

Other International Issues

LONDON CALLING?: A COMPARISON OF LONDON AND U.S. STOCK EXCHANGE LISTING REQUIREMENTS FOR FOREIGN EQUITY SECURITIES

I. INTRODUCTION

The economic reforms in China, India, Southeast Asia, and Latin America, as well as the collapse of communism in the former Soviet Union and Eastern Europe, have created entirely new commercial and capital markets.¹ Massive amounts of capital in the forms of direct investment² and debt and equity investments are flowing to developing markets as companies in these countries privatize or seek additional funds for growth.³ Notably, a majority of equity offerings by corporations in developing countries have taken place on industrial

1. See generally *The Recent Surge in Capital Flows to Developing Countries*, WORLD ECON. OUTLOOK, Oct. 1994, at 48 [hereinafter *Recent Surge in Capital Flows*] (discussing capital flows between industrial and developing nations, their causes, and likely trends in the future); *International Markets and Individual Investors: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 103rd Cong., 2nd Sess. (1994) (Statement of Arthur Levitt, Chairman, SEC) [hereinafter *Hearings*] (commenting on impact of international trends on U.S. financial markets), available in LEXIS, Legis Library, CNGTST File.

2. Direct investment is:

... the investment of money, goods or services in a project for entrepreneurial commitment, especially establishing subsidiary companies or take-over of enterprises; capitalising branches and plants (endowments); securing equity holdings in corporations with powers of management and control (generally of 25%); making long-term loans with low or partnership-type interest rates in conjuncture with equity holdings.

Jurgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686, 686 (1982). Direct investments are characterized by their dependence on the success of the project and their long-term commitment. *Id.*

3. Total long-term capital flows to developing countries in 1994 totaled an estimated \$227.4 billion. Of this total, \$173 billion represents private capital flows in the form of debt, equity and direct investment—a four-fold increase over the \$41.9 billion flowing to such countries in 1989. Diana I. Gregg, *International Finance: World Bank Sees Slowing in Flow of Private Capital to Developing World*, BNA MGMT. BRIEFING, Jan. 23, 1995, available in LEXIS, News Library, BNAMB File.

country stock markets.⁴ The trend of private capital flows to emerging markets is expected to continue.⁵ Not surprisingly, the major international stock markets, including the New York Stock Exchange (NYSE) and the London Stock Exchange (LSE), have taken steps to encourage developing country corporations to list on their exchanges.⁶

However, competition among international stock exchanges for foreign company⁷ listings is not limited solely to companies from developing countries. Companies from industrialized nations find it advantageous to list their shares on foreign exchanges for a variety of reasons, the most significant of which is to reduce the company's cost of capital. A listing on a major international stock exchange allows a

4. *Recent Surge in Capital Flows*, *supra* note 1, at 49. Asian and Latin American countries have accounted for the bulk of international equity issues. *Id.* The stock markets in emerging markets are often ill-equipped in terms of size or sophistication to handle transactions involving massive formerly state-owned companies being privatized. *Stockmarket Listings: Plunging Into Foreign Markets*, *ECONOMIST*, Sept. 17, 1994, at 86, 89 [hereinafter *Plunging Into Foreign Markets*].

5. *Recent Surge in Capital Flows*, *supra* note 1, at 54 (noting that the trend toward globalization and international diversification of investments is likely to continue regardless of cyclical factors because of the high growth potential in developing countries and the benefits derived from portfolio diversification). Finance theorists have long demonstrated that international diversification of a portfolio of investments can reduce risk while maximizing returns. *See, e.g.*, Pornchai Chunhachinda et al., *Efficiency of Portfolio Performance Measures: An Evaluation*, 33 *Q.J. BUS. & ECON.* 74, 85-86 (1994). For a discussion of other factors influencing the growth of international equity financing see Roberta S. Karmel, *Living With U.S. Regulations: Complying With the Rules and Avoiding Litigation*, 17 *FORDHAM INT'L L.J.* S152, S154-55 (1994).

While investments in emerging markets are subject to shake-ups when economic policies of developing nations appear questionable, withdrawal from weaker markets is not complete and funds that do leave these economies likely flow to other non-domestic markets. *See* Michael R. Sesit, *Dollar Darwinism: Global Capital Crunch Begins to Punish Weak Economies*, *WALL ST. J.*, Jan. 12, 1995, at A1. Further, withdrawals from these emerging markets in times of panic appear temporary as "bottom feeders" seeking bargains move into the devalued market stemming a permanent flight. *See* Robert McGough & Sara Calian, *Adios, Amigos: Mutual Funds Flee Emerging Markets—Led by the Managers*, *WALL ST. J.*, Jan. 13, 1995, at A1 (discussing investors' reactions to shake-up cause by Mexico's devalued peso).

6. *See, e.g.*, *Plunging into Foreign Markets*, *supra* note 4, at 86 (discussing efforts by world exchanges to lure new listings); Renee Lai & Foo Choy Peng, *London Joins Battle for Listings; Three-Way Contest Develops to Win Global Trading Prize*, *S. CHINA MORNING POST*, June 2, 1994, at 1 (discussing competition among the New York Stock Exchange, the Hong Kong Stock Exchange, and the London Stock Exchange for listing of Chinese companies stock); David Chance, *London Seeks Bigger Slice of Emerging Market Equity*, *THE REUTER EUROPEAN BUSINESS REPORT*, Nov. 30, 1994, available in *LEXIS*, News Library, REUEUB File (citing efforts to lure emerging market companies to list in London).

7. This Note defines a "foreign company" as a company not incorporated in the same country where the exchange upon which a listing is sought is located. In the context of the United Kingdom, foreign company, and "overseas company" are used interchangeably.

foreign company to exploit the heightened demand for foreign equity that exists in mature securities markets due to the quest by institutional investors⁸ for greater returns and reduced risk through diversification.⁹ Other potential advantages of foreign listing include increasing share value by broadening the investor base,¹⁰ protecting against hostile takeover bids,¹¹ increasing name recognition in foreign markets,¹² and providing the opportunity for employees of multinational corporations to purchase and trade shares of their employer's stock with fewer complications.¹³ Regardless of the specific reasons, companies are listing shares on international stock exchanges in large numbers, and competition among the major international stock exchanges to list foreign companies is increasing because foreign listings are viewed as a key contributor to the financial health of the exchanges and the securities industries.¹⁴

International stock exchanges frequently cite the regulatory burden that securities regulators impose on listed companies as a critical factor in the competition for foreign company listings, because

8. The term "institutional investors" typically refers to mutual funds, pension plans, and insurance companies. *Hearings, supra* note 1.

9. During 1993, \$3.6 trillion in equities were traded across national boundaries, an increase of 50% from 1992. Anthony Rowley, *NYSE Chief Sees Big Shift to Emerging Market Stocks*, BUS. TIMES, Oct. 15, 1994, at 5. The increase in cross border trading is attributed to investors' efforts to diversify their portfolios. *Id.*

While institutional investors can and do diversify their holdings by purchasing shares directly on foreign exchanges, such investors typically prefer to trade on their domestic exchanges where rules are clear and transaction costs are low. *Plunging Into Foreign Markets, supra* note 4, at 89. Further, policies of some foreign institutions also limit their investments to stocks on major exchanges. See Michael R. Sesit, *More U.S. Concerns Seek to Be Listed Overseas: Corporations See Foreign Investors Boosting Stock Prices*, WALL ST. J., June 10, 1985, at 6 (discussing reasons U.S. firms offer for seeking foreign listings); see also, Frederick D.S. Choi & Richard M. Levich, *International Accounting Diversity: Does it Impact Market Participation?* 10-11 (National Bureau of Economic Research Working Paper Series, No. 3590, 1991) (reporting results of survey of international institutional investors on how they cope with international accounting diversity).

10. *Plunging Into Foreign Markets, supra* note 4, at 89; Sesit, *supra* note 9, at 6.

11. *Plunging Into Foreign Markets, supra* note 4, at 89; Sesit, *supra* note 9, at 6.

12. William E. Decker, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S10, S12 (1994). For a good discussion of the expected benefits and costs of seeking advertising, commercial, and financial recognition through a foreign listing, see Marcus W. Brauchli, *World Stock Markets: Foreign Firms Want Prestige of Listing In Tokyo, But Get Complications as Well*, WALL ST. J., Aug. 29, 1988, at 20.

13. *Plunging Into Foreign Markets, supra* note 4, at 89.

14. See *Big Board Chairman Seeks to Boost Overseas Listings*, WALL ST. J. Nov. 8, 1994, at C18 (discussing plan of New York Stock Exchange to greatly expand foreign companies traded on the exchange); Ken Clay, *Exchange Broadens its Outlook*, HERALD (Glasgow), Sept. 12, 1994, at 18 (discussing efforts by London Stock Exchange to acquire foreign listings).

a regulator's stance greatly impacts the amount of resources a company expends to meet information and financial requirements associated with being listed on an exchange.¹⁵ The major U.S. stock exchanges¹⁶ and the LSE¹⁷ are noteworthy examples of exchanges vying for foreign listings because of their prominence in the international securities arena and the active role they have taken in garnering foreign listings.¹⁸

To demonstrate the obstacles faced by a company seeking a secondary listing¹⁹ on a major international stock exchange, this Note analyzes the relative difficulties of the listing process for foreign companies on major U.S. stock exchanges, and the listing process on the LSE. Part II provides an overview of the regulatory framework governing foreign listings in the United States and describes the steps required for listing foreign equity securities on a major U.S. exchange. Part III provides a similar analysis of the regulatory scheme for securities trading in the United Kingdom, and the foreign security listing process for the LSE. Finally, Part IV assesses the competitive positions of the U.S. exchanges and the LSE in terms of their attractiveness to foreign companies.

15. See Lawrence Malkin, *NYSE is Going More Global*, INT'L HERALD TRIBUNE, Aug. 8, 1995, available in LEXIS, News Library, IHT File (noting that regulatory requirements create burdens for foreign companies seeking listings in the United States). See generally J. Carter Beese, Jr., *Reengineering Regulation: Maintaining the Competitiveness of the U.S. Capital Markets*, 18 WASHINGTON Q. 133 (1995), available in LEXIS, News Library, WASHQR File (evaluating the impact of regulatory requirements on the international competitiveness of U.S. capital markets and stock exchanges).

