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HARMONIZATION OF SECURITIES DISCLOSURE RULES IN THE GLOBAL MARKET—A PROPOSAL

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INTRODUCTION

THE internationalization of the world's securities markets has become a well-established phenomenon. By the end of 1997, more than 1,000 foreign companies were traded in U.S. public markets.[1] In the United Kingdom, the daily foreign equity turnover is over 50% of the total daily turnover; in the United States, the daily foreign equity turnover has been increasing rapidly since the beginning of the 1990s.[2] Investors are increasingly diversifying their portfolio between several markets. In 1996, the gross purchases and sales of securities in the United States by foreign investors amounted to more than $12.4 trillion.[3]

Although the nature of the world's securities markets has changed dramatically, there have been no corresponding changes in the way these markets are regulated. This paper presents an alternative to the

1. Office of International Corporate Finance of the U.S. Securities and Exchange Commission, *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission* (Dec. 31, 1997).
2. G. Andrew Karolyi, *What Happens to Stocks that List Shares Abroad? A Survey of the Evidence and its Managerial Implications*, NYSE Working Paper 96-04, Sept. 1996, at 36.
3. Office of the Secretary, U.S. Department of Treasury, *Treasury Bulletin*, table CM-V-5 (March 1997).

current regulatory regimes of the securities markets. The paper suggests the replacement of the prevailing domestic disclosure regulatory regimes with unified disclosure standards to be used by domestic and foreign issuers in all developed markets. Such a transformation would result in a more efficient securities market, a significant reduction in the cost of equity, and a higher level of investor protection worldwide.[4]

This proposal describes the scope of the suggested common standards, the steps regulators will need to take to agree upon unified standards, the content of those standards, and the mechanism for their implementation. The timing of this proposal is important. In July 1997, the U.S. Securities and Exchange Commission (the "SEC") and the regulators of all major securities markets announced their intention to replace the registration system for cross-border offerings with international disclosure standards developed within the framework of the International Organization of Securities Commissions (IOSCO).[5] This article also addresses the issues raised in the IOSCO proposal and provides an alternative concept.[6]

Part I of this article describes and evaluates two existing models of harmonization, the European Union (EU) harmonization plan and the United States-Canadian Multijurisdictional Disclosure System (MJDS). Both models are based on the concept of mutual recognition, but differ in method of implementation and other details. The conclusions drawn from this evaluation are incorporated in the proposed harmonization model discussed in parts II and III.

Part II explores the preferred form of harmonization of securities disclosure rules. The discussion begins with an analysis of two possible approaches to harmonization: reciprocity and commonality, while arguing for the superiority of the commonality approach. The discussion continues with the scope of the proposed standards, the structure

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4. *See, e.g.*, Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 Colum. Bus. L. Rev. 241 (utilizing various economic theories to support the argument that harmonization is the most efficient approach for regulating securities disclosure rules in the global market).

5. The international disclosure standards [hereinafter the IOSCO Proposal] are accompanied by a proposed timetable based upon endorsement of the IOSCO Proposal by the member states by fall 1998, and thereafter implementation of the standards into the domestic law of the member states, including the U.S. (on file with the author). *See also* U.S. Securities and Exchange Commission, Current Issues and Rulemaking Projects (visited Feb. 25, 1998) <http://www.sec.gov/rules/othern/cfcr0298.html> (describing the development of international standards and the rulemaking process).

6. The concept of the IOSCO Proposal is different from that of this paper. The IOSCO Proposal does not call for the harmonization of securities disclosure rules; instead, it suggests the creation of international disclosure standards to be used *only* for cross-border offering and listing. For further discussion of the conceptual differences, see *infra* part II.B.

of the Global Prospectus[7] and its review process. Finally, this part addresses the institutional framework of the model, focusing on the process of creating, implementing, monitoring, and changing the harmonized standards. The need for a central body with decision-making, monitoring and dispute-resolution mechanisms (a Global Coordinator) is illustrated by the experiences of various multinational economic cooperation bodies.

Part III presents the content of the proposed standards. This discussion is based upon a comprehensive analysis of the disclosure rules in the United States, the United Kingdom, Japan and eleven other markets. This part specifies the disclosure rules which are to be the core of the Global Prospectus. Although not a complete disclosure code, these rules cover all aspects of the issuer's development and the description of its business.

Finally, part IV identifies some of the problems which are likely to hinder the process of harmonization. The discussion covers the cost of governmental intervention, differences in structural and regulatory schemata in different markets, the costs of moving from the current disclosure regime to harmonization and political opposition to harmonization by interest groups. The analysis of these problems is followed by suggestions as to how to avoid them or mitigate their negative effects.

I. Existing Models of Harmonization

Over the last two decades, we have witnessed the implementation of two major plans to harmonize securities disclosure rules: the EU harmonization plan and the MJDS. Under the EU plan, a single disclosure document can be used for the offering of securities in any member state, as long as the disclosure requirements mandated by the issuer's home country conform to a minimum standard. In contrast, the MJDS allows Canadian and U.S. issuers to satisfy each other's registration and disclosure requirements by complying with their own domestic requirements. Before presenting any new proposal concerning harmonization, it is important to analyze these two models.

A. *The EU Harmonization Plan*

The EU's harmonization of securities laws is part of its plan to create a common market in Europe.[8] Several directives[9] govern the registration and admission for the trading of securities to be listed on a

7. The term "Global Prospectus" is used to describe the prospectus which would be prepared pursuant to the harmonized standards.

8. Andreas J. Roquette, *New Developments Relating to the Internationalization of the Capital Markets: A Comparison of Legislative Reforms in the United States, the European Community, and Germany*, 14 U. Pa. J. Int'l Bus. L. 565, 571 (1994).

9. Directives are rules adopted by the EU Council which must be implemented by legislation into each member state's domestic law. *Id.* at 587-88.

stock exchange in a member state; the sale of securities offered to the public without listing, periodic reporting requirements; and mutual recognition of offering documents.

1. The Basic Approach of the EU Harmonization Plan

The EU harmonization plan is based upon minimum disclosure standards combined with a mutual recognition approach. The directives set only a minimum standard, which each member state may supplement with more stringent rules appropriate to the specific needs of its own markets.[10] Each member state is required to recognize disclosure documents which meet the minimum standards and are approved by a competent authority in another member state.[11] The minimum standards ensure a level of disclosure which is acceptable to all member states, making it possible for states with more stringent regulatory regimes to accept registration documents based on the home country requirements of any other member state.[12]

2. Directives Governing Issuing and Trading in Securities

Issuing and trading in securities in the EU are governed by five directives.[13] The Admissions Directive,[14] adopted in 1979, specifies the minimum requirements for the admission of securities for trading on a stock exchange in any member state. The Listing Particular Directive,[15] adopted in 1980, defines the minimum disclosure requirements for registration documents to be used in any member state. Information required for an equity offering is specified in schedule A,[16] which mandates the disclosure of information concerning the parties involved in the offering, the issuer's business and management, and financial statements. In addition, article four of the Listing Particular Directive mandates the disclosure of material information which is "necessary to enable investors and their investment advisers to make

10. David Reid & Andrew Ballheimer, *The Legal Framework of the Securities Industry in the European Community Under the 1992 Program*, 29 Colum. J. Transnat'l L. 103, 124 (1991) (describing the development of the EU harmonization program).

11. For a discussion of the mutual recognition procedure, see *infra* text accompanying notes 18-19.

12. *See* Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation*, 4 Transnat'l L. & Contemp. Probs. 69, 96 (1994).

13. Due to the nature and scope of this work, only the Listing Particular Directive and the Mutual Recognition Directive are discussed in detail. For a comprehensive discussion of all of the directives which relate to the issuance of and trading in securities in the EU, see Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 Harv. Int'l L.J. 185, 209-21 (1990).

14. Council Directive No. 79/279, 1979 O.J. (L 66) 21 [hereinafter the Admissions Directive].

15. Council Directive No. 80/390, 1980 O.J. (L 100) 1 [hereinafter the Listing Particular Directive].

16. *Id.* at (L 100) 11.

an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities."[17]

The Listing Particular Directive was amended in 1987 by the Mutual Recognition Directive.[18] The Mutual Recognition Directive provides that listing particulars which are approved by a competent authority in any member state must be recognized in all other member states if the application for listing is made simultaneously or within a short interval.[19] Mutual recognition is not required if an exemption from the requirements of the Listing Particular has been granted in the member state where the particular was scrutinized, and such an exemption is not allowed in the member state where mutual recognition is sought.

The Interim Reports Directive,[20] adopted in 1982, mandates the publication of semi-annual reports by all issuers with equity securities listed on a stock exchange in a member state.[21] Finally, the Public Offer Prospectus Directive, adopted in 1989, specifies the minimum disclosure requirements for public offerings of securities which are not to be listed on an exchange.[22] The Public Offer Prospectus Directive includes a mutual recognition provision similar to the one added to the Listing Particular Directive.

