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POST-SOX TRENDS IN DELISTINGS AND DEREGISTRATION

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It is well known that in recent years a number of companies, both domestic and foreign, have delisted from U.S. securities exchanges, ceased reporting to the Securities and Exchange Commission (SEC), and/or gone private. This trend is frequently attributed to the passage of the Sarbanes-Oxley Act of 2002[1] ("SOX") or the burdens of U.S. regulation in general, as well as, among other things, the litigation and enforcement environment in the United States.[2] In this article, we review recent SEC filings for the purpose of documenting the number of departing issuers that in their public disclosures gave SOX (or U.S. regulatory burdens in general) as a principal reason for exiting the U.S. markets.

We review filings that an issuer is required to make in order to change its status as a reporting company under the U.S. Securities Exchange Act of 1934 ("Exchange Act"). An issuer generally files a Form 15 with the SEC when it decides to deregister from SEC reporting requirements due to having a limited number of shareholders.[3] A foreign issuer files a Form 15F with the SEC to deregister under the Exchange Act due to low trading volume in the United States in comparison to a foreign listing.[4] A foreign private issuer with a foreign

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[1] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745. *See generally* HAROLD S. BLOOMENTHAL, SARBANES-OXLEY ACT IN PERSPECTIVE: 2008–2009 EDITION (2008) (discussing the Sarbanes-Oxley Act and its impact on the area of securities law and regulation).

[2] *See* COMM. ON CAPITAL MARKETS REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 71–72 (2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (last visited July 26, 2009).

[3] 17 C.F.R. §§ 240.12g-4, 240.12h-3; *see* SEC Form 15, *available at* http://www.sec.gov/about/forms/form15.pdf.

[4] 17 C.F.R. § 240.12h-6; *see* SEC Form 15F, *available at* http://www.sec.gov/about/forms/form15f.pdf.

listing may also file a Form 15F to deregister under the Exchange Act based upon a low number of foreign and/or U.S. shareholders.[5] An issuer files a Form 25 to notify the SEC of its withdrawal of securities from listing on a national securities exchange, such as the New York Stock Exchange (NYSE) or Nasdaq, and of its intention to withdraw the securities from registration under Section 12(b) of the Exchange Act.[6] An issuer "going private" (technically, engaging in a "Rule 13e-3 transaction") is generally required to file a Schedule 13E-3.[7] Each of these forms, except Form 15F, may be filed by foreign or domestic issuers; Form 15F may only be filed by foreign private issuers.

The authors reviewed the above-referenced filings with the SEC, disclosures in other SEC documents and press releases for the periods shown (generally 2002 through the second quarter of 2008) in an effort to assess the extent to which registrants in delisting, deregistering, or going private stated that their principal reason was SOX or burdens or costs of U.S. securities regulation in general. We present raw data and do not attempt to control for market conditions, types of securities, or any other variables.

The Sarbanes-Oxley Act was enacted in 2002.[8] The most onerous provision of the Sarbanes-Oxley Act—Section 404, the internal controls provisions[9]—was phased in two or more years later. To oversimplify the complex history of the Section 404 phase-in, all "accelerated filers" under the Exchange Act became subject to Section 404 requirements for fiscal years ending after November 14, 2004.[10] Non-accelerated filers were not required to file management's Section 404(a) report until fiscal years ending on or after December 15, 2007.[11] Non-accelerated filers are not required to file the auditors' attestation required by section 404(b) until the first fiscal year ending on or after December 15, 2010.[12]

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[5] 17 C.F.R. § 240.12h-6(a)(4)(ii). Form 15F and Rule 12h-6 were both promulgated in 2007. Termination of a Foreign Private Issuer's Registration of a Class of Securities, Exchange Act Release No. 34,55540, 72 Fed. Reg. 16934 (Apr. 5, 2007).

[6] 17 C.F.R. § 240.12d2-2(c)(1); *see* SEC Form 25, *available at* http://www.sec.gov/about/forms/form25.pdf.

[7] 17 C.F.R. § 240.13e-3(d); Securities Lawyer's Deskbook, http://www.law.uc.edu/CCL/34ActRls/rule13e-100.html.

[8] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

[9] *See* COMM. ON CAPITAL MARKETS REGULATION, *supra* note 2, at 115.

[10] BLOOMENTHAL, *supra* note 1, at § 3:31.

[11] COMM. ON CAPITAL MARKETS REGULATION, *supra* note 2, at 118.

[12] BLOOMENTHAL, *supra* note 1, at § 3:31; *see* Release 33-9072 (Oct. 13, 2009).

I. DEREGISTRATIONS

Presented in Table 1 below is a summary of Form 15[13] filings during the periods shown and the number of instances in which the registrant gave SOX (or related U.S. regulatory burdens) as the principal reason for filing. The data presented below reflect an increasing number and percentage of Form 15 filings that specify SOX or U.S. regulatory burdens in general as a principal reason for deregistering under the Exchange Act.