16. The three national stock markets in the United States from largest to smallest are as follows: the New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotation System (NASDAQ), and the American Stock Exchange (AMEX). SECURITIES INDUSTRY YEARBOOK 960-61 (Rosalie Pepe ed., 1994) (ranking size based on dollar volume of securities traded). While NASDAQ trading occurs via computer quotations rather than on the floor of an exchange, the system is treated the same as an exchange with an actual trading floor for regulatory purposes. See Exchange Act § 3(a)(1) (defining exchange broadly). Consequently, this Note uses the term "exchange" to apply to both national U.S. stock exchanges and NASDAQ.

17. In 1986 the London Stock Exchange changed its official name to The International Stock Exchange of the United Kingdom and Republic of Ireland, Ltd. THE INTERNATIONAL STOCK EXCHANGE OF THE UNITED KINGDOM AND THE REPUBLIC OF IRELAND, LTD., A HISTORY OF THE LONDON STOCK EXCHANGE 14 (1993). However, because the institution is still commonly referred to as the London Stock Exchange this Note follows popular convention and refers to the exchange as the LSE, an abbreviated form of the London Stock Exchange.

18. See *supra* notes 6, 14.

19. This Note addresses the requirements for a secondary listing on a U.S. Exchange and on the LSE. Treatment of companies without a primary listing is not considered in detail.

II. ACQUIRING A LISTING IN THE UNITED STATES

A. Regulatory Framework

The U.S. Securities and Exchange Commission (SEC), an independent regulatory body, enforces and administers the regulation of securities markets in the United States through a complex system of statutes and regulations.²⁰ The premise of U.S. securities law is that full disclosure is the best means of ensuring a high standard of ethics in the securities industry and of allowing investors to determine the appropriateness and fairness of a transaction.²¹ The SEC ensures that companies utilizing public securities markets in the United States provide adequate disclosures through a system of registration and reporting. Two laws form the core of U.S. securities registration and reporting requirements—the Securities Act of 1933²² (Securities Act) and the Securities Exchange Act of 1934²³ (Exchange Act). While the SEC plays the central role in implementing these laws, U.S. stock exchanges retain a role in specifying some of the requirements that companies must meet in order to attain and maintain a listing.²⁴

1. *The Securities Act.* The Securities Act governs disclosures required in connection with an issuer's distribution of securities.²⁵ Absent an exemption, an issuer must file a registration statement with the SEC prior to the sale of securities to the public.²⁶ Registration

20. See generally LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 35-44 (2d ed. 1988) (providing a summary of the SEC's operation and describing the laws that comprise the core of U.S. securities regulation).

21. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). Justice Louis D. Brandeis' famous statement that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed. 1933), serves as a memorable capsulization of this philosophy.

22. 15 U.S.C. §§ 77a-77aa (1994). Further citations to this statute provide parenthetical cites to the act's original section numbers.

23. 15 U.S.C. §§ 78a-7811 (1994). Further citations to this statute provide parenthetical cites to the act's original section numbers.

24. NORMAN S. POSER, *INTERNATIONAL SECURITIES REGULATION: LONDON'S "BIG BANG" AND THE EUROPEAN CAPITAL MARKETS* § 3.1.1 (1991).

25. See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 45 (1991).

26. Sections 3 and 4 of the Securities Act contain exemptions for special categories of securities and for types of transactions respectively. 15 U.S.C. §§ 77c-d (1994) (Securities Act §§ 3, 4). Exemptions to U.S. securities laws are narrowly interpreted and the party seeking an exemption bears the burden of proving that the exemption is satisfied. See LOSS, *supra* note 20,

is required in order to provide prospective investors with adequate information to make informed investment decisions.²⁷ For foreign companies first accessing U.S. markets, registration can be time-consuming and costly due to the amount and type of information—both financial and non-financial—that must be provided.²⁸ However, foreign issuers registering their securities in the United States do so on special forms designed to reduce disclosure burdens.²⁹

Three categories of registration exist, requiring either full disclosure on Form F-1, moderate disclosure on Form F-2, or minimal disclosure on Form F-3.³⁰ The first time that a foreign company registers a U.S. public offering it must utilize Form F-1. Companies that have registered an offering on Form F-1 for a security issuance within the past year need not recapitulate all of their prior disclosures in the registration statement for a new security issuance if they satisfy specific requirements.³¹ The theory behind different levels of

at 274.

27. Upon acceptance by the SEC an issuer may distribute a document called a prospectus to potential investors to inform them about the company and the securities being offered. Section 5 of the Securities Act defines the timing and manner of selling efforts and requires the delivery of a prospectus to every purchaser. 15 U.S.C. § 77e (1994) (Securities Act § 5). The statute prescribes the contents of the prospectus in a general manner. *Id.* § 77j (Securities Act § 10). Regulations S-X, and S-K expand on the statute's general requirements and provide very detailed instructions about the financial and non-financial disclosures required. 17 C.F.R. §§ 210, 229 (1995).

28. *See, e.g.,* Roberta S. Karmel & Mary S. Head, *Barriers to Foreign Issuer Entry Into U.S. Markets*, 24 LAW & POL'Y INT'L BUS. 1207 (1993) (evaluating regulatory burdens and costs faced by foreign companies seeking access to U.S. markets); M. Shane Warbrick, *Practical Company Experience in Entering U.S. Markets: Significant Issues and Hurdles From the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S112 (1994) (discussing financial and managerial costs and benefits associated with seeking a U.S. listing).

29. *See* COX ET AL., *supra* note 25, at 328 (describing registration forms for foreign companies and efforts by the SEC to accommodate foreigners without placing domestic companies at a disadvantage).

30. The threshold requirements for use of short-form registrations (F-2, F-3) were recently reduced by the SEC in an attempt to reduce the regulatory impediments for foreign issuers seeking capital in the U.S. markets. Simplification of Registration and Reporting Requirements for Foreign Companies, 59 Fed. Reg. 21,644 (1994) [hereinafter *Simplification of Registration*]. To register an issue on Form F-2, an issuer must have filed at least one Form 20-F, and have an aggregate market value of voting stock equal or greater than \$75 million. 17 C.F.R. §§ 239.32(b)(2)(i), (ii) (1995). Similarly, to use Form F-3 a registrant must have filed at least one Form 20-F annual report, filed all required reports in a timely manner, and not have failed to make any material preferred stock dividend, interest payment, or rental or lease payment. 17 C.F.R. §§ 239.33(a)(1)-(4) (1995). Like Form F-2, to utilize Form F-3, a company must have at least \$75 million in stock held by non-affiliates. 17 C.F.R. § 239.33(b)(1) (1995).

31. *See* Integrated Disclosure System for Foreign Private Issuers, Securities Act Release No. 6360, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,054 (Dec. 9, 1981), for a discussion of integrated disclosure for foreign companies and the policies behind their adoption.

disclosure is an assumption that in an efficient market publicly disclosed information is fully disseminated making repetitious disclosures unnecessary.³²

Issuers filing on Form F-1 must supply information about the securities offered and the issuer's business, management, and financial condition. Additionally, issuers must provide legal and other documents as exhibits.³³ Of these informational requirements, the most critical, comprehensive, and contested is that concerning issuer information. A Registrant must provide information about its business, property, management,³⁴ and major shareholders. Financial information must include income and cash flow statements from the previous three years, balance sheet statements from the past two years,³⁵ selected financial information from the past five years,³⁶ and, if the issuer does not utilize U.S. Generally Accepted Accounting Principals (U.S. GAAP),³⁷ a reconciliation of financial statements to

32. See *id.* (describing integrated disclosure).

33. Form F-1, [2 Securities Act, Exchange Act Binder] Fed. Sec. L. Rep. (CCH) ¶ 6951, ¶ 6954. Form F-1 references Regulation S-K item 601, 17 C.F.R. § 229.601 (1995), to specify the exhibits. Examples of the types of information that must accompany Form F-1 include: underwriting agreements, articles of incorporation, bylaws, rights of security holders, material contracts, and legal opinions. *Id.*

34. Management information is a particularly sensitive issue for many foreign companies for cultural and other reasons. See Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From a Legal Perspective*, 17 *FORDHAM INT'L L.J.* S25, S31 (1994) [hereinafter *Methods of Accessing U.S. Markets*] (citing areas of concern such as executive compensation, business segment information, and disclosure of material contracts).

35. 17 C.F.R. §§ 210.3-01, -19 (1995).

36. Form 20, Item 8. Foreign issuers must provide information concerning currency issues. 17 C.F.R. §§ 210.3-20 (1995). In 1994, the SEC proposed special rules to ease the burden of foreign disclosure for companies operating in hyperinflationary countries. Selection of Reporting Currency for Financial Statements of Foreign Private Issuers and Reconciliation to U.S. GAAP for Foreign Private Issuers with Operations in a Hyperinflationary Economy, 59 Fed. Reg. 21,821.

37. The federal securities laws enable the SEC to specify the accounting principles that govern the preparation of financial disclosures filed with the Commission. Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 4, [1937-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,005 (Apr. 25, 1938). The SEC in turn delegated the task of developing and improving accounting standards to the Financial Accounting Standards Board (FASB) of the American Institute of Certified Public Accountants, while it retained the power to recognize the standards for filing purposes. Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150, [1937-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,172 (Dec. 20, 1973). The standards adopted by FASB are collectively referred to as U.S. GAAP.

U.S. GAAP³⁸ These disclosures can consume a substantial amount of managerial and financial resources.³⁹

Companies seeking capital in the United States can avoid registration by obtaining a registration exemption.⁴⁰ The Securities Act contains several technically defined and narrowly interpreted exemptions that allow an issuer to forego registration for certain transactions.⁴¹ The private placement exemption is the most important to foreign issuers.⁴² Foreign companies often attempt to raise funds through a private placement exemption because it reduces transaction costs and allows a company to raise money from qualified private investors.⁴³ However, for companies seeking large amounts

38. Items 8, 17, and 18 of Form 20-F require companies filing financial statements following non-U.S. GAAP to reconcile their statements to U.S. GAAP. To simplify the reporting process for foreign issuers, in 1994 the SEC modified its regulations to reduce the amount of financial information that must be reconciled. See *Hearings*, *supra* note 1, at *5-6.

