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Revisiting the SEC's Memoranda of Understanding: A Fresh Look

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Abstract

In attempting to understand the effectiveness of the Security and Exchange Commission's ("SEC") Memoranda of Understanding ("MOU"), this Note proceeds in three parts. Part I examines the structure of the global marketplace and evaluates the prospects for cooperation. Part II looks at the U.S. court system's approach to extraterritorial jurisdiction and reviews some representative MOUs. Part III concludes that MOUs are primed for success as an information exchange framework, though an evaluation of their effectiveness should be carried out by the SEC or another body with access to confidential files obtained from foreign regulators.

NOTE

REVISITING THE SEC'S MEMORANDA OF UNDERSTANDING: A FRESH LOOK

*Eduard H. Cadmus**

INTRODUCTION

In 2009, the Securities and Exchange Commission (“SEC”) brought billionaire Allen Stanford to trial for investor fraud.¹ Although he surrendered to federal law enforcement within the United States,² his influence abroad could have been an unfortunate frustration for the SEC.³ As a financier, Stanford controlled banks across the Caribbean and Latin America.⁴ But it

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1. See Clifford Krauss et al., *Texas Firm Accused of \$8 Billion Fraud*, N.Y. TIMES, Feb. 18, 2009, at A1 (“[T]he Securities and Exchange Commission, in a civil suit, said Mr. Stanford and two colleagues fraudulently peddled to scores of investors.”); Graeme Wearden, *Allen Stanford Indicted on Fraud Charges After Surrendering to FBI*, GUARDIAN (London), June 19, 2009, <http://www.guardian.co.uk/world/2009/jun/19/allen-stanford-arrested> (“In February, [the SEC] . . . alleged that he fraudulently sold \$8bn (£4.7bn) in certificates . . .”).

2. See Wearden, *supra* note 1 (“Stanford, 59, had been staying at his girlfriend’s home in Fredericksburg, 50 miles south of Washington, but left the premises to speak with FBI agents who were parked outside, according to his lawyer.”); see also Zachary A. Goldfarb & Anita Kumar, *Stanford, 5 Associates Charged With Running \$7 Billion Ponzi Scheme*, WASH. POST, June 20, 2009, at A11 (“Stanford, 59, surrendered to FBI agents at his girlfriend’s house in Fredericksburg, Va., Thursday night.”).

3. See Krauss et al., *supra* note 1 (“On the tiny island of Antigua, Mr. Stanford’s presence was both large and controversial”); see also Tom Leonard, *An Island Bowled over by a Master of Spin; Sir Allen Stanford’s Lavish Spending Turned Antigua into His Very Own Theme Park*, DAILY TELEGRAPH (London), Feb. 21, 2009, at 23 (“The sums of money the Texan was willing to splash around would have caused ripples even in a rich country, but on an island of 70,000 people the Allen Stanford largesse crashed over like a tidal wave.”).

4. See Daniel Cancel & Matthew Walter, *Venezuela takes over Local Bank Owned by Stanford*, CARIBBEAN NET NEWS, Feb. 20, 2009, http://www.caribbeanetnews.com/venezuela/venezuela.php?news_id=14384&start=0&category_id=12 (“In addition to Venezuela, Stanford operated affiliates in Mexico, Peru, Ecuador, Colombia and

was in Antigua, Stanford's adopted home, where his influence was at its peak.

The island had a gross domestic product smaller than Stanford's personal fortune.⁵ He poured money into both the island's development and, correspondingly, the government's pockets.⁶ In response, the Antiguan government knighted Stanford.⁷ His alleged bribes of Antiguan financial regulators⁸ may yet hamper the SEC's efforts to extract evidence and information from Antiguan control. For example, the head of Antigua's regulator already attempted to throw the SEC off of its investigation of Stanford before his arrest.⁹

Potential difficulties in discovering and investigating misconduct abroad are well illustrated, though perhaps at an extreme, by Stanford's situation. The SEC has to deal with these and other complexities that hamper effective cooperation when investigating transnational transgressions. In response, the

Panama . . ."); *Profile: Allen Stanford*, SUNDAY TIMES (London), Nov. 2, 2008, at 21 ("Allen opened offices in Latin America and the Caribbean.").

5. See Jenny Booth & Hannah Strange, *Allen Stanford Fraud Charges Trigger Panic and Run on His Banks*, TIMES (London), Feb. 18, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5760612.ece (discussing Stanford as the largest employer and investor in Antigua and the possible catastrophic effects of the charges against him); *Profile: Allen Stanford*, *supra* note 4 (stating that Stanford's "[US]\$2.2 billion (£1.4 billion) fortune . . . dwarfs the GDP of Antigua and Barbuda.").

6. See Goldfarb & Kumar, *supra* note 2 (discussing Stanford's extensive holdings in Antigua); Leonard, *supra* note 3; see also Jacqueline Charles, *Billionaire Stanford's Troubles Cause a Tropical Headache on Antigua*, MIAMI HERALD, Feb. 22, 2009, at A1 (discussing Stanford's celebrity status, donations and sponsorships, and his knighthood granted by Antigua).

7. See Leonard, *supra* note 3 ("After he took dual US and Antiguan-Barbudan citizenship, the islands gave him a knighthood."); Krauss et al., *supra* note 1.

8. See Goldfarb & Kumar, *supra* note 2 (stating that bribes to the Antiguan regulator were both cash and in-kind); Krauss et al., *supra* note 1 ("[Stanford] was viewed by many as cozying up with key politicians to win their favor."); Robert Khuzami, Director, Division of Enforcement, SEC, Speech by SEC Staff: Statement at News Conference Announcing Additional Charges in Stanford Ponzi Scheme Case (June 19, 2009), <http://www.sec.gov/news/speech/2009/spch061909rk.htm> [hereinafter Khuzami Speech] (stating that the Antiguan regulator was "bought and paid for [by Stanford] with bribes and corruption").

9. See Goldfarb & Kumar, *supra* note 2 ("The indictment charges that [the Antiguan regulator] gave confidential information about an SEC inquiry to Stanford, which enabled him to deceive the SEC about the bank's finances and the level of oversight conducted by Antiguan authorities."); Khuzami Speech, *supra* note 8 (stating that the Antiguan regulator's assurances to the SEC "were just more Stanford lies, dressed-up in the letterhead of a supposedly impartial bank regulator who had in fact been bought and paid for with bribes and corruption").

agency has been signing informal Memoranda of Understanding (“MOU”) with foreign regulators for over two decades in an attempt to circumvent barriers to international cooperation and information sharing.¹⁰

These agreements are more important now than ever before. Markets across the globe are rising to challenge U.S. financial supremacy,¹¹ providing increasing opportunities for U.S. citizens to be defrauded abroad and for U.S. firms to engage in misconduct supposedly beyond the SEC’s ability to meaningfully scrutinize.¹² MOUs partake in the solution to this problem by expanding the SEC’s ability to investigate internationally. They do this by providing a fundamental framework for interactions between two regulators, allowing them to request information pursuant to a mutually determined procedure and anticipate cooperation in return.¹³ Alternatively stated, the SEC can obtain information about misconduct outside the United States through MOUs concluded with regulators that have jurisdictional access to the desired information.¹⁴ Accordingly, MOUs appear to effectively promote investigatory cooperation,¹⁵ though confidentiality provisions surrounding the documents limit meaningful study.¹⁶

The agreements are a response to changing conditions in the global financial marketplace.¹⁷ MOUs may also represent one facet of an effort by the United States to counter its slip from dominance.¹⁸ As a tool to promote information-gathering

10. See *infra* notes 200–204 and accompanying text (discussing the background of Memoranda of Understanding (“MOU”)).

11. See *infra* Part I.B (reviewing current conditions in global financial markets).

12. See *infra* Part I.B (reviewing current conditions in global financial markets).

13. See *infra* Part II.C (discussing MOUs as cooperative frameworks).

14. See *infra* Part II.B (discussing MOUs’ structure and provisions).

15. See *infra* Parts III.A–B (discussing elements of MOUs that make them effective).

16. See *infra* Part III.C (discussing confidentiality provisions applicable to MOUs).

17. See *infra* notes 44–47 and accompanying text (discussing the SEC’s acknowledgment of the need for international cooperation and that the SEC has been attempting to improve its regulatory regime).

18. See *infra* notes 44–47 and accompanying text (discussing SEC’s acknowledgment of the need for international cooperation and that the SEC has been attempting to improve its regulatory regime); *infra* Part I.B.2–4 (discussing U.S. competitiveness and regulations).

cooperation, MOUs mitigate some of the factors harming U.S. competitiveness within capital markets.¹⁹

In attempting to discover and understand the effectiveness of the SEC's MOUs, this Note will proceed in three Parts. Part I examines the structure of the global marketplace and evaluates the prospects for cooperation. Part II looks at the U.S. court system's approach to extraterritorial jurisdiction and reviews some representative MOUs. Part III concludes that MOUs are primed for success as an information exchange framework, though an evaluation of their effectiveness should be carried out by the SEC or another body with access to confidential files obtained from foreign regulators.

I. MARKET TRENDS AND STRUCTURE

From an unchallenged, post-World War II high as the preeminent global financial leader, the United States' status is, and has been, under threat from several rising competitor financial centers. The erosion of U.S. dominance in global capital-raising is an inevitable result of the development of other states, including the departure of Europe from the U.S. financial umbrella.²⁰ Although this trend has been clear since the 1980s, some potential to retard or reverse it lies in international enforcement cooperation, particularly as markets—and more importantly their effects—become progressively transnational.²¹

Prospects for international cooperation in securities regulation are affected by the growing number and importance of non-U.S. actors and the variations between their securities laws.²² Although harmonizing all states' securities laws would smooth out differences between relevant jurisdictions, no consensus or constituency exists for such an undertaking.²³ Instead, less formal arrangements, such as the SEC's MOUs, are more plausible mechanisms for promoting international securities enforcement cooperation.²⁴

19. See *infra* Part II.B (describing MOU provisions that open up new sources of enforcement information for the SEC).

20. See *infra* Part I.A (discussing historical changes in global financial markets).

21. See *id.*

22. See *infra* Parts I.A–B (reviewing current conditions in global financial markets and how they have changed).

23. See *infra* notes 210–214 and accompanying text (discussing MOUs as soft law).

24. See *id.*

In order to better understand the environment within which MOUs are operating and to which they are structured to respond, Part I.A presents a brief historical overview of international financial developments. Part I.B then examines current conditions in the global marketplace, including U.S. competitiveness, and looks at the International Organization for Securities Commissions. Finally, Part I.C discusses the feasibility of international cooperation within this environment.

A. *Historical Overview*

After World War I, the United States, even as a major global power, passed on the opportunity to influence the post-war global structure, but it had a second opportunity to take the lead in creating a new comprehensive global system after World War II.²⁵ In 1945, the ravages of war left the other advanced and potential competitor states physically destroyed and struggling to rebuild their exhausted economies, while U.S. territory remained unscathed.²⁶

U.S. leadership manifested itself in the creation of a new, formalized global economic order: the Bretton Woods system.²⁷

25. See Colum Gavan Duffy, *The League of Nations*, 78 *THE IRISH MONTHLY* 166, 173–74 (1950) (“[I]f the United States had not refused to become a member of the League of Nations from the beginning, it is possible that . . . this great international experiment would have been more successful . . .”); Barry Eichengreen & Peter B. Kenen, *Managing the World Economy Under the Bretton Woods System: An Overview*, in *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* 3, 9 (Peter B. Kenen ed., 1994) (“The failure of . . . initiatives can be attributed to a combination of circumstances, prominent among which was the recalcitrance of the United States.”). By declining to cooperate, the United States largely condemned to failure efforts at structuring international interaction by the European powers. See Duffy, *supra*; Eichengreen & Kenen, *supra*.

26. See Donald C. Langevoort, *Foreword: United States Securities Regulation and Global Competition*, 3 *VA. L. & BUS. REV.* 191, 194 (2008) (discussing U.S. advantages compared to Europe and Japan after World War II); Raymond Vernon, *The United States Government at Bretton Woods and After*, in *THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS* 52, 58 (Orin Kirschner ed., 1996) (explaining the United States’ formidable economic might after World War II).

27. See ARMAND VAN DORMAEL, *BRETTON WOODS: BIRTH OF A MONETARY SYSTEM* 286 (1978) (stating that by the end of 1945, thirty-four nations had ratified the Bretton Woods agreements); Rolf W. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 *U. PA. J. INT’L L.* 391, 391 (2007) (discussing the vision for Bretton Woods to “redevelop and reintegrate” the world economy). The Bretton Woods system was strongly shaped by U.S. preferences. See VAN DORMAEL, *supra* at 29–95 (discussing how the implementation and structure of Bretton Woods was altered by the United States by using “bulldozer tactics,” locating the IMF and World

Bretton Woods was conceived as a series of international organizations and agreements to promote international financial and commercial cooperation and stability.²⁸ With the establishment of Bretton Woods, the United States maneuvered itself into the center of the new world order—politically, geographically, and, most importantly, financially. The Bretton Woods system focused on domestic restrictions. States' currencies were tied to the U.S. dollar at fixed rates in order to promote financial stability.²⁹ These and other domestic restrictions were expected to produce the desired international commercial stability, overseen by the international organizations constituting Bretton Woods system.³⁰ As international finance grew in importance and complexity throughout the decades following the war, Bretton Woods was increasingly stressed. The system, however, was designed with enough flexibility to adapt to changing conditions and maintain itself.³¹ It survives today, in part, through the International Monetary Fund.

Through this time, the United States' economic dominance has slipped, though it still commands an impressive share of global capital-raising income.³² These troubles are partly the

Bank in Washington, D.C. and detailing a "personal decision" by the U.S. Treasury Secretary to preempt the desires of a majority of Bretton Woods delegations); *see also* Vernon, *supra* note 26 (explaining the wide array of options for the United States to achieve through its economic muscle).

28. *See* Henry Morgenthau, Jr., *Bretton Woods and International Cooperation*, 23 FOREIGN AFF. 182, 182 (1945) ("For [Bretton Woods] took the first, the most vital and the most difficult step toward putting into effect the sort of international economic program which will be necessary for preserving the peace and creating favorable conditions for world prosperity."); John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1129 (1946) (stating that one of the goals of Bretton Woods was to "reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations").

29. *See* Weber & Arner, *supra* note 27, at 395 ("The essential underlying theory . . . was based, first, on a system of stable exchange rates."); Eichengreen & Kenen, *supra* note 25, at 13 ("[M]embers of the IMF were required to peg their currencies to gold or to the dollar (which was pegged to gold at [US]\$35 an ounce).").

30. *See supra* note 29 and accompanying text.

31. *See* Weber & Arner, *supra* note 27, at 391 ("While international finance began to reemerge soon after World War II . . . , due to the Bretton Woods' focus on fixed exchange rates . . . , there were no corresponding efforts directed towards its regulation, leaving the matter to domestic law."); *see also* Eichengreen & Kenen, *supra* note 25, at 4 ("[T]he postwar institutional order was not just sturdy but remarkably adaptable. It was sufficiently flexible to cope with unanticipated events and rectify mistakes . . .").

32. *See* COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 29 (2006), *available at*

result of newly-risen competitor financial centers attracting some of the United States' global share of capital-raising. Competitor markets have been restructuring and rebranding themselves into globally appealing entities.³³ For example, the European Union ("EU") has implemented the Financial Services Action Plan ("FSAP"), which attempts to reduce regulatory costs for investors by harmonizing securities law across Europe.³⁴ The change in global finance can be characterized simply: companies looking to raise capital now have a meaningful choice when deciding which state's financial system is best suited for their needs.³⁵ In the past they would have had only one feasible option: to come to the United States.³⁶

But blame for the United States' relative decline does not lie solely in other jurisdictions. Although it would have been unrealistic to expect the United States to maintain indefinitely such a disproportionate and uncontested lead in global finance, certain aspects of the U.S. finance industry have accelerated its slip.³⁷ Fundamentally, the U.S. financial market is no longer

http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf [hereinafter INTERIM REPORT] (showing the decline of capital raised in the United States); Ingo Walter, *Financial Integration Across Borders and Across Sectors: Implications for Regulatory Structures*, in FINANCIAL SUPERVISION IN EUROPE 15, 46 (Jereon J.M. Kremers et al. eds., 2003) (identifying "the current US market share as roughly 65 per cent in global capital-raising and corporate advisory revenues").

33. See INTERIM REPORT, *supra* note 32, at 39–41 (discussing changes in competitor markets such as "an increase in the integrity of and trust in major foreign public markets resulting from more transparency and better disclosure"); see also Walter, *supra* note 32, at 42–43 (explaining that Europe makes less distinction between financial firms and is more unified within national systems).

34. See Luca Enriques & Matteo Gatti, *Is There a Uniform EU Securities Law after the Financial Services Action Plan?*, 14 STAN. J.L. BUS. & FIN. 43–44, 74 (2008) (discussing FSAP and its uniformity goals); European Commission, *Financial Services: Implementing the Framework for Financial Markets*, at 3, COM (1999) 232 Final (May 1999), available at http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf (1999) [hereinafter FSAP] (discussing the European move to a single market and FSAP's goals within that framework).

35. See Langevoort, *supra* note 26, at 193 (citing Dubai, London, and Hong Kong as examples of New York's competitors); see also INTERIM REPORT, *supra* note 32, at x–xi (describing the difference between the past and current options of capital raising firms).

36. See INTERIM REPORT, *supra* note 32, at 29 ("The United States Public Equity Market is Losing Competitiveness to Foreign and Private Markets[.]"); see also Langevoort, *supra* note 26, at 193 ("[C]apital market transactions are increasingly based in London, Hong Kong or Dubai, rather than in New York.").

