. Once the SEC grants approval to certain markets, those markets will likely grant approval to U.S. markets. The companies and markets seeking to list will be able to list, in a technical sense; however, each entity will be required to meet differing standards in order to list with each country.⁸⁴ The foreign countries may impose restrictions on U.S. companies similar to those placed on foreign corporations and markets seeking U.S. regulatory approval.

6. *Hybrid Approach of Exchange Regulation*

Some foreign exchanges have proposed that the SEC directly regulate the foreign exchanges in a limited manner. In a comment on the SEC's proposal, Deutsche Börse AG suggested that the SEC should allow "qualified U.S. persons" to trade on foreign exchanges if the foreign exchanges meet certain conditions. The conditions suggested by Deutsche Börse include: (1) quarterly reporting to the SEC regarding "the volume of trading involving U.S. members as compared to overall trading volume on the foreign exchange,"; (2)⁸⁵ providing information "regarding the location of U.S. member terminals; (3)"⁸⁶ "providing notice . . . [of] changes to the securities laws and regulations of [the] home country,"⁸⁷ and (4) "providing notice of any material changes to the constitution, rules, or operating procedures of the foreign exchange."⁸⁸ While this suggestion eliminates some of the disadvantages of the Exchange Regulation approach, it also eliminates the primary advantage, uniformity of regulations, and is therefore unlikely to receive approval.

83. Sulger, *supra* note 59, at 227-28.

84. See Testy, *supra* note 20, at 933 ("The extraterritorial application of domestic securities law to transnational transactions results in duplicative or inconsistent regulation, and thereby impedes the free flow of capital across borders.")

85. Franke, *supra* note 52.

86. *Id.*

87. *Id.*

88. *Id.*

C. Access Regulation—SEC Regulates the Entities that Actually Provide Access to Trade on the Foreign Exchanges

In the access regulation approach, the SEC would “regulate the access providers to foreign markets, including broker-dealers, rather than regulating the foreign markets themselves.”⁸⁹ This proposal represents the middle ground in terms of the SEC’s options. Rather than relying on regulation by a foreign regulatory agency or direct SEC regulation of a foreign exchange, this approach allows the SEC to regulate only those entities providing U.S. investors with links to a foreign market. Thus, the difficulties associated with regulation of transactions not involving U.S. investors would be eliminated,⁹⁰ as would the concerns about having foreign regulatory agencies regulating transactions involving U.S. investors.

1. What Is Access Regulation?

In order for a U.S. citizen to trade a stock on a foreign exchange, the investor must go through a member of the foreign exchange and have that member execute the trade on his behalf. Typically, the U.S. investor will contact his brokerage firm and have the brokerage firm act as the intermediary between himself and the foreign exchange member. The SEC proposal will regulate the U.S. broker to ensure that the investor receives the necessary level of protection. Under this approach, the SEC will require those broker-dealers who enable U.S. investors to trade directly on a foreign exchange to register as securities information processors (SIPs).⁹¹ SIPs are subject to a lower level of regulation. Typically, this regulation includes meeting watered-down requirements for record keeping, reporting, and disclosure, and complying with certain anti-fraud rules.

Those markets which lack the technology to enable investors to trade directly on the exchange will also be regulated in a manner similar to the regulation of SIPs because the “access is provided in a manner that is functionally equivalent to that provided by SIP access providers, it presents the same risks to U.S. investors.”⁹² Thus, the SEC would be able to regulate the

89. Regulation of Exchanges, *supra* note 22, at 1695.

90. See *supra* Part IV.B for a discussion on the SEC’s regulation of transactions involving foreign exchanges and foreign investors.

91. See § 11A of the Exchange Act, 15 U.S.C. §§ 78k-1, for a further discussion of SIPs.

92. Regulation of Exchanges, *supra* note 22, at 1695.

transactions made by U.S. investors without setting up an elaborate scheme to regulate world securities markets, nor relying on the local enforcement of regulations similar to those present in the United States.