Specifically, the SEC's modified regulations streamlined foreign company reconciliation by: eliminating U.S. GAAP reconciliation for issuers foreign cash flow statements that conform to International Accounting Standard No. 7; reducing the reconciliation requirements for first-time registrants to require only two years of reconciled financial information; and loosening reconciliation requirements for issuance of investment grade debt. *Simplification of Registration*, *supra* note 30, at 21,644 to 21,648.

39. To ensure compliance and accuracy of information disclosed in the registration process, the Securities Act contains civil and criminal penalties that can be levied against an issuing company, its officers, directors, controlling persons, or underwriters. Sections 11 and 12 of the Securities Act provide the primary grounds for private parties to seek redress for violations of the Securities Act. 15 U.S.C. §§ 77k-1 (1994) (Securities Act §§ 11, 12). Liability for control persons arises under § 15 of the Securities Act. *Id.* § 77o (Securities Act § 15). Each of these sections enables private parties to recover damages related to registration violations. Section 20 of the Securities Act enables the SEC to prevent securities violations through injunctions and criminal prosecutions. *Id.* § 77t (Securities Act § 20). In addition to enforcement actions brought by the SEC, the Act allows for private recoveries. Private actions serve as a valuable tool in deterring fraud in U.S. securities markets. COX ET AL., *supra* note 25 at 611. For a comparison of the civil liability provisions of U.S. and U.K. securities laws see Robert E. Kohn, *Civil Liability for Primary Securities Distributions in the United States and the United Kingdom*, 55 LAW & CONTEMP. PROBS. 399 (1992). See also POSER, *supra* note 24, § 3.7.6.2.

40. See *supra* note 26 (discussing Securities Act exemptions).

41. *Id.*

42. 15 U.S.C. § 77d(2) (1994) (Securities Act § 4(2)) enables an issuer to forego registration of their securities sold in "transactions by an issuer not involving any public offering." *Id.* While the contours this exemption defy simple description, generally a private offering requires: no public advertising or solicitation, a limited offering to sophisticated investors, disclosures akin to registration made in an "Offering Circular," signed statements by investors of investment intent, and restrictions on resale of the securities. See COX ET AL., *supra* note 25 at 373-95 (describing requirements of private placements).

43. Traditionally the private placement exemption was not widely used because, while it offered the issuer reduced transaction costs, parties purchasing the securities discounted their value to compensate for the lack of liquidity in the secondary market for privately placed securities. See *Methods of Accessing U.S. Markets* *supra* note 34, at S34-5 (discussing problems

of capital, the limitations associated with exempt offerings makes the listing of securities on an exchange a more attractive alternative.⁴⁴

2. *The Exchange Act.* The provisions of the Exchange Act⁴⁵ require companies with securities trading in the United States to provide investors and potential investors with updated company information similar to that required by the Securities Act. The Exchange Act also requires reporting companies⁴⁶ to file annual and other periodic reports with the SEC.⁴⁷ Ongoing disclosures ensure that investors engaged in post-distribution trading of securities receive updated information to help accurately appraise a security's value.⁴⁸

Under the Exchange Act, foreign companies listing shares on a U.S. stock exchange must initially register with the SEC through a comprehensive report, Form 20-F, which covers the firm's business activities and financial results.⁴⁹ Consistent with the principle of

historically associated with private placements). In response the SEC adopted Rule 144A, 17 C.F.R. § 230.144A (1995), which enables resales of privately obtained securities to qualified investors upon satisfying a series of conditions. See Resale of Restricted Securities, Securities Act Release No. 6862, Exchange Act Release No. 27,928, Investment Company Act Release No. 17,452, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523 (April 23, 1990) (discussing rationale for adoption of Rule 144A and description of how rule operates).

44. Although a secondary market for privately placed securities exists, the liquidity of privately placed securities remains limited. Joseph Velli, *American Depository Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38, S54 (1994). As mentioned, an issuer must compensate a purchaser for this lack of liquidity in private placements. See *supra* note 43. At some point it becomes more cost effective for an issuer to register securities that can trade freely on an exchange than it is to privately place such securities. Joseph Velli implicitly observes that this threshold currently occurs when a company's financing needs exceed \$50 million U.S. dollars. Velli, *supra* at S53.

45. 15 U.S.C. §§ 78a-78ll (1994). The Exchange Act is a conglomeration of rules designed to cure a variety of the ills that plagued U.S. markets in the early part of the century. In addition to establishing reporting requirements, the Exchange Act regulates: (1) stock exchanges, the over-the-counter market, and securities brokers and dealers; (2) solicitation of proxies; (3) "takeover bids" or "tender offers"; and (4) insider trading. For a thorough discussion of the Exchange Act see LOSS, *supra* note 20, at 406-581.

46. A "reporting company" is a company that lists its shares on a U.S. national exchange or any company with assets in excess of five million dollars and whose shares are held by more than 300 shareholders that are resident in the United States. 15 U.S.C. §§ 78l(a), (b), (g) (1994) (Exchange Act, § 12(a), (b), (g)).

47. The annual report that a foreign issuer must file is Form 20-F, a combined registration and reporting form. Form 20-F, Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (Nov. 29, 1979). Foreign reporting companies must also file periodic reports on Form 6-K when significant business events occur. Form 6-K, Fed. Sec. L. Rep. (CCH) ¶ 30,971, at 21,951 (Apr. 28, 1967).

48. See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984) (describing the critical role that information plays in the valuation of securities).

49. See *supra* note 47.

disclosure, the registration form requires a company to describe its operations, management, and financial information. The form also mandates disclosure of income and cash flow statements from the past three years, balance sheet statements from the past two years, and other selected financial information from the past five years.⁵⁰ SEC regulations require foreign issuers to reconcile much of the financial information to U.S. GAAP.⁵¹

Like the Securities Act, the Exchange Act provides limited exemptions from registration. For example, one registration exemption allows certain foreign companies with more than 300 U.S. shareholders and over five million dollars in assets to avoid registration under the SEC's "information-supplying" exemption, Rule 12g3-2(b).⁵² This rule allows a foreign company whose shares are traded in the U.S. over-the-counter market to avoid registration in the United States by providing its U.S. shareholders with the same information it provides for investors in its home country.⁵³ However, when a foreign issuer seeks a listing of its shares on a U.S. stock exchange, Rule 12g3-2(b) does not apply and the company must register as a reporting company on Form 20-F.⁵⁴

3. *Regulation by Exchanges.* The Exchange Act relies in part on self-regulation by national security exchanges to police the market. Under the Exchange Act, the national security exchanges⁵⁵ are self regulatory organizations (SROs) charged with establishing and enforcing rules to regulate members and protect investors.⁵⁶ Each SRO adopts and enforces rules governing its members and the companies listed on its exchange.⁵⁷ The SEC as the supreme

50. General Instructions to Form 20-F, Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745-3 to 21,771 (Nov. 29, 1979).

51. *Id.*

52. 17 C.F.R. § 240.12g3-2(b) (1995).

53. *Id.*

54. See Amendments to Rule 12g3-2(b), Securities Act Release No. 6493, Exchange Act Release No. 20,264, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,435 (Oct. 6, 1985) (describing operation of Rule 12g3-2(b)).

55. See *supra* note 16.

56. See, e.g., COX ET AL., *supra* note 25, at 29-30 (stating that the national security exchanges are SRO's which have rule making power over their members and that such rules must be designed to prevent fraudulent and manipulative practices). Section 19 of the Exchange Act specifies the process of registering as an SRO and the responsibilities and oversight of such bodies by the SEC. 15 U.S.C. § 78s (1994) (Exchange Act, § 19).

57. *Id.* at 30. The exchanges play a secondary role as regulators and seldom exercise their full regulatory power. For example, in 1994 AMEX, in the first such action since 1971, delisted

regulatory body has the power to disapprove of changes to rules adopted by SROs.⁵⁸

Each exchange, as an SRO, establishes its own criteria that companies must meet as a predicate to listing on that exchange. Foreign issuers seeking a listing on a major U.S. exchange must satisfy financial guidelines concerning tangible assets and pre-tax income and disclose information about public share distribution.⁵⁹ The NYSE listing standards explain that these criteria are designed to ensure that "there is a broad, liquid market for a company's shares in its country of origin."⁶⁰ A Company seeking a listing may submit information to an exchange for a confidential review of eligibility for listing prior to submitting a formal application.⁶¹

Additionally, SROs impose corporate governance criteria with which companies must comply as a condition of listing. The goals of these rules, like the broad goals of the SEC, are to protect shareholders and ensure fair and efficient markets. Topics covered by such governance requirements include: distribution of annual and interim reports to shareholders; election of independent directors; utilization of an audit committee; holding an annual shareholders' meeting; adoption of shareholder voting rules; solicitation of proxies; and conflict of interest rules.⁶² However, if foreign corporations comply with their home country laws and practices, the exchanges typically will waive corporate governance requirements.⁶³

two companies for failure to comply with disclosure rules. Norma Cohen, *Amex Aims to Win Back Market Share*, FINANCIAL TIMES, Oct. 25, 1994, at 30. AMEX's action is seen as a strategic move to bolster its image as a fair and quality exchange. *Id.* AMEX's actions appear to be an effort to contrast itself with NASDAQ, which came under a U.S. Justice Department probe for improprieties. See Michael Schroeder, *Nasdaq: An Embarrassment of Embarrassments*, BUSINESS WEEK, Nov. 7, 1994. A popular joke circulated that NASDAQ had changed its slogan from "Nasdaq. The stock market for the next 100 years," to "Nasdaq. The stock market for the next 100 years — with 25 years off for good behavior." *Id.*

58. 15 U.S.C. §§ 78s(b)-(c) (1994) (Exchange Act, §§ 19(b)-(c)) (describing the SEC's role in overseeing SRO rule making).

59. Each of the three major U.S. exchanges provides different combinations and permutations of financial and share trading requirements.