37. See discussion *infra* notes 39–43 (discussing the importance of retail investors in the United States).

dominant enough to draw undivided attention in spite of regulation more cumbersome than that of its competitors.³⁸

The U.S. investment market is comprised to a unique degree of individual investors, known as retail investors.³⁹ These small and unsophisticated participants have pushed for a different approach to regulation in order to protect themselves.⁴⁰ As a result of this popular participation, the U.S. regulatory regime is much more prone to overreaction in response to financial downturns, as elected officials respond to their constituent investors' fury.⁴¹ Widespread financial market participation often acts to push the U.S. government, acting to protect relatively unsophisticated investors, away from the level of regulation that would best attract firms to the United States.⁴² The end result is that other states see the U.S. system as a labyrinth of high costs.⁴³

38. See Langevoort, *supra* note 26, at 196 (“[T]he United States no longer has rents that can compensate for—and thus mask—any suboptimal regulation.”); see also INTERIM REPORT, *supra* note 32, at x–xi (“U.S. financial markets need to attract business that has a choice, and therefore how our markets are regulated by rules and laws really does matter today.”).

39. See Langevoort, *supra* note 26, at 204 (“But globally, few if any other countries have a similarly retail-driven approach.”); see also Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT’L L.J. 31, 41 (2007) (“Today, more than half of all U.S. households are invested in the stock market, either directly or through mutual funds and pension schemes.”).

40. See Langevoort, *supra* note 26, at 204 (“U.S. securities regulation truly is in a bind. It has been built over the last seventy-five years largely to promote the interests of retail investors, and the political demand for regulatory responses after every scandal reminds us of this.”); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025–26 (2009) (discussing the SEC’s historical focus on the need to protect retail investors).

41. See Langevoort, *supra* note 26, at 204 (“The common theme is relatively easy to spot. U.S. securities regulation truly is in a bind. It has been built over the last seventy-five years largely to promote the interests of retail investors, and the political demand for regulatory responses after every scandal reminds us of this.”); Langevoort, *supra* note 40, at 1025–26 (explaining how SEC rule making can be driven by popular outcry in response to scandals and crashes).

42. See Langevoort, *supra* note 26, at 192, 204 (“[A] demand for tough, intense regulation has been persistent for most of the past decade”); see also Walter, *supra* note 32, at 46 (discussing problems of overregulation and underregulation).

43. See Walter, *supra* note 32, at 41 (“Regulation in the USA is carried out through a crazy quilt of agencies”); see also INTERIM REPORT, *supra* note 32, at x–xi (“U.S. financial markets need to attract business that has a choice, and therefore how our markets are regulated by rules and laws really does matter today.” (emphasis added)). Interestingly, other nations are beginning to follow the U.S. lead of securities ownership by individuals, as opposed to large institutional investors, indicating a possible future change in regulatory attitudes and priorities. See Luigi Guiso et al., *Household Stockholding*

But this does not all lead to a foregone conclusion. The United States may yet recapture definitive control of the global conversation about international finance; there currently exists a dearth of clear leadership in transnational securities enforcement.⁴⁴ Perhaps in response, SEC Chairman Mary Schapiro, in an address to the International Organization of Securities Commissions (“IOSCO”), emphasized that the SEC is attempting to become a more effective securities regulator within the global system.⁴⁵ But in a nod to the rise in importance of other regions, she acknowledged the need for regulators to work together in meeting the challenges created by the ever-increasing internationalization of finance markets.⁴⁶ The United States has been building momentum to find ways to make securities regulation and enforcement more effective at home and, more relevantly, abroad.⁴⁷

in Europe: Where Do We Stand and Where Do We Go?, 18 *ECON. POL'Y* 123, 125 (2003) (“[A] much larger proportion of [European] investors now hold stocks in their portfolio.”); Tafara & Peterson, *supra* note 39, at 41 (“[T]rends in Europe and elsewhere follow this [U.S.] pattern, with retail investors more willing than in the past to put their savings into the capital market, rather than in safer but comparatively low-return bank savings accounts.”).

44. See C. Fred Bergsten, *Managing the World Economy of the Future*, in *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* 341, 349 (Peter B. Kenen ed., 1994) (“Filling the present leadership vacuum is one of the most crucial challenges facing the system as it enters the 21st century.”); Joseph A. Greenwald, *Regionalism, Multilateralism, and American Leadership*, in *THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS*, *supra* note 26, at 270, 281 (“No single power or group of countries has moved up to take the place of the United States.”).

45. See Mary Schapiro, Chairman, SEC, Speech by SEC Chairman at 34th Annual IOSCO [Int’l Org. of Securities Comm’ns] Conference: Improving the Role of the Securities Regulators in a Changing Global Financial System (June 11, 2009), *available at* <http://sec.gov/news/speech/2009/spch061109mls.htm> [hereinafter Schapiro Speech] (“You might say that, in the U.S., we are attempting to do exactly what this panel is slated to discuss: ‘Improving the Role of [a] Securities Regulator in a Changing Global Financial System.’”).

46. See *id.* (discussing the interconnectedness of markets and the new importance of international securities enforcement).

47. See Margaret E. Tahyar, *Final Report of the Securities Law Subcommittee of the Task Force on Extraterritorial Jurisdiction of the International Bar Association*, 2009 *PLI/CORP. L. & PRAC. COURSE HANDBOOK SERIES* 685, 701 (“For the first time, the United States has expressed a serious willingness to explore alternatives to a nationally based securities regulatory regime in favour of greater coordination with foreign regulators . . .”); see also Roberta S. Karmel, *The EU Challenge to the SEC*, 31 *FORDHAM INT’L L.J.* 1692, 1711 (2008) (“The SEC can no longer take a unilateralist approach to securities regulation and assume the U.S. markets will remain the premier capital markets.”).

Challenges to coordination in securities regulation and enforcement may be overcome by favoring less formalized arrangements. The structure of the U.S. government, namely its separation of powers, makes it difficult for the United States to credibly commit itself to binding agreements and initiatives.⁴⁸ These same structural problems threatened U.S. success and participation in the Bretton Woods negotiations and remain relevant today in international cooperation efforts.⁴⁹ Binding arrangements, however, may not be necessary to secure meaningful coordination in the field of securities enforcement.⁵⁰ Non-enforceable alternatives, such as MOUs, may sidestep constitutional and other internal agreement-approval processes.

B. *Current Conditions*

Major financial markets today have significant international participation. For example, in 2005 the New York Stock Exchange (“NYSE”) had a total capitalization of US\$21 trillion dollars, of which over a third came from foreign firms.⁵¹ This percentage has increased over the last few decades, illustrating

48. See H. Bockleman, *The Need for Worldwide Coordination of Economic Policies*, in FINANCING THE WORLD ECONOMY IN THE NINETIES 39, 46 (Jac J. Sijben ed., 1989) (explaining that the “constitutional role of Congress” impairs the ability of the United States to commit itself); Vernon, *supra* note 26, at 52–53 (explaining that the structure of U.S. government encourages the promulgation of ideas, but also that these ideas must run a gauntlet of checks and balances).

49. See Bockleman, *supra* note 48, at 46; Vernon, *supra* note 26, at 52–53 (“The Bretton Woods agreement itself was a race against declining U.S. public opinion and against possible rejection by Congress”); VAN DORMAEL, *supra* note 27, at 286 (observing that Congressional approval required the “most high-powered propaganda campaign in . . . history”); see also John S. Odell, *From London to Bretton Woods; Sources of Change in Bargaining Strategies and Outcomes*, 8 J. OF PUB. POL’Y 287, 303–04 (1988) (discussing the careful considerations that went into securing approval of Bretton Woods in the United States, including “a stunning national campaign to ‘stimulate public interest, crystallize public opinion, and make that opinion vocal.’”).

50. See *infra* Part II.B (discussing the advantages of soft law arrangements).

51. See Tafara & Peterson, *supra* note 39, at 34 (“In terms of market capitalization, these 450 foreign private issuers had a total market capitalization of \$7.9 trillion at the end of 2005, or 37% of the NYSE’s total \$21.2 trillion market capitalization.”); Letter from Mary Yeager, Assistant Sec’y, N.Y. Stock Exch., to Nancy M. Morris, Sec’y, SEC (Mar. 10, 2006), available at <http://sec.gov/rules/proposed/s71205/myeager031006.pdf> (“Currently, there are 453 foreign companies from 47 countries listed on the NYSE . . . represent[ing] over 37% of the total market value of NYSE-listed companies and over \$8 trillion in total global market capitalization.”).

the accelerating international focus of global financial markets.⁵² Correspondingly, U.S. retail investors now go abroad in increasing numbers for their investment needs, in part due to U.S. markets' loss of global competitiveness and considerable opportunities to invest abroad.⁵³

But serious problems with and challenges to the internationalization of financial markets exist. Retail investors can face significant costs in dealing with foreign markets, notably due to the need for different brokering arrangements for each jurisdiction within which the investors operate.⁵⁴ National domestic rules may also impose large burdens on firms attempting to comply with the rules of multiple regulators.⁵⁵ In addition, the same technological advances helping to drive markets towards global reach also make fraud easier and cheaper to perpetrate from ostensibly outside the reach of the victims' regulators and governments.⁵⁶ Finally, as more competitor

52. See John C. Coffee, *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1771 tbl. 1 (2002) (graphically showing the increase in percentage of foreign listings over time); Tafara & Peterson, *supra* note 39, at 34 (noting that the New York Stock Exchange ("NYSE") was domestically focused historically, but now is significantly international).

53. See Karmel, *supra* note 47, at 1711 ("U.S. investors are buying foreign securities in record numbers and foreign issuers no longer believe they need to make offerings in the U.S. to raise capital."); Tafara & Peterson, *supra* note 39, at 48 (noting that "over the past two years, U.S. retail investment abroad has surged dramatically"); see also Tahyar, *supra* note 47, at 699–700 ("The current challenge for national securities regulators and national legislators is how to reshape and modernise their national securities regulatory systems, which were conceived at a time when markets were primarily local, to be helpful to investors (both retail and institutional) and regulated actors already functioning on a global level.").

54. See Tahyar, *supra* note 47, at 699 ("[M]ost national systems make it burdensome and costly for retail investors to invest in foreign securities."); see also George W. Madison & Stewart P. Greene, *TIAA-CREF Response to a Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 99, 101–02 (2007) ("Retail investors currently face high barriers, such as having to use foreign broker affiliates and facing multiple layers of fees, that make direct investment abroad difficult, although not impossible.").

55. See Tahyar, *supra* note 47, at 706 (stating that barriers can exist even if legal rules across borders are consistent); see also Walter, *supra* note 32, at 41 (discussing the different approach and complicated structure of U.S. regulation).

56. See Tafara & Peterson, *supra* note 39, at 35 ("Technology and globalization have also created new opportunities for securities fraud."); see also THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, REPORT ON SECURITIES ACTIVITY ON THE INTERNET III 32–33 (Oct. 2003), available at http://www.abanet.org/intlaw/committees/finance/securities_capital_markets/IOSCOPD159.pdf (explaining the huge

financial markets emerge and gain strength, they are at risk of engaging in a race to the bottom—attempting to capture more firms and capital through progressively permissive regulatory standards.⁵⁷

Alternatively, competition between different states' financial centers may bring some advantages to the global financial system. The struggle for capital-raising income may lead to better oversight coupled with lower costs through regulatory innovation, which would be to the benefit of all market participants.⁵⁸ Additionally, firms may choose to signal their reliability to investors by choosing a more stringent regulatory jurisdiction.⁵⁹

In this environment, states face an important choice of how to structure their regulatory regime. The challenge for regulators, as it has always been, is to balance compliance costs with investor confidence.⁶⁰ The regulator able to reformulate its

informational burdens investors face, even in light of vast informational access through the internet); Schapiro Speech, *supra* note 45 (describing the interconnectedness of financial markets and new challenges); Press Release, International Organization of Securities Commissioners, IOSCO Welcomes 50th Signatory in Fight against Cross Border Market Misconduct, IOSCO/MR/07/2009 (Mar. 31, 2009), *available at* <http://iosco.org/news/pdf/IOSCONEWS141.pdf> (“The success of the MMOU represents a commitment by securities regulators, and their governments, to work together to intensify investor protection and to combat the threat to market integrity posed by the increasing occurrence of cross border market misconduct.”).

57. See INTERIM REPORT, *supra* note 32, at xi (“A regulatory ‘race to the bottom’ will serve no useful competitive purpose.”); see also Tahyar, *supra* note 47, at 705 (“Will the inevitable competition in a world of several financial centres create a regulatory race to the bottom?”).

58. See Tafara & Peterson, *supra* note 39, at 52 (“[H]ealthy regulatory competition exists when different regulators share the same overarching regulatory objectives, but, in implementing comparable regimes, compete with each other to develop the most effective and least costly ways to achieve these goals.”); see also Stravos Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT’L L.J. 447, 492 (2008) (“The dominant center may engage in a race to the top or to the bottom against its competitor to attract more investors from third countries.”).

59. See Bo Harvey, *Exchange Consolidation and Models of International Securities Regulation*, 18 DUKE J. COMP. & INT’L L. 151, 161 (2007) (“Having several competing regimes can provide a useful signaling device to regulators, as companies choose to issue securities where regulation is neither overly burdensome nor so light that investors require a higher return on their investments to compensate them for additional risk.”); Ariel Yehezkel, *Foreign Corporations Listing in the United States: Does Law Matter? Testing the Israeli Phenomenon*, 2 N.Y.U. J.L. & BUS. 351, 358 (2006) (stating considerations for firms when choosing where to list, including the signaling function to investors).

60. See INTERIM REPORT, *supra* note 32, at xi (explaining that a regulator must “manag[e] regulatory costs and burdens while maintaining the confidence of

rules to balance these factors more successfully can pull ahead of other competitors in capturing new global capital.⁶¹ London's Financial Services Authority ("FSA"), discussed below, is generally regarded as having done so.⁶²

1. IOSCO

The International Organization for Securities Commissions is a loose international organization consisting solely of securities regulators.⁶³ An individual securities regulator achieves membership through direct application, without any necessary intervention by other governmental organs.⁶⁴ As of March 2010,

investors"); Tahyar, *supra* note 47, at 699 ("[T]he goals of effective regulation of securities offerings are to balance investor protection against the benefits of capital formation . . ."); SEC, 2004–2009 STRATEGIC PLAN 30, *available at* <http://www.sec.gov/about/secstratplan0409.pdf> [hereinafter SEC STRATEGIC PLAN] ("By providing a formalized structure and government oversight, [U.S. securities] laws carefully balance the desire for open, accessible, and competitive markets with the need to protect investors.").

61. See Langevoort, *supra* note 26, at 192 ("[R]eports have criticized U.S. securities regulation for being unduly cumbersome, and, in part, blamed overregulation for a loss of competitiveness . . ."); see also INTERIM REPORT, *supra* note 32, at xi ("Investors and companies raising capital participate in markets where they feel safe by virtue of effective laws and rules vigorously enforced by knowledgeable, transparent courts and evenhanded, vigilant regulators."). The internal organizational structure of regulators, however, has not been shown to be meaningfully correlated to potential effectiveness. See Tahyar, *supra* note 47, at 710–11 ("[A]cademic research to date has found little difference in the quality of financial market oversight in jurisdictions that have consolidated their financial regulation into unitary agencies . . . as compared to the more traditional divisions of authority found in the United States."); see also Martin Cihak & Richard Podpiera, *Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision* 3 (Int'l Monetary Fund, Working Paper No. 57, 2006), *available at* <http://imf.org/external/pubs/ft/wp/2006/wp0657.pdf> ("[I]ntegrated supervision is generally associated with higher quality and consistency of supervision across supervised institutions, even though a large part of the difference is explained by other variables, mainly income level . . .").

62. See discussion, *infra* notes 90–93 (discussing the Financial Services Authority ("FSA")).

63. See About IOSCO, <http://www.iosco.org/about/> (last visited Aug. 21, 2010) [hereinafter About IOSCO] (stating the objectives of the International Organization of Securities Commissions ("IOSCO")).

64. See About IOSCO, Membership Categories and Criteria, <http://iosco.org/about/index.cfm?section=membership> (last visited Aug. 21, 2010) [hereinafter IOSCO Membership] (discussing IOSCO membership requirements); see also Pamela Jimenez, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 HARV. INT'L L.J. 295, 306 (1990) ("[An] MOU need not be formally ratified by the United States Senate and the corresponding body in the foreign jurisdiction . . ." (quoting Pitt, Hardison & Shapiro, *Problems of Enforcement in the Multinational Securities Market*, 9 U. PA. J. INT'L BUS. L. 374, 435 (1987))). The SEC had been signing MOUs for

IOSCO has 193 members, including national and provincial-level regulators.⁶⁵ IOSCO principally serves as a forum for regulators to discuss differences and, ideally, work out cooperation agreements.⁶⁶ To this end, one of IOSCO's primary drives has been to engage regulators to harmonize their principles of regulation and disclosure rules.⁶⁷

IOSCO requires most participating regulators to sign the IOSCO Multilateral Memorandum of Understanding ("MMOU") as a condition of joining.⁶⁸ As the document itself states, IOSCO designed the MMOU to facilitate "mutual assistance and the exchange of information" between securities regulators.⁶⁹ The MMOU explicitly does not "create legally binding obligations or supersede domestic laws."⁷⁰ The provisions of the MMOU are very similar to those in the SEC's bilateral MOUs, some of which are over two decades old.⁷¹

years when Congress passed an act legitimizing the practice. *See* International Securities Enforcement Cooperation Act ("ISECA"), title II, sec. 202, § 24, 104, Stat. 2713, 2715–16 *amending* 15 U.S.C. § 78x (1990); codified at 15 U.S.C. § 78x(d)(2)(B) (2007) (legitimizing the signing of MOUs by the SEC).

65. *See* IOSCO Members Lists, <http://iosco.org/lists/index.cfm?section=general> (last visited Aug. 21, 2010) (listing ordinary, associate and affiliate members).

66. *See* Tahyar, *supra* note 47, at 707 ("The development of IOSCO, . . . with its intra-regulator discussions and principles, has created a forum in which securities regulators around the world are able to work together on technical issues and agree on principles for regulation."); About IOSCO, *supra* note 63 (stating that a goal of IOSCO is "to cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets").

67. *See* Tahyar, *supra* note 47, at 703 (describing "IOSCO's work on the harmonisation of disclosure and principles for regulators"); *see also* IOSCO, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION ii (2003), *available at* <http://iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> ("Regulation should require disclosure, as set forth under the principles for issuers, which is necessary to evaluate the suitability of a collective investment scheme for a particular investor and the value of the investor's interest in the scheme.").