3. Evaluation of the EU's Experience

The EU harmonization plan serves as a good case study for the applicability and effectiveness of harmonized disclosure rules. It is the first attempt to harmonize securities disclosure rules among separate nations. The EU has sought to achieve a common market for securities using minimum standards for the listing of securities and mutual recognition of disclosure documents. This approach, however, suffers from several problems. The minimum standards approach, which allows member states to set more stringent disclosure requirements, can result in regulatory disharmony and disparities among member states.[23] These disparities potentially lead to regulatory arbitrage within the EU. Issuers may prefer to seek approval of their listing

17. *Id.* at (L 100) 2.

18. Council Directive No. 87/345, 1987 O.J. (L 185) 81 [hereinafter Mutual Recognition Directive].

19. Mutual recognition is subject only to translation and the incorporation of limited additional information concerning tax systems, paying agents, and the way notices are to be delivered to investors in the member state where recognition is sought. *Id.* at (L 185) 82.

20. Council Directive No. 82/121, 1982 O.J. (L 48) 26.

21. The requirements for the publication of an annual report are listed in the Fourth Company Law Directive which applies to every company incorporated within the EU. *See* Council Directive No. 78/660, 1978 O.J. (L 222) 11.

22. Council Directive No. 98/298, 1989 O.J. (L 124) 8.

23. Warren, *supra* note 13, at 231 (stating that the EU chose "harmony now" at the price of "discord later").

document in a nation which offers a less rigid disclosure regime, and then use the Mutual Recognition Directive to obtain listing in other nations. This puts pressure on member states to reduce their disclosure requirements to the lowest common denominator.[24] The fear of regulatory arbitrage has already led the London Stock Exchange (LSE) to reduce its disclosure requirements to the EU's minimum standard.[25]

Another source of potential disparities is the method by which member states have interpreted, implemented, and enforced the directives. Since the directives do not mandate any particular method of implementation, each member state may interpret and implement the directives differently. Thus, even when disclosure requirements are formally harmonized, in practice there are still differences in regulatory requirements.[26] The lack of uniformity in implementation and enforcement of the directives is exacerbated by the lack of an institutional mechanism for coordination and enforcement of the rules. Several commentators have pointed to the lack of such an institution as a major obstacle to the creation of a common market for securities in Europe.[27]

B. *The United States-Canadian Multijurisdictional Disclosure System*

The MJDS, adopted in 1991, employs a reciprocal approach to facilitate United States/Canadian cross-border securities transactions.[28] The MJDS is the first attempt by United States regulators to allow foreign issuers to access the United States public market using their home country disclosure documents. The MJDS was designed to serve as a model for future arrangements with other nations.[29] Thus, it is important to analyze the concept and content of the MJDS and to draw conclusions from the American and Canadian experience accumulated since its adoption.

24. *Id.* at 213 (exploring the mutual influence of the minimum standards and the mutual recognition approach).

25. Reid & Ballheimer, *supra* note 10, at 126 (describing how the LSE relaxed its listing requirements).

26. *Id.* at 144.

27. *See, e.g.*, Roquette, *supra* note 8, at 598 (stating that the lack of an institutional mechanism for coordination and enforcement reduces the chance for efficient and effective harmonization); Warren *supra* note 13, at 231 (suggesting the establishment of a supernational regulatory body to ensure the coordination and enforcement of the regulatory system).

28. Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,812, at 81,860 (July 1, 1991) [hereinafter the MJDS Release].

29. When adopting the MJDS, the SEC indicated its intention to extend it to other foreign countries such as the United Kingdom and Japan. *See* Edward E. Green et. al., U.S. Regulation of the International Securities and Derivatives Markets 8-5 (3d ed. 1995).

1. Concept and Content of the MJDS

The basic concept of the MJDS is similar to that of the EU harmonization plan. The United States and Canada have agreed to mutually recognize registration statements prepared in accordance with each other's domestic disclosure requirements. The MJDS has not formally established a minimum standard similar to the one established by the EU. During the negotiation of the MJDS, however, Canadian authorities adopted new rules which made Canadian disclosure requirements substantially equal to those of the United States.[30] Furthermore, following the adoption of the MJDS, the Canadian securities regime has become increasingly aligned with that of the United States.[31] Today, Canadian authorities are quick to adopt new United States initiatives, making Canadian issuers which do not use the MJDS subject to American style disclosure.[32]

To be eligible to use the MJDS for equity offerings, a Canadian issuer has to satisfy three basic conditions:[33] (1) a twelve month reporting history in Canada; (2) a public float of seventy-five million U.S. dollars; and (3) full United States GAAP reconciliation. Eligible Canadian issuers may conduct a public offering in the United States, using a Canadian prospectus under a "wrap-around" registration statement on Form F-10.[34] The prospectus, however, must include all "material" information within the definition of U.S. securities laws.[35] Furthermore, issuers and underwriters remain subject to civil liability under U.S. antifraud provisions for misstatements and omissions of material information.[36] Once cleared with a review jurisdiction in Canada, the prospectus is not subject to review in the United States unless the SEC has reason to believe that there are deficiencies in the filing.[37]

2. Evaluation of the MJDS Experience

The first conclusion to draw from the experience of the adoption of the MJDS is that the harmonization of securities disclosure standards, even between two nations whose economies are strongly connected, requires a long process of negotiation and modification of existing

30. *Id.* at 8-3 to 8-4 n.1 (explaining how the equality of Canadian and U.S. requirements was achieved).

31. Cally Jordan, *Regulation of Canadian Capital Markets in the 1990s: The United States in the Driver's Seat*, 4 Pac. Rim L. & Pol'y J. 577, 592 (1995).

32. *Id.* at 592-93 (describing the Americanization of the Canadian disclosure system).

33. For a full discussion of the conditions for using the MJDS, see Green, *supra* note 29, at 8-6 to 8-12.

34. 17 C.F.R. § 239.40 (1997).

35. The MJDS Release, *supra* note 28, at 81,880-81.

36. *Id.*

37. *Id.* at 81,866.

rules.[38] Formally based on a reciprocal approach, the MJDS is, in fact, based upon many changes in the Canadian disclosure regime which make it almost identical to that of the United States. It may be the reluctance of other nations to engage in a similar process of Americanization of their securities disclosure rules which has prevented the planned expansion of the MJDS to the United Kingdom and Japan.[39] Even between the United States and Canada, the lack of common accounting standards, reflected in the requirement to reconcile financial statements in an equity offering, limits the effectiveness of the MJDS for equity. As a result of the reconciliation requirement, only a small amount of equity has been raised using the MJDS.[40] Finally, the retention of U.S. civil liability for the MJDS prospectus has resulted in the MJDS prospectus becoming very similar to the U.S. prospectus[41] and in underwriters insisting on a U.S. style due diligence process.[42]

II. The Form, Scope and Process of Harmonization

This part discusses three basic issues which need to be addressed before drafting the harmonized standards. First, it is essential to decide which form of harmonization would be more efficient for the harmonization of securities disclosure rules in the global market: reciprocity or commonality.[43] Next, it is necessary to determine the structure and use of these standards. Finally, the form and powers of the institution which would coordinate the creation of and the changes to the harmonization standards and monitor their implementation have to be determined.

A. *Reciprocity or Commonality*

Harmonization usually refers to two different forms of legal order: reciprocity and commonality.[44] The reciprocity approach is based upon deference to the standards of other jurisdictions. Reciprocity

38. The development of the MJDS took six years, see Green, *supra* note 29, at 8-3 n.1.

39. An additional reason might be the fact that until 1997 the United Kingdom securities market was regulated by a private organization (the LSE) which the SEC did not find to be an appropriate contra party for multinational disclosure agreement.

40. As of March 1995, only $3 billion had been raised in MJDS equity offerings. In contrast, $13 billion had been raised in MJDS debt offerings. *See* Green, *supra* note 29, at 8-39 to 8-40 nn.112 & 114.

41. Jordan, *supra* note 31, at 591.

42. Trachtman, *supra* note 12, at 95.

43. A similar pattern was followed by the SEC when it initiated the development of the MJDS. The first step was the publication of a concept release requesting comments on two alternative approaches to facilitate multinational offerings: the reciprocal approach and the common prospectus approach. *See* Facilitation of Multinational Securities Offering, Securities Act Release No. 6568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743, at 87,318 (Feb. 28, 1985) [hereinafter Multinational Offerings Release].

44. Warren, *supra* note 13, at 191.

requires an agreement by each of the participating countries that an offering document used by issuers in their own countries will be accepted for offering in each of the other countries.[45] Reciprocity is usually limited to situations in which there is a strong economic connection among all the countries involved, and all meet some minimum standards.[46] Commonality involves the modification or replacement of domestic rules with rules that are substantially the same as those of other countries.[47] In our context, commonality would require agreement on disclosure standards for an offering document that could be used in all participating countries.[48]

The reciprocity approach is considered easier to implement because it only requires the acceptance of a document based on the domestic requirements of another nation.[49] Pure reciprocity without minimum standards, however, would not be acceptable to most nations. It is very hard to imagine that the United States would ever accept a prospectus based on the disclosure requirements of a third world country or even those of Japan or Germany. Furthermore, unless it results in the lowest common denominator,[50] reciprocity does not minimize the disparities between nations or enhance the comparability of investment opportunities. If the standards of many nations were accepted in one market, it would be difficult for investors to compare their investment opportunities. This lack of comparability would hinder the efficient flow of capital worldwide.[51] The experience with the EU harmonization plan[52] and the MJDS,[53] both of which are based on a reciprocal approach, proves that the reciprocal approach cannot serve as a basis for global harmonization. The EU tried to avoid the problems of reciprocity by adopting minimum standards. This led to opportunities for regulatory arbitrage and a reduction of the disclosure level in the member states to the lowest common denominator. The lesson from this experience is that if we are to end up with the lowest common denominator anyway, we would be better off designing a common optimal standard (i.e., the commonality approach) to begin with.