60. NEW YORK STOCK EXCHANGE, LISTING STANDARDS AND PROCEDURES FOR NON-U.S. CORPORATIONS 30 (1994).

61. See, e.g., *id.* at 7-8 (describing informal review process); AMERICAN STOCK EXCHANGE, LISTING NON-U.S. SECURITIES 13 (1994).

62. See NATIONAL ASSOCIATION OF SECURITIES DEALERS, BY-LAWS, sched. D, pt. III, § 5, available in THE NASDAQ STOCK MARKET, INC., A PRACTICAL GUIDE TO LISTING ON THE NASDAQ STOCK MARKET 58-59 (1994); NEW YORK STOCK EXCHANGE, *supra* note 60, at 12.

63. See THE NASDAQ STOCK MARKET, INC., *supra* note 62, at 59 (describing conditions for waiver); NEW YORK STOCK EXCHANGE, *supra* note 60, at 12 (same).

B. Alternative Methods of Listing in U.S. Security Markets

A description of the alternative methods of trading foreign shares in the United States, and the level of regulation associated with each option, will provide a clearer picture of the regulatory requirements applicable to a foreign company. The goals of a company and the regulatory burdens associated with each trading option will determine where a company elects to have its shares traded. The exemptions provided in both the Securities Act and the Exchange Act, allow some companies to enter the United States without the expenses of registration. However, such a strategy has serious limitations, because exempt securities often sell at a discount to compensate for their limited transferability.⁶⁴ Another strategy is for a company to ease into the regulatory process by becoming a reporting company with a national listing without issuing new shares. This option increases the liquidity of a company's outstanding securities and generates greater interest in future public offerings, but does not allow the company to raise new capital. Finally, a company may elect to enter the U.S. market by both seeking a listing and issuing new registered securities.

Foreign companies primarily use American Depositary Receipts (ADRs) to create a market for their shares in the United States.⁶⁵ An ADR is a certificate that represents an ownership interest in the securities of a non-U.S. company.⁶⁶ ADRs simplify ownership of foreign securities by allowing investors in the United States to purchase and trade foreign shares in U.S. dollars and to receive

64. See *supra* notes 43-44 (discussing private placements). The SEC's response to create a secondary market for privately placed securities through Rule 144A has resulted in making the private offering exemption more attractive for foreign issuers. See Velli, *supra* note 44, at S54. However, issuers often find it necessary to look beyond private placements to satisfy their financing needs. See Velli, *supra* note 44, at S54.

65. See *Symposium: Entering the U.S. Securities Markets: Opportunities and Risks for Foreign Companies Panel I Discussion*, 17 *FORDHAM INT'L L.J.* S68, S70-71 (1994) (discussing practical difficulties of foreign issuers raising significant funds through means other than ADRs).

At the end of 1994 there were 1,397 ADR programs in use in the United States. Dave Kansas, *ADR Holders Feel Heat From Crisis in Mexico*, *WALL ST. J.*, Jan. 12, 1995, at C1. One hundred and fifty-one of the 202 non-U.S. companies listed on the NYSE as of Dec. 20, 1994 utilized ADRs. Letter from Edmund Lukas, Vice President International Business Development, *New York Stock Exchange* (Dec. 20, 1994) (on file with the *Duke Journal of Comparative & International Law*).

66. For a detailed analysis of ADRs, see Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 *FORDHAM INT'L L.J.* 48 (1993).

dividends in U.S. dollars.⁶⁷ ADRs accomplish this through a series of arrangements between financial institutions in the United States and the country in which the company's shares are traded.

An issuer has three options for initiating ADR trading in U.S. markets: (1) trading ADRs with minimal regulation in the over-the-counter market; (2) listing existing ADRs on an exchange by complying with a moderate amount of regulation; or (3) simultaneously listing and offering new ADRs for sale, which requires full registration under the Securities and Exchange Acts.⁶⁸ Because the level of regulatory complexity increases for each of these options, companies often enter the U.S. market through a less regulated method, such as the over-the-counter market, and utilize more complex methods over time.⁶⁹ Given that the motivations of foreign companies entering U.S. capital markets differ greatly, no single ADR trading strategy satisfies each foreign issuer's needs equally.

The over-the-counter market offers a company a method of having its shares traded without requiring the company to fully register under either the Securities or Exchange Acts. By fulfilling the information exemption of Exchange Act Rule 12g3-2,⁷⁰ a foreign company's shares trade with little regulatory expense.⁷¹ However, for a foreign issuer hoping to raise new funds, the low costs of the over-the-counter market disappear because a company must register new issues. When the Securities Act requires registration of an offering, companies seeking greater liquidity and analyst coverage of their shares typically seek a listing on a national exchange.

The decisions about whether to list existing securities or to simultaneously list and offer new ADRs depends on the capital needs of the foreign company and its reasons for listing in the United States. Companies that have no immediate need for new capital and that view entry into the U.S. market as a long-term strategy may elect to list on

67. Investors receive a better exchange rate and do not have to concern themselves with registration of ownership. See Richard W. Stevenson, *World Markets; Depository Receipts: Now, the World*, N.Y. TIMES, Nov. 6, 1994, at § III, 15. Although ADRs trade as if they were U.S. securities, the actual shares that the certificate represents fluctuate in value based on both the company's home country market value and currency exchange rates. See Kansas, *supra* note 66, at C1.

68. Full registration refers to registration under both the Securities Act and the Exchange Act.

69. Velli, *supra* note 44, at S44.

70. 17 C.F.R. § 240.12g3-2 (1995).

71. The issuer qualifying for both Securities Act and Exchange Act exemptions must still file some information with the SEC on Form F-6. See Saunders, *supra* note 66, at 62-63.

an exchange without offering new shares. A company may view a listing as a means of heightening investor awareness and encouraging increased coverage by securities analysts.⁷² This strategy may increase the company's U.S. shareholder base and may heighten interest in future issues. A company listing on an exchange must register with the SEC under the Exchange Act on Form F-20 and apply to an exchange for a listing.⁷³ The SEC registration process allows a company to gain experience with the SEC, thus making a future issue of shares on a U.S. exchange less daunting.

For unlisted foreign companies seeking immediate capital through a public offering of ADRs on a U.S. exchange, registration of both the company and the issue are required. Registration of the offering itself requires the filing of Form F-1 to satisfy the Securities Act requirements.⁷⁴ Similarly, the company, as a newly listed company, must register as a reporting company under the Exchange Act on Form F-20.

C. Challenges Encountered by Foreign Issuers Accessing U.S. Markets

While the challenges encountered by foreign companies navigating the U.S. regulatory process vary greatly, some generalizations concerning the process provide for useful comparison with regulation in the United Kingdom. Foreign issuers generally find the process of registering under the Securities Act or the Exchange Act cumbersome and costly due to the amount and types of information that must be provided.⁷⁵ Two different issues concerning information disclosures surface in the process—availability and sensitivity.⁷⁶

Availability refers to the ability to generate and organize the information that must be disclosed.⁷⁷ For companies that are either entering the U.S. market for the first time or moving from a market requiring less complete disclosures, part of the challenge of the U.S. regulatory scheme is putting systems in place to compile the required

72. Companies seeking a listing to allow their U.S. employees a means of trading shares acquired in an employee stock purchase plan may have no need to issue new shares.

73. Each of the three U.S. exchanges have listing requirements specifying financial and share distribution requirements that must be met to receive a listing.

74. The F-1 serves to register the deposited shares themselves, and the F-6 filing registers the depository receipts. Saunders, *supra* note 66, at 62.

75. See *supra* note 28.

76. Decker, *supra* note 12, at S18.

77. *Id.*

information.⁷⁸ Companies that either adopt U.S. GAAP or reconcile statements to U.S. GAAP must not only invest in a system to generate the accounting data, but must also hire or train accountants to perform the required reconciliation and auditing. A company must weigh the costs of compiling information for disclosure under the U.S. regulatory system against the benefits of a more efficient and liquid market.

When foreign companies complain about the U.S. information requirements, they typically refer to required disclosure of what they consider sensitive information. Registration in the United States under U.S. GAAP may require the disclosure of information that is potentially embarrassing or advantageous to competitors.⁷⁹ Potential areas of concern include: hidden reserves, unfunded pension liabilities, and liabilities for retirement health benefits.⁸⁰

Foreign issuers may also object to the Management Discussion and Analysis section of Regulation S-K, which requires the disclosure of a variety of types of potentially delicate information. For example, under Regulation S-K an issuer must reveal detailed information concerning the backgrounds, business experience, involvement in legal and bankruptcy proceedings, and compensation and stock ownership of company directors and executives.⁸¹ For cultural and other reasons, companies may disclose this type of information only very grudgingly.

These examples illustrate some of the burdens of the U.S. regulatory requirements. Disclosures mandated by the SEC tend to be precise, specific, and difficult to avoid. Proponents of maintaining strict disclosure requirements for foreign issuers entering the U.S. securities markets justify a hard-line position by pointing to the success and liquidity of the U.S. capital markets.⁸²

78. See Warbrick, *supra* note 28, at S113-14 (addressing the need to alter accounting systems to format information properly).

79. For example, under the German accounting system companies may protect against future losses by keeping funds in hidden reserves that are not disclosed. See Wendy Cooper, *Discovering the Foreign Investor*, INSTITUTIONAL INVESTOR, July 1993, at 81-82.

80. See *id.* U.S. GAAP mandates that companies disclose these types of information in footnotes to financial statements.

81. See Regulation S-K, 17 C.F.R. § 229.401-403 (1995) (specifying the detail required in management disclosures).

82. See, e.g., Richard M. Kosnik, *Comments on Barriers to Foreign Issuer Entry into U.S. Markets*, 24 LAW & POL'Y INT'L BUS. 1237 (1993) (defending SEC policies and asserting the position that regulation fosters efficiency and security in U.S. securities markets); Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L.J. S77, S81-S84 (1994) (pointing to complete disclosures as the key to liquidity and integrity of U.S. markets and urging caution in modifying disclosure requirements).