Table 1 - Form 15 Filings

Year	No. of Filings	No. of Giving SOX As Reason for Filing	% Giving SOX As Reason
2000	710	n/a	n/a
2001	805	n/a	n/a
2002 7/31/02-12/31/02	261	15	6%
2003	744	5	1%
2004	737	47	6%
2005	720	71	10%
2006	654	78	12%
2007	706	110	16%
2008 (through second quarter)	302	53	18%

Presented in Table 2 below is a summary of the number and percentage of Form 15F[14] filings during the specified period that gave SOX (or related U.S. regulatory burdens) as the principal reason for filing. (Note, again, that Form 15F was adopted in 2007). Almost one third of issuers filing Form 15F during the periods shown gave SOX or U.S. regulatory burdens as a principal reason for their decision to deregister under the Exchange Act and cease reporting to the SEC.

II. DELISTINGS

As shown in Table 3 below, a smaller percentage of issuers delisting from a U.S. national securities exchange cited SOX as the reason for delisting. Issuers listed on the NYSE or Nasdaq tend to be

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[13] SEC Form 15, *supra* note 3.
[14] SEC Form 15F, *supra* note 4.

larger, better capitalized issuers. Still, through the second quarter of 2008, ten percent of such issuers cited SOX or U.S. regulation as a principal reason for delisting, whereas twenty-six percent of delisting issuers cited SOX or regulatory burdens during 2007.

Table 2 - Form 15F Filings			
Year	No. of Filings	No. of Giving SOX As Reason	% Giving SOX As Reason
2007	135	43	32%
2008 (through second quarter)	48	15	31%

Table 3 – Form 25 Filings			
Year	No. of Filings	No. of Giving SOX As Reason	% Giving SOX As Reason
2003	468	3	.6%
2004	445	8	1.8%
2005	428	4	.9%
2006	333	15	4.5%
2007	334	88	26%
2008 (through second quarter)	289	29	10%

III. GOING PRIVATE

Finally, we reviewed Schedule 13E filings[15] to assess the extent to which registrants going private pursuant to Rule 13e-3 stated that a principal reason for doing so was the Sarbanes-Oxley Act or burdens or costs of U.S. securities regulation in general. Table 4 presents a summary of the number and percentage of Schedules 13E-3 filed during the specified period that gave SOX (or related U.S. regulatory burdens) as a reason for filing a Schedule 13E-3. This number has climbed from under twenty percent in 2003 to over fifty percent for the first two quarters of 2008.

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[15] 17 C.F.R. § 240.13e-3(d).

Table 4 - Schedule 13E-3 Filings			
Year	No. of Filings	No. of Giving SOX As Reason	% Giving SOX As Reason
2000	125	n/a	n/a
2001	171	n/a	n/a
2002 7/31/02-12/31/02	52	10	19%
2003	173	33	19%
2004	116	21	18%
2005	130	21	16%
2006	142	28	20%
2007	89	43	48%
2008 (through second quarter)	24	13	54%

IV. DISCUSSION

These results should be viewed in the context of the work of other commentators who document an increase in delistings, deregistrations and decisions to go private following the passage of SOX, as well as a decrease in firms' listings or initial public offerings in the United States.[16] The data presented above should also be viewed in

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[16] Stanley Block, *The Latest Movement to Going Private: An Empirical Study*, 14 J. APPLIED FIN. 36, 36 (Spring 2004) (finding an increase in going private transactions and stating that the "cost of being public is the number one reason for going private by smaller firms"); Ellen Engel et al., *The Sarbanes-Oxley Act and Firms' Going Private-Decisions* 44 J. ACCT. & ECON. 116, 118, 126 (2007) ("[t]he data show a substantial increase in the number of firms undertaking going-private transactions after the enactment of SOX". The authors examined Schedule 13E-3 filings, excluding foreign issuers and certain other filers.); Ehud Kamar et al., *Sarbanes-Oxley's Effects on Small Firms: What is the Evidence* 19–20 (Harv. L. Sch. John M. Olin Ctr. for L., Econ. & Bus. Discussion, Paper No. 588, (2007)), http://lsr.nellco.org/harvard_olin/588/; Christian Leuz et al., *Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations*, 45 J. ACCT. & ECON. 181, 183 (2008) (documenting "a spike in going dark that is largely attributable to the Sarbanes-Oxley Act" and stating that "we find that the time pattern of going-dark decisions is closely associated with the passage of SOX and the timing of policy changes regarding the implementation of the internal controls requirement in Section 404 . ." and not finding an increase in going private trans-

the context of other indicators of the attractiveness of U.S. capital markets. There are currently sixty-nine U.S. companies admitted for quotation on AIM, the market for growth companies that is part of the London Stock Exchange.[17] In 2008, of the total IPOs of U.S. companies, seven of them reportedly listed their securities only abroad.[18] The U.S. share of the twenty largest global IPOs was zero of twenty in 2007, zero of twenty in 2008, and one of nine in the first quarter of 2009; from 1996 to 2006, an average of five of the largest twenty global IPOs listed on a U.S. exchange.[19] In terms of funds raised, the Hong Kong Stock Exchange was the leading exchange in the world in 2007, the London Stock Exchange was second, and the New York Stock Exchange third.[20] In 2008, for the first time in three years, the U.S. exchanges slightly outperformed the European exchanges in terms of funds raised,[21] but this was in part attributable to the almost eighteen