45. Multinational Offerings Release, *supra* note 43, at 87,322.

46. James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 Law & Contemp. Probs. 157, 179 (1992) (describing situations in which the United States should defer to other countries' securities regulations); Warren, *supra* note 13, at 191-93 (describing the use of reciprocity in EU harmonization and in connection with the MJDS).

47. Warren, *supra* note 13, at 191-92.

48. For the names of the countries that would participate in the harmonization process, see *infra* note 59.

49. Multinational Offerings Release, *supra* note 43, at 87,323.

50. *See supra* text accompanying note 24.

51. The IASC-U.S. Comparison Project: A Report on the Similarities and Differences Between IASC Standards and U.S. GAAP 4 (Carrie Bloomer ed., 1996) (stating that reciprocity introduces noncomparability and precludes firms from competing on a level playing field) [hereinafter IASC-U.S. Comparison Project].

52. *See supra* part I.A.

53. *See supra* part I.B.

With respect to the MJDS, such a system can work only between two countries with very similar reporting systems. Moreover, although Canada and the United States had a similar disclosure system even before the adoption of the MJDS, the Canadian disclosure system went through significant changes during the negotiation of the MJDS to make its disclosure even more similar to that of the United States. The retention of U.S. civil liability has further made the MJDS Prospectus similar to the U.S. Prospectus. The MJDS, although formally based on reciprocity, is truly based on a commonality approach. The MJDS has resulted in the Americanization of Canadian securities laws, a result which would not be acceptable to many nations.

In contrast to reciprocity, the advantages of commonality outweigh its disadvantages.[54] Economies of scale would be created by standardizing a single set of rules to govern primary and periodic disclosure. Investors, analysts, accountants, and lawyers would only need to learn how to deal with a single set of rules, rather than multiple sets, as is now the case.[55] A common prospectus would also make possible a much more systematic comparison of companies in different markets, the ultimate result of which would be more efficient financial markets.[56] Finally, a common prospectus would make possible the development of an international database to be used for secondary offerings and trading.[57]

An agreement on a common prospectus with high quality disclosure might be difficult to achieve. The experience with the EU harmonization plan and MJDS, however, has shown that the same problem applies to reciprocity, which requires the adoption of minimum standards—such as those adopted by the EU—or the creation of similar disclosure standards—as in the MJDS. The feasibility of the crea-

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54. For a detailed discussion of the benefits of common standards, see Geiger, *supra* note 4, at 297-312.

55. *See* Lawrence J. White, *Competition Versus Harmonization — An Overview of International Regulation of Financial Services*, *in* International Financial Markets: Harmonization Versus Competition 5, 39 (Claude E. Barfield ed., 1996) (describing the savings in transaction costs that would result from harmonization and comparing the diversity of disclosure rules to a situation in which each of the 50 states had its own accounting standards); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 Harv. Int'l L.J. 47, 66-67 (1993) (describing the economies of scale which are created when one set of rules governs a broad class of transactions); David Mercado, *Evolving Accounting Standards in the International Markets*, 961 PLI/CORP 343, 348 (1996), *available in* Westlaw, PLI-CORP File (explaining how investors' and analysts' familiarity with one international standard facilitates the ease with which they understand the disclosure document).

56. *See* Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 Fordham Int'l L.J. S77, S88-S89 (1994) (explaining the importance of comparability); Mercado, *supra* note 55, at 348 (explaining that having one set of standards will make possible a much more systematic comparison of companies around the world).

57. Multinational Offerings Release, *supra* note 43, at 87,323.

tion of high quality unified standards is demonstrated in part III of this work.[58]

B. *The Scope of the Common Standards*

If the commonality approach is to be used to regulate the global securities market, it is essential to define the scope of the common standards. The first question in this regard is in which nations would the common standards be applicable? This proposal recommends a two step process. In the first stage, the common standards would apply only to a relatively small group of developed nations.[59] Most developed nations have a sophisticated investment community, an established financial industry, and an experienced accounting and legal community. This makes them most suitable to share common standards. Furthermore, an attempt to develop and implement common standards by a much larger group of nations might be impossible. Finally, since the proposed review process of the Global Prospectus anticipates mutual recognition of documents reviewed by the domestic regulatory authorities of all participating nations,[60] it is unlikely that the developed nations would agree to the participation of all interested nations in the first stage. In the second stage, other nations which decided to adopt the common standards would become part of the Global Coordinator, subject to the approval of the decision-making institution of the Global Coordinator.[61]

A second limitation on the applicability of the standards is that they would not apply to small offerings by companies with limited market capitalization. Many nations allow exemptions from registration for small offerings.[62] The main justification for this exemption is that in a small offering, the registration costs are spread over the small amount of capital raised, and are much higher than the cost of registration for a large offering. Without the exemption, many small companies would not be able to access the public market. In the context of the Global Prospectus, small companies, especially those which transact business domestically, or do not anticipate that foreign investors will

58. IOSCO Proposal, *supra* note 5, although not meant to replace domestic disclosure requirements, is another example of the feasibility of creating an agreed upon international standard.

59. The following nations which are currently involved in the creation of international disclosure standards within the framework of IOSCO are potential candidates for participation in the first stage of harmonization: Australia, Belgium, Canada, France, Germany, Hong Kong, Italy, Japan, Luxembourg, the Netherlands, Spain, Switzerland, the United Kingdom and the United States [hereinafter "Major Markets"].

60. *See infra* text accompanying notes 78-80.

61. For a discussion of the voting mechanism of the Global Coordinator, see *infra* part II.D.2.

62. In the U.S., certain non-reporting issuers can raise up to $5 million in aggregate during any 12 month period without registration. *See* Regulation A — Conditional Small Issuers Exemption, 17 C.F.R. § § 230.251-63 (1997).

find them attractive, might find it too expensive to disclose information in accordance with the common standards. Consequently, domestic offerings below a minimum threshold by companies with a limited market capitalization would be exempt from the disclosure requirements of the Global Prospectus. In addition, certain exemptions from the common periodic reporting obligations would be available for small companies which did not list their securities on a national exchange or quotation system.[63] Those small companies would be subject to domestic rules, which would either exempt them completely from registration, or require a more lax disclosure. Finally, notwithstanding the exemption, exempt companies could elect to voluntarily report in accordance with the requirements of the Global Prospectus, and in so doing, increase their exposure to the international investment community.

Perhaps the most relevant question in connection with the scope of the common standards is whether the common standards should be used for every securities offering, including purely domestic ones (a global standard), or only for multinational offerings.[64] The IOSCO proposal takes the latter approach, suggesting the establishment of international disclosure standards to be used only for multinational offerings.[65] For both issuers and investors, however, this approach is less beneficial than the establishment of a global standard. From an issuer's perspective, a global standard is likely to result in more significant savings in transaction costs. The ability to use the same document for both domestic and international offerings would significantly reduce the cost of multinational offerings. Furthermore, issuers would realize an ongoing savings of periodic disclosure costs by using the same disclosure standards in both domestic and foreign markets.[66] In contrast, by having to use different standards for domestic and multinational offerings, issuers which offered securities outside their home markets would bear multiple disclosure costs. Issuers in countries—such as the United States—where domestic standards are more stringent than the international standards, might be put at a competitive disadvantage. U.S. issuers might argue that disclosure has costs, and that if foreign issuers did not have to supply certain types of information or comprehensive periodic reporting to their American investors, why should American issuers be required to supply this informa-

63. The specific details of these exemptions are to be determined in the negotiation process.

64. Unless otherwise stated, the term "multinational offering" refers to an offering or listing of securities conducted in one or more markets other than the issuer's home market.

65. *See supra* note 5. One should note, however, that the IOSCO Proposal can serve as a first step toward a full scale harmonization.