III. ACQUIRING A LISTING IN THE UNITED KINGDOM

A. Regulatory Framework

The regulation of securities in the United Kingdom has undergone dramatic changes in recent years in response to the internationalization of the securities markets and the integration of the United Kingdom into the European Community (EC).⁸³ In 1986, the LSE enacted a series of reforms that significantly restructured its operations. These reforms, known as the "Big Bang," took place during the same year that the British government altered its role in regulating securities markets through the adoption of the Financial Services Act⁸⁴ (FSA). Both the FSA and the reformed rules of the LSE encompass EC directives concerning the listing of securities on an EC member's exchange.⁸⁵ Collectively, these events created the regulatory framework that foreign companies must navigate in order to list their shares on the LSE.

While the British appear reluctant to view their regulatory scheme as similar to the U.S. regulatory behemoth, the SEC, the two systems are similar in many respects.⁸⁶ The British counterpart of the SEC is the Securities and Investment Board (SIB), an agency delegated regulatory authority by the FSA.⁸⁷ The FSA empowers the SIB to make rules and regulations with statutory force, to authorize investment businesses, and to recognize and delegate authority to SROs.⁸⁸

Similar to U.S. exchanges, SROs in the United Kingdom play a key role in regulating the conduct of participants in the financial

for foreign issuers).

83. The United Kingdom joined the European Economic Community in 1973. In 1993 the European Economic Community restructured itself as the European Union. Because most of the European Union laws that impact securities regulation in the United Kingdom were adopted prior to the name change in 1993, this Note refers to the organization as the EC.

84. Financial Services Act, 1986 (Eng.).

85. The United Kingdom's participation in the EC has impacted the development of the U.K. securities laws dramatically. Patrick M. Creaven, Note, *Inside Outside Leave Me Alone: Domestic and EC-Motivated Reform in the U.K. Securities Industry*, 60 *FORDHAM L. REV.* S285, S298 (1992). EC agreements required U.K. regulators to modify U.K. domestic laws to comply with EC directives on securities listings and trading. *Id.*

86. POSER, *supra* note 24, § 3.1.1, at 30 (Supp. 1992).

87. The SIB is granted power under the FSA by the Secretary of State for Trade and Industry through the Department of Trade and Industry ("DTI"). Sam Scott Miller, *Regulating Financial Services in the United Kingdom—An American Perspective*, 44 *BUS. LAW.* 323, 324 (1989).

88. *Id.*

markets by promulgating and enforcing their own rules. As in the United States, SRO rule making is subject to review by a higher regulatory body, the SIB. Consequently, to achieve recognition by the SIB, an SRO must adopt rules and compliance standards that ensure the level of investor protection sought by the FSA.⁸⁹

The LSE⁹⁰ plays the central role in establishing the listing and continuing disclosure obligations for companies wishing to list shares on the LSE. Unlike in the United States, where the regulatory body plays the pivotal role in establishing what information must be disclosed to attain and maintain a listing, in the United Kingdom the exchange itself plays the central role.⁹¹ The aptly named book, *The Listing Rules*, commonly known as the Yellow Book, contains the rules and procedures applicable to companies seeking LSE listings.⁹²

In the United Kingdom, as in the United States, disclosure ensures market integrity in order to protect investors. As *The Times* stated in 1844: “[s]how up roguery and it is harmless.”⁹³ Accordingly, a company seeking capital through a listing of shares on the LSE must apply for admission and provide information about the company and the securities being listed. This process, akin to a Securities Act registration in the United States, entails furnishing information about the firm for use by the LSE and for dissemination to the public in the “listing particulars.”⁹⁴ The company seeking a listing channels this information through a sponsor firm⁹⁵ that deals directly with the LSE.⁹⁶

1. *Conditions for Listing.* As a prerequisite for listing shares,

89. POSER, *supra* note 24, § 3.2.1, at 94.

90. Technically, the SRO governing the LSE is called the Securities Association. *Id.*

91. *Id.* § 3.8.2, at 309. Under the FSA, the LSE is also named the “competent authority” for listings and is empowered to adopt listing rules that comply with European directives and the FSA’s disclosure guidelines. Financial Services Act, § 142(6), *id.* app., at 568.

92. LONDON STOCK EXCHANGE, *THE LISTING RULES* (1995) [hereinafter *YELLOW BOOK*].

93. LOSS, *supra* note 20, at 31 (quoting *The Times* (London), July 4, 1844).

94. The term “listing particulars” is equivalent to the term prospectus in the United States. *Id.* § 3.8.4.1, at 312.

95. See generally *YELLOW BOOK* ch. 2 (discussing role of sponsor). The sponsor firm provides expertise and counsel to guide the applicant through the listing process. *Yellow Book Changes Allow Non-Members to Become Sponsors*, LONDON STOCK EXCHANGE NEWS, Mar. 1994, at 4. While in the past the sponsor was required to be a member of the LSE, in 1993 the LSE amended its rules to allow non-members, such as accounting firms, banks, and law firms to serve this function. *Id.*

96. This channeling places the sponsor in a position of ensuring compliance with the rules and information requirements for listing. See *YELLOW BOOK*, *supra* note 92, at ¶ 2.19.

a company must satisfy a variety of conditions pertaining to its legal status, financial condition, management and securities. A company and its securities must conform to the laws of its place of incorporation.⁹⁷ Foreign companies seeking a secondary listing in London must be in full compliance with the requirements of the exchange and the regulatory body where its shares are listed.⁹⁸ In addition, the company must have published or filed audited financial statements that conform to U.K. Accounting Standards, U.S. GAAP, or International Accounting Standards (IAS)⁹⁹ in each of the preceding three years.¹⁰⁰ However, overseas companies¹⁰¹ may deviate from these accounting standards for some disclosures¹⁰² when the method followed is "appropriate to protect the interests of investors" or when the company lists depository receipts, rather than shares.¹⁰³ Further, conditions for listing require continuity of management¹⁰⁴ and business activities¹⁰⁵ through the periods disclosed in financial statements, and forbid conflicts of interest for directors.¹⁰⁶ Finally, the company must satisfy minimum market capitalization and public ownership requirements, in order to ensure liquidity.¹⁰⁷ Once a

97. *Id.* ¶¶ 3.2, 3.14.

98. *Id.* ¶ 17.19.

99. *Id.* ¶ 3.3(c).

100. *Id.* ¶ 3.3(a). The three year period may be reduced if the LSE finds that the information is readily available and that it is in the interests of the issuer and investors. *Id.* ¶ 3.4. The three year period must have ended within 12 months of the publication of the listing particulars. *Id.* ¶ 17.17. See *infra* notes 116-35 and accompanying text (discussing listing particulars).

101. The Yellow Book defines an "overseas company" as any company incorporated outside the United Kingdom. YELLOW BOOK, *supra* note 92, Definitions.

102. The Yellow Book permits different accounting treatment in an accountant's report, in a comparative table, and in the annual report and accounts. *Id.* ¶ 17.3. However, the rules mandate specific methods of accounting for consolidations, transfers to reserves, and asset valuation disclosures. *Id.*

103. *Id.* While the LSE fails to define exactly what is meant by "appropriate standards," it does indicate specific requirements that must be satisfied. In August 1994, the LSE adopted new rules for depository receipts that allow accounts to be prepared according to home country accounting conventions. *Id.* ¶ 23.46. Depository receipts are treated differently because the market for depository receipts is dominated by sophisticated institutional investors. LONDON STOCK EXCHANGE, DEPOSITORY RECEIPTS: SUMMARY OF THE MAIN LISTING REQUIREMENTS 1 (1994).

104. YELLOW BOOK, *supra* note 92, ¶ 3.7.

105. *Id.* ¶ 3.6.

106. *Id.* ¶ 3.9.

107. See *id.* ¶¶ 3.16-.21. The aggregate of value for equity must be at least 700,000 pounds, *id.* ¶ 3.16(a), and 25% of each class of shares must be held in "public hands," as defined by § 3.20 of the Yellow Book. *Id.* ¶ 3.20. These requirements may be waived if an issuer convinces the Exchange that an adequate market for the securities will exist without satisfying the cutoffs.

company satisfies these conditions, it must focus on the preparation of the listing particulars.

2. *Listing Particulars.* The Yellow Book details the types of information a company must provide to satisfy the statutory goal of disclosing "all such information as investors and their professional advisors would reasonably require."¹⁰⁸ To comply with this statutory mandate, the Yellow Book requires the publication of listing particulars by companies applying for a listing.¹⁰⁹ In the absence of an exemption,¹¹⁰ an issuer must disclose information concerning: (1) the persons responsible for the listing particulars;¹¹¹ (2) the securities being offered;¹¹² (3) the capital,¹¹³ business, management,¹¹⁴ products,¹¹⁵ and financial statements of the issuer;¹¹⁶ and (4) recent

Id. ¶¶ 3.17, 3.19.

108. Financial Services Act, 1986 (Eng.), § 146(1), *reprinted in POSER, supra* note 24, app. at 570.

109. YELLOW BOOK, *supra* note 92, ¶ 5.1.

110. The exemptions most pertinent to foreign issuers are those concerning companies with either prior listings on an EC member's exchange, *id.* ¶ 5.23(b), or simultaneous listings on a EC member's exchange, *id.* ¶ 17.68. Securities that have been listed for at least three years on the exchange of a European Member state, in full compliance with the EC Directives, may supply abbreviated disclosures, rather than the full disclosures mandated for listing particulars. *Id.* ¶ 5.23(b). Overseas companies that simultaneously seek a listing on a non-U.K. EC member's exchange may use the issuing documents prepared for that listing, provided that a series of conditions are satisfied. *Id.* ¶ 17.68(a).

111. *Id.* ¶¶ 6.A.1-9. Among other items, disclosures must include names and addresses of directors, auditors, investment bankers and legal advisors. *Id.* Further, the listing particulars must include a statement that the information has been audited by auditors. *Id.* ¶¶ 6.A.5-6.

112. *Id.* ¶¶ 6.B.1-26. The rules require an issuer to disclose detailed information that relates to the value and transferability of shares being issued. *Id.* Issuers must also disclose information about other shares of the same class that exist and are being traded on stock exchanges or on the open market. *Id.* ¶¶ 6.B.17-20.