2. *Advantages*

The SEC would be able to avoid “stepping on foreign governments’ toes,” thus enabling U.S. investors to gain access to regulated foreign markets while not incurring the wrath or retaliation of foreign governments. The only transactions regulated by this approach are those that take place in the United States, and the only entities regulated by the SEC are those entities that provide the connection between the investor and the foreign market. Some foreign exchanges appear ready to accept this level of regulation.⁹³

Unlike the Direct Regulation approach, the Access Provider approach would avoid any potential Constitutional problems because regulation occurs only in the United States. Additionally, this form of regulation is already taking place, but on a smaller scale.⁹⁴ The SEC would also not give up any regulatory power, in contrast to the mutual recognition approach.⁹⁵

With this approach, the SEC is still able to accomplish its stated objectives—to protect the U.S. investor, ensure that markets operate fairly, and enforce the securities laws⁹⁶—but with less manpower than the direct regulation approach would require, and far less dependence on foreign regulatory agencies than the mutual recognition approach requires.

3. *Disadvantages*

The only real problem facing the SEC, if it chooses to adopt this approach would be the ability of the regulated entities (i.e. the middle men) to ensure fair markets abroad. It is true that the SEC would regulate the access providers, however, some foreign markets may choose not to operate the markets in a fair manner, thus creating a potential problem for the SEC because of the lack of

93. See Franke, *supra* note 52 (“Deutsche Borse would also not be averse to an approach to monitoring the activities of foreign exchanges in the United States that would require foreign exchanges to register with the Commission as ‘securities information processors’ and to comply with certain minimal substantive requirements respecting their U.S. activities.”).

94. The SEC already regulates SIPs. See Securities Exchange Act § 11A.

95. See Pottruck, *supra* note 69 (“A mutual recognition regulatory scheme might result in some short-term loss of control for the Commission.”).

96. U.S. GOVERNMENT MANUAL, *supra* note 17, at 659.

control it would have over those rogue markets. This problem would not, however, defeat the SEC's mandate to protect U.S. investors as long as the differences in markets are fully disclosed. Mitsuhide Yamaguchi, President and CEO of the Tokyo Stock Exchange, stated, "[i]f the SEC were to introduce the concept of an 'access provider' into the U.S. regulatory framework, it should limit such regulation to a relatively narrow range of requirements, such as disclosure of differences in investor protections between the U.S. and foreign countries."⁹⁷

4. *Why the Access Provider Solution Will Work*

SEC Commissioner Laura Unger noted that the Access Provider proposal

seemed to be the one being given the most serious consideration. By regulating only the U.S. activities of the foreign market or third party entities, it might reduce some of the conflicts between U.S. and home country regulations. It might also alleviate concerns that the Commission would overstep its statutory authority by regulating foreign market activity in the home country.⁹⁸

The interesting aspect of this proposal is that unlike the other proposals, the access provider solution does not infringe on any other nation's rights. This proposal would seem to run contrary to some globalization theories, which advocate one world rather than a number of countries interacting with one another. While it is true that the access provider regulation proposal does run contrary to some globalization theories like the erosion of borders theory, the proposal does not reject or defeat other globalization theories. Many globalization theories actually support and provide the justification for SEC regulation in the first place. Such theories as the time-space compression theory and increased interdependence have given rise to the SEC's proposals. In effect, the globalizing world has provided the necessity for the SEC's regulation, and the access provider regulation is simply the best way to regulate international securities transactions within the parameters of a world that has not reached a truly global scale (i.e. a world where political boundaries cease to be relevant).

97. Yamaguchi, *supra* note 76.

98. Unger, *supra* note 5.

One other theory that supports the Access Provider regulation is that of local regulation of a global problem. In this theory, the large, global problem can be solved on a smaller scale. This "approach did not 'obliterate the distinction of what is national and what is local,' his willingness to define the national interest by looking beyond national borders to an interdependent global economy, represents an approach that ultimately would vest most regulatory decisions at the federal level. . . ."99 Thus, although the SEC's approach of access regulation is a local solution to a global problem, it is a step in the right direction, a step that will be acceptable to a globalizing world that has not reached the ultimate destination.

CONCLUSION

If the SEC wishes to protect U.S. investors in foreign markets, then the foreign markets must be regulated by the SEC. The SEC's three proposals would all succeed in providing regulation, although the extent of regulation, and therefore the ultimate success of the approaches, differs due to factors other than those associated with pure regulation. The Mutual Recognition approach could lead to a lack of regulation because the SEC relinquishes control to another foreign government. Direct Regulation would lead to political problems because of the SEC's infringement on other government's sovereignty. The Access Provider approach appears to offer the most hope because it stands on the middle ground. The SEC would be able to protect U.S. investors without infringing on foreign states' sovereignty.

99. Alfred C. Aman, Jr., *The Globalizing State: A Future Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. OF TRANSNT'L L. 769, 867 (1998).