68. *See* IOSCO Membership, *supra* note 64 ("Applicants for ordinary membership and applicants for associate membership, with primary responsibility for securities regulation in their jurisdictions, need to apply to become signatories to the IOSCO MOU and will need to sign the IOSCO MOU as a condition for being accepted as IOSCO members.").

69. Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ¶ 6(a), May 2002, *available at* <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf> [hereinafter MMOU].

70. *Id.*

71. *Compare* MMOU, *supra* note 69, *with* discussion *infra* Part II.B.1–3 (containing similar provisions).

Like MOUs, the MMOU is also considered soft law. Standards set by IOSCO regarding the MMOU are considered neither international nor national law.⁷² Though noncommittal in nature, the agreement lays out the procedure for one party-regulator (a regulator that has signed an MOU) to make information requests from another, as well as the actions each should undertake to meet the requests.⁷³

IOSCO also supports efforts by pairs of regulators to conclude their own bilateral Memoranda of Understanding. Typically these are supplementary to the MMOU and more tailored to the two regulators' specific legal needs and powers.⁷⁴ Supplemental bilateral MOUs help solve one of the potential problems with the MMOU, namely that party-regulators with different levels of power limit its functional reach.⁷⁵ For example, party-regulators that have the domestic power to compel testimony or disclosure can use a complementary MOU to account for the enforcement circumstances that exist in their respective states better than through the MMOU.⁷⁶

72. See MMOU, *supra* note 69, ¶ 6(a) ("The provisions of this Memorandum of Understanding are not intended to create legally binding obligations or supersede domestic laws."); Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 *BROOK. J. INT'L L.* 883, 885 (2009) ("IOSCO standards do not have the force of either international or national law.").

73. See MMOU, *supra* note 69, ¶ 6(a) ("This Memorandum of Understanding sets forth the Authorities' intent with regard to mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the respective Laws and Regulations of the jurisdictions of the Authorities.").

74. See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT'L L.* 113, 144 (2009) ("IOSCO encouraged the development of a network of bilateral MOUs between national regulators, which could better take into account specific national laws and policies."); IOSCO, *PRINCIPLES FOR MEMORANDA OF UNDERSTANDING* (1991), available at <http://iosco.org/library/pubdocs/pdf/ioscopd17.pdf> (outlining the problems regulators face in creating MOUs).

75. See SEC, *The SEC's Cooperative Arrangements with Foreign Regulators*, http://sec.gov/about/offices/oia/oia_coopfactsheet.htm (last modified May 23, 2008) [hereinafter *Coop Factsheet*] (explaining the SEC's current policy as only signing bilateral MOUs supplemental to the IOSCO MMOU when the other regulator has powers beyond those enumerated in the MMOU).

76. See *id.*; see also Verdier, *supra* note 74, at 144. The MMOU has had to structure itself to be more inclusive. See MMOU, *supra* note 69, ¶¶ 7(b)(iii), 9(d) (containing provisions that are written to be inclusive).

2. United States Competitiveness

The United States is now operating in an environment where its financial centers must compete with global rivals in order to attract businesses and investors. When the United States was the only realistic option for raising capital, the expenses of operating within the United States were perceived simply as costs of doing business. But with the rise of competitor financial centers, firms now have the opportunity to reduce these costs by shopping abroad for their capital-raising needs.⁷⁷ Differences in securities laws between two states can result in significantly different costs for a non-domestic firm picking between those states' financial markets.⁷⁸ Reducing the impact of these differences, or the differences themselves, can give a state a competitive edge.⁷⁹

The United States has some compensatory advantages. Despite difficulties with competitiveness in U.S. markets, the NYSE remains the largest capital market in the world.⁸⁰ Research interviews conducted by Professor Howell Jackson determined that demand for the U.S. dollar as a standard unit of exchange drives some of the capital activities of firms within the United States, thus confirming that the U.S. dollar remains a prominent

77. See Gadinis, *supra* note 58, at 504 (“When a competitor challenges U.S. dominance, however, U.S. firms and investors can no longer be indifferent to the impact of regulation on international financial activity.”); see also Steven Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89, 89 (2007) (“Non-U.S. companies increasingly appear to spurn U.S. stock markets and choose to list their securities abroad.”).

78. See Gadinis, *supra* note 58, at 487 (“Foreign firms with a U.S. presence still face increased regulatory costs due to the divergence between the U.S. regime and their local one.”); Tahyar, *supra* note 47, at 706 (discussing the harmonization and recognition of different nations' securities laws).

79. See Gadinis, *supra* note 58, at 487; Tahyar, *supra* note 47, at 706 (“[T]here may still be significant barriers to access to markets even if national rules are similar or even identical.”).

80. See Davidoff, *supra* note 77, at 98 (“The NYSE . . . is the largest in the world.”); see also Gadinis, *supra* note 58, at 493 (stating that the NYSE is “the largest stock exchange in the world”).

currency.⁸¹ Jackson's interviews also concluded that the United States continues to be considered a prestige market.⁸²

However, U.S. markets also have hurdles to overcome. As already suggested, regulatory standards in the United States are higher than those required by regulators in other jurisdictions.⁸³ U.S. Treasury Secretary Henry Paulson has highlighted the high risk of litigation that firms seeking capital inside the United States face, and the tort system's high levels of inefficiency relative to competitor jurisdictions.⁸⁴ Paulson has also pointed out the byzantine U.S. regulatory structure's focus on to-the-letter compliance with formulated rules, which robs the system of the flexibility to deal with different firms on an individualized basis.⁸⁵ For instance, the regulations applied to each firm under the SEC's jurisdiction are uniform, changing only if the firm is foreign and not a U.S. firm.⁸⁶ Finally, Paulson has noted the role new rules, especially those created by the Sarbanes-Oxley Act, have had in increasing compliance costs for participating firms.⁸⁷

81. See Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe—Part II*, 3 VA. L. & BUS. REV. 207, 225 (2008) (“A separate reason for accessing U.S. capital markets was the desire to obtain . . . a medium of payment for making future acquisitions of firms located in the United States or at least with corporations with substantial numbers of U.S. shareholders.”).

82. See *id.* at 224 (“The top two reasons for accessing U.S. capital markets were financial advantages (improved pricing as a result of additional demand from U.S. investors) and the prestige associated with entering the U.S. market.”).

83. See Sara M. Saylor, Note, *Are Securities Regulators Prepared for a Truly Transnational Exchange?*, 33 BROOK. J. INT'L L. 685, 709 (2008) (“The United States regulators require a much higher standard of disclosure than do their European counterparts.”); see also Henry M. Paulson, Sec'y, U.S. Dep't of the Treas., Remarks by Treasury Secretary Henry M. Paulson on the Competitiveness of United States Capital Markets at the Economic Club of New York, Nov. 20, 2006, available at <http://ustreas.gov/press/releases/hp174.htm> (“Yet recently, in the wake of new, heightened regulatory and listing requirements for all public companies in the U.S., we have witnessed changes in IPO activity.”).

84. See Paulson, *supra* note 83 (“A sophisticated legal structure . . . is necessary to protect investors, businesses, and consumers . . . , [b]ut our legal system has gone beyond protection.”).

85. See *id.* (stating that the SEC regulatory scheme is prescriptive and should be more flexible).

86. See Daniel A. Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies*, 17 NW. J. INT'L L. & BUS. 30, 31 (1996) (“[T]he rules applicable to U.S. companies are also noted where they differ in substance.”); Davidoff, *supra* note 77, at 151 (“The U.S. listings market is subject to one-size-fits-all regulation which varies only if the issuer is a domestic or non-domestic one.”).

87. See Paulson, *supra* note 83 (explaining the effect of new rules in the context of Sarbanes-Oxley).

The impact of these factors shows in the numbers. In 2005, for the first time, only six percent of capital raised globally by firms operating outside their home jurisdiction was raised in the United States.⁸⁸ In the same year, only one of the top twenty-five initial public offerings was offered within the United States.⁸⁹

3. London's Financial Services Administration

The FSA in the United Kingdom provides a useful example of a new approach to regulatory objectives and the kind of competition the United States is facing. In stark contrast to Secretary Paulson's statements about the U.S. regulatory regime, the Director of Enforcement at the FSA has characterized the FSA as "innovative and highly effective."⁹⁰ The FSA's philosophical regulatory approach acknowledges that failures are impossible to eliminate, and thus the agency focuses on "big-ticket" dangers.⁹¹ The FSA avoids imposing new rules until after an attempt to solve the problem through the market.⁹²

88. Davidoff, *supra* note 77, at 112 ("For example, in 2005, 352 companies issued equity outside their home markets for the first time, raising a total of \$92 billion. Only six percent of this equity, or \$4.6 billion, was raised on the U.S. public markets."); *see also* INTERIM REPORT, *supra* note 32, at 29 ("[I]n 2005, approximately one in every 20 [IPO] dollars was raised in the United States."). One criticism is that U.S. regulation is a one-size-fits-all approach. *See* Davidoff, *supra* note 77, at 151 ("The U.S. listings market is subject to one-size-fits-all regulation which varies only if the issuer is a domestic or non-domestic one."); Paulson, *supra* note 83.

89. *See* INTERIM REPORT, *supra* note 32, at 30 ("Twenty-four of twenty-five of the largest IPOs in 2005 and nine of the ten largest IPOs in 2006 to date took place outside the United States."); *see also* Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1435 (2008) ("Instead, foreign exchanges have developed liquid markets of their own, and now consistently attract over 90 percent of the world's initial public offerings (IPOs) and half of all investor activity.").

90. Margaret Cole, Dir. of Enforcement, Fin. Serv. Auth. [FSA], *The U.K. FSA: Nobody Does it Better?*, Lecture at the A.A. Sommer Jr. Lecture on Corporate, Securities, & Financial Law, in 12 FORDHAM J. CORP. & FIN. L. 259, 267 (2007) ("But I would still argue that our model in the United Kingdom is an innovative and highly effective one."). *See generally* Iain MacNeil, *The Future for Financial Regulation: The Financial Services and Markets Bill*, 62 MOD. L. REV. 725 (1999) (reviewing the structure and purpose of the FSA).

91. *See* Cole, *supra* note 90, at 269 (discussing the "non-zero-failure regime"); THE TREASURY COMM., FSA, RECENT TURBULENCE IN GLOBAL FINANCIAL MARKETS AND NORTHERN ROCK'S LIQUIDITY CRISIS (2007), ¶ 6, *available at* <http://www.fsa.gov.uk/pubs/other/tsc.pdf> ("In competitive markets there will be failures; as we have said in the past, it would be impossible—and, in any event, undesirable to seek to eliminate all risk from financial markets and to operate a zero-failure regime.").

92. *See* Cole, *supra* note 90, at 269 ("Our philosophy is that only after market solutions have been exhausted should regulatory initiatives be contemplated."); FSA, A

Outcomes, rather than process, are the priority for the FSA, giving it the flexibility the SEC is struggling to achieve.⁹³ By structuring normative guidelines, the FSA is able to tailor its approach to specific situations, while the SEC proscribes rules that mandate compliance even if the particular needs of a transaction or situation may be less than those required.⁹⁴

4. SEC Rules

Many SEC rules are relevant to U.S. and foreign firms seeking to utilize U.S. financial markets. SEC Rule 144A and the Sarbanes-Oxley Act, in particular, have created very important considerations for foreign firms seeking to raise capital within the United States. Each requirement has significantly altered how foreign companies view the capital-raising potential of the U.S. market and their deliberations about whether to enter it.

Promulgated in order to reduce the barriers to foreign firms seeking to raise capital in the United States,⁹⁵ Rule 144A permits foreign issuers to sidestep SEC registration requirements by limiting the sale of their offering to institutional, and thus presumably sophisticated, buyers.⁹⁶ The securities offered, however, must not be the same as the issuer's other publicly held securities.⁹⁷ Rule 144A offerings are now non-U.S. firms'

GUIDE TO MARKET FAILURE ANALYSIS AND HIGH LEVEL COST BENEFIT ANALYSIS (2006), available at http://www.fsa.gov.uk/pubs/other/mfa_guide.pdf (discussing the importance of market failure in the FSA's regulatory outlook).

93. See Cole, *supra* note 90, at 270 (“[T]he FSA is an advocate for principles-based regulation . . . [with a] focus . . . on the outcomes rather than on the prescription of detailed rules.”); Paulson, *supra* note 83; see also Stephanie Ben-Ishai, *Sarbanes-Oxley Five Years Later: A Canadian Perspective*, 39 *LOY. U. CHI. L.J.* 469, 469 (2008) (“[T]he UK approach places emphasis on normative guidelines rather than detailed rules.”).

94. See Cole, *supra* note 90, at 270; Paulson, *supra* note 83; see also Ben-Ishai, *supra* note 93, at 469.

95. See Private Resales of Securities to Institutions, 17 C.F.R. § 230.144A (2009) (listing the requirements for a 144A listing); Jackson & Pan, *supra* note 81, at 246 (“[W]hen the SEC adopted Rule 144A in April 1990, the Commission intended to make it easier for foreign issuers to enter the U.S. markets.”).

96. See 17 C.F.R. § 230.144A (requiring that the securities be “offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer.”); Jackson & Pan, *supra* note 81, at 212 n.4 (“Rule 144A offers publicly-traded foreign issuers greater leeway in raising equity from large institutional investors located in the United States than is available to publicly traded U.S. domestic issuers.”).

97. See 17 C.F.R. § 230.144A (listing the qualifications for exemption).

preferred method of raising capital in the United States.⁹⁸ The potential effect of excluding retail investors from these offerings is in large part reduced because demand for foreign securities comes mainly from institutional investors—no doubt partially a result of the high costs individual retail investors face in such transactions.⁹⁹

Despite its liberal treatment of non-U.S. issuers, Rule 144A does not exempt issuers utilizing the rule from all other SEC requirements.¹⁰⁰ Firms taking advantage of Rule 144A remain within the umbrella of the SEC's enforcement provisions for proscribed conduct regarding investors.¹⁰¹ In particular, firms remain subject to the SEC's antifraud provisions.¹⁰² One such important rule, Rule 10b-5, is a wide-reaching antifraud regulation that prohibits using any "means or instrumentality of interstate commerce, . . . mails or . . . any facility of any national securities exchange[]" to commit fraud or release false material facts.¹⁰³

Conscientious firms can entirely avoid interference from the SEC. Regulation S specifies that a foreign firm is not subject to the U.S. Securities Act of 1933¹⁰⁴ when the firm's offering is made outside the United States and is not directed at U.S. citizens, provided that such securities are not resold to U.S. citizens for a

98. See INTERIM REPORT, *supra* note 32, at 46 (stating that in 2005, over ninety percent of all foreign initial public offering capital raised in the U.S. was through Rule 144A exemptions); see also Jackson & Pan, *supra* note 81, at 244 (showing in Table 3 the growing importance of Rule 144A offerings).

99. See Jackson & Pan, *supra* note 81, at 232 ("[T]he demand for foreign shares in the United States was predominantly from institutional investors, whether sold in public offerings or in Rule 144A transactions."); see also Tahyar, *supra* note 47, at 699 (stating that "most national systems make it burdensome and costly for retail investors to invest in foreign securities").

100. See 17 C.F.R. § 230.144A ("This section relates solely to the application of section 5 of the Act and not to antifraud or other provisions of the federal securities laws.").

101. See Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2009) (making it unlawful for any person to use an instrument of interstate commerce for fraud in a securities transaction); 17 C.F.R. § 230.144A.

102. See 17 C.F.R. § 230.144A.

103. *Id.* § 240.10b-5.

104. See Gary M. Brown, *Securities Act Registration Exemptions*, 1756 PLI/CORP. 209, 240 (2009) (discussing Regulation S as a safe harbor provision); Harvey, *supra* note 59, at 159 (discussing Regulation S as a safe harbor provision).

year.¹⁰⁵ Transactions meeting these requirements are functionally exempt from the SEC's registration requirements.¹⁰⁶ Firms falling under this regulation avoid both the risk of litigation in the United States and the substantial costs of registering securities with the SEC.

The Sarbanes-Oxley Act¹⁰⁷ was passed in 2002 in response to the corporate scandals surrounding Enron, Worldcom, and Arthur Andersen.¹⁰⁸ The Act contains broad provisions requiring non-U.S. firms to comply with its measures.¹⁰⁹ For example, section 106 requires that non-U.S. accounting firms, if they undertake the corporate governance work specified in the Act, must comply with the same standards as U.S. accounting firms.¹¹⁰

105. See Brown, *supra* note 104, at 240 ("The regulation is complex, but one of its main features is that in the kind of transaction described, the securities may not be reoffered or resold to U.S. persons for one year."); Harvey, *supra* note 59, at 159 ("Regulation S provides safe harbors for issuers in response to the question of whether it is appropriate to require an issuer to register its securities under the Securities Act of 1933—even though there would be jurisdiction to do so—when it offers those securities exclusively to non-U.S. citizens in offshore transactions.").

106. See Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933, 17 C.F.R. § 230.901-05 (2007) (detailing the Regulation S exemption); see also Brown, *supra* note 104, at 240 ("[Regulation S] is an interpretive regulation by which one can determine if a particular offshore transaction is subject to the Securities Act."); Harvey, *supra* note 59, at 159 ("Regulation S provides safe harbors for issuers when it offers those securities exclusively to non-U.S. citizens in offshore transactions."). In the case of non-U.S. firms offering securities to non-U.S. citizens outside of the United States, it is difficult to see how the United States could obtain jurisdiction anyway. See *infra* notes 152–184 and accompanying text (discussing U.S. extraterritorial jurisdiction).

107. Sarbanes-Oxley Act of 2002, 17 U.S.C. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).

108. See Saylor, *supra* note 83, at 707 ("In the wake of corporate scandals of the 1990s, the U.S. Congress amended the laws governing corporate governance and disclosure . . . by regulated companies to increase investor confidence."); see also Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *YALE L.J.* 1521, 1591 (2005) (pointing out that Sarbanes-Oxley is a prime example of poor legislative product that comes out of rushed Congressional action responding to emergency situations).