66. For a detailed description of issuers' benefits from harmonization, see Geiger, *supra* note 4, at 306-07.

tion?[67] Finally, having different domestic and international standards would make it impossible to use a short form registration procedure based on home country disclosure in multinational offerings.[68]

From the investors' perspective, the use of one standard for foreign companies and another for domestic companies would result in non-comparability. Investors would face a difficult task in trying to overcome qualitative differences in the information presented by foreign and domestic firms.[69] Using different standards for foreign and domestic companies would also hinder investors' ability to compare companies' risk-return characteristics across the markets.[70] Furthermore, if the standards are to be used only for multinational offerings, investors would still have to become familiar with many forms of disclosure documents when investing in foreign markets. In contrast, the use of one document in all markets would create significant economies of scale, improve comparability, and result in a more efficient allocation of capital.[71] A global standard could also confer the benefits of an efficient disclosure system upon a large body of investors and improve disclosure efficiency in many markets where local standards are currently suboptimal.[72]

The last recommendation regarding the scope of the common standards focuses on industry-specific disclosure. In some countries, specific rules apply to companies in industries such as oil and gas, banking, real estate, and mining.[73] In many instances, the development and content of those rules reflect the importance of a specific industry to the economy of a country. However, because specific industries have varying levels of importance in different countries, and in order to facilitate the process of developing the new common rules, no specific industry guidelines would be instituted in the first stage of harmonization.

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67. *See* Breeden, *supra* note 56, at S88 (arguing that having lower disclosure standards for foreign issuers might put U.S. firms at a competitive disadvantage); Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 Colum. L. Rev. 1335, 1338 (1996) (arguing that if the SEC lowers standards radically for foreign issuers, domestic issuers will demand equal treatment).

68. A short form cross-border registration procedure based upon domestic disclosure was adopted in the EU in 1994. *See* Council Directive No. 94/18, 1994 O.J. (L 135) 1.

69. IASC-U.S. Comparison Project, *supra* note 51, at 5. In fact, even investors who invest only in local markets would have to bear the costs of becoming familiar with the international disclosure standards which would be used by foreign issuers in the investors' domestic market.

70. Breeden, *supra* note 56, at S88-S89.

71. *See* Geiger, *supra* note 4, at 307-10 (showing how the harmonization could significantly reduce the cost of capital and improve comparability).

72. *Id.* at 309-10 (explaining how using harmonized standards would improve the operation of markets worldwide).

73. *See, e.g.*, Securities Act Industry Guides, 1 Fed. Sec. L. Rep. (CCH) ¶ 3825-31, at 3311 (July 15, 1996) (stating specific disclosure requirements for certain industries).

C. *The Global Prospectus*

1. The Structure of the Global Prospectus

The Global Prospectus would be based on two forms: a Basic Form to be used by companies that do not offer or list their securities in foreign markets, and a Global Form for multinational offerings. The Basic Form would include a complete description of the issuer's business, management, securities, and the details of the offering.[74] The Basic Form would also include financial statements prepared in accordance with the reformed International Accounting Standards (IAS).[75]

For a multinational offering, an issuer would have to use the Global Form, which would be a "wrap-around" of a translation of the Basic Form into the language of each market in which public offerings are to be conducted.[76] In addition, the Global Form would include specific information concerning investments by investors from each host market in the issuer's home market as well as any material changes in the issuer's position since the date of authorization of the Basic Form.[77]

2. The Review Process of the Global Prospectus

In order to realize the full benefits of harmonization, there is a need to coordinate the review process among the participating nations. Clearing the same document with each jurisdiction in which securities are to be offered is complicated and impractical. A multiple review process would hinder the offering process, making it slow and expensive. Instead, each nation would designate a competent authority which would be entrusted with reviewing the Global Prospectus.[78] This authority would review all Basic Forms filed by domestic issuers. This would be done even for purely offshore offerings of domestic issuers. There are multiple reasons for this process. First, a local authority would have more experience with and possess a better understanding of the operation of domestic firms than a foreign authority would. Second, a local authority is more accessible to domestic issuers, making the clearance of documents with a local authority

74. For a detailed discussion of the content of the Global Prospectus, see *infra* part III.

75. For a description of the IAS and a comparison of the new standards with U.S. GAAP, see IASC-U.S. Comparison Project, *supra* note 51 (presenting a study prepared by the Financial Accounting Standards Board).

76. There will be no need to translate a Basic Form prepared in English if the competent authority in the host market authorizes the use of English language prospectuses in cross-border offerings. The term "host market" refers to any market, other than the issuer's home market, in which securities are publicly offered.

77. For a discussion of the additional information to be provided in the Global Form, see *infra* part III.D.2.

78. The need to rely on the review process of other authorities is another justification for limiting the applicability of the proposed rules to developed markets, which are supervised by reliable regulatory bodies. *See supra* text accompanying notes 60-61.

faster and cheaper. Finally, allowing issuers to designate a review jurisdiction, as in the MJDS and EU harmonization plan,[79] would encourage regulatory arbitrage. Issuers might choose authorities which are known for their less strict review process.

A Basic Form reviewed and authorized by a competent authority would be acceptable for public offering in any other, participating jurisdiction within three months of the authorization.[80] The additional information in the Global Form and the translation of the Basic Form, if necessary, would be reviewed by the competent authority of each host market. This authority would have a greater understanding of the specific needs of investors from its own market which would be reflected in the Global Form. Furthermore, within the period provided for the review of the Global Form, the competent authority of the host market would be able to determine whether to use its right to require a full review process as discussed below.

Each jurisdiction would have the right to require a full review of the Basic Form by its own competent authority if it had reasonable grounds to believe that the competent authority of the issuer's home country was not complying with the harmonized standards or that there were problems with the filing. This safety mechanism would be required because we could not expect regulatory agencies, such as the SEC, to completely waive their right to review disclosure documents to be used in their territory.[81] Disputes concerning the application, interpretation, and review process of the Global Prospectus would be brought before the dispute-resolution mechanism of the Global Coordinator.[82]

D. *The Global Coordinator*

The harmonization of securities disclosure rules would be achieved through the cooperation of domestic regulatory agencies within the framework of an international regulatory body—the Global Coordinator. This organization would also monitor the implementation, interpretation, and enforcement of the unified standards by domestic regulators.[83] The Global Coordinator would not replace domestic

79. For U.S.-only offerings, the MJDS allows Canadian issuers to designate any review jurisdiction in Canada. Green, *supra* note 29, at 8.02[2]. In the EU, when an offering is conducted in several markets outside of the issuer's home market, the issuer can engage in regulatory arbitrage by choosing a "convenient" competent authority to conduct the review process. *See* Warren, *supra* note 13, at 213.

80. In the Global Form, issuers would have to disclose any material changes from the date of authorization of the Basic Form until the date the Global Form goes into effect in the host market. *See infra* text accompanying note 247.

81. The idea of local regulatory authorities relying on a foreign authority's review process is likely to raise resistance by many organizations. For a discussion of this issue, see *infra* text accompanying notes 306-08.

82. For a discussion of the dispute-resolution mechanism, see *infra* part II.D.3.

83. The leading candidate to serve as the "Global Coordinator" is the IOSCO. The IOSCO is a private organization encompassing representatives of securities regu-

regulators, who, in addition to their role within the framework of the Global Coordinator, would maintain supervisory powers over domestic markets and continue to perform review functions.

1. The Need for a Global Coordinator

The Global Coordinator would be the institutional mechanism that is needed in any international economic organization.[84] Integration theory identifies the existence of a common institution as a vital variable for facilitating economic integration.[85] Such an institution is charged with three basic powers: first, decision-making powers required for developing the unified standards and making changes and adaptations to future occurrences; second, monitoring powers required for ensuring the implementation of the standards; third, dispute-resolution powers to resolve disagreements and to ensure a unified interpretation.[86]

The need for an institutional mechanism is highlighted by the experience with the EU harmonization plan and the General Agreement on Trade and Tarriffs (GATT). Several commentators see the lack of an institutional mechanism dedicated to monitoring the implementation of the EU harmonization plan as one of the plan's greatest weaknesses, resulting in inconsistent interpretation and implementation of the standards.[87] The creation of the World Trade Organization (WTO) in 1994 was a direct response to the 1947 GATT's lack of an institutional framework and strong dispute-resolution mechanism. These deficiencies led to GATT's weak application in national law,

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lators from more than 100 countries, including the regulatory agencies of all the major financial centers. The IOSCO serves as the principal forum for the study and discussion of international securities regulation. *See, e.g.*, Paul Guy, *Regulatory Harmonization to Achieve Effective International Competition*, *in* Regulating International Financial Markets: Issues and Policies 291 (Franklin R. Edward & Hugh T. Patrick eds., 1992) (providing a general overview of IOSCO). However, as discussed below, the IOSCO's limited powers, structure, and weak decision-making mechanism make it, in its current form, unsuitable to serve as the Global Coordinator.

84. John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 Hous. J. Int'l L. 1, 6 (1996) (expressing the need for an organization with the power to develop and harmonize legal regimes and enforce compliance with regional law).

85. Winfried Lang, *Institutional Development and Linkages — A Response*, *in* Creating a European Economic Space: Legal Aspects of EC-EFTA Relations 105, 105 (Mary Robinson & Jantien Findlater eds., 1989). Since the harmonization of disclosure rules would result in a high degree of integration of securities markets, it is useful to analyze current models of economic integration.

86. Fitzpatrick, *supra* note 84, at 23 (identifying the essential powers of the institutional mechanism).

87. The EU does have separate decision-making and judicial institutions. However, there is no institution which is designated to monitor the implementation and enforcement of the EU harmonization plan. For a general discussion of the institutional structure of the EU, see Dominick Lasok & John W. Bridge, *Law and Institutions of the European Communities* (5th ed. 1991).

and controversy over its interpretation, making it a constant improvisation.[88] To prevent these problems, the Global Coordinator would be structured to ensure the implementation, unified interpretation, and viability of the harmonized rules.