113. *Id.* ¶¶ 6.C.1-24. These sections provide much of substance of the listing particulars. In addition to revealing basic information about the issuer's form, purpose and place of incorporation, the listing particulars must provide information about how a potential investor may access an array of documents relating to the issuer's legal and financial status. *Id.* ¶ 6.C.7. If the information is not in English, translated copies must be furnished. *Id.* ¶ 6.C.8. The issuer must also provide information about its capital structure, *id.* ¶¶ 6.C.9-14, and significant shareholders, *id.* ¶¶ 6.C.15-16. Material contracts must also be detailed. *Id.* ¶ 6.C.20.

114. *Id.* ¶¶ 6.F.1-13. An issuer must disclose information about its founders and directors. *Id.* The total aggregate of directors' compensation must be disclosed, but this information need not be broken down to show the compensation received by each individual director. *Id.* ¶ 6.F.3. Any loans to directors or significant contracts between the issuer and a director must also be divulged in the listing particulars. *Id.* ¶¶ 6.F.6-7.

115. *Id.* ¶¶ 6.D.1-15. These sections require an issuer to reveal information about the company's products and activities, and about principal property and real estate detailed by geographical location. *Id.* Further, the issuer must disclose any plans for future material investments in plants, factories, and research and development. *Id.* ¶ 6.D.13.

developments and prospective information about the issuer's business.¹¹⁷ Furthermore, the LSE reserves the right to require additional information as it deems appropriate.¹¹⁸ The listing particulars need not follow any specific form, provided that the information is presented in a manner that easily can be understood and analyzed.¹¹⁹

Upon consent of the LSE, foreign companies seeking a secondary listing on the LSE may incorporate documents prepared for their primary listing authority as part of the listing particulars.¹²⁰ However, any incorporated document must be in English, or an English translation must be provided.¹²¹ Overseas companies may also omit required information if they convince the LSE that the information is of minor importance, contrary to public interest, or harmful to the issuer and not detrimental to investors.¹²²

3. *Continuing Disclosure.* Applicants to the LSE need not file the equivalent of a U.S. Form 20-F registration statement at the time of listing their shares. However, they must agree to comply with the LSE's continuing disclosure obligations.¹²³ A company is under a duty to report "any major new developments in its sphere of activity which are not public knowledge and which may . . . by virtue of the effect of those developments on its assets and liabilities or financial position or on the general course of its business, lead to substantial movement in the price of its listed securities."¹²⁴ Similarly, the LSE rules require disclosures when the company anticipates a change in its financial performance that it expects to impact its share price.¹²⁵ Companies with listings on multiple exchanges must ensure that

116. *Id.* ¶¶ 6.E.1-16. The financial information that must be provided is also described in Chapter 12 of the Yellow Book. Generally, the information must be audited and must span a three year period. *Id.* ¶¶ 6.E.1, 12.17-20.

117. *Id.* ¶¶ 6.G.1-2. Prospective information about the firm's future profits may be included in the listing particulars if required by regulations of the competent authority where the company has its primary listing. *Id.* ¶ 17.16.

118. *Id.* ¶ 5.6.

119. *See id.* ¶¶ 5.7-8 (describing minimum requirements for presentation of information).

120. *Id.* ¶ 17.5.

121. *Id.*

122. *Id.* ¶¶ 5.18, 17.6.

123. The preliminary notes to Chapter 9 of the Yellow Book provide a summary of the applicability of continuing disclosure requirements to companies listed on the LSE. If a company fails to meet its continuing disclosure obligations, the LSE may suspend or revoke its listing. *Id.* ch 1.

124. *Id.* ¶ 17.22. These general duties of disclosure supplement, rather than replace, specifically identified items that must be disclosed. *Id.* ¶ 17.24.

125. *Id.* ¶ 17.23.

disclosures occur simultaneously in the various markets in which their shares are traded.¹²⁶

The Yellow Book provides detailed instructions on the types of events and information that foreign companies with secondary LSE listings must disclose. For example, a listed company must announce preliminary financial information concerning annual and semi-annual financial results and dividends.¹²⁷ Further, a company must publicly disseminate information about any significant changes in capital structure,¹²⁸ major shifts in share ownership,¹²⁹ major acquisitions or disposals of assets,¹³⁰ or changes on the board of directors.¹³¹ The Yellow Book does grant foreign companies some flexibility in delaying announcements for matters being negotiated.¹³² In addition, a foreign company must file audited annual reports that require the same accounting treatment as the listing particulars.¹³³

The continuing disclosure rules also address the content requirements for annual and semi-annual reports. Unlike in the United States, the format of the annual report is not specified in great detail; rather, the report "must be prepared to a standard appropriate to protect the interests of the investors."¹³⁴ A company must file its semi-annual report in a format consistent with its annual report, although there is no audit requirement.¹³⁵ A foreign issuer must supply the LSE with copies of all notices, reports and other documentation supplied to the regulatory body governing its primary listing.¹³⁶

126. *Id.* ¶¶ 9.9, 17.30.

127. *See, e.g., id.* ¶¶ 17.35-37.

128. *Id.* ¶ 17.31.

129. *Id.* ¶ 17.33(b).

130. *Id.* ¶ 17.32.

131. *Id.* ¶ 17.34.

132. *See id.* ¶ 17.25. If a required disclosure might prejudice the company's legitimate interests, the [LSE] may grant a dispensation from the relevant requirement. *Id.* ¶ 17.29.

133. *Id.* ¶ 17.45(a).

134. *Id.* ¶ 17.51.

135. *See id.* ¶¶ 17.52-63 (describing content of half-yearly reports). The fact that a half-yearly report is not audited must be disclosed. *Id.* ¶ 17.60. The LSE provides some flexibility in its requirement where requirements are "unsuited to the company's activities or circumstances." *Id.* ¶ 17.62. Upon approval, certain half-yearly financial information may be omitted. *Id.* ¶ 17.63. In cases where a foreign company publishes a semi-annual report for the regulator of its primary listing, the Exchange may authorize its use for purposes of LSE compliance. *Id.* ¶ 17.7.

136. *Id.* ¶ 17.44.

B. Alternative Methods of Listing in the U.K. Security Markets¹³⁷

Foreign issuers wishing to have their shares publicly traded on the LSE have a number of options similar to those available in the United States. As in the U.S. regulatory system, exemptions from regulatory requirements play a large role in defining how foreign companies trade their securities on the LSE. Naturally, the burdens and benefits associated with each of the London trading options must be weighed by issuing companies in light of their financial objectives. Foreign issuers may trade their shares without an official listing¹³⁸ on SEAQ International¹³⁹ with little regulation, may list depository receipts¹⁴⁰ representing shares on the LSE with a moderate level of regulation, and finally, may list actual shares on the "official list" of the LSE and subject themselves to full regulation.

1. *Trading on SEAQ International.* A foreign company that wishes to have its shares quoted on London's electronic quotation system, SEAQ International, need satisfy only minimal requirements. For companies that have their primary shares traded on a regulated foreign exchange approved by the LSE,¹⁴¹ shares may be quoted once a "market maker"¹⁴² registers as a trader of the company's

137. An extended discussion of the methods of raising capital in the United Kingdom is beyond the scope of this Note. For a description of some of the costs and methods of issuing shares in the United Kingdom see the study *New Equity Issues in the United Kingdom*, 30 BANK OF ENGLAND Q. BULL. 243 (May 1990), and its predecessor *New Issue Costs and Methods in the UK Equity Market*, 26 BANK OF ENGLAND Q. BULL. 532 (Dec. 1986).

138. The term "listing" is a term of art. Listing refers to the status of being registered with the LSE, as a member of the "official list." Having shares quoted is not the same as having shares listed.

139. SEAQ is an acronym for Stock Exchange Automated Quotations. SEAQ International is a computer based system of quoting securities of non-U.K. companies. LONDON STOCK EXCHANGE, GUIDE TO THE INTERNATIONAL EQUITY MARKET 20 (1994).

140. Depository receipts are also known as Global Depository Receipts (GDRs), or in the Yellow Book as certificates representing shares, and consist of the same components as ADRs. See Velli, *supra* note 44, at S45 (discussing ADRs and GDRs).

141. The stock exchanges of most western industrialized nations, some southeast Asian nations, and Mexico are among the approved organizations. LONDON STOCK EXCHANGE, GUIDE TO INTERNATIONAL EQUITY MARKET 10 (1994).

142. London's system of trading utilizes a system of market makers, who are required to display prices at which they will buy and sell quoted securities. LONDON STOCK EXCHANGE, FACT BOOK 1995 16 (1995). Currently, 30 firms are registered with the LSE as market makers. *Id.*

securities.¹⁴³ Companies with primary stock listings on non-approved foreign exchanges may either seek to have their exchanges certified by the LSE, or quote their shares on the developing market sector of SEAQ International.¹⁴⁴ In both cases, a market maker must register to quote the securities prior to their addition to the system.¹⁴⁵ While a quotation on SEAQ International may raise the visibility of a foreign company in the international investment community, the mere presence of a company on the system does not ensure that additional information regarding the issuer enters the market. As such, investor interest in and liquidity of shares quoted on SEAQ International may be limited.¹⁴⁶ Further, companies may desire an official listing for a variety of different reasons that make a quotation on SEAQ International unsatisfactory.¹⁴⁷ Recognizing these limitations, some foreign issuers may utilize SEAQ International simply as a first step toward a full listing in London.

2. *Listing GDRs on the LSE.* Foreign issuers who wish to take advantage of the international market also may choose to pursue listing global depository receipts (GDRs), rather than actual shares. In 1994, the LSE changed its rules concerning GDRs in order to make London a more attractive place for foreign issuers to raise capital. Although the listing requirements treat GDRs as similar to shares in applying rules for listing,¹⁴⁸ several key exemptions make GDRs an

143. LONDON STOCK EXCHANGE, *GUIDE TO THE INTERNATIONAL EQUITY MARKET* 10 (1994).

144. *Id.* at 11-12.

145. *Id.* Companies trading in the developing markets sector must have at least two market makers register to trade in their shares. *Id.* at 12.