109. See Ben-Ishai, *supra* note 93, at 471 ("SOX [Sarbanes-Oxley Act] has an extraterritorial application in that it applies to all publicly traded companies on U.S. stock exchanges, notwithstanding their status as cross-listed foreign issuers."); Saylor, *supra* note 83, at 708 ("Sarbanes-Oxley, enacted hastily in response to financial scandals, includes sections which apply to foreign issuers without consideration as to whether it was appropriate to do so.").

110. See Sarbanes-Oxley Act of 2002, 17 U.S.C. Pub. L. No. 107-204, at § 106(a)(1), 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).

Of all the provisions of Sarbanes-Oxley, however, section 404 is among the most notorious.¹¹¹ The section requires the corporate management of a securities-issuing firm to attest to the effectiveness of its internal requirements for financial reporting.¹¹² Section 404 further requires that an independent auditor, in the form of a registered public accounting firm, report on the statements made by the corporate management.¹¹³

The benefits of section 404 include the reduction of information costs for investors and increased efficiency within companies' internal reporting systems.¹¹⁴ But although it has had benefits, in the final calculation, section 404 has been detrimental to U.S. competitiveness. It has drastically increased compliance costs for foreign firms.¹¹⁵ Average per-firm costs of compliance ended up thirty-five times higher than initial estimates.¹¹⁶ The Committee on Capital Markets Regulation,

111. See INTERIM REPORT, *supra* note 32, at 115 (“The main policy debate over SOX, however, is focused on the implementation of a single provision, Section 404 . . .”); see also Ben-Ishai, *supra* note 93, at 483–84 (“The current focus on amending or rolling back SOX is centered upon section 404, which deals with internal controls.”).

112. See Sarbanes-Oxley Act of 2002, 17 U.S.C. Pub. L. No. 107-204, at § 404(a), 116 Stat. 745 (codified in scattered sections of 15 U.S.C.) (listing internal assessment controls in SOX).

113. See *id.* § 404(b) (“With respect to the internal control assessment required by subsection (a), each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement.”).

114. See INTERIM REPORT, *supra* note 32, at 119 (“Section 404 control reviews appear to have acted as a catalyst for companies to improve the efficiency of financial management”); see also Ben-Ishai, *supra* note 93, at 478 (explaining the benefits of SOX as being “more efficient financial reporting processes and improved management understanding of corporate risks”).

115. See INTERIM REPORT, *supra* note 32, at 115 (“There is widespread concern that the compliance costs of Section 404 [of SOX] are excessive.”); see also Davidoff, *supra* note 77, at 132 (“[T]he increased level of regulation imposed on non-U.S. issuers by the Sarbanes-Oxley Act has been qualitatively significant.”); Ben-Ishai, *supra* note 93, at 471 (stating that Sarbanes-Oxley is seen “as imposing higher costs than benefits”). Other jurisdictions considered implementing reforms similar to Sarbanes-Oxley, but ultimately rejected the idea. See Ben-Ishai, *supra* note 93, at 480 (“Multilateral Instrument 52-111, the Canadian equivalent of section 404 of SOX, was not implemented . . .”); Saylor, *supra* note 83, at 709 (“Nevertheless, Sarbanes-Oxley and similar European regulations are not quite the same. The United States regulators require a much higher standard of disclosure than do their European counterparts.”).

116. See INTERIM REPORT, *supra* note 32, at 126 (showing that the SEC's initial estimate was thirty-five times lower than the actual cost of compliance); Cost Estimates of Sarbanes-Oxley Compliance on the Rise, <http://my.advisor.com/doc/14592> (last visited

designed to explore methods of improving U.S. financial markets' competitiveness, has concluded that a more efficient implementation of section 404 is necessary—in particular one which does not subject foreign firms to duplicate regulation when they already face requirements similar to section 404 in their home states.¹¹⁷

Despite the problems within its financial markets, the United States remains a significant and important actor in international finance. If the United States can make itself more attractive compared to its competitor jurisdictions, the trend towards investing through U.S. competitors may be slowed, or even reversed. This can be achieved by reducing the barriers firms and investors face when operating within the United States, including lessening the impact of regulatory differences and expanding effective enforcement transnationally.

C. *Feasibility of International Cooperation*

The field of securities regulation presents serious issues regarding international cooperation. Specific shared norms are infrequent in securities regulation, but securities enforcement seems to be an area ripe for coordination.¹¹⁸ The structure of the markets in question—here international financial markets—changes the likelihood and effectiveness of attempts to coordinate between states. IOSCO is not the only organization active in this field; in 2004 the Organization for Economic Development put together standards for corporate governance, including disclosure.¹¹⁹

Aug. 21, 2010) (“The cost estimates of Sarbanes-Oxley Section 404 compliance rose 62 percent in six months . . .”).

117. See INTERIM REPORT, *supra* note 32, at 131, 133 (“The Committee would not apply Section 404 to foreign firms that could demonstrate that they were subject to equivalent home country internal control regulation.”).

118. See Hannah L Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 264 (2006) (“[T]here are fewer shared norms in the area of securities regulation.”); Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT’L & COMP. L. REV. 403, 462 (2006) (“[T]he rapid integration of financial markets suggests the utility of harmonizing securities regulation and corporation law.”).

119. See Buxbaum, *supra* note 118, at 264 (discussing international accounting principles); see also OECD, OECD PRINCIPLES OF CORPORATE GOVERNANCE 9 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> (2004) (discussing the

1. Market Structures

The way a particular market is structured changes the arrangement of the incentives of its participants and affects the prospects for meaningful cooperation within it. Stravos Gadinis, a post-graduate fellow at Harvard Law School specializing in international finance and securities regulation, has outlined four types of international market structures and what they imply for the likelihood of cooperation: (1) a centralized market under strong dominance; (2) a dispersed market under strong dominance; (3) a centralized market with contested dominance; and (4) a dispersed market with contested dominance.¹²⁰ As transnational finance moves away from a U.S.-dominated and centered model into a more pluralistic structure, where the global market ultimately ends up is relevant to the prospects and structure of any potential cooperative scheme. The first and third market models are relevant to the changes currently taking place in international finance.

A centralized market under strong dominance, the first model, is akin to a system where only one exchange of meaningful size exists globally.¹²¹ Such a dominant center is not motivated to respond to the desires of foreign entities.¹²² In a strongly dominated and centralized market, foreign governments expect to structure their own rules to make it easier for their firms to operate with the dominant center.¹²³ Thus, the standards of non-dominant states tend to converge on the standards of the dominant center.¹²⁴ The past U.S. dominance in the global financial market post-World War II is a model example of such a centralized market with strong dominance.¹²⁵

promulgation of the OECD corporate governance standards); Robbins, *supra* note 118, at 463 (discussing the OECD principles of corporate governance).

120. See Gadinis, *supra* note 58, at 451–52 (explaining the meaning of different dimensions of market structures).

121. See *id.* at 470–73 (discussing centralized markets under strong dominance generally).

122. See *id.* at 473 (discussing the unlikelihood of success of foreign firms lobbying the dominant center).

123. See *id.* at 474 (“Local governments that wish to minimize compliance costs for their constituents are more likely to accept ‘coordination’ with a set of rules very close, if not identical, to the dominant center’s regime.”).

124. See *id.*

125. See *id.* at 475 (“Up to the early 2000s, U.S. dominance in the primary securities markets was strong. Foreign companies gravitated toward U.S. markets to take advantage

A more recent example from a related field illustrates how the theory of converging standards plays out in practice. European states attempted to force the United States to allow more Europe-friendly accounting standards to be applied to foreign companies seeking to raise capital in the United States.¹²⁶ However, the United States refused to acquiesce and the international accounting standards ended up close to existing U.S. standards, thus demonstrating that the U.S. retains some muscle in international finance.¹²⁷

In a centralized market with contested dominance, the third model, competitors rise to challenge an old hegemon, forcing investors and firms to choose between established financial centers.¹²⁸ In situations like these, there is a danger of a race to the bottom—that competing financial centers could attempt to attract more investors and capital through progressively permissive regulation.¹²⁹ Alternatively, the competing centers could respond with a race to the top to capture more of the global financial market through more innovative regulation—regulation that is more effective while lowering costs.¹³⁰ Ultimately, cooperation is unlikely as governments seek to protect their own center from competition and retain their domestic market by making regulations incompatible with their competitors' regulations.¹³¹ Governments are more likely to bow to pressure from powerful domestic groups controlling the domestic centers than to the needs of foreign entities.¹³² As more

of their deeper liquidity and lower cost of capital, often combining a public offering with a listing on a U.S. stock exchange.”).

126. *See id.* at 479 (“The European Commission hoped that under the political weight of twenty-five jurisdictions, the IASB would be able to push for accounting solutions preferable to European companies otherwise disadvantaged by U.S. GAAP.”).

127. *See id.* (“In the end, the United States did not yield in its insistence that the differences between U.S. GAAP and IFRS be reduced to a minimum (i.e., that IFRS obtain virtually the same content as U.S. GAAP) before the reconciliation requirement could be dropped.”).

128. *See id.* at 490 (“In centralized markets, competition between the dominant center and a new venue leads to increased polarization.”).

129. *See id.* at 492 (“The dominant center may engage in a race to the top or to the bottom against its competitor to attract more investors from third countries.”).

130. *See id.*

131. *See id.* (“Eventually, the dominant center’s government will maintain regulatory barriers that increase the costs investors from the dominant center face when seeking to access the competitor’s market.”).

132. *See id.* (“Thus, the groups opposing coordination and seeking protection from the dominant center’s government are likely to have greater domestic influence; these

financial centers arise and develop to compete with the United States, global capital markets correspond more and more closely to this model.¹³³

These different types of markets warrant different approaches to international cooperation. It appears that the international financial system is drifting from a centralized market with uncontested dominance to one with contested dominance—financial centers are clearly defined and competing with each other to capture new investment. As the uncontested dominance of the United States fades, governments and regulators operating within this environment have to overcome increasing incentives to not cooperate. In the particular case of financial centers within a state, pressure for more stringent and internationally incompatible regulation may come from retail investor voters—particularly salient in the United States—rather than the finance industry itself, since their income is dependent on attracting investors and firms seeking to raise capital. Regulators seeking to cooperate across national borders need to balance these two forces.

2. Other Considerations

Cooperation can be affected by a wide range of other factors. The perception of the motivations behind attempts to coordinate can make actors balk at participation. Differing norms between jurisdictions and domestic pressures may also either inhibit or promote cooperation.

International sensitivity about the real motivations behind coordination can hinder its prospects. The proliferation of a regulatory standard may be an expression of a state's hegemony, or at least be perceived as such, and make other states uneasy about participating.¹³⁴ This apprehension is born out of concern

entities are typically cohesive and well-resourced interest groups perceived as central to the local economy.”).

133. *See id.* at 494 (“Although capitalization data confirm the preeminence of U.S. markets in terms of size, developments in foreign stock exchanges during the 1990s have allowed them to contest the dominance of U.S. market operators.”); *see also supra* notes 77–89 and accompanying text (discussing American competitiveness).

134. *See* Buxbaum, *supra* note 118, at 303–04 (“[C]oncerns of observers . . . do speak to continued reservations regarding the appropriateness of applying international regulatory norms in domestic courts—particularly . . . if both the source of the norms and their enforcement are centralized in one country.”); Verdier, *supra* note 74, at 150

that one state's norms will be imposed on other states through the creation of international law in a dominated forum.¹³⁵ For example, one of IOSCO's successes has been the development of a standard for disclosure in international offerings.¹³⁶ However, this standard is very similar to the SEC's pre-existing requirements.¹³⁷ Such similarities are taken to demonstrate U.S. influence in the global capital market, rather than a genuine international consensus on disclosure.¹³⁸

Irreconcilably different norms can also sink attempts at cooperation.¹³⁹ For example, IOSCO's successes have come in areas, such as fraud prevention, where the domestic preferences of the involved states are closely aligned.¹⁴⁰ In other areas, such as

("The form was in fact virtually identical to the SEC's existing form for private foreign issuers, and its adoption reflected little more than an exercise of U.S. market power in setting global disclosure standards.").

135. See Buxbaum, *supra* note 118, at 303–04 (discussing the appropriateness of applying one state's norms to another state through the creation of international law); Verdier, *supra* note 74, at 150 ("[The disclosure form's] adoption reflected little more than an exercise of U.S. market power in setting global disclosure standards.").

136. See Robbins, *supra* note 118, at 462 (stating that "[o]ne of the IOSCO's key projects has been the formation of a core set of disclosure standards for nonfinancial statement portions of a proposed international offering document," which the SEC adopted); Verdier, *supra* note 74, at 150 ("In 1998, IOSCO adopted a standardized form intended to be used by its members as a uniform standard for nonfinancial disclosure by foreign firms raising capital in their jurisdiction."). See generally ISOSCO, INTERNATIONAL DISCLOSURE STANDARDS FOR CROSS-BORDER OFFERINGS AND INITIAL LISTINGS BY FOREIGN ISSUERS (1998), available at http://www.sec.gov/about/offices/oia/oia_corpfin/crossborder.pdf (containing IOSCO's disclosure standards).

137. See Verdier, *supra* note 74, at 150 ("The [IOSCO disclosure] form was in fact virtually identical to the SEC's existing form for private foreign issuers . . ."); see also J. William Hicks, *Harmonization of Disclosure Standards for Cross-Border Share Offerings: Approaching an "International Passport" to Capital Markets?*, 9 IND. J. GLOBAL LEGAL STUD. 361, 372 n.27 (2002) (stating that "the SEC was a major participant" in IOSCO efforts to put out the disclosure standards, thus influencing outcome).

138. See Verdier, *supra* note 74, at 150 (stating that "[the disclosure form's] adoption reflected little more than an exercise of U.S. market power in setting global disclosure standards"); see also Hicks, *supra* note 136, at 372 n.27 (stating that "the SEC was a major participant" in IOSCO efforts to put out the disclosure standards, thus influencing the outcome).

139. See Buxbaum, *supra* note 118, at 295 (explaining the discrepancy between domestic norms and the effect on cooperative prospects, including over whether "private lawsuits may be inappropriate means to pursue public regulatory goals"); Verdier, *supra* note 74, at 126 ("If the participants in TRNs were free to disregard domestic preferences in their states and pursue globally optimal policies, distributive and enforcement problems would not hinder international regulatory cooperation.").

140. See Verdier, *supra* note 74, at 143 ("IOSCO has been largely successful at coordinating securities enforcement among developed countries because they share strong domestic preferences in preventing transnational securities fraud."); Thomas D.

dealing with offshore financial havens, IOSCO has met serious difficulties in convincing such states to give up lucrative practices.¹⁴¹ In general, large developed states have been more ready participants in cooperative schemes, to a significant extent because capital markets comprise such large and advanced parts of their economies.¹⁴²

The domestic forces acting on securities regulators are also important in shaping their outlook and actions. Even as markets become ever more international, drawing investors from around the world, securities regulators remain domestic entities limited by statutory mandates.¹⁴³ This link to the legislative process and the constituent pressures acting on legislators can undermine attempts by regulators to exercise independence through unilateral regulatory reform.¹⁴⁴ Concerns about the ability of partner regulators to resist political pressure to deviate from informally agreed upon standards make even strongly independent regulators hesitant to enter into such agreements with weaker counterparts.¹⁴⁵

Willett, *National Macroeconomic Policy Preferences and International Coordination Issues*, 8 J. PUB. POLICY 235, 235 (1988) (“It is becoming increasingly clear, however, that domestic political pressures frequently have a major impact on national macroeconomic policy making.”).

141. See Verdier, *supra* note 74, at 143 (“IOSCO faced considerable resistance in its efforts to secure enforcement cooperation from offshore financial centers (“OFC”s), which have strong domestic incentives to protect their financial industry through strict privacy laws and lax securities fraud enforcement.”); Willett, *supra* note 140, at 235.

142. See Verdier, *supra* note 74, at 146 (stating that “[IOSCO’s] success can be accounted for by these states’ parallel domestic preferences for effective securities enforcement[,]” especially when both markets are highly developed); Willett, *supra* note 140, at 235.

143. See Davidoff, *supra* note 77, at 124 (“[T]he interests of securities regulators still tend to be local.”); see also Verdier, *supra* note 74, at 126 (“[Regulators] are instead politically and legally accountable to numerous domestic constituencies, including not only their superiors in the executive branch but also the legislature, the courts, the media, and the public.”).

144. See David A. Singer, *Capital Rules: The Domestic Politics of International Regulatory Harmonization*, 58 INT’L ORG. 531, 532–35, 537–44 (2004) (discussing the “win-set” for regulators as a range of action that will satisfy a range of both competitiveness and confidence in the market acceptable to legislators without them intervening); see also Verdier, *supra* note 74, at 127 (“[P]oliticians exercise significant influence over the administrative process.”).

145. See Singer, *supra* note 144, at 532–35, 537–44 (talking about a restricted “win-set” for regulators as a range of agreement that will be acceptable enough to legislators to prevent them from intervening, which could negate commitments made unilaterally by the regulator); Verdier, *supra* note 74, at 127 (“Even a powerful and independent regulator like the Federal Reserve might hesitate to commit itself to a demanding

Attempting to reconcile different norms among international actors raises the costs of international coordination. Domestic constraints on actors and suspicion of the motivations behind international efforts may scuttle attempts to cooperate. MOUs sidestep many of these problems by being very narrow—really only a framework for cooperation—and by being nonenforceable, thus encouraging otherwise hesitant regulators to sign by minimizing the potential effect of their provisions. Even when parties have entered into an MOU in part because it is unenforceable, the existence of the agreement facilitates more cooperation than would otherwise occur, creating a surprisingly effective arrangement between diverse regulators.

3. A European Union Development

The EU has undertaken an ambitious project to substantially harmonize aspects of the securities laws of its Member States. The Financial Services Action Plan presented uniform rules to accelerate the integration of financial markets across the EU.¹⁴⁶ In particular, FSAP's established standard disclosure requirements allow securities that pass muster in one EU jurisdiction to travel freely within the EU.¹⁴⁷

However, the plan is not completely comprehensive. FSAP allows individual states to determine which rules to apply when the securities in question are not publicly offered, or are below a

international standard if it suspected that some of its foreign counterparts would be unable to resist domestic political pressures to breach that standard.”).