2. Decision-Making Mechanism

The Global Coordinator would be responsible for promulgating the unified rules, making amendments to those rules, and developing future standards. Without a decision-making mechanism to facilitate ongoing revisions to adjust for changing circumstances, the harmonized standards would become outdated.[89]

The voting mechanisms of several international organizations serve as potential models for the Global Coordinator's decision-making mechanism. The IOSCO's decision-making mechanism is based upon consensus. The President's Committee adopts only unanimous decisions which are not binding upon member states.[90] In our context, a consensus voting mechanism could serve the purpose of creating the initial rules. A consensus requirement, however, which effectively gives veto power to each member, could not be used for ongoing operations. It would be enough for one member state to resist a certain change and paralyze the operations of the Global Coordinator and hinder the operations of all securities markets. Thus, the IOSCO consensus model would not be recommended for the Global Coordinator.

Another potential model is the voting mechanism of the WTO. Pursuant to the WTO agreement, when a consensus cannot be reached in the Ministerial Conference or the General Conference, a bypass rule applies, and a decision is then reached by vote.[91] The disadvantage of the WTO arrangement is that each nation receives one vote, notwithstanding the size of its economy.[92] In our context, it is not logical to provide nations that have small capital markets with the same voting powers as nations with large markets.

A possible solution is to adopt a voting mechanism similar to that of the United Nations Security Council. In the Security Council, every decision on substantive matters requires the votes of nine of the fif-

88. Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 Mich. J. Int'l L. 349, 354 (1995) (describing the effect of GATT's lack of an institutional framework).

89. Fitzpatrick, *supra* note 84, at 61-62 (exploring the role of a decision-making institution). In fact, "[n]o regional group without the type of centralized decision-making structure of the EU has yet been successful in fully integrating separate sovereign state economic systems." Frederick M. Abbott, *Interpretation Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 Am. J. Comp. L. 917, 945 (1992).

90. Guy, *supra* note 83, at 296-97 (describing the structure of IOSCO).

91. Dillon, *supra* note 88, at 365-66 (describing the decision-making mechanism of the WTO).

92. *Id.* at 365.

teen members, including the concurring votes of all five permanent members.[93] Likewise, nations with large capital markets such as the United States, United Kingdom, Japan, Germany, and France, could be granted a veto power similar to that of the permanent members of the Security Council. However, giving veto powers only to a limited number of nations is likely to raise strong resistance from other nations not given such powers. In addition, the veto mechanism does not differentiate among the levels of power of the "permanent" members.

A better solution is to develop a mechanism similar to the EU's qualified majority vote. Until 1987, a unanimous vote of the Council was required to issue or amend directives.[94] This effectively gave veto power to each member state, and served as a major impediment to the development of harmonization in Europe.[95] In 1987, an amendment to Article 100 of the Treaty of Rome replaced the unanimity requirement with the requirement for a qualified majority of 54 of the 76 weighted votes of the Council.[96] Pursuant to the qualified majority procedure, each nation is assigned votes in proportion to the size of its market.[97] A similar procedure could be used for the voting mechanism of the Global Coordinator. Each nation would receive voting rights in proportion to the capitalization of its securities market.[98] This would enable the nations most affected by the decisions of the Global Coordinator to have a stronger voice than the nations with limited capital markets which would be less affected. To prevent a situation in which small nations have no say in the Global Coordinator, the qualified majority would be designed to eliminate the possibility of two or three large nations being able to pass a decision over the objections of all other nations.[99] The rules promulgated by the Global Coordinator would be binding on member states only in that they would be required to enact them through internal legislation. Each

93. This gives a veto power to the five permanent members of the Security Council. Department of Public Information United Nations, Basic Facts About the United Nations 11 (1992).

94. This unanimity was required pursuant to Article 100 of the Treaty of Rome. *See* Treaty Establishing the European Economic Community and Connected Documents, Mar. 25, 1957, 298 U.N.T.S. 11.

95. Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 Dick. J. Int'l L. 485, 500 (1993) (discussing the effects of the unanimity requirement of Article 100 of the Treaty of Rome).

96. *Id.* at 502-04 (describing the "Qualified Majority Approximation"). A unanimous vote is still required for certain issues involving the movement of persons and employee rights.

97. *Id.* at 503.

98. The determination of market capitalization would have to take into account corporations that trade in more than one market.

99. A similar mechanism was adopted in the EU; it enables six of the seven smaller nations in the EU to block a proposal by the larger nations. Del Duca, *supra* note 95, at 503.

state, however, would be allowed to choose the form and method of implementation into national law.

3. Monitoring and Dispute-Resolution Mechanisms

It is not enough to create a "formal" unified standard. The Global Coordinator must include an institution with the authority to monitor the implementation of the rules into the national law of each member state. This institution would guarantee that all of the obligations of the member states are fulfilled, that the harmonized rules are implemented across markets, and that the review process in each market is similar. In the event that a member state was found to be in violation of its obligations, the monitoring institution would send a notice to the domestic authority. If the infringement continued, the monitoring institution would be authorized to suspend the recognition in documents reviewed by the domestic authority until the violation was cured.[100] Another role of the monitoring institution would be to identify areas in which the unified standards were not optimal, and to recommend adjustments appropriate to the changing circumstances of the world's securities markets. The monitoring institution would issue periodic reports on the status of the adoption of the rules, empirical studies on their effectiveness, and recommendations for improvement. This process would ensure that the standards remain efficient and do not become outdated.

To avoid political conflicts and to ensure the integrity of the monitoring institution, it should be composed of professionals with no direct affiliation to the member states.[101] An example of such an institution is the Commission of the EU. The Commission is a supranational body required to act in the general interest of the EU.[102] It supervises the actions of member states to ensure their compliance with EU law and investigates any breach or infringement.[103] The members of the EU Commission are independent of the member states' governments.[104] The monitoring institution of the Global Coordinator could be structured in a similar way to the Commission of the EU.

In addition, a dispute-resolution institution should be established. Dispute-resolution institutions are part of most international agreements.[105] The Global Coordinator's dispute-resolution institution

100. Such quasi-judicial decisions would be subject to appeal before the dispute-resolution mechanism.

101. The independence of the monitoring institution's member would negate the need for an internal voting mechanism based on nationality.

102. *See* Lasok & Bridge, *supra* note 87, at 214-15.

103. Del Duca, *supra* note 95, at 494-95 (exploring the institutional framework of the EU).

104. Lasok & Bridge, *supra* note 87, at 214-15.

105. *See, e.g.*, Fitzpatrick, *supra* note 84, at 78, 83 (describing the judicial institutions of EFTA-EEA and NAFTA); Philip M. Nichols, *Extension of Standing in World*

would hear the complaints of member states over issues such as the implementation of the rules in other member states or unsatisfactory review processes by other nations' competent authorities. Another important function of the dispute-resolution mechanism would be to ensure a uniform interpretation of the standards. Even if the rules are "formally" harmonized, their enforcement and interpretation might differ among nations.[106] The combination of the monitoring and dispute-resolution institutions would minimize this risk.

Finally, it is important to note that neither the monitoring institution nor the dispute-resolution mechanism would replace domestic authorities in monitoring the local markets. Domestic authorities would continue to review disclosure documents,[107] enforce national laws (which would include the new harmonized rules) and maintain investor protection. In this respect, each member state's materiality standard would continue to apply,[108] and both domestic authorities and investors, to the extent permitted by domestic law, would be able to bring enforcement action against issuers that failed to meet their disclosure obligations.[109]

III. THE CONTENT OF THE GLOBAL PROSPECTUS

This part explores the proposed content of the Global Prospectus.[110] The goal is not to provide a complete code of disclosure rules; this code would be developed within the framework of the Global Co-

Trade Organization Disputes to Nongovernment Parties, 17 U. Pa. J. Int'l Econ. L. 295, 321-26 (1996) (comparing the dispute-resolution mechanisms of the WTO and the EU).

106. In connection with the IAS, the SEC has already made its endorsement of the rules conditional on the creation of a mechanism which would guarantee rigorous interpretation. *See* SEC Statement Regarding International Accounting Standards, SEC News Digest 96-67.

107. *See supra* part II.C.2.

108. In the United States, the concept of materiality is reflected in Section 11's liability for prospectuses that contain an untrue statement of material fact or omit a material fact required to be stated therein or is necessary to make the statement therein not misleading. *See* 15 U.S.C.A. § 77k (West 1997). A fact is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See* TSC Indust., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

109. In the United States, investors have a private right of action against issuers and certain other parties that fail to meet their disclosure obligations. An analysis of the method used to enforce securities laws in different nations and the problems related to enforcement against foreign companies is beyond the scope of this article. For a discussion of enforcement in the Internet era, see John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 Bus. Law. 1195 (1997).