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actions during the sample period); András Marosi & Nadia Massoud, *Why Do Firms Go Dark?*, 42 J. FIN. & QUANTITATIVE ANALYSIS (No. 2) 421, 426 (June 2007) (stating that "the number of firms going dark has grown dramatically over time. The increase is the highest after Sarbanes-Oxley . . ."); Joseph Piotroski & Suraj Srinivasan, *Regulation and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings*, 46 J. ACCT. RES. (NO. 2) 383, 388 (May 2008) (observing a decline in the rate of U.S. listings post-SOX among smaller foreign firms, consistent with smaller firms being unable to absorb the incremental costs of SOX). Not all commenters evaluating the impact of SOX on U.S. markets have reached the same conclusion. Ehud Kamar et al., *Going Private Decisions and the Sarbanes-Oxley Act of 2002:A Cross-Country Analysis* 2 (RAND Inst. for Civil Justice, Working Paper No. WR-300-2-EMKF, 2008) (showing a relative increase in going private transactions by small U.S. firms in the first year after SOX); Xi Li, *The Sarbanes-Oxley Act and Cross-Listed Foreign Private Issuers* 29 (2d Annual Conference on Empirical Legal Studies Paper, Working Paper No. G15, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952433.

[17] London Stock Exchange, AIM Statistics, http://www.londonstockexchange.com/statistics/companies-and-issuers/companies-and-issuers.htm (visited Oct. 3, 2009).

[18] Press Release, Comm. On Capital Markets Regulation, Continued Erosion in Competitiveness of U.S. Public Equity Market Was Among the Few Clear Trends During 2008 Market Chaos (Mar. 24, 2009), http://www.reuters.com/article/pressRelease/idUS150050+24-Mar-2009+PRN20090324.

[19] *Id.* A different source reports that of the top twenty largest IPOs in 2007, two had their primary listing in the United States. Most of the top twenty IPOs listed on domestic exchanges. A decade ago, local stock markets were not as mature "and most large international companies would be compelled to list either in the US or London." *See* ERNST & YOUNG, GROWTH DURING ECONOMIC UNCERTAINTY: GLOBAL IPO TRENDS REPORT 2008 5, 14 (2009).

[20] *See* ERNST & YOUNG, *supra* note 19, at 4.

[21] PRICEWATERHOUSECOOPERS, IPO WATCH EUROPE, REVIEW OF THE YEAR 2008 21 (2009).

billion dollar VISA IPO, the largest IPO in U.S. history.[22] Europe outperformed the U.S. in 2008 in terms of international IPOs (listings by foreign companies).[23]

Our results indicate that a significant number of issuers have departed the United States, reporting publicly that one of the principal reasons for doing so is SOX or the burdens of U.S. regulation in general. Among the other reasons for issuers to depart the United States are the litigation/enforcement environments in the United States[24] and the growth and maturation of foreign markets: issuers now have several real alternatives to the U.S. securities markets. By reporting findings, we do not comment on the merits of SOX or suggest that U.S. securities regulation is necessarily too burdensome. However, we do suggest that U.S. policymakers bear in mind as they formulate and implement U.S. policies that issuers now have several alternatives to U.S. markets.

V. CONCLUSION

Congress is currently considering major reforms to the system of financial regulation,[25] and the Schapiro Commission is pursuing an invigorated enforcement program.[26] We are not suggesting that major changes to financial regulation are not in order or that the SEC enforcement program is unjustified. We are merely suggesting that as U.S. policymakers pursue their agendas, they bear in mind that the international securities markets look very different than they did ten to fifteen years ago. More than ever before, issuers have a choice of markets for capital-raising and secondary market trading. Of course, engaging in a "race to the bottom" in order to maintain market share is not in U.S. interest either. Efforts toward international regulatory cooperation or convergence can be useful in this regard. In considering the upcoming round of legislative and regulatory changes in response to the recent financial crisis, regulators should take the time to ensure they are striking the right balance among competing regulatory objectives.

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[22] Michael Liedtke, *Visa IPO Biggest in U.S. History*, SEATTLE TIMES, Mar.19, 2008.

[23] PRICEWATERHOUSECOOPERS, *supra* note 21, at 21.

[24] COMM. ON CAPITAL MARKET REGULATION, *supra* note 2, at 71.

[25] *See generally* DEPT. OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009).

[26] Stephen Labaton, *S.E.C. Chief Pursues Tougher Enforcement*, N.Y. TIMES, Feb. 22, 2009.