146. See FSAP, *supra* note 34 (discussing the European move to a single market and FSAP's goals within that framework); Council Directive No. 2003/71, art. 1, 2003 O.J. L 345/64, at 68 [hereinafter Prospectus Directive] (“The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.”); see also Enriques & Gatti, *supra* note 34, at 43 (“The main purpose of the FSAP was to provide the legal bedrock for EU financial markets’ integration through uniform rules that, while providing a high level of investor protection, at the same time lower the costs that otherwise stem from the joint application of differing Member States’ legal regimes to cross-border transactions.”).

147. See FSAP, *supra* note 34, at 12 (discussing the European move to a single market and FSAP's goals within that framework); Enriques & Gatti, *supra* note 34, at 54 (“The Directive gives issuers a ‘passport’ to allow them to raise capital within the European borders on the basis of a single prospectus in order to reduce EU issuers’ overall transaction costs.”).

certain aggregate value threshold.¹⁴⁸ Finally, national regulators are left with the ultimate regulatory power over securities emanating from their jurisdictions, regardless of where they travel under FSAP's umbrella.¹⁴⁹ This arrangement, as a concept, is beyond the role of an MOU, but serves as a useful example of successful—and binding—coordination in transnational securities markets.¹⁵⁰

Developments in international finance have been rapid and will likely continue in direction, if not in strength. The SEC and other regulators have acknowledged the importance of this growing field and regulatory innovation within it.¹⁵¹ These important changes require a new, more cooperative approach to international securities regulation. Although the U.S. global market share has declined, the United States retains the political and economic muscle to take the lead in the global discussion about international securities regulation cooperation. Regulatory changes within the United States and other pressures, including IOSCO's cooperative efforts, may yet negate some aspects contributing to the trends reducing U.S. influence and attractiveness. Understanding market structures, as well as other pressures and considerations acting on regulators and governments, contributes to structuring international cooperation in a way most likely to be successful. MOUs respond to these issues and are structured to succeed within their environment.

148. See Prospectus Directive, *supra* note 146, No. 2003/71, art. 1, 2003 O.J. L 345/64, at 68 (“Notwithstanding paragraph 2(b), (d), (h), (i) and (j), an issuer, an offeror or a person asking for admission to trading on a regulated market shall be entitled to draw up a prospectus in accordance with this Directive when securities are offered to the public or admitted to trading.”); see also Enriques & Gatti, *supra* note 34, at 56 (“[L]ocal legislatures appear to be able to apply the harmonized regime or even their own idiosyncratic national provisions also to transactions that, as a matter of EC law, do not constitute a public offer.”).

149. See Prospectus Directive, *supra* note 146, No. 2003/71, art. 13, 2003 O.J. L 345/64, at 76 (stating that prospectuses must be approved by home state regulator before they can disseminate to the market); see also Enriques & Gatti, *supra* note 34, at 58 (stating that the home regulator has jurisdiction regardless of where the securities it approved are traded within the EU).

150. See *supra* notes 146–149 and accompanying text (discussing the scope and measures of FSAP, including disclosure standards).

151. See *supra* note 45 (discussing SEC changes).

II. *INTERNATIONAL ENFORCEMENT AND THE MOU FRAMEWORK*

The SEC has been able to take advantage of U.S. courts' eagerness to exert extraterritorial jurisdiction in prosecuting financial misconduct abroad. However, foreign secrecy laws continue to be a difficult hurdle for parties and courts seeking or compelling disclosure from non-U.S. jurisdictions. The MOU helps overcome these challenges and targets others, including the development of effective capital markets and regulation within other states. Access to information by the SEC seems to have greatly increased as a result of its MOU agreements with foreign regulators. As a soft-law mechanism, the MOU is not binding, but is instead structured in such a way as to acknowledge and accommodate potential conflicts between regulators. In this capacity, it is a framework for information-exchange cooperation and creates expected methods of interaction and communication between regulators.

In order to further the understanding of MOUs as a cooperative framework, Part II.A examines the state of U.S. extraterritorial jurisdiction and disclosure jurisprudence. Part II.B studies the actual form of the MOU, in its enforcement cooperation, regulatory cooperation, and technical assistance forms. That information is then applied to a simple economic-political game in Part II.C to extract its potential usefulness as a procedural structure. Part II.D briefly discusses some other states that have signed MOUs. Lastly, Part II.E looks at U.S. statutes related to MOUs and their confidentiality provisions.

A. *Reaching Out: Extraterritorial Judicial Considerations*

The SEC has expressed its own mission as: (1) protecting investors; (2) maintaining fair, orderly, and efficient markets; and (3) facilitating capital formation.¹⁵² In carrying out this mandate, however, the SEC has increasingly faced conduct that occurs overseas.¹⁵³ Extraterritorial jurisdiction and

152. See SEC STRATEGIC PLAN, *supra* note 60, at 4 (detailing the mission of the SEC).

153. See *supra* notes 77–89 and accompanying text (discussing American competitiveness and changes in global investment markets that expose U.S. entities to more transnational investment).

extraterritorial disclosure are two tools U.S. courts have utilized to deal with foreign defendants.

U.S. jurisdiction theory is fundamentally based on territoriality—the idea that a state has authority only over that which occurs within its own borders.¹⁵⁴ Comity, a connected concept, holds that a state should not interfere with the actions of another state.¹⁵⁵ These notions, however, have proven somewhat incompatible when dealing with the new kinds of transnational issues facing the SEC and other enforcement bodies.¹⁵⁶

1. Extraterritorial Jurisdiction in a Securities Context

When the SEC brings securities violation actions against foreign defendants, it must meet U.S. courts' jurisdictional standards—the defendant's conduct must have been subject to U.S. law. Courts in the United States only apply U.S. laws outside of U.S. borders when Congress has intended to provide for extraterritorial jurisdiction.¹⁵⁷ Congressional legislative history is

154. See Buxbaum, *supra* note 118, at 280–82 (“[B]ecause [jurisdiction] remains rooted in notions of territorial sovereignty, it is simply not well suited to cases that involve forms of global harm in which both the conduct and its effects are felt simultaneously in many jurisdictions—harm that, in a sense, does not merely cross borders but transcends them.”); see also Caryn R. Nutt, *Carnero v. Boston Scientific Corporation: Interpreting the Extraterritorial Effect of the Civil Whistleblower Protection Provision of the Sarbanes-Oxley Act*, 41 U.S.F. L. REV. 201, 208 (2006) (discussing the territoriality presumption).

155. See Nutt, *supra* note 154, at 208–09 (explaining the connection between territoriality and “the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory.”) (quoting *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879, 882 (E.D. Pa. 1995)); see also Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflicts*, 57 AM. J. COMP. L. 631, 648–49 (2009) (discussing the connection between territoriality and comity).

156. See Buxbaum, *supra* note 118, at 281–82 (“In the securities context too, the jurisdictional analysis based on territorial links respects the sovereignty of other countries, but fails to account for the fairly global arguments made in favor of United States jurisdiction.”); Nutt, *supra* note 154, at 207–08, 214–15 (discussing territoriality presumption and the difficulty in expanding jurisdiction to include “extraterritorial” jurisdictions).

157. See Nutt, *supra* note 154, at 209 (“[T]he territoriality presumption typically operates to limit the reach of legislation to application only within the territorial boundaries of the United States unless Congress has expressly conferred extraterritorial authority”); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1314 (1985) (“The language and legislative history of the securities acts are rather unclear with respect to extraterritoriality. In light of this

useful in determining congressional intent, but such legislative history must be tempered with the knowledge that Congress is aware that it must make a statement of clear intent within a given statute. Therefore, the absence of clearly stated intent can itself be evidence of intent to limit jurisdiction.¹⁵⁸

In practice, however, U.S. courts have often found such intent and viewed their own jurisdiction broadly.¹⁵⁹ Regarding securities, courts have inferred a congressional intent for extraterritorial application regardless of the lack of express statements by Congress, in large part because Congress did not anticipate the rise in importance of transnational securities transactions.¹⁶⁰

Courts have justified jurisdiction in securities cases under a variety of reasons. At a seeming extreme, the Eighth Circuit has gone so far as to claim jurisdiction where the matter was brought by a foreign plaintiff; involved securities issued by a foreign firm and not available within the United States; lacked any domestic effect; and was born out of conduct taken, in most part, outside

ambiguous jurisdictional mandate, courts have stretched the statutory language, divining an unexpressed congressional intent.”).

158. See Nutt, *supra* note 154, at 213, 219 (stating that “the legislative history of the congressional action is a key part of this inquiry” and that “Congress is aware of the need to make a clear statement that it intends legislative action to apply extraterritorially”); Note, *supra* note 157, at 1314 (“The language and legislative history of the securities acts are rather unclear with respect to extraterritoriality. In light of this ambiguous jurisdictional mandate, courts have stretched the statutory language, divining an unexpressed congressional intent.”).

159. See Jill E. Fisch, *Imprudent Power: Reconsidering United States Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 523 (1993) (“Traditionally the United States has viewed its jurisdiction expansively and imposed its regulations on transactions that may be viewed as essentially foreign.”); see also *Plessey Co. v. Gen. Elec. Co.*, 628 F.Supp. 477, 494 (D. Del. 1986) (“To prevent the United States from becoming a ‘Barbary Coast’ hospitable to international securities ‘pirates’ who defraud investors, the exercise of jurisdiction by American courts must be broad.” (citing *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977))).

160. See Fisch, *supra* note 159, at 548 (“The courts have responded that Congress could not have been expected, when the Exchange Act was drafted, to foresee the development of an international and largely interdependent market for securities.”); see also *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (“The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later.”).

the United States.¹⁶¹ In general, though, U.S. courts have typically accepted jurisdiction partially to deter foreign entities from engaging in misconduct by providing a forum for foreign plaintiffs to redress their injuries.¹⁶² This interest becomes more relevant as the effects of financial misconduct are increasingly border-blind and the opportunities for transnational misconduct become more common.¹⁶³

There are three basic conditions that may trigger jurisdiction by U.S. courts. An explanatory case, *Bersch v. Drexel Firestone, Inc.*, involved a foreign offering where investors had been given false and misleading information about the prospects and activities of the issuing company.¹⁶⁴ In *Bersch*, the Second Circuit articulated the three circumstances under which federal securities laws apply: (1) when “Americans resident in the United States” are injured; (2) when U.S. citizens abroad have been injured and material acts occurred within the United States; and (3) when acts that occurred within the United States directly caused the injury to foreigners not resident in the United States.¹⁶⁵

Beyond being subject to the laws of the United States, a defendant must also be subject to the authority of the court in which the suit is brought. Courts in the United States require both personal and subject matter jurisdiction.¹⁶⁶ Courts apply the “minimum contacts” test to find personal jurisdiction.¹⁶⁷ But, in order to obtain subject matter jurisdiction in securities suits with

161. *Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 420–21 (8th Cir. 1979) (discussing the court’s concern with fraud perpetrated in part from within United States).

162. *See id.* at 420; Buxbaum, *supra* note 118, at 281 (“[P]laintiffs had presented a plausible argument that this type of harm would be insufficiently deterred if foreign purchasers could not litigate their claims in United States courts.”).

163. *See* Buxbaum, *supra* note 118, at 282 (“[I]t makes little sense to suggest that the effects of fraud can be territorially segregated.”); Schapiro Speech, *supra* note 45 (“[B]ecause our sovereign power cannot cross borders with as much ease, fraud often gets a head start on our enforcement efforts.”).

164. *See Bersch*, 519 F.2d at 987 (“Here the final prospectus emanated from a foreign source, London or Brussels in the case of the Drexel offering, Toronto in the case of the Crang offering, and apparently the Bahamas and Geneva in the case of the IOB offering.”).

165. *See id.* at 993 (listing when federal antifraud securities laws apply).

166. *See generally* *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (discussing jurisdictional requirements).

167. *See generally id.* (discussing the concept and application of minimum contacts).

international parties, U.S. courts can apply either or both the conduct test or the effects test.¹⁶⁸

Meeting these tests confers jurisdiction and satisfies the requirement of territoriality, as the Eighth Circuit has explained.¹⁶⁹ The effects test is satisfied when substantial effects of a foreign transaction are felt within the United States.¹⁷⁰ However, these effects must be fairly direct to trigger jurisdiction.¹⁷¹ The impact can be felt either by specific markets within the United States or by individual U.S. investors.¹⁷²

The conduct test is rooted in the important goal of preventing the United States from becoming an exporter of financial misconduct.¹⁷³ It can be applied even if no harmful

168. See Fisch, *supra* note 159, at 542–43 (mentioning the alternate conduct or effect standards for imposing jurisdiction); see also Colleen P. Mahoney, *International Enforcement of U.S. Securities Laws*, 1743 PRACTISING L. INST. CORP. L. & PRACTICE COURSE HANDBOOK SERIES 861, 889 (2009) (discussing conduct and effect tests).

169. See *Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 420 (8th Cir. 1979) (“[F]inding subject matter jurisdiction after such an analysis is consistent with the subjective territorial principle of international law.”).

170. See *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989) (“The anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States.”); see also *Europe and Overseas Commodity Traders, S.A. v. Banque Paribus London*, 147 F.3d 118, 125 (2d Cir. 1998) (“Congress would want to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States” (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968))).

171. See *Gold Fields*, 871 F.2d at 262 (“[C]ourts have been reluctant to apply [American] laws to transactions that have only remote and indirect effects in the United States.” (citing *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972))).

172. See *Banque Paribus*, 147 F.3d at 125 (“Congress would want to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States”); *Schoenbaum*, 405 F.2d at 206 (“We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.”). *Bersch* holds that the effects must be felt by individual investors and that “generalized effects” are not sufficient. See *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974, 998 (2d Cir. 1975) (stating that these generalized effects consisted of a loss of investor confidence in the United States, both in the firm at issue and in the regulatory system).

173. See *Bersch*, 519 F.2d at 987 (“Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners”); *Plessey Co. v. Gen. Elec. Co.*, 628 F.Supp. 477, 494 (D. Del. 1986) (“To prevent the United States from becoming a ‘Barbary Coast’ hospitable to international securities ‘pirates’ who defraud investors, the exercise of jurisdiction by

effects were actually felt within the United States, as long as the requisite conduct was undertaken within the United States.¹⁷⁴ Conduct within the United States must be more than merely preparatory to satisfy this test.¹⁷⁵

When the injury is suffered by foreign investors, the conduct must also have been directly causal.¹⁷⁶ In a Second Circuit case, *SEC v. Berger*, the defendant was a partner of an offshore investment fund designed to cater to foreign investors.¹⁷⁷ The Southern District of New York later found that the fund failed to report losses. Berger unsuccessfully appealed the issue of subject matter jurisdiction.¹⁷⁸ The Second Circuit held that a “scheme masterminded and implemented” from within the United States met extraterritorial jurisdictional standards, even when the relevant false information was disseminated by a foreign entity.¹⁷⁹

Continental Grain Ltd. v. Pacific Oilseeds, Inc., a case that dealt with a purchase of one firm by another through a stock acquisition where the purchased firm defrauded its purchaser,¹⁸⁰ further developed the standard for causality under the conduct test. In *Continental Grain*, the conduct sufficient for jurisdiction from within the United States consisted of phone calls and mailings from the United States when they were “necessary to further the fraudulent scheme.”¹⁸¹ As these examples show, U.S.

American courts must be broad.” (citing *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977)).

174. See *Cont'l Grain*, 592 F.2d at 420 (holding that U.S. courts will “examine . . . whether defendants conduct in the United States was significant with respect to the alleged violation”).

175. See *id.* (“[C]onduct in the United States cannot be ‘merely preparatory.’” (quoting *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1018 (2d Cir. 1975))).

176. See *Bersch*, 519 F.2d at 993 (stating that anti-fraud provisions “[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses”); *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2002) (stating that conduct must be more than merely preparatory and directly causal to trigger the conduct test).

177. See *Berger*, 322 F.3d at 188 (noting that “Berger, along with two close friends as partners, formed an offshore investment company” designed for non-U.S. investors.).

178. See *id.* at 190, 196 (holding that the trial court had subject matter jurisdiction because the “fraud [was] conceived and executed in New York”).

179. *Id.* at 193–94 (applying the conduct test to the facts of the case).

180. *Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 411–12 (8th Cir. 1979) (discussing the purchase transaction and the issues undisclosed to the purchaser).

181. See *id.* at 420 (“Defendants conduct in the United States consisted of letters and telephone calls which were necessary to further the fraudulent scheme and, in fact, constituted the organization and completion of the fraud.”).

courts have typically not been squeamish in asserting extraterritorial jurisdiction under either the conduct or effect tests.

Bersch, Berger, and Continental Grain deal with harm already caused. But unlike private litigants, the SEC is permitted to bring suit before an injury has actually been suffered in order to prevent foreseeable harm.¹⁸² In carrying out its investigations to determine which suits to bring, the SEC has certain privileges. Any broker registered with the SEC, regardless of whether within the United States or not, can be compelled to turn over records without a subpoena.¹⁸³ The SEC can also utilize U.S. courts to informally ask a foreign court, to order persons, natural or otherwise, within that court's jurisdiction to disclose documents to the SEC or to give testimony.¹⁸⁴ Supplementing and enhancing its international investigatory powers, the SEC has a range of bilateral MOUs.

2. Requiring Extraterritorial Disclosure

Once U.S. courts determine personal and subject matter jurisdiction, and a trial is underway, other international issues may arise. Typically, courts permit fairly liberal discovery for entities with relevant documents in overseas jurisdictions.¹⁸⁵ U.S.

182. See *Berger*, 322 F.3d at 193 (“The SEC notes that, unlike private plaintiffs, it may bring securities fraud actions prophylactically in order to prevent loss to the public before it occurs and to protect the integrity of the stock exchanges”); *Sec. & Exch. Comm’n v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (“Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money.”).

183. See *Mahoney*, *supra* note 168, at 890 (“[A] non-resident broker-dealer who is registered with the Commission under Section 15(b) of the Exchange Act can be required to produce its books and records to the SEC without a subpoena.”); SEC, DIV. OF TRADING & MKTS, *GUIDE TO BROKER-DEALER REGISTRATION* (2008), available at <http://www.sec.gov/divisions/marketreg/bdguide.htm#VII> (listing requirements for broker-dealers).