146. LONDON STOCK EXCHANGE, *A LISTING IN LONDON* 5 (2d ed. 1994). However, it is not uncommon for the level of trading of foreign securities on SEAQ International to eclipse the market activity of shares where the company has its primary listing. See Lorna Cox, *Regulatory Balance is Focus of FIBV Forum*, INT'L SEC. REG. REP., July 26, 1994, available in LEXIS, News Library, ISSR file (noting that in 1992 almost 50% of trading in Italian shares occurred on SEAQ International).

147. A share price quotation on SEAQ International may not meet the goals of a company seeking an international listing. Such a quotation does not necessarily reduce a company's cost of capital, increase a company's name recognition in the United Kingdom, significantly broaden the company's investor base or provide an opportunity for firm employees in the United Kingdom to purchase the share more easily. See *supra* notes 8-13 and accompanying text (discussing motivations for a foreign listing). Many of the gains of an international listing are predicated on the dissemination of information about an issuer and the issuer's business which does not occur when a share price is merely quoted. *Id.*

148. See *YELLOW BOOK*, *supra* note 92, ¶ 3.31. Parties listing depository receipts must supplement the listing particulars with information concerning the depository arrangement. See *id.* ¶¶ 6.P.1-10.

attractive alternative to listing actual shares.¹⁴⁹

The principal difference between the listing requirements for depository receipts and for actual shares concerns accounting treatment of financial disclosures.¹⁵⁰ Foreign companies listing GDRs need only provide financial information prepared and audited in accordance with the laws of their home country.¹⁵¹ Because accounting reconciliation typically consumes a significant amount of time, energy and money, the exemption from reconciliation provides a significant incentive for foreign issuers to list GDRs.

By listing GDRs, a foreign company disseminates a greater amount of information to the marketplace than it would by simply having its shares quoted on SEAQ International, because the LSE requires listing particulars and continuing disclosure for GDRs. However, many investors place a value on the information revealed through accounting reconciliation, and therefore may discount the price they pay for GDRs to compensate for uncertainty arising from limited or unfamiliar information supplied in conformance with the company's home country accounting system.¹⁵²

3. *Listing Shares on the LSE.* Finally, foreign issuers may obtain an official listing of their shares on the LSE. Although shares in London were formerly traded in three separate markets that each required different obligations for listing, one of the markets closed in 1990¹⁵³ and another was recently replaced by a newly conceived

149. Chapter 23 of the Yellow Book contains special rules for foreign issuers seeking a listing of certificates representing shares. *Id.* ¶¶ 23.45-88. The LSE adopted these rules in an effort to make it easier for foreign issuers to list their securities in London. See *Exchange Strengthens International Role*, Reg. News Service, Aug. 15, 1994, available in LEXIS, News Library, TEXTRN File.

150. See YELLOW BOOK, *supra* note 92, ¶ 23.46 (modifying ¶ 3.3(c) such that foreign companies are exempt from compliance with U.K. Accounting Standards, U.S. GAAP, and IAS requirements). Note however, that LSE may require the disclosure of major departures from International Accounting Standards. *Id.* ¶ 23.51(m).

151. *Id.* ¶ 23.46.

152. Companies whose accounts conform to accounting standards that are less transparent run a greater risk of having their shares discounted or scaring off foreign investors entirely. See Choi & Levich, *supra* note 9, at 11 (citing different means institutional investors use for coping with accounting uncertainty). One fund manager's comments about German accounting standards highlight this potential problem: "[t]he way it is now, investing in German companies can be a stab in the dark. You simply don't know enough about what's going on inside the company." David Duffy & Lachlan Murray, *The Wooing of American Investors*, WALL ST. J., Feb. 25, 1994, at A14.

153. In 1990, the Third Market closed forcing firms to either list their securities on one of London's remaining two stock markets or to cease trading altogether. See Fitzsimons, EC

market for small issuers (AIM).¹⁵⁴ The newness of AIM and its uncertain future makes it a risky place for foreign issuers to list their shares.¹⁵⁵ Consequently, foreign issuers seeking international exposure in London must look to the LSE, and must comply with its relatively extensive listing requirements.

C. Challenges Encountered by Foreign Issuers Accessing U.K. Markets

Compared to the requirements of the U.S. registration process, London provides greater flexibility for foreign companies. The regulatory burdens vary depending on whether a company lists shares or simply lists GDRs. In either case, companies may meet listing requirements without compiling and disclosing as much information as is required for a U.S. listing.

Disclosures in London, like those in the United States, raise issues of availability and sensitivity for the listing company's management to consider. Because listing particulars require the compilation of a substantial amount of information, a company seeking a primary listing, or a secondary listing, may be required to expend a large amount of resources gathering the required information. However, for issuers of GDRs, the burdens are greatly reduced due to exemptions from disclosures and reconciliations. Where accounting reconciliation is required,¹⁵⁶ the ability to reconcile to one of several accounting standards provides issuers with greater flexibility. In the regulatory context, greater flexibility is beneficial because it translates into reduced costs.

Generally, the Yellow Book's listing requirements provide more room for foreign issuers to avoid disclosing potentially sensitive

Directives Change Securities Markets, FIN. TIMES, Feb. 15, 1990, available in LEXIS, News Library, INT-NEWS File, at *3.

154. The new market for small issuers is the Alternative Issuer Market (AIM). Johnathan Isaacs, *Alternative Investment Market Aims at Small Firms*, CORP. MONEY, May 12, 1995, available in LEXIS, News Library, INT-NEWS File, at *1 (discussing background and goals of AIM). Part of the reason for the turmoil in London's markets stems from the United Kingdom's membership in the EC which necessitated rule changes that obviated the distinctions between the separate markets. *Aim, Set, Fire (or Fizzle)*, INVESTORS CHRON., June 2, 1995, available in, LEXIS, News Library, INVCHR File, at *2. For a discussion of the impact of European Union Directives on the U.K. securities market, see Creaven, *supra* note 85.

155. See generally *Aim, Set, Fire (or Fizzle)*, *supra* note 154 (addressing the risks associated with AIM and the potential that institutional investors will not invest in the market).

156. Reconciliation is mandated for companies seeking either a primary or secondary listing of shares on the LSE. YELLOW BOOK, *supra* note 92, ¶ 3.3(c).

information. For companies that elect to list GDRs rather than shares, the ability to avoid reconciling financial data means that sensitive information demanded by U.S. GAAP may go undisclosed. Further, where required, reconciliation can be to U.K. or IAS standards, which require fewer disclosures. Correspondingly, LSE rules allow companies to be less precise when disclosing information concerning the business and management of a company. While information similar to that required in the United States is disclosed under the rules of the LSE, the level of detail is not as great. For example, compensation for the board of directors may be aggregated and disclosed as a single figure, rather than on an individual basis.¹⁵⁷

IV. SIGNIFICANT FACTORS IN THE REGULATORY COMPETITION

Differences between the listing requirements in the United States and those in the United Kingdom are a matter of degree, rather than a matter of kind. Both listing processes require an issuer to compile large amounts of information and to invest substantial company resources in the process. Both U.S. and U.K. regulators appear to recognize that international equity trading plays a central role in the continued financial success of their respective securities exchanges. Thus, the struggle is to adopt regulatory policies that make it easy for foreign companies to participate on international stock exchanges without sacrificing the integrity of the markets. How far regulators go to accommodate foreign issuers depends on their regulatory philosophies and subjective judgments.

Participants in U.S. securities markets frequently criticize the policies of U.S. securities regulators concerning foreign companies. Critics of the U.S. regulatory scheme cite the following factors to support their position that the SEC is placing U.S. exchanges at a competitive disadvantage: (1) mandatory reconciliation of foreign financial statements to U.S. GAAP; (2) delays in Securities Act registration; (3) costly Exchange Act continuous disclosure requirements; (4) required disclosure of potentially embarrassing information; and (5) potentially substantial liability under the U.S. legal system and its securities laws.¹⁵⁸ Of these common complaints, the requirement

157. *Id.* ¶ 6.F.3.

158. Michael A. Schneider, Note, *Foreign Listings and the Preeminence of U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 315-16 (1994).

that non-U.S. financial statements be reconciled to U.S. GAAP draws the greatest amount of criticism.¹⁵⁹

A comparison of the U.S. and U.K. accounting standards for foreign issuer listings shows that critics may be overstating the detrimental impact of U.S. regulatory policy. Undoubtedly, the SEC takes a much firmer position than U.K. regulators concerning accounting reconciliations. However, the impact of a more flexible position differs depending on the type of accounting system used by foreign companies applying for listings. Reconciliations impact companies from countries with firmly established accounting systems differently than companies from emerging countries with undeveloped accounting systems.

When evaluating the impact of accounting reconciliations on the cost of attaining a listing, it is important to recognize that the burden of reconciliation is greatest for companies with accounting systems that differ greatly from U.S. GAAP or U.K. Accounting Standards. Studies of accounting origins reveal that U.S. GAAP greatly influenced the development of the accounting systems of Mexico, Canada, Japan, and the Philippines.¹⁶⁰ Not surprisingly, U.K. Accounting Standards greatly influenced accounting standards in Commonwealth countries.¹⁶¹ While within these broad categories a large amount of variance still exists, it is reasonable to expect that the burdens of reconciliation are reduced for companies following accounting systems of similar origin.¹⁶²

A. Impact of Reconciliation Requirements on Foreign Companies with Firmly Established Accounting Systems Listed on U.S. Exchanges.

While foreign companies may file financial statements with U.S. regulators that conform to their home-country accounting standards,

159. The NYSE has publicly pushed for relaxation of accounting reconciliation for certain classes of foreign companies. See James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 *FORDHAM INT'L L.J.* S58 (1994); Karmel & Head, *supra* note 28.

160. See, e.g., Lawrence S. Speidell & Vinod B. Bavishi, *GAAP Arbitrage: Valuation Opportunities in International Accounting Standards*, *FIN. ANALYSTS J.*, Nov.-Dec. 1992, at 58, 60.