110. This proposal sets forth the author's views on how multinational negotiations on harmonized disclosure rules might conclude. In the real world, the development and implementation of these standards would face many obstacles. For an overview of some of the problems with harmonization, see *infra* part IV.

ordinator.[111] Rather, this part discusses the philosophy of the harmonized disclosure standards and presents a set of disclosure rules that cover the description of the issuer.[112]

This proposal is based on a comparative analysis of disclosure requirements of the Major Markets.[113] The comparison also demonstrates that the gaps between the disclosure rules of the Major Markets are not huge, so that distillation of these rules is feasible. The format of the presentation is based upon Regulation S-K under the Securities Act.[114] Regulation S-K is the most comprehensive set of disclosure rules of all Major Markets,[115] and therefore serves as a good basis for comparison.[116]

The discussion in this part is limited to non-accounting disclosure. Financial statements which would be part of the disclosure document, would be prepared in accordance with the new harmonized IAS.[117] The discussion also does not cover periodic reporting requirements. In general, periodic reporting would include annual reports, whose content would be similar to that of the Global Prospectus, and semi-annual reports including unaudited financial statements.[118]

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111. The IOSCO is expected to vote in fall 1998 on a proposed draft of international disclosure rules. Those rules, however, are to be used only for cross-border offerings. *See* IOSCO Proposal, *supra* note 5.

112. The proposed rules do not cover offerings by small businesses, offerings which do not involve listing on an exchange, or offerings by companies in specialized industries (such as banking, mining, etc.). *See* discussion *supra* part II.B.

113. The comparison includes mainly the disclosure requirements of the United States, Japan, and the United Kingdom (LSE); United Kingdom rules are similar to those of the EU Listing Particular. In addition, references are made to the disclosure regimes of Australia, Belgium, Canada, France, Germany, Hong Kong, Italy, Luxembourg, the Netherlands, Spain, and Switzerland. The analysis is based on the regulation of the Major Markets and on information included in the Comparative Analysis of Disclosure Regimes prepared by Working Party No.1 of the Technical Committee of the IOSCO. See International Organization of Securities Commissions, *Comparative Analysis of Disclosure Regimes* (1991) (available through the IOSCO's web site at <http://www.iosco.org>) [hereinafter CADRE].

114. 17 C.F.R. § 229 (1997) [hereinafter Regulation S-K].

115. *See, e.g.*, Shahrokh M. Saudagaran & Gary C. Biddle, *Financial Disclosure Levels and Foreign Stock Exchange Listing Decisions*, 4 J. Int'l Fin. Mgmt. & Acct. 106, 124-25 (1992) (presenting a survey of 142 market participants who ranked the U.S. reporting requirements as the most stringent among all Major Markets).

116. Another reason for using Regulation S-K as a basis for comparison is that the American reader is already familiar with the structure of Regulation S-K.

117. For a discussion of the IAS, see IASC-U.S. Comparison Project, *supra* note 51.

118. Currently, the United States is the only major market which requires issuers to furnish quarterly reports. *See* Cox, *supra* note 46, at 187. Furthermore, several commentators suggest that the requirement to disclose financial information on a quarterly basis increases share volatility, focuses management on short term profits rather than long term investments, and puts U.S. companies at a competitive disadvantage to non-U.S. companies, which are not subject to mandatory quarterly reporting. *See, e.g.*, Bruce Alan Mann, *Reexamining the Merits of Mandatory Quarterly Reporting*, Insights, Apr. 1992, at 3-4.

A. *Disclosure Philosophy*

The regulators of all Major Markets share three fundamental goals: protecting investors from fraud, promoting the efficiency of the markets, and establishing and maintaining fair and honest markets.[119] Most nations use full disclosure of all information which is material to investors' investment decisions as a means of achieving these goals.[120] There are, however, differences in the methods employed by various nations to achieve full disclosure. The specificity of disclosure requirements varies among nations. Some nations require specific disclosure requirements which include a list of line items and specific instructions for their fulfillment.[121] Other nations give greater weight to custom and have only a general obligation to disclose all material information.[122]

The disclosure philosophy of the Global Prospectus would be based on two special requirements: First, detailed line item requirements, which would include instructions for their fulfillment; second, a general requirement to disclose any information that may be necessary to make the information contained in the prospectus not misleading under the circumstances which it is made.[123] Using specific line items is needed to overcome the gaps in customary practices among nations. Specific line items ensure similarity among documents drafted in different nations and will therefore result in better comparability. Furthermore, it is easier to monitor compliance with specific requirements than with general custom.

B. *The Business*

The description of the issuer's business is the most important information for investors' investment decisions. Consequently, a description of the business is required in all Major Markets.[124] In the Global Prospectus, the description of the business and its development would be divided into three parts. The first would be a narrative description of the issuer's business and property. The second part would contain financial statements covering the three most recent fiscal years, to be prepared in accordance with the new harmonized IAS.[125] The third

119. International Organization of Securities Commissions, International Equity Offers 7 (1989) (available through the IOSCO's web site at <http://www.iosco.org>).

120. *Id.* at 8. Some countries, such as Canada, use a certain degree of merit review in addition to disclosure to achieve the goal of protecting investors.

121. *See, e.g.*, Regulation S-K, *supra* note 114 (listing U.S. reporting requirements).

122. CADRE, *supra* note 113, at 3-4 (exploring differences in disclosure systems among the Major Markets).

123. Similar disclosure is required in the United States, pursuant to 17 C.F.R. § 230.421 (1997).

124. CADRE, *supra* note 113, at 9.

125. For a description of the new IAS, see IASC-U.S. Comparison Project, *supra* note 51. Those standards will not be discussed in this paper.

part would contain management's discussion and analysis of the company's financial condition and results of operations.

1. Development of the Business

Information required under this caption includes a description of the general development of the business as well as specific line items concerning the issuer's organizational form, material acquisitions, dispositions, and major investments. The U.S. requirements cover the general development of the issuer's business and its subsidiaries during the preceding five years.[126] Information from earlier periods is required if it is material for the understanding of the general development of the business.[127] Japan requires information about the issuer's history from the date of incorporation, including any mergers or changes of business purpose.[128] In addition, any changes in the business product items in the most recent financial year must be reported.[129] In the United Kingdom,[130] general information is required only with respect to trends in the group's—the issuer and its subsidiaries—business since the end of the financial year to which the last published annual accounts relate.[131] Issuers also are required to describe the group's prospects for at least the current financial year.[132]

The Global Prospectus would require the disclosure of the information on the history and development of the issuer's business for the most recent three years. This three-year period correlates to the period covered by the financial statements.[133] Information from prior periods would be required if it is material to an understanding of the general development of the issuer's business. A general disclosure concerning the entire life of the company, as required in Japan, would be too long and partially irrelevant. The discussion of the development of the business would include the following line items:

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126. 17 C.F.R. § 229.101(a) (1997).

127. *Id.*

128. Securities Registration Statement — Instruction for Completion § 19(2), translation of Form 7 prepared by Nomura Securities (on file with author) [hereinafter Form 7]. Form 7 is used by foreign corporations which offer their securities publicly in Japan. The content of Form 7 is similar to that of Form 2, which is used by domestic companies except for the sections that refer to financial statements.

129. *Id.* § 20(1)(c).

130. In the United Kingdom, the disclosure requirements are set out in chapter 6 of the London Stock Exchange Listing Rules (1997) [hereinafter Yellow Book].

131. *Id.* § 6.G.1(a). Trend information is required in particular with respect to (a) the most significant trends in production, sales, stocks, and the state of the order book, and (b) recent trends in costs of selling prices. *Id.*

132. *Id.* § 6.G.1(b). This information requirement is unique to the United Kingdom and is not required in accordance with the equivalent clause of the EU Listing Particular.

133. Whenever information on interim periods following the most recent complete fiscal years would be required in the financial statements, narrative disclosure for the same period would be provided in the Global Prospectus.

a. Year and Form of Organization — The year in which the issuer was organized and the form of organization must be disclosed in the United States, Japan, and the United Kingdom.[134] Similar information including information on the internal corporate governance system of the issuer would be required in the Global Prospectus.[135]

b. The Nature and Results of Bankruptcy and Similar Proceedings — The United States requires the disclosure of the nature and results of any bankruptcy, receivership, or similar proceedings with respect to the issuer or any significant subsidiary.[136] The Japanese requirement in this area is identical.[137] In the United Kingdom, there is no specific requirement to disclose this particular information. This type of information, however, is disclosed in accordance with the requirement to disclose exceptional factors which have had a significant effect on the group's financial position.[138] Applying the disclosure philosophy, which calls for specific requirements, the Global Prospectus would mandate disclosure similar to that required in the United States and Japan.

c. Material Reclassification, Merger or Consolidation — In the United States, issuers are required to disclose the nature and results of a material reclassification, merger, or consolidation of the issuer or any of its significant subsidiaries.[139] Japan requires disclosure of any merger since the date of incorporation of the issuer.[140] In the United Kingdom, this topic is covered by two rules. First, there is a general requirement to disclose any exceptional factors which have influenced the group's activities.[141] Second, there is a requirement to state the aggregate consideration for shares issued in connection with any merger, division of the company, takeover or acquisition of an undertaking's assets and liabilities.[142]

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134. 17 C.F.R. § 229.101(a)(1) (1997); Form 7, *supra* note 128, §§ 14(2), 19(2) (Japan); Yellow Book, *supra* note 130, §§ 6.C.3, 6.C.4 (United Kingdom).