184. See *Mahoney*, *supra* note 168, at 891 (“The SEC may also ask U. S. courts to send letters of request to foreign judicial authorities asking those authorities to compel disclosure and testimony by individuals and companies within their jurisdictions.”); SEC, Int’l Enforcement Assistance Site http://www.sec.gov/about/offices/oia/oia_crossborder.shtml [hereinafter SEC Enforcement Site] (listing other enforcement mechanisms available to the SEC, including “formal letters rogatory between a U.S. court and foreign judicial authorities”).

185. See Philip O. Erwin, *The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?*, 15 B.C. INT’L &

courts issuing such disclosure orders, however, may come into conflict with foreign secrecy and non-disclosure laws—potentially putting litigant parties in a position of having to choose between violating the court order or breaking foreign law. Even in these cases, however, U.S. judges usually require the production of documents, unless certain good-faith criteria are met by the party claiming impossibility of performance.¹⁸⁶

The 1958 U.S. Supreme Court case *Société Internationale v. Rogers*, in which a Swiss holding company sued the U.S. Attorney General to reclaim property improperly seized during World War II, first laid out the standards for imposing extraterritorial discovery in the face of conflicting foreign laws.¹⁸⁷ In this case, the trial court had dismissed the suit on the grounds that the complaining party had failed to produce required documents in Switzerland.¹⁸⁸ The decision was appealed on the grounds that such production would violate Swiss banking and economic espionage laws which carried criminal sanctions, including imprisonment, for persons held responsible.¹⁸⁹ Around the same time, the Swiss authorities, aware of the U.S. suit, interceded to confiscate the documents.¹⁹⁰ The Court noted that the firm had

COMP. L. REV. 471, 477 (1992) (“In dealing with foreign obstacles to extraterritorial discovery, U.S. courts have most often resolved conflicts between domestic and foreign law in favor of the former.”); Fisch, *supra* note 159, at 523 (“Traditionally the United States has viewed its jurisdiction expansively and imposed its regulations on transactions that may be viewed as essentially foreign.”).

186. See *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211–12 (1958) (discussing how plaintiff’s attempts to comply with disclosure did not exempt it from disclosure requirements); Erwin, *supra* note 185, at 477 (“The courts have reasoned that the SEC’s need for specific information to pursue possible violators of securities laws outweighs the restrictive purpose of conflicting foreign law.”).

187. See *Société Internationale*, 357 U.S. at 210–12 (spelling out the analysis for determining good-faith effort on the part of party compelled to disclose); Erwin, *supra* note 185, at 477–78 (“In *Société Internationale*, the Supreme Court addressed the issue of whether sanctions were appropriate where the plaintiff had failed to comply with a discovery request for documents on the grounds that doing so would violate Swiss banking law.”).

188. See *Société Internationale*, 357 U.S. at 201–02 (listing the trial court’s reasoning in dismissing the complaint after the failure to produce Swiss documents).

189. See *id.* at 204 (“Swiss penal laws did in fact limit petitioner’s ability to satisfy the production order because of the criminal sanctions to which those producing the records would have been exposed.”).

190. See *id.* at 210 (“During this period the Swiss Federal Attorney . . . ‘confiscated’ the Sturzenegger records.”). The confiscation amounted to forbidding the transmittal of the documents, but the documents themselves were not physically confiscated. See *id.* at

undertaken “extensive efforts” to comply with the order and that the firm’s “inability [was] fostered neither by its own conduct nor by circumstances within its control.”¹⁹¹

This focus on good faith was carried forward into later decisions by the U.S. circuit courts. In *United States v. First National City Bank*, the defendant corporation appealed a decision holding it in contempt after it disclosed subpoenaed documents available in the United States, but excluded information located in Germany.¹⁹² The Second Circuit’s ruling in *First National City Bank* advocated an important role for comity, stating that “the mere absence of criminal sanctions abroad [does not] necessarily mandate[] obedience to a subpoena.”¹⁹³ Instead it was held that courts should work to balance the competing interests of the foreign state and the United States, even while stating that the U.S. interest in subpoena enforcement was particularly strong.¹⁹⁴

A later Second Circuit case involving a kickback scheme utilizing foreign bank accounts, *United States v. Davis*,¹⁹⁵ reiterated the same concerns: balancing interests, taking into consideration strong U.S. interest and possible foreign state intervention, and

200–01 (“This ‘confiscation’ left possession of the records in Sturzenegger and amounted to an interdiction on Sturzenegger’s transmission of the records to third persons.”).

191. *Id.* at 211.

192. *See United States v. First Nat’l City Bank*, 396 F.2d 897, 898 (2d Cir. 1968) (“Citibank complied with the subpoena insofar as it called for the production of material located in New York but failed to produce or divulge any documents repositied in Frankfurt.”).

193. *See id.* at 902 (“We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena.”).

194. *See id.* (“Such a rule would show scant respect for international comity; and, if this principle is valid, a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision.”). In this case the fact that neither the United States nor the foreign government had issued any kind of statement about the matter and its impact on state relations was held to indicate that neither state believed it was a very important matter for their national public policies. *See id.* at 904 (“[I]t is noteworthy that neither the Department of State nor the German Government has expressed any view on this case or indicated that, under the circumstances present here, enforcement of the subpoena would violate German public policy or embarrass German-American relations.”).

195. *See United States v. Davis*, 767 F.2d 1025, 1026 (2d Cir. 1985) (stating the scheme “involved the payment of multi-million dollar kickbacks to executives of General Dynamics Corporation in return for the approval of subcontracts awarded by General Dynamics”).

the desire to avoid using foreign laws to shield criminal activity.¹⁹⁶ The Restatement of Foreign Relations proposes that “[w]here two states have jurisdiction to prescribe and enforce rules of law[,]”¹⁹⁷ and the states’ rules are inconsistent, the courts should consider: (1) competing interests of the states; (2) the hardship imposed on the party; (3) how much conduct must occur in the foreign territory; (4) the party’s nationality; and (5) the relation between enforcement and the objectives of the applied rule.¹⁹⁸

The U.S. courts’ approach towards extraterritorial jurisdiction means that circumstances forcing the courts to refuse to hear securities cases with international components are narrow, though there *are* situations in which U.S. courts will not always be able to hear cases involving transnational securities conduct. Similarly, U.S. courts seem, in general, unimpressed with foreign parties’ attempts to escape disclosure obligations through foreign secrecy laws, unless fairly stringent good-faith requirements are met.

B. *The MOU: Soft Law for a Hard Problem*

The SEC has made extensive use of MOUs and has broad powers to facilitate productive MOU arrangements with foreign regulators. The Office of International Affairs is an entire department within the SEC that deals exclusively with international cooperation matters.¹⁹⁹ This office sends out over 500 requests for assistance annually to foreign financial regulators and receives around 400 itself.²⁰⁰ The MOU is the

196. *See id.* at 1035 (stating that courts should “strike a careful balance between the competing national interests and the extent to which these interests would be impinged upon by the order.”).

197. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

198. *See id.* (listing considerations for the imposition of one state’s laws).

199. *See* SEC, Office of International Affairs, <http://sec.gov/about/offices/oia.shtml> (last modified Jan. 20, 2010) (stating the role of the Office of International Affairs as “promot[ing] investor protection and cross-border securities transactions by advancing international regulatory and enforcement cooperation, promoting the adoption of high regulatory standards worldwide, and formulating technical assistance programs to strengthen the regulatory infrastructure in global securities markets.”).

200. *See* Mahoney, *supra* note 168, at 892 (“In fiscal year 2008, the staff made 556 requests to foreign regulators for enforcement assistance and responded to 454 requests for foreign assistance from foreign regulators.”); SEC Enforcement Site, *supra* note 184 (“In fiscal year 2008, the SEC made 594 requests to foreign authorities for enforcement assistance and responded to 414 requests from foreign authorities.”).

primary means through which the SEC structures these requests and the response procedure.²⁰¹

Currently the SEC has MOUs active in over twenty countries, though this represents agreements with more than twenty regulators.²⁰² The SEC is statutorily authorized to investigate in the United States on behalf of foreign regulators, and in doing so, may compel testimony or disclosure, even from entities not regulated by the SEC.²⁰³ The International Securities Enforcement Cooperation Act of 1990 expanded the SEC's powers to include keeping information obtained from foreign regulators confidential.²⁰⁴ This includes information received through MOUs.

The SEC's bilateral MOUs and the MMOU are closely related. Like the IOSCO MMOU, bilateral SEC MOUs are not binding on the parties.²⁰⁵ The bilateral MOUs' primary use is providing a framework for voluntary cooperation, much like the MMOU.²⁰⁶ The similarity is intentional—most MOUs concluded by the SEC predate the IOSCO MMOU, and the MMOU was

201. See Mahoney, *supra* note 168, at 892–93 (“These MOUs and cooperative arrangements cover most major foreign securities markets.”); Bryan Thomas Shipp, Comment, *Filling Gaps in European Union Securities Law: Contractually Organized Supervision & the College of Euronext Regulators*, 23 AM. U. INT'L L. REV. 387, 407 (2008) (“Cooperation between national securities regulators has traditionally taken place via memoranda of understanding (‘MOUs’).”).

202. See SEC, Cooperative Arrangements with Foreign Regulators, http://sec.gov/about/offices/oia/oia_cooparrangements.shtml (last modified Jan. 20, 2010) [hereinafter SEC Cooperative Agreements] (listing all MOUs signed by the SEC). For example, the U.S.-Canada MOU is more specifically between the SEC, the Ontario Securities Commission, the Commission des Valeurs Mobilières du Québec, and the British Columbia Securities Commission. See Memorandum of Understanding, U.S.-Can., Jan. 7, 1988, available at http://sec.gov/about/offices/oia/oia_bilateral/canada.pdf [hereinafter Canada MOU].

203. See Securities Exchange Act of 1934, 15 U.S.C. § 78u(a)(2) (2009) (authorizing the SEC to assist foreign regulators in their investigations).

204. See International Securities Enforcement Cooperation Act, Pub. L. No. 101-550, 104 Stat. 2713, 2715 (codified as amended at 15 U.S.C. § 78x(d) (1990)) (creating FOIA exemption to ensure confidentiality of exchanges with non-U.S. financial regulators).

205. See Mahoney, *supra* note 168, at 893 (“MOUs and cooperative arrangements are generally non-binding agreements.”); Shipp, *supra* note 201, at 415 (“[N]on-binding MOUs facilitate cooperation between regulatory authorities”).

206. See Mahoney, *supra* note 168, at 892–93 (“[MOUs] in many cases establish procedures for sharing informational and providing enforcement assistance.”); see Shipp, *supra* note 201, at 418–19 (“MOUs are generally confined to information sharing efforts and do not contemplate actual enforcement.”).

modeled on those agreements.²⁰⁷ MOUs concluded by the SEC since the implementation of the MMOU in 2002 are considered supplementary to its provisions.²⁰⁸ Numerous agreements predating the MMOU, however, have remained in effect between the SEC and foreign regulators.²⁰⁹

The MOU's place within international law, or rather its lack thereof, is important to its prospects for effectiveness. As a form of soft international law,²¹⁰ the MOU avoids lengthy treaty processes that could involve numerous financial non-experts and political machinations; it is also particularly well suited for the flexible and quick approach necessary in international securities regulation.²¹¹ As soft law agreements such as MOUs proliferate, however, they can move norms into greater alignment, which may culminate in a shift to hard law—either through a treaty or an acknowledgement of a customary international law.²¹²

207. See SEC Cooperative Agreements, *supra* note 202 (listing all MOUs signed since 1987, including ones signed since 2002 with Germany, Switzerland, and Japan).

208. See Mahoney, *supra* note 168, at 893 (“[T]he SEC currently views bilateral agreements as supplementary to the IOSCO multilateral MOU.”); Coop Factsheet, *supra* note 75 (“[T]he SEC considers these bilateral arrangements to be an excellent supplement to the information sharing mechanism of the IOSCO MMOU.”). MOUs signed since the 2002 MMOU include those with Germany, Japan, and Switzerland. See Cooperative Agreements, *supra* note 202 (listing all MOUs signed since 1987).

209. See Cooperative Agreements, *supra* note 202 (showing that the oldest MOU is from 1987).

210. See Karmel & Kelly, *supra* note 72, at 884, 913 (“Indeed, the SEC, an independent regulatory agency, negotiates and utilizes memoranda of understanding . . . which are treaty-like agreements, but are soft law.”); Richard L. Williamson, *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT’L L. 59, 63 (2003) (“[S]oft law is nonbinding . . .”).

211. See Karmel & Kelly, *supra* note 72, at 890–91 (“Neither treaty law nor customary international law can provide the speed, flexibility, and expertise that international securities regulation requires.”); Williamson, *supra* note 210, at 63 (“Diplomats and their governments sometimes prefer concluding soft law instruments because doing so can be easier than adopting treaties.”); see also Mahoney, *supra* note 168, at 893 (“MOUs and cooperative arrangements are generally non-binding agreements . . .”); Shipp, *supra* note 201, at 415 (“[N]on-binding MOUs facilitate cooperation between regulatory authorities . . .”).

212. See Christopher C. Joyner, *Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law*, 19 MICH. J. INT’L L. 401, 425 (1998) (discussing how soft law ATCM agreement shifted norms regarding Antarctica); Karmel & Kelly, *supra* note 72, at 894, 938 (“Soft law sometimes hardens into binding treaty law . . . after soft law moves normative positions far enough that States are willing to make a hard law commitment in a form of agreement already recognized as constitutionally acceptable.”).

Soft law arrangements highlight the fact that cooperation is more likely when the benefits of compliance are significant.²¹³ Parties rely on neither the actual document, nor any consequences detailed therein, to secure coordination.²¹⁴ Instead, convergent interests make cooperation more likely.²¹⁵

The structure of MOUs has not significantly changed since they came into existence in the 1980s. They are intended to provide a framework for cooperation without forcibly mandating that cooperation. Since the SEC's bilateral MOUs are all very similar, examples from each category illustrate those central provisions unique to each group. This Note will use the Argentine MOU as a representative example of an enforcement cooperation MOU; the United Kingdom MOU as representative of a regulatory cooperation MOU; and the Egyptian MOU as representative of a technical assistance MOU.

1. Enforcement Cooperation MOUs

Enforcement cooperation MOUs focus on enforcement assistance, though many of their provisions are common to MOUs in the other two categories. The MOU between the SEC and Argentina's *Comisión Nacional de Valores* was concluded in 1991.²¹⁶ Both parties are expected to assist each other to the full extent provided in the MOU, within the bounds of their respective domestic constraints.²¹⁷ Information can be requested

213. See Karmel & Kelly, *supra* note 72, at 897 (“[C]ompliance stems less from the written agreement and more from the compliance benefits or recognition that the rules contained in those treaties are legitimate.”); Williamson, *supra* note 210, at 74-76 (outlining circumstances where there is not likely to be a gap in compliance between hard and soft law arrangements).

214. See Karmel & Kelly, *supra* note 72, at 897 (“[Soft law] may be developed through resolutions, practices, aspirational agreements, and the promulgation of norms in various forms that guide behavior.”); Williamson, *supra* note 210, at 63 (stating that soft law avoids domestic legal requirements associated with treaties and other hard law).

215. See *supra* note 213 and accompanying text.

216. See Memorandum of Understanding On Consultation, Technical Assistance and Mutual Assistance for the Exchange of Information, U.S.-Arg., Dec. 9, 1991, *available at* http://sec.gov/about/offices/oia/oia_bilateral/argentina.pdf [hereinafter Argentina MOU].

217. See *id.* art. III, § 1(1) (“To the extent permitted by the laws and regulations of their respective States, the Authorities will provide the fullest measure of mutual assistance, as contemplated by this Article.”). When legal constraints are relevant, the requested authority is supposed to use “all reasonable efforts” to assist. *Id.* art. III, § 1(3) (“Subject to such limitations of legal authority, the Authorities will use all reasonable efforts to obtain the authorization, or the assistance of such other governmental

for numerous reasons, including “market oversight functions,” “enforcement of the laws or regulations applicable to securities markets,” “examination of investment businesses,” and “investigations . . . where information [is] located within the jurisdiction” of the requested regulator.²¹⁸

Under the MOU, the following kinds of assistance, among others, may be given by the requested regulator: “(a) providing access to information in the files of the requested [regulator]; (b) taking testimony and statements of persons; (c) obtaining information and documents from persons; and (d) conducting compliance inspections or examinations of investment businesses, securities processing businesses or securities markets.”²¹⁹

The Argentine or U.S. regulator can also deny a request for assistance:

- (a) where the request would require the requested [regulator] to act in a manner that would violate the laws of the [s]tate of the requested [regulator];
- (b) where the request is not in accordance with the provisions set forth in this [MOU];
- (c) on grounds of essential public interest; or
- (d) on grounds of national security.²²⁰

The MOU also creates an obligation to render unsolicited assistance when a regulator discovers information that may be relevant to the other party-regulator.²²¹

agencies that have such authority, necessary to provide the assistance described in this Article.”).

218. *Id.* art. III, § 1(1). It does not matter whether the conduct questioned by the requesting regulator would constitute a violation within the requested jurisdiction’s laws. *See id.* (“Such assistance will be provided without regard to whether the type of conduct described in the request for assistance would constitute a violation of the laws or regulations of the State of the requested Authority.”). However, if the requesting jurisdiction’s laws specify that the target of an investigation be given access to counsel, the requested regulator must attempt to provide counsel in its own investigations on the behalf of the requesting regulator. *See id.* art. III, § 4(7)(b) (stating that if “the laws of the State of the requesting Authority require the opportunity for counsel . . . the requested Authority will use its best efforts to ensure that such an opportunity will be given.”).

219. *Id.* art. III, § 1(2).

220. *Id.* art. III, § 2(4).