161. See *Id.*

162. This may explain in part why many of London's foreign listings are from former U.K. colonies. See Gary Putka, *London's Trading in Foreign Shares Surges: Exchange Works to Lure Overseas Business*, *WALL ST. J.*, Apr. 3, 1987, at 38 (noting London's colonial ties as a key factor in London attracting foreign listings).

issuers must supplement this information with explanations of differences from U.S. GAAP.¹⁶³ For firmly established companies with non-US accounting systems, this requirement often proves to be costly and forces disclosure of information that may remain undisclosed in their home country accounting systems. Although the NYSE continues to exert pressure on the SEC to permit an exemption from reconciliation for "world-class" issuers,¹⁶⁴ the SEC continues to stand firm in its position that reconciliation ensures fairness and protection for all market participants.¹⁶⁵

The case of Daimler-Benz provides support for the SEC's position. German accounting standards differ significantly from U.S. GAAP in many respects and make no claim to provide a "true and fair" view of economic reality.¹⁶⁶ German accounts protect against future losses by creating "hidden" reserves, or *Ruckstellungen*, to provide security in the event of future losses.¹⁶⁷ Reluctant to disclose its reserve of Dm4 billion,¹⁶⁸ Daimler-Benz sought an exemption from reconciliation. After months of protracted negotiations, the company conceded and provided reconciliation to U.S. GAAP.¹⁶⁹

Although the Daimler-Benz case may portray the SEC as inflexible, subsequent rule changes show that the SEC is willing to allow foreign companies some flexibility in how they report.¹⁷⁰ While remaining fairly resolute in its position, the SEC has taken steps to tailor specific exemptions from reconciliation, and has changed the

163. Form F-1 requires the same disclosures that Item 18 of Form 20-F dictates (reconciliation to U.S. GAAP), subject to exceptions for certain "investment grade securities" or other narrowly defined exceptions. *YELLOW BOOK*, *supra* note 92, ¶ 6.F.3.

164. "World class" issuer refers to "foreign private issuers that have an equity float of at least \$500 million, at least \$150 million of which is beneficially held by U.S. residents, or that are registering 'investment grade debt securities.'" Securities Act Release No. 6360 (Nov. 20, 1981).

165. See Cochrane, *supra* note 159, at S61 (noting that exempting world-class foreign companies from U.S. GAAP reconciliation was NYSE's "number one priority").

166. See David Waller, *Daimler-Benz Gears Up For a Drive on the Freeway - David Waller Explains Why Germany's Biggest Industrial Group is Bowing to Anglo-American Accounting Practice*, *FIN. TIMES*, Apr. 29, 1993, at 18 (describing differences between German accounting and motivations for listing on the NYSE).

167. Cooper, *supra* note 79, at 82.

168. This reserve is equivalent to over \$5.5 billion at current exchange rates. *Currency Trading*, *WALL ST. J.*, Nov. 14, 1995, at C17 (1.4175 Dm to 1 U.S. \$).

169. *Id.* at 81.

170. See *Hearings*, *supra* note 1 (discussing efforts by SEC to ease foreign entry into U.S. capital markets).

frequency of reporting for foreign companies.¹⁷¹ These steps include allowing foreign companies to follow the International Accounting Standard No. 7 when preparing cash flow statements, rather than reconciling to U.S. GAAP.¹⁷² Form F-1 also defines situations and classes of securities for which issuers may forego full reconciliation.¹⁷³ Further, foreign companies need only file semi-annual reports rather than quarterly reports. Finally, the SEC makes great efforts to help foreign issuers comply with the U.S. regulatory scheme as evidenced by their willingness to provide confidential initial compliance reviews and feedback.

B. Impact of Reconciliation Requirements on Foreign Companies with Firmly Established Accounting Systems Listed on the LSE.

Undoubtedly, the LSE provides greater flexibility for foreign issuers in terms of accounting requirements. Although the Yellow Book requires reconciliation of non-U.K., non-U.S. and non-IAS financial statements, this requirement is qualified in the case of overseas companies to allow "a standard appropriate to protect the interests of investors."¹⁷⁴ This vague standard is given little substance in the rules other than three requirements concerning consolidations, reserve accounts, and asset valuation.¹⁷⁵ Further, the exemption for accounting reconciliation when listing depository receipts makes London a less expensive alternative than the United States. Like the SEC, the LSE only requires semi-annual reports, however, the reports need not be audited or reconciled if they are consistent with disclosures in annual reports.¹⁷⁶ Collectively, the LSE rules form a less rigid format for foreign corporations.

171. The shift in policy to encourage foreign participation in U.S. capital markets is somewhat ironic because, in the past, the government sought to discourage foreign issuers from raising funds in the United States thereby spurring the growth of overseas securities markets. See DETLEV F. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 492 n.3 (Foundation Press 1986) (discussing the Interest Equalization Tax of 1964, I.R.C. §§ 4911-4931 (1964), and its tax of up to 15% on the value of foreign stocks and bonds).

172. See *Simplification of Registration*, *supra* note 30, at 21,646 (discussing adoption of IAS No. 7).

173. Form F-1, Item 11(c), *supra* note 33, ¶ 6,953.

174. *YELLOW BOOK*, *supra* note 92, ¶ 17.3.

175. *Id.* ¶ 17.3(a)-(c).

176. *Id.* ¶ 17.53.

C. Impact of Reconciliation Requirements on Foreign Companies from Emerging Countries with Undeveloped Accounting Systems.

Where foreign company accounting practices are either underdeveloped or structured for planned economies, the requirement that a listing company perform a reconciliation to U.S. GAAP, U.K. Accounting Standards, or "standard[s] appropriate to protect the interests of investors"¹⁷⁷ has little impact on a listing decision. When developing accounting systems in the former Soviet Union, China, or other planned economies, a company must develop a new system from scratch.¹⁷⁸ Similarly, in other emerging countries that have accounting systems which generate inadequate information, international exchanges are all on an equal footing. Companies in this situation arguably would have an incentive to comply with U.S. GAAP, as it is widely accepted and satisfies requirements of both U.S. exchanges and the LSE.¹⁷⁹

D. Empirical Evidence Concerning Competition for Foreign Listings.

How the LSE's greater flexibility impacts the competition for foreign listings between U.S. exchanges and the LSE is not precisely clear. Collectively, U.S. exchanges list a greater number of foreign companies than the LSE,¹⁸⁰ and in recent years, London has lost overseas listings.¹⁸¹ It is unclear whether foreign listings in the United States have expanded due to shifts in regulatory policy or in

177. *Id.* ¶ 17.3.

178. *NYSE Chairman Urges Foreign Companies to List on Market*, L.A. TIMES, June 15, 1995, at D6.

179. See Cochran, *supra* note 159, at S64 (discussing NYSE's experience with emerging market companies and their adoption of U.S. GAAP). Some issuers view compliance with U.S. GAAP as a means of attaining investor confidence and ensuring transparency of information in different markets around the world. See Warbrick, *supra* note 28, at S113-14.

180. At the end of 1994, there were 662 foreign companies with shares listed on a U.S. exchange or on NASDAQ. Beese, *supra* note 15, at *18. By comparison, 464 foreign companies had shares listed in London on the LSE at the end of 1994. LONDON STOCK EXCHANGE, FACT BOOK 1995 4 (1995).

181. During 1994, the net listings of foreign companies on the LSE dropped from 485, LONDON STOCK EXCHANGE, FACT BOOK 1994 4 (1994), to 464. FACT BOOK 1995, *supra* note 180. In the same year over 100 foreign issuers entered U.S. markets to seek capital. Beese, *supra* note 15.

spite of U.S. regulatory requirements.¹⁸²

Ultimately, it is impossible to determine the significance of mandatory accounting reconciliation in the competition for foreign listings. Undoubtedly, there are costs associated with reconciling accounting information.¹⁸³ However, these disclosures are demanded on the assumption that this information provides fair and attractive markets which result in a lower cost of capital. A foreign company must weigh the costs and benefits in order to determine whether reconciliation makes economic sense. In addition, the decision to list in the United States or in the United Kingdom depends on the macro-economic factors impacting the economies and institutional investors in those locations. When domestic returns pale in comparison to the expected returns in an emerging market, the costs of reconciliation for a foreign company may pay off in the form of a premium when new shares are issued.

V. CONCLUSION

Given the projected staggering demand for capital around the world, more foreign companies will be facing the decision of whether to list their securities on an international stock exchange. Because new listings eventually translate into new jobs in the local economy where exchanges are located,¹⁸⁴ the stakes are high for regulators in both London and the United States to maintain systems that protect investors, yet remain inviting to foreigners. Although securities regulators in the United States and the United Kingdom share the broad goals of regulating securities markets, the means adopted to accomplish those goals differ. While in either case a company must provide detailed and extensive information, London offers foreign companies greater flexibility and therefore, reduced costs. However,

182. Studies of the impact of disclosure requirements and their impact on U.S. stock exchange competitiveness are inconclusive. See, e.g., C. Sherman Cheung & Jason Lee, *Disclosure Environment and Listing on Foreign Stock Exchanges*, 19 J. BANKING & FIN. 347, 349 (1995) (analyzing disclosure requirements and concluding with only general observations).

183. See *U.S. Rules Deter Foreign Share Listings-U.K. Director*, REUTERS, June 29, 1993, available in WESTLAW, REUTERNEWS database (describing SEC accounting rules as "daunting" and claiming that the number of U.S. listings would be higher with less stringent accounting standards).

184. Listing of shares on a stock exchange creates opportunities for parties providing advisory and other services. For instance, New York investment banks benefit from having foreign firms list on the NYSE. Nicholas Bray & Glenn Whitney, *British Investment Banks Face Struggle: U.K. Loses Lead in Sales of State-Owned Industries*, WALL ST. J., Dec. 12, 1994, at A9. Similarly, if listing occur in London, U.K. investment bankers obtain a competitive advantage. *Id.*

whether these savings translate into a lower cost of capital than would be possible with a listing in the United States remains unclear. Regulators in the United States maintain that the greater precision and detail mandated for a U.S. listing creates unparalleled market transparency and corresponding efficiency that makes the U.S. capital markets unique and attractive. Ultimately, the decision by a foreign company to acquire a listing in London or in the United States depends on the company's needs, goals and characteristics. How well the current policies of U.K. and U.S. regulators address these needs remains to be seen.

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