135. Information on the internal corporate governance system should focus on shareholder rights, the board of directors and the allocation of power between the shareholders and the board of directors. Information concerning relevant legislation in the country where the issuer is incorporated would be provided in another section of the Global Prospectus. *See infra* text accompanying note 241.

136. 17 C.F.R. § 229.101(a)(1) (1997). A subsidiary is defined as significant if the issuer's investment in or advances to the subsidiary exceeds 10% of the issuer's total consolidated assets, or if the issuer's equity in the subsidiary's income from continuing operations exceeds 10% of the issuer's consolidated income from continuing operations. 17 C.F.R. §§ 210.1-02(w)(1), (3) (1997).

137. CADRE, *supra* note 113, at 24.

138. Yellow Book, *supra* note 130, § 6.D.9.

139. 17 C.F.R. § 229.101(a)(1) (1997).

140. Form 7, *supra* note 128, § 19(2). In addition, if the company has merged or entered into a contract for merger during the period from the beginning of the business year to the filing date, the issuer is required to explain the purpose and terms of the merger. *Id.* § 20(2)(a).

141. Yellow Book, *supra* note 130, § 6.D.5.

142. *Id.* § 6.C.22.

The Global Prospectus would require a general description of any merger or consolidation. In addition, the terms of the transaction would be described pursuant to the requirement to describe any material contract entered into outside of the ordinary course of business during the three most recent fiscal years.[143]

d. Acquisition or Disposition of Material Assets — The United States requires a description of the acquisition or disposition of any material amount of assets other than in the ordinary course of business.[144] In Japan, the disclosure of the acquisition or disposition of material assets is divided into three categories. Investments in securities of other companies ("main investments") are disclosed in schedules to the financial reports.[145] Internal capital investments ("principal investments") in plants, factories, and research and development are disclosed annually.[146] Material dispositions are disclosed pursuant to a requirement for a summary of changes to the business, including information regarding the type, content, and amount of profits or losses on assets sold.[147] The United Kingdom requires a description, with figures, of the main investments made, including interests such as shares and debt, in other undertakings over the last three financial years and during the current financial year.[148] Information in the report must include principal investments, including plants, factories and research and development; the geographical distribution of the investments, home and abroad; and the method of internal and external financing.[149]

The Global Prospectus would require the disclosure of three topics under this caption. First, investments in securities of other companies including the method of financing. Second, material capital investments in plants and factories including geographical distribution and method of financing. Third, any significant acquisition or disposition of material assets other than in the ordinary course of business. Information concerning investments in research and development is to be disclosed under a different caption.[150]

143. *See infra* text accompanying notes 191-93.

144. 17 C.F.R. § 229.101(a)(1) (1997). In addition to the narrative disclosure, the issuer has to submit financial statements, including Pro Forma reports of significant acquisitions. 17 C.F.R § 210.3-05 (1997).

145. CADRE, *supra* note 113, at 22.

146. *Id.* at 23.

147. *Id.* at 22.

148. Yellow Book, *supra* note 130, § 6.D.11.

149. *Id.* § 6.D.12. Information concerning principal investments must cover future investments on which the issuer's directors have already made firm commitments. *Id.* § 6.D.13.

150. Research and development investments are to be described as part of the description of the issuer's business. *See infra* text accompanying notes 161-66.

2. Description of the Business

Under this caption issuers would be required to provide a general description of the business followed by a list of line items. The United States requires a description of the business to be completed by the issuer and its subsidiaries, focusing upon the issuer's dominant industry segment or each reportable segment.[151] Japan requires a description of the nature of the business, and any significant changes in the business purpose or product items, from the beginning of the financial year to the filing date of the statement.[152] In the United Kingdom, the listing rules require a description of the issuer's principal objects[153] and the group's principal activities.[154]

The Global Prospectus would require a brief description of the nature of the business and the products or services rendered and any material change in the three most recent fiscal years. This would provide investors with a general background on the company's business before specific issues are addressed. In addition, the following line items would be required:

a. Principal Products and Services — In the United States, issuers are required to disclose their principal products and services in each industry segment and principal market. In addition, issuers must state the amount, or percentage, of total revenues which are contributed by any class of products or services accounting for 10% or more of consolidated revenues in the three preceding fiscal years.[155] Japanese regulations call for disclosure of the amount, or percentage, of revenues for each segment. Segments are defined as those product lines accounting for 10% or more of revenue, profit, or loss.[156] In the United Kingdom, issuers are required to disclose the group's principal activities, including the main categories of products sold or services performed.[157] There is no requirement, though, to disclose the amount of revenues for each segment of products.

A compromise is needed in the area of segmented information. The U.S. requirement to disclose the amount of revenues for each line of business has encountered strong opposition from domestic and foreign issuers who believe that this requirement deprives them of potential competitive advantages.[158] Consequently, the Global Prospectus would adopt the following strategy. Issuers would be required to provide a narrative description of each line of business accounting for

151. 17 C.F.R. § 229.101(c) (1997).

152. Form 7, *supra* note 128, § 20(1).

153. Yellow Book, *supra* note 130, § 6.C.5.

154. *Id.* § 6.D.1.

155. 17 C.F.R. § 229.101(c)(i) (1997). The threshold is 15% or more of consolidated revenues if they did not exceed $50,000,000 during any of those fiscal years. *Id.*

156. CADRE, *supra* note 113, at 10.

157. Yellow Book, *supra* note 130, § 6.D.1.

158. Cox, *supra* note 46, at 174 (describing the controversy over line of business information).

10% or more of consolidated revenues. Numerical information, including the number of products sold and the revenues derived from them, would also be required, unless this requirement is waived—on a case by case basis—by the domestic authority. The waiver would be provided only if the adverse effects of the disclosure significantly outweigh the benefits to investors.[159] Full descriptions (narrative and numerical) would be provided for geographical segments.[160]

b. Description of Products Being Developed — The United States requires a description of the development of new products and of entry into new industry segments in certain circumstances. The description is required only if the issuer has already made public information about the new product or segment and its development would require the investment of a material amount of assets, or if the new development is otherwise material.[161] Moreover, estimated expenditures on research and development of new products must be disclosed for a three-year period, if material.[162] In Japan, the status of research and development activities during the last two business years must be disclosed.[163] In addition, information on principal investments, including research and development, has to be disclosed.[164] United Kingdom listing rules require the disclosure of information describing research and development over the three most recent financial years.[165] In addition, such information is provided in the description of principal investments.[166]

The Global Prospectus would mandate the disclosure of issuers' research and development policy, and a description—including figures—of material research and development investments over the preceding three years. Issuers would be allowed to withhold information about specific projects that had not yet been made public.

c. Sources and Availability of Raw Materials — Information concerning the sources and availability of raw materials must be disclosed in the United States.[167] Japan requires the disclosure of the volume and price of principal raw materials purchased.[168] Unlike the United States and Japan, the United Kingdom listing rules do not require the disclosure of information concerning raw materials. However, such

159. For a similar approach, see *id.* at 189-90 (suggesting the adoption of a safe harbor that would allow the company to maintain confidential line of business information).

160. *See infra* text accompanying note 209.

161. 17 C.F.R. § 229.101(c)(ii) (1997).

162. *Id.* § 229.101(c)(xi).

163. Form 7, *supra* note 128, § 20 (3).

164. *See supra* notes 145-46 and accompanying text.

165. Yellow Book, *supra* note 130, § 6.D.7.

166. *See supra* notes 148-49 and accompanying text.

167. 17 C.F.R. § 229.101(c)(iii) (1997).

168. Form 7, *supra* note 128, § 21(3)(c).

information is disclosed in the United Kingdom pursuant to custom.[169] The Global Prospectus would require a description of sources, the availability of raw materials, and the price trends of the raw materials in the three most recent fiscal years.

d. Information Regarding Patents and Licenses — In the United States, information is required on the existence, duration, and effect of all patents, trademarks, licenses, franchises, and concessions.[170] In Japan, information about patents and licenses is not a line item, but is disclosed in offering documents pursuant to custom.[171] United Kingdom rules mandate the disclosure of information concerning the extent to which the group is dependent on patents, licenses or new manufacturing processes, where such factors are of fundamental importance to the group's business or profitability.[172] Today, in the technology era, the importance of intellectual property to an issuer's business cannot be overstated.[173] Consequently, the Global Prospectus would include a line item similar to that required in the United Kingdom and the United States.

e. Seasonality — Material seasonal variations and their effect on the industry segment are required to be disclosed in the United States.[174] No specific requirement regarding seasonality is mandated in Japan.[175] In the United Kingdom, however, seasonal trends are disclosed pursuant to the requirement to disclose information on trends in the group's business since the previous year. This requirement covers trends in production, sales, stocks, costs, and selling prices.[176] An approach similar to that of the United Kingdom would be used in the Global Prospectus. Requirements to disclose all recent trends, rather than only those derived from seasonality—as required in the United States—would give a better understanding of the issuer's business.

f. Practices Related to Working Capital — The United States and Canada are the only countries of all the Major Markets which mandate the disclosure of practices related to working capital.[177] However, in the United States, foreign issuers are exempt from this

169. CADRE, *supra* note 113, at 9 (providing tabular data on the description of business disclosure requirements in the Major Markets).