221. *See id.* art. III, § 8 (“To the extent permitted by the laws or regulations of their respective States, each Authority will use reasonable efforts to provide the other

There are restrictions on information obtained through an MOU request. The information may only be used by the requesting regulator for the purposes specified in the request.²²² The requested regulator must be given an opportunity to object to any unstipulated uses.²²³ Regulators are expected to keep requests and their outcomes confidential, as permitted by their respective domestic laws.²²⁴ When a regulator is forced to disclose such information pursuant to its domestic law, it must notify the other regulator and attempt to exempt itself from disclosure.²²⁵

Other MOUs are very similar. For example, the MOU between the SEC and three Canadian provincial regulators also states that the regulators will “provide the fullest mutual assistance, as contemplated” by the MOU.²²⁶ It does not, however, contain compliance inspections of financial entities as available assistance between regulators.²²⁷ In 1986 the SEC

Authority with any information it discovers that gives rise to a suspicion of a breach, or anticipated breach, of the laws or regulations of the State of the other Authority.”).

222. *See id.* art. III, § 5(1) (“The requesting Authority may use the information furnished solely: (a) for the purposes stated in the request . . .”).

223. *See id.* art. III, § 5(2) (“In order to use the information furnished for any purpose other than those stated in paragraph 1 of this Section, the requesting Authority will first notify the requested Authority of its intention and provide it the opportunity to oppose such use.”).

224. *See id.* art. III, § 6(1) (“Except as contemplated by Section 5 of this Article, the requesting Authority will not offer the information to, and shall use its best efforts to ensure that it is not obtained by, any other person.”); *see also* International Securities Enforcement Cooperation Act of 1990 [ISECA], Pub. L. No. 101-550, § 202, 104 Stat. 2713, 2715–16 (codified as amended in scattered sections of 15 U.S.C.) (allowing the SEC to keep information obtained from foreign regulators confidential). Congress created a specific disclosure exception for information obtained through memoranda of understanding. *See id.* (allowing the SEC to keep information obtained from foreign regulators confidential); *see also* 15 U.S.C. 78x(d)(2)(B) (2007) (codifying part of ISECA, specifying MOUs as valid vehicles for obtaining information that may be kept confidential).

225. *See* Argentina MOU, *supra* note 216, art. III, § 6(3) (“The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand, and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.”).

226. Canada MOU, *supra* note 202, art. II, § 1.

227. *See id.* (failing to contain a provision to this effect). It is possible that this measure was omitted from the U.S.-Canada agreement because it was an earlier agreement. Alternatively, the SEC might have been concerned about the ineffectiveness of the Argentine regulator when including the provision. The U.S.-Norway MOU was also a later-concluded MOU and includes such a provision. *See* Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, art. III § 1(1), U.S.-Nor., Sep. 24, 1991, *available at* http://sec.gov/about/offices/oia/oia_bilateral/norway.pdf (“The Authorities will

concluded an MOU with the Securities Bureau of the Japanese Ministry of Finance.²²⁸ This document is surprisingly short, with the parties agreeing only to “facilitate each [regulator]’s respective requests for surveillance and investigatory information on a case-by-case basis.”²²⁹ However, a later supplementary Statement of Intent from 2002 is largely similar to other bilateral SEC MOUs.²³⁰ Other regulators with whom the SEC has signed MOUs closely reflecting these core provisions include Israel, the Jersey Isles, Mexico, Norway, and Portugal.²³¹

2. Regulatory Cooperation MOUs

Regulatory cooperation MOUs spotlight communication for both enforcement purposes and general developments relevant to regulators. The MOU between the SEC and the FSA discusses areas of cooperation with a focus on general regulator considerations.²³² The change in focus can in part be accounted for by the fact that it was implemented after the development of IOSCO’s MMOU.²³³ This MOU is therefore seen as a

provide the fullest mutual assistance within the framework of this Memorandum of Understanding. Such assistance will be provided to facilitate the enforcement of the laws or regulations applicable to securities markets and their members; . . . [and] the inspection or examination of investment businesses . . .”).

228. See Understanding on the Sharing of Information, U.S.-Japan, May 13, 1986, available at http://sec.gov/about/offices/oia/oia_bilateral/japan.pdf.

229. *Id.*

230. See Statement of Intent Concerning Cooperation, Consultation and the Exchange of Information, U.S.-Japan, May 17, 2002, available at http://sec.gov/about/offices/oia/oia_bilateral/japan.pdf.

231. See Cooperative Agreements, *supra* note 202 (showing all MOUs signed by SEC and their actual texts, including those with Israel, the Jersey Isles, Norway, and Portugal); see also Memorandum of Understanding Concerning Cooperation, Consultation and the Exchange of Information, U.S.-Jersey, May 22, 2002, available at http://sec.gov/about/offices/oia/oia_bilateral/jersey.pdf [hereinafter Jersey MOU] (containing many similar provisions to the Supplementary MOU between the Japanese and the SEC).

232. See Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms, ¶ 19, U.S.-U.K., Mar. 14, 2006, available at http://sec.gov/about/offices/oia/oia_multilateral/ukfsa_mou.pdf (“The Authorities recognize the importance of close communication concerning the global operations of Firms, and intend to consult regularly regarding general supervisory developments and issues relevant to the operations, activities and regulation of such Firms.”).

233. See *id.* ¶ 15 (“This MOU is intended to complement, but does not alter the terms and conditions of the following existing arrangements concerning cooperation in securities matters: . . . (ii) the IOSCO [MMOU], to which the SEC and FSA are

complement to the MMOU (and other previous cooperative agreements).²³⁴ The two regulators undertake to:

inform [each] other . . . in advance of: a) pending regulatory changes that may have a significant impact on the operations, activities or reputation of a [f]irm, in the other jurisdiction; and b) any material event that could adversely impact each other's markets or the stability of a [f]irm, in the other jurisdiction²³⁵

Each regulator also has the authority to conduct on-site visits with companies that are either headquartered within either regulators' jurisdiction or regulated by both.²³⁶

Other MOUs concluded by the SEC explicitly state that they are supplementary to the MMOU. The regulatory cooperation MOU between the SEC and Germany's *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) is one example.²³⁷ In fact, it is largely identical to the FSA agreement.²³⁸

Bilateral agreements do not have to take the form of a full MOU. Beyond their general MOU, German and U.S. regulators have concluded a more specific supplementary agreement dealing with the merger and subsequent oversight of German and U.S. securities exchange holding companies.²³⁹ The document states that "joint ownership . . . of [m]arkets alone will

signatories, which also covers information-sharing in the context of enforcement investigations.").

^{234.} *See id.*

^{235.} *Id.* ¶ 20.

^{236.} *See id.* ¶ 23 (listing requirements for on-site visits). The regulator must notify the "Host [Regulator]" before such a visit. *Id.* ¶ 24(a) (requiring the Inspecting Authority to "notify the Host Authority of its intent to conduct an On-Site Visit").

^{237.} *See* Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms, ¶ 16, U.S.-F.R.G., Apr. 26, 2007, available at http://sec.gov/about/offices/oia/oia_bilateral/germany_regcoop.pdf ("This MOU is intended to complement, but does not alter the terms and conditions of the following existing arrangements concerning cooperation in securities matters: . . . (ii) the *IOSCO* [MMOU], to which the SEC and BaFin are signatories, which also covers information-sharing in the context of enforcement investigations.").

^{238.} *See id.* arts. 1–8 (containing similar provisions to the SEC-FSA MOU).

^{239.} *See* Arrangement for Consultation, Cooperation and the Exchange of Information Relating to the Oversight of Affiliated Markets Made under the Supervisory MOU between the US SEC and the German BaFin, U.S.-F.R.G., Apr. 26, 2007, available at http://sec.gov/about/offices/oia/oia_bilateral/germany_bafin.pdf (stating more specific provisions, but also incorporating sections of the original MOU between BaFin and SEC).

not lead to mandatory registration of, or application of domestic laws to, a [m]arket in another [regulator]'s jurisdiction or companies listed on that [m]arket.”²⁴⁰ In addition, the heads of the regulators agree to regularly meet in person in order to share concerns specifically about the integration of the exchanges.²⁴¹ Should the merged exchanges decide to harmonize their internal rules, the regulators commit to “coordinate their regulatory approval processes and . . . facilitate the development and implementation of consistent rules.”²⁴² The Swiss Federal Banking Commission and the SEC have also issued an accord concerning the same merger, as the German holding company is itself held by a Swiss firm.²⁴³

3. Technical Assistance MOUs

Technical assistance MOUs focus on helping developing financial centers promulgate rules and create useful regulatory frameworks for their nascent markets. In 1996 the Egyptian Capital Market Authority and the SEC signed an MOU oriented towards aiding the development of Egyptian financial markets.²⁴⁴ This MOU briefly mentions enforcement cooperation and contains a provision about periodic consultations “about subjects of mutual interest and issues facing their respective markets.”²⁴⁵ The SEC also commits in the agreement to advise on: (1) “[l]aws and regulations to protect investors;” (2) “[s]tandards for offering securities;” (3) “[m]arket oversight and enforcement

240. *Id.* ¶ 10.

241. *See id.* ¶ 13 (“The Chairmen of the SEC, BaFin and ESA intend to meet periodically to identify and discuss issues of regulatory concern to one or more Authorities, and to identify and discuss at early stages the regulatory implications of anticipated further levels of integration of the Markets.”).

242. *Id.* ¶ 16.

243. *See* Undertaking Relating to the Oversight of Affiliated Markets between the United States Securities and Exchange Commission and the Swiss Federal Banking Commission, U.S.-Switz., Apr. 30, 2007, *available at* http://sec.gov/about/offices/oia/oia_bilateral/switzerland_sfbc.pdf (describing the ownership structure of the entities involved).

244. *See* Memorandum of Understanding Regarding Exchange of Information, Consultation and Technical Assistance, U.S.-Egypt, Feb. 11, 1996, *available at* http://sec.gov/about/offices/oia/oia_bilateral/egypt.pdf (stating the desire between the parties to “establish a framework for cooperation in the enforcement of the securities laws of the United States and Egypt and the provision of technical assistance to facilitate the development of the Egyptian markets”).

245. *Id.* art. I.

mechanisms;” and (4) “[s]ystems of supervision.”²⁴⁶ The SEC-Russian Federal Commission on Securities and the Capital Market MOU expands these areas of advice and assistance and includes, as topics for advisement infrastructure of markets, “accounting and auditing principles” and educational programs for Russian government officials.²⁴⁷ Technical assistance MOUs have targeted states whose financial markets are beginning to develop and which could use the guidance and support of experienced regulators like the SEC.

C. *The MOU as a Cooperative Framework*

Hypothetical scenarios constructed by political theorists, also known as simple game models, are useful in evaluating MOUs as cooperative framework tools. The interactions arranged for by MOUs at first glance resemble the simple game model called the prisoner’s dilemma. In the prisoner’s dilemma, two actors each independently and simultaneously decide whether to cooperate or not cooperate (also termed “defect”) with each other.²⁴⁸ These interactions take place in a system of anarchy, meaning that repercussions for defecting actors are limited to acts by the other actor.²⁴⁹ Each actor’s ultimate payoff from each

246. *Id.* art. II.

247. Memorandum of Understanding Regarding Technical Cooperation, Mutual Assistance and Consultation, ¶ 4., U.S.-Russ., Dec. 6, 1995, available at http://sec.gov/about/offices/oia/oia_bilateral/russia.pdf. (expanding upon the Egyptian-U.S. MOU). Several other regulators, including the Securities and Exchange Board of India, have technical cooperation agreements with the SEC. See Cooperative Agreements, *supra* note 202 (listing all technical cooperation MOUs that the SEC has signed, including with India).

248. See generally Stephen J. Majeski & Shane Fricks, *Conflict and Cooperation in International Relations*, 39 J. CONFLICT RESOL. 622, 623 (1995) (discussing the prisoner’s dilemma and variations); R. Harrison Wagner, *The Theory of Games and the Problem of International Cooperation*, 77 AM. POL. SCI. REV. 330, 330–32 (1983). The requirement of simultaneous decision-making is more appropriate here than in other circumstances as it is easy to imagine that at any time, a foreign regulator and the SEC have information requests pending with each other. See *supra* note 200 (noting the large number of requests the SEC makes and deals with annually).

249. See Joseph M. Grieco, *Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner’s Dilemma Model*, 50 J. POL. 600, 613 (1988) (“[T]he anarchical context within which the states are operating is likely to induce a very high level of caution in each.”); Majeski & Fricks, *supra* note 248, at 622–23 (explaining that the assumption of anarchy in the international system means that states’ options are constrained by the actions of other states).

decision responds to the simultaneous decision of the other.²⁵⁰ The highest payoff available to an actor occurs if he defects while his partner cooperates; the next highest payoff results from mutual cooperation.²⁵¹ A second-worst outcome is reached when both actors defect. The least desirable outcome is for the actor to cooperate while his partner defects.²⁵²

In an international securities enforcement environment, an example of the most preferred prisoner's dilemma outcome for a foreign regulator would be if the SEC cooperated with the terms of the relevant MOU by responding favorably to an information request, and in turn the foreign regulator defected by denying assistance to the SEC in contravention of the terms of the MOU. In this way, the foreign regulator would be able to accumulate information on securities issues within its own jurisdiction, while reducing the likelihood that firms and individuals within its own jurisdiction will get in trouble for violating another state's securities laws. The assumption of anarchy is perhaps more relevant here than in other international situations, since MOUs are not binding and dispute resolution procedures are limited to the parties "engag[ing] in consultation . . . in the event of . . . a denial by one [regulator]" of an information request.²⁵³ However, this is not as troublesome for the prospects of cooperation as it might seem.

A deeper examination of the structure and operations of particular MOUs reveals that this outcome is not likely. The

250. See Majeski & Fricks, *supra* note 248, at 622–23 (explaining that the assumption of anarchy in the international system means that states' options are constrained by the actions of other states); Wagner, *supra* note 248, at 330 (describing different models, including the prisoner's dilemma, and how states' payoffs are structured).

251. See Majeski & Fricks, *supra* note 248, at 623 ("The logic of the game dictates that it is individually rational for both players to defect . . ."); Wagner, *supra* note 248, at 330 ("First, [the prisoner's dilemma] illustrates the general point that equilibrium outcomes in noncooperative games can be sub-optimal.").

252. See *supra* note 251 (discussing the structure of the prisoner's dilemma).

253. Argentina MOU, *supra* note 216, art. 3, § 7. See Mahoney, *supra* note 168, at 893 ("MOUs and cooperative arrangements are generally non-binding agreements that state the parties' intent to exchange information and cooperate in securities violation investigations."). Although there are no official repercussions for defection, securities regulators are agents of their larger state governments. As such, their costs and benefits from either cooperating or defecting may be influenced by the attitude and policies of their national governments. See *supra* notes 143–145 and accompanying text (discussing larger political pressures exerted on government agencies).

prisoner's dilemma model has two critical shortfalls in accurately predicting the interactions between regulators governed by an SEC MOU. First, it does not consider the possibilities for communication between the two regulators. Frequent communication, in particular, "cheap talk," or nonbinding communications used to hammer out differences and voice concerns, greatly increases the odds of successful mutual cooperation.²⁵⁴ The MOU itself is a framework designed to facilitate just this kind of cooperation. In fact, Michael Mann, former director of the SEC's Office of International Affairs, stated that one of the most significant side-benefits of an MOU is that it promotes a personal relationship between the regulators within the SEC and those within foreign regulatory agencies.²⁵⁵ This greatly enhances communication.

Second, the simple prisoner's dilemma model contemplates only one iteration of the game, but in practice MOUs are exercised repeatedly and often.²⁵⁶ Multiple iterations of an interaction increase the likelihood of cooperation, since a regulator knows that its own defection this time around will incite retaliatory defection by its counter-party the next time around.²⁵⁷ Relating this back to the original structure of the

254. See Majeski & Fricks, *supra* note 248, at 625 (stating that the "second form of communication labeled cheap talk is costless"); Wagner, *supra* note 248, at 338 ("If player 2 can decide more than simply whether to cooperate or defect, but can also develop and communicate to player 1 a variety of retaliatory choices that influence either or both a1 and a2, then player 2 confronts an additional decision problem."). Effective communication also allows the two regulators to bargain over the terms of compliance and information sharing, which should result in a higher probability of success in any scenario, but particularly ones where one of the regulators is facing conditions that might induce it to not cooperate. See Grieco, *supra* note 249, at 618 (discussing how Tokyo Round outcomes were affected by bargaining (communication) between actors); Wagner, *supra* note 248, at 342 ("Selection of one agreement over another [by actors] must . . . be the result of bargaining.").

255. See Telephone Interview with Michael Mann, Former Dir., Office of Int'l Affairs, SEC (Oct. 28, 2009) (on file with author) [hereinafter Mann Interview] (stating that a significant side-benefit of an MOU is that it promotes a personal relationship between the regulators within the SEC and those within foreign regulators).

256. See *supra* notes 168–200 and accompanying text; SEC, IN BRIEF FY 2011 CONGRESSIONAL JUSTIFICATION 24 (2010) (listing requests between the SEC and foreign regulators for enforcement assistance during the fiscal years 2006, 2007, 2008, and 2009).

257. See Majeski & Fricks, *supra* note 248, at 639 ("Not surprisingly, groups also achieve mutual cooperative lock-in (defined as a situation in which mutual cooperation is sustained from the nth iteration of the game through the final iteration of the game)

prisoner's dilemma, a foreign regulator defecting in an interaction with the SEC may achieve the foreign regulator's most preferred outcome in the first iteration, but in the second iteration will almost certainly realize the second worst payoff, or even the worst payoff if the foreign regulator attempts to cooperate while the SEC defects. By locking in to a cycle of cooperation, the foreign regulator can ensure at least its second most preferred outcome, mutual cooperation.²⁵⁸

Considering that MOUs promote communication and contemplate iterated interactions, their prospects for success in prompting cooperation within the prisoner's dilemma framework seem high.

D. *Non-U.S. MOUs*

Other states' regulators have signed MOUs among themselves. For example, China's Securities Regulatory Commission has been particularly active in promulgating MOUs.²⁵⁹ The Chinese regulator has MOUs with most of the major developed states and even Taiwan.²⁶⁰ India's Securities and Exchange Board has also been creating MOUs, recently signing one with Dubai's regulator.²⁶¹ Other countries' use of MOUs

more often when they can communicate."); Wagner, *supra* note 248, at 333 (discussing indefinitely iterated prisoner's dilemma).