170. 17 C.F.R. § 229.101(c)(iv) (1997).

171. CADRE, *supra* note 113, at 9.

172. Yellow Book, *supra* note 130, § 6.D.6.

173. Such information is disclosed (in accordance with law or custom) in all the Major Markets except Switzerland. CADRE, *supra* note 113, at 9.

174. 17 C.F.R. § 229.101(c)(v) (1997).

175. Seasonality is reflected, however, in the description of major operational indices over the most recent five years, which includes turnover and net operating profits. *See* Form 7, *supra* note 128, § 19(1). In addition, seasonality is required to be described in semiannual reports. CADRE, *supra* note 113, at 15.

176. Yellow Book, *supra* note 130, § 6.G.1.

177. CADRE, *supra* note 113, at 9. Working capital practice refers to carrying a significant amount of inventory and whether the issuer provides customers with extended payment terms or the right to return goods. 17 C.F.R. § 229.101(c)(vi) (1997).

requirement.[178] The Global Prospectus would not have a specific line item for a description of practices related to working capital for two reasons. First, the results of these practices are already reflected in the cash flow statement. Second, because the disclosure of this item is not required in most of the Major Markets, mandating it would require changes in the practices of many markets.

g. Dependence on Particular Customers — In the United States, the dependence of an industry segment upon a single customer or a few customers must be disclosed if the loss of the customer or customers could adversely affect the industry segment.[179] In Japan, the identity of material customers accounting for 10% or more of the issuer's unconsolidated revenues must be disclosed. The United Kingdom requires the disclosure of group dependence on commercial and financial contracts of fundamental importance to the group's business or profitability.[180] Under the general materiality concept,[181] this requirement is interpreted as requiring disclosure of the dependence on important customers, even if no long-term contract exists.[182]

Information about the dependence on a particular customer is important for assessment of the risk involved in investing in a particular company. Thus, such information would be disclosed in the Global Prospectus. However, the identity of a specific customer might be a commercial secret, the disclosure of which could put the issuer at a competitive disadvantage. A good balance between these interests would be created by the adoption of the United States requirement calling for disclosure of customer identity only in specific situations.[183] In addition, issuers would be able to withhold information on the identity of specific customers if the adverse effects of the disclosure significantly outweigh the benefits to investors.

h. Backlog Orders — U.S. regulations require disclosure of the dollar amount of definite orders, as of a recent date, and a comparable date, in the preceding fiscal year, as well as an indication of the number of orders not reasonably expected to be filled within the current fiscal year.[184] Such disclosure is not required from foreign issu-

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178. 17 C.F.R. § 249.220(f) (1997).

179. 17 C.F.R. § 229.101(c)(vii) (1997). In addition, the identity of a customer accounting for 10% or more of the issuer's consolidated revenues must be disclosed if the loss of such a customer would have a material adverse effect on the issuer and its subsidiaries. *Id.*

180. Yellow Book, *supra* note 130, § 6.D.6.

181. Financial Services Act, 1986, ch. 60, § 146 (Eng.).

182. CADRE, *supra* note 113, at 13 (providing the EU interpretation).

183. *See supra* note 179 and accompanying text. This approach bridges the gap between the United Kingdom (and the EU) which does not require identification of important customers, and the Japanese requirement to disclose the identity of any customer which accounts for more than 10% of the issuer's revenues on an *unconsolidated* basis.

184. 17 C.F.R. § 229.101(c)(viii) (1997).

ers.[185] Japanese requirements include the disclosure of the volume of orders received, and the outstanding balance of orders that remain unfulfilled for each product item.[186] In the United Kingdom, issuers are required to disclose trends in the group's business.[187]

The Global Prospectus would include a requirement to disclose the state of the order book as of the date of the most recent financial statements, and a comparable date in the preceding years to which the financial statements refer.

i. Contracts Subject to Renegotiation — In the United States, details on contracts subject to renegotiation at the election of the government must be disclosed.[188] In Japan, there is no mandatory requirement for the disclosure of information on contracts subject to renegotiation, but such information is disclosed pursuant to custom.[189] In the United Kingdom, the issue is covered under the general requirement to disclose the extent to which the issuer's group is dependent on commercial and financial contracts.[190]

The Global Prospectus would not include a separate line item covering contracts subject to renegotiation. The issue would be covered under a broader requirement to disclose the terms of any material contracts, and the extent to which the issuer is dependent on such contracts. Similar requirements exist in the United States, Japan, and the United Kingdom. In the United States, material contracts are required to be filed as exhibits to the registration statement.[191] Japan requires the disclosure of the content of material contracts concluded during the most recent business year.[192] Similarly, the United Kingdom requires a summary of the content of each material contract entered into by any member of the group in the two years immediately preceding the publication of the particular listing.[193] This requirement does not extend to contracts which were entered into in the ordinary course of business. With the authorization of the competent authority, issuers would be permitted to withhold commercial secrets from their descriptions of contracts.[194] This authorization would be granted only if the disclosure of the information would have a material adverse effect on the issuer.

185. 17 C.F.R. § 249.220(f) (1997).

186. Form 7, *supra* note 128, § 21(4).

187. Yellow Book, *supra* note 130, § 6.G.1.

188. 17 C.F.R. § 229.101(c)(ix) (1997).

189. CADRE, *supra* note 113, at 9.

190. Yellow Book, *supra* note 130, § 6.D.6.

191. 17 C.F.R. § 229.601(b)(10) (1997). A material contract is defined as any contract not made in the ordinary course of business which is material to the issuer and is to be carried out, in whole or in part, at or after the filing of the registration material, or which was entered into not more than two years before such filing.

192. CADRE, *supra* note 113, at 16.

193. Yellow Book, *supra* note 130, § 6.C.20.

194. In the U.S., a similar exception applies to confidential information in material contracts. *See* 17 C.F.R. § 230.406 (1997).

j. Competitive Conditions in the Business — In the United States, issuers are required to disclose, where material, information on the markets in which they compete, including an estimate of the number of competitors, the issuer's competitive position, and its principal methods of competition.[195] Foreign issuers are required to disclose only unusual competitive conditions in the industry.[196] Japan requires information showing the issuer's competitive position and ranking in the relevant field of business.[197] In contrast, the United Kingdom's listing requirements do not refer to the competitive conditions of the business. However, pursuant to custom, information is disclosed on the markets in which the issuer competes.[198]

The Global Prospectus would mandate disclosure of information on the principal markets in which the issuer competes and the issuer's competitive position. This information would enable investors to better compare the issuer's performance with that of other companies in the field.

k. Effects of Government Regulation — In the United States, the discussion of the effects of government regulation is limited to environmental matters.[199] In Japan and the United Kingdom, the subject of government regulation is customarily discussed in annual reports.[200]

There is no reason to limit the discussion of government regulation to environmental issues. Consequently, the Global Prospectus would include a discussion of the effects of government regulation that materially affects the issuer and the industries in which it operates.

l. Persons Employed — The United States requires the disclosure of the number of persons employed by the issuer.[201] In Japan, issuers are required to disclose the number of employees and employment trends of temporary and permanent employees.[202] The United Kingdom requires disclosure of the average number of employees and changes over the three preceding financial years—if material—with, if possible, a breakdown of persons employed according to their main categories of activities.[203]

The number of employees and trends of employment are one way to assess an issuer's efficiency. This information also tends to reflect

195. 17 C.F.R. § 229.101(c)(x) (1997).
196. 17 C.F.R. § 249.220(f) (1997). *See*, in particular, Item 1(a)(5) of Form 20-F.
197. Form 7, *supra* note 128, § 21(1).
198. CADRE, *supra* note 113, at 9.
199. 17 C.F.R. § 229.101(c)(xii) (1997).
200. CADRE, *supra* note 113, at 14.
201. 17 C.F.R. § 229.101(c)(xiii) (1997). It is customary, however, to include management's assessment of its relationship with employees and to state whether the employees are subject to collective bargaining agreements. *See* CADRE, *supra* note 113, at 11.
202. Form 7, *supra* note 128, § 19(11).
203. Yellow Book, *supra* note 130, § 6.D.10.

the volatility of the issuer's business and its growth. Consequently, the Global Prospectus would adopt the United Kingdom requirements, which refer to the same three year period that applies for most other requirements. In addition, information concerning the relationship between management and employees, and material labor disputes would be provided.

3. Information about Industry Segments, Foreign Activities and Subsidiaries

This section covers the breakdown of the issuer's activities into industry segments, geographic markets, and a description of the issuer's subsidiaries.

a. Segmented Information and Foreign Activities — Segmented information about revenues, operating profits