258. See *supra* note 257 and accompanying text; Majeski & Fricks, *supra* note 248, at 639; Wagner, *supra* note 248, at 333 (observing that the iterated prisoner's dilemma changes optimal strategies). This view of a regulator's preferences may be overly cynical, but a general ethos of effective enforcement for all probably spurs a large part of cooperation. See Mann Interview, *supra* note 255 (explaining actual regulator motivations behind cooperation).

259. See Checklist of the Memoranda between the China Securities Regulatory Commission and the Overseas Regulatory Commissions, <http://old.csrc.gov.cn/n575458/n4001948/n4002030/4079126.html> (last visited Apr. 25, 2010) (listing all MOUs signed by Chinese regulators).

260. See *id.*; Taiwan, *China Seal Financial MOU*, CHINA POST (Taipei), Nov. 17, 2009, <http://www.chinapost.com.tw/taiwan/china-taiwan-relations/2009/11/17/233003/Taiwan-China.htm> ("The memorandum of understanding (MOU) on cooperation in financial supervision across the Taiwan Strait was officially signed yesterday . . .").

261. See *Sebi Inks MoU with Dubai Regulatory Agency*, TIMES OF INDIA (Mumbai), Oct. 28, 2009, <http://timesofindia.indiatimes.com/biz/india-business/Sebi-inks-MoU-with-Dubai-regulatory-agency/articleshow/5173121.cms> ("Market regulator Securities and Exchange Board of India (SEBI) on Wednesday signed a memorandum of understanding (MoU) with Dubai Financial Services Authority (DFSA) for bi-lateral assistance and mutual cooperation."); Press Release, Sec. & Exch. Bd. of India, Sebi Signs MOU with DFSA, Dubai, PR No.325/2009 (Oct. 28, 2009), *available at*

speaks to the effectiveness of the form in encouraging meaningful cooperation.

E. *The International Securities Enforcement Cooperation Act*

The International Securities Enforcement Cooperation Act (“ISECA”) was passed in 1990 in order to “strengthen international cooperation in the enforcement of securities laws and thereby enhance the ability of the [SEC] to prevent and detect violations of US securities laws that are committed at least in part abroad and whose investigation may require the [SEC] to obtain substantial foreign-based evidence.”²⁶² The Act greatly increased the ability of the SEC to keep information obtained from foreign regulators confidential by creating a Freedom of Information Act (“FOIA”) exemption.²⁶³ Specifically, the FOIA exemption applies to information obtained through an MOU when, as ISECA states, “the foreign securities authority has in good faith determined and represented to the [SEC] that public disclosure of such records would violate the laws applicable to that foreign securities authority.”²⁶⁴ By expanding FOIA exceptions through ISECA to include MOU-obtained documents, Congress gave the SEC an effective and helpful backdoor approach to getting the information it needs to conduct its

http://www.sebi.gov.in/Index.jsp?contentDisp=SubSection&sec_id=25&sub_sec_id=25 (“Securities and Exchange Board of India (SEBI) today signed a bi-lateral Memorandum of Understanding (MoU) with Dubai Financial Services Authority (DFSA) on assistance and mutual cooperation.”).

262. H.R. REP. NO. 101-240, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3888 (stating that a goal of ISECA is to “strengthen international cooperation in the enforcement of securities laws and thereby enhance the ability of the [SEC] to prevent and detect violations of United States securities laws that are committed at least in part abroad and whose investigation may require the [SEC] to obtain substantial foreign-based evidence”).

263. *See id.* at 21; *see also* 15 U.S.C. § 78x(d)(2)(B) (2007) (describing the FOIA exemption in ISECA for exchanges with foreign financial regulators). Before the exemption, the SEC found obtaining documents from foreign regulators covered by foreign confidentiality provisions very difficult and often impossible. *See* H.R. REP. NO. 101-240, at 21 (“The Commission cannot provide assurances of confidentiality because of its disclosure obligations under the Freedom of Information Act (‘FOIA’) or pursuant to a third party subpoena” and the resultant harm to cooperative efforts); Jimenez, *supra* note 64, at 298 (“In many cases, foreign secrecy laws and blocking statutes have hampered SEC attempts to obtain witnesses and documentary evidence from abroad.”).

264. International Securities Enforcement Cooperation Act of 1990, Pub. L. No. 101-550, title II, sec. 202, § 24, 104 Stat. 2713, 2715 (1990) (codified as amended at 15 U.S.C. § 78x(d)(1) (2007)).

investigations. Although U.S. courts have not been squeamish about asserting extraterritorial jurisdiction, bringing a party to trial has not proven a guarantee of complete disclosure. If a party is able to demonstrate good faith efforts to produce the required information, or if the other state's interest is deemed overridingly important, the party may avoid having to reveal the information.

Although nonbinding, coinciding regulator interests should serve to render MOUs effective. This is especially true considering the provisions giving regulators the option of not complying when doing so would violate their domestic laws. MOUs' general wording creates a framework for cooperation that responds to these parallel interests and gives regulators the flexibility to be comfortable agreeing to an MOU.

III. IMPROVED INVESTIGATION AT THE EXPENSE OF DISCLOSURE

The SEC has used MOUs to effectively increase information gathering through cooperation with foreign regulators. This success comes in part from appropriate structuring as a soft-law arrangement between individual regulators.²⁶⁵ MOUs are not negotiated by the two regulators' respective governments, but are instead developed and signed by the regulators themselves.²⁶⁶ Unfortunately, significant study into the SEC's actual requests made pursuant to its MOUs, and the outcomes of those requests, is hampered by FOIA exceptions created by Congress specifically to improve the effectiveness of MOUs.²⁶⁷

Part III.A compiles the evidence that MOUs are effective tools in promoting regulator cooperation. Part III.B suggests that soft-law arrangements, like the SEC's MOUs, are better suited to inter-regulator coordinative arrangements than harder law. Part III.C discusses the FOIA exception to disclosure of information obtained through MOUs and how that exception impedes meaningful information gathering about the SEC's activities and outcomes through MOUs.

265. *See supra* Part II.B (discussing soft law arrangements).

266. *See supra* Part I.B.1 (discussing regulators' independence in signing MOUs).

267. *See* § 202, 104. Stat. at 2715 (describing the FOIA exemption in ISECA for exchanges with foreign financial regulators).

A. *MOUs Promote Cooperation*

MOUs catalyze transnational interactions between regulators.²⁶⁸ Although MOUs are not binding arrangements purporting to require regulators to share information, they do prime regulators to cooperate.²⁶⁹ By establishing procedures and limits for information requests, and by promoting personal and institutional relationships between regulators, the SEC's MOUs ensure that foreign regulating bodies know both what to expect from the SEC and how they are expected to handle a response.²⁷⁰

As an agreement designed to facilitate communication, an MOU can increase the possibilities of coordination between the SEC and other party regulators.²⁷¹ The SEC's first MOU greatly enhanced SEC access to Swiss records, even before the confidentiality provisions in ISECA were passed.²⁷² The fact that information requests are typically not denied is a testament to the effectiveness of the MOU framework. Such success is also a result of an awareness within the SEC of which foreign records will remain undisclosed under foreign securities laws, even considering ISECA's confidentiality stipulations.²⁷³ According to Michael Mann, a convergence on the norm of enforcement, even if the states and regulators disagree on the specific details, may

268. See Mahoney, *supra* note 168, at 893 (stating MOUs' effect as "sharing information and providing enforcement assistance in where [sic] key evidence exists outside of the United States' borders"); Mann Interview, *supra* note 255 (stating that MOUs promote interpersonal relationships between regulators and prepare them to cooperate).

269. See Jimenez, *supra* note 64, at 305 ("MOU's are merely statements of intent."); Mann Interview, *supra* note 255 (stating that MOUs promote interpersonal relationships between regulators and prepare them to cooperate).

270. See Jimenez, *supra* note 64, at 306 (detailing advantages of MOUs from the SEC's viewpoint); Mann Interview, *supra* note 255 (stating that regulators know what to expect in cooperation structured through MOUs).

271. See Majeski & Fricks, *supra* note 248, at 624 ("One additional way to help account for the unexpected presence of cooperation in international politics may be found by enriching the neorealist theory of international relations and its attendant game-theoretic formalisms to include communication."); Wagner, *supra* note 248, at 338 ("If player 2 can decide more than simply whether to cooperate or defect, but can also develop and communicate to player 1 a variety of retaliatory choices that influence either or both a₁ and a₂, then player 2 confronts an additional decision problem . . .").

272. See H.R. REP. NO. 101-240, at 5 (1989), *reprinted in* 1990 U.S.C.A.N. 3888 (stating the significant benefits from the 1982 MOU between the SEC and Swiss regulator).

273. See Mann Interview, *supra* note 255 (stating that denials are uncommon because regulators can reasonably anticipate responses).

also be contributing to the success of the MOU system.²⁷⁴ Perhaps the greatest available evidence of the effectiveness of the MOU framework regime is the promulgation of IOSCO and the MMOU and the fact that the SEC has continued to sign supplementary bilateral MOUs after the 2002 acceptance of the MMOU.²⁷⁵ Other states' use of MOUs supports this position.²⁷⁶ Taken all together, the growing use of MOUs suggests that the agreements must be significantly useful in aiding the SEC's international investigations.

B. *Softer Law is Valuable*

The flexibility provided by soft law arrangements is advantageous to the parties involved in an SEC MOU. The option to withdraw from the agreement without consequence, when coupled with effective communication, tends to enhance cooperative prospects.²⁷⁷ The nature of MOUs does not necessarily require hard-law codification in any case. As purely procedure oriented, information-sharing agreements that take into account the particular sensitivities of foreign securities laws through their own exemptions to disclosure and ISECA,²⁷⁸ MOUs already seem particularly disposed to success. A hard-law agreement between governments does not offer anything not already putatively accomplished by MOUs.

In fact, a binding treaty obligation between the United States and another state on behalf of their regulators could face problems. Government agencies responsible for diplomatic relations almost certainly have different objectives than securities regulators, as their political mandate differs. In addition, any binding treaty agreement runs the risk of reducing both

274. *See id.* (stating that regulators want to cooperate).

275. *See* Cooperative Agreements, *supra* note 202 (listing all of the SEC's MOUs including those signed after 2002); About IOSCO, *supra* note 63 (reviewing the activities of IOSCO).

276. *See supra* notes 259–261 (discussing MOUs between foreign regulators).

277. *See* Karmel & Kelly, *supra* note 72, at 890–91 (explaining speed and flexibility benefits of soft law); Majeski & Fricks, *supra* note 248, at 637 (“By providing a safe and more valuable option, the withdrawal choice also reduces defection without eroding cooperation to any significant degree.”).

278. *See* International Securities Enforcement Cooperation Act, title II, sec. 202, § 24, 104. Stat. 2713, 2715–16 *amending* 15 U.S.C. § 78x (1990) (codified at 15 U.S.C. 78x(d)(2)(B) (2007) (describing the FOIA exemption in ISECA for exchanges with foreign financial regulators).

flexibility and the ability of the SEC to deal with foreign regulators on a case-by-case basis.

C. *A Confidentiality Roadblock*

ISECA's FOIA exception for documents obtained through MOUs certainly has made cooperation between the SEC and non-U.S. regulators more feasible.²⁷⁹ As the FOIA exemption states, records obtained from foreign regulators are only covered if the foreign regulator determines in good faith that disclosure would violate its own confidentiality laws and conveys that information to the SEC.²⁸⁰ MOUs are drafted to respond to this power regarding confidentiality. For example, a typical SEC MOU, signed around the same time as the MMOU came into effect, provides that "[t]o the extent possible, the [r]equesting [regulator] will notify the [r]equested [regulator] of any legally enforceable demand for non-public information furnished under this [MOU] prior to compliance, and the [r]equested [regulator] will assert such appropriate legal exemptions or privileges with respect to such information as may be available."²⁸¹

Under this MOU framework, when the SEC receives a FOIA request for information obtained from a foreign regulator, the SEC should notify the foreign regulator of the request.²⁸² The foreign regulator then, in good faith, determines if the records are subject to confidentiality provisions within their own jurisdiction. That regulator then conveys that information to the

279. See H.R. REP. NO. 101-240, at 23 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3888 ("[U]nless an appropriate FOIA exemption is created, foreign securities authorities will refuse to enter into MOUs with the [SEC].").

280. See International Securities Enforcement Cooperation Act, title II, sec. 202, § 24, 104 Stat. 2713, 2715–16 *amending* 15 U.S.C. § 78x (1990) (codified at 15 U.S.C. 78x(d)(2)(B) (2007) (describing the FOIA exemption in ISECA for exchanges with foreign financial regulators).

281. Compare Jersey MOU, *supra* note 231, ¶ 16(c) ("To the extent possible, the Requesting Authority will notify the Requested Authority of any legally enforceable demand for non-public information furnished under this Memorandum of Understanding prior to compliance, and the Requested Authority will assert such appropriate legal exemptions or privileges with respect to such information as may be available."), with Argentina MOU, *supra* note 216, at art. III, § 6(3) ("The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand, and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.").

282. See *supra* note 281 and accompanying text.

SEC, which in turn articulates that reason for withholding the documents.

The non-binding nature of MOUs means that the SEC may disclose as it chooses, though this would significantly hamper future efforts to coordinate. According to the statute, the only circumstances under which the SEC must disclose information obtained from foreign regulators under an MOU is either when a court orders it, but only if the underlying suit was instituted by the U.S. government or the SEC, or when Congress demands it.²⁸³

The determination made by the foreign regulator must be in good faith; however, the SEC has stated that it assumes all assertions made by the foreign party to be in good faith, unless indications say otherwise.²⁸⁴ Foreign regulators are barred from making sweeping determinations about confidentiality.²⁸⁵ Instead, determinations must be made on a case-by-case basis.²⁸⁶

In 1989, while contemplating ISECA, Congress seemed receptive to arguments for expanding the reach of the FOIA exemption beyond the SEC's proposal.²⁸⁷ However, the SEC defended the initial proposal, which was ultimately the one included in the bill.²⁸⁸ As international investigations have become more important in the two decades since ISECA was passed, the FOIA exemption for MOU-obtained documents has

283. See 15 U.S.C. § 78x(e)(2) (2007) (stating that the FOIA exception does not apply if the records are requested by Congress or by the court in a proceeding if instituted by the SEC). Thus, the information is protected from disclosure in a suit by private parties. See *id.* (stating that the FOIA exception does not apply if the records are requested by Congress or the court if in a proceeding instituted by the SEC).

284. See H.R. REP. NO. 101-240, at 33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3888 (explaining the importance of good faith in confidentiality determinations by the foreign regulator).

285. See *id.*

286. 15 U.S.C. § 78x(d)(1) (2007) (stating “the foreign securities authority has in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority . . .”).

287. See H.R. REP. NO. 101-240, at 33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3888 (showing that Congressman Rinaldo asked whether the exemption should be made “more broad”).

288. See International Securities Enforcement Cooperation Act, title II, sec. 202, § 24, 104 Stat. 2713, 2715–16 (1990) (stating that “the Commission shall not be compelled to disclose records obtained from a foreign securities authority”); H.R. REP. NO. 101-240, at 34 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3888 (“The proposed exemption would establish a clear standard for nondisclosure: whether the information is protected by applicable foreign law.”).

become increasingly relevant. It may be operating to exclude a growing body of significant information from parties facing investigation and possible prosecution by the SEC. The exemption also shields the SEC's international interactions from meaningful public examination. Although the exemption is clearly necessary to satisfy the interests of confidentiality, without which the existence of cooperation would be questionable, a new balance may need to be struck. The democratic values enshrined and promoted within FOIA warrant a reconsideration of the extent of these confidentiality provisions, especially considering the overlap with enforcement exemptions also available under FOIA.

CONCLUSION

The financial centrality of the United States is eroding as other states begin to catch up developmentally and technologically. Coinciding with the first clear signs of this U.S. decline—beginning in the 1980s and steadily growing in importance—MOUs allow the SEC to increase information sharing with other regulators in order to combat growing opportunities for foreign misconduct. As frameworks for international cooperation, MOUs hold the promise of successfully promoting cooperation. This is especially the case considering the changes in the global financial market structure and how these changes affect the prospects and arrangement of successful cooperation. MOUs prime regulators to exchange information in expected ways. Their soft law structure allows them to embody the flexible and timely approach desirable in securities regulation.

In the United States, however, the FOIA exception has served to remove many actual operations of MOUs from public scrutiny. As an important vehicle for the SEC to exchange information with foreign regulators, an activity growing rapidly in importance, a more meaningful and deep review into MOUs' operation and true effectiveness is certainly in order. Until a study is concluded by a body with the power to compel the necessary disclosure, namely Congress, other factors will have to suffice in determining the effectiveness of MOUs. The SEC's ambitious actions against foreign fraud and other violations and its enthusiastic continued support for MOUs clearly demonstrate

their ability to foster cooperation and enhance transnational enforcement.

Although the U.S. Congress, in consultation with the SEC, ultimately left the extent of the FOIA exception at the level the SEC proposed, that level seems increasingly onerous. Investigations into transnational conduct are increasingly common, and responding to that conduct is correspondingly more important. Admirable and important democratic values are enshrined within the ethos that underlies FOIA; but exceptions are warranted in balancing those values with the other goals and responsibilities faced by society and government.

The FOIA exception operates to impose other states' domestic confidentiality laws on to investigations and information gathered by the SEC, sometimes in pursuit of prosecuting U.S. citizens. However, the justifications are reasonable and valid. The information itself is being surrendered by foreign governments, or at least their agencies. In the interest of meaningful justice, subjecting that information to confidentiality restrictions is reasonable if a condition of the information's release is its confidentiality. This was Congress' intention in passing the FOIA exception. The effect, as intended, has been to create fewer "information havens" for suspect individuals either operating from within the United States or having effects on U.S. citizens.

Important justifications aside, the growing use and importance of information obtained through MOUs, including the IOSCO MMOU, mean that a progressively larger amount of information used by the SEC in investigating U.S. citizens with connections or interests abroad is confidential. This confidentiality extends beyond the conclusion of an investigation, even if charges are never pursued. It is incumbent upon those with access to the information—Congress and the SEC—to make the effectiveness of MOUs and the impact of their resulting information public in a way that does not unreasonably impair the relevant confidentiality provisions or enforcement of U.S. securities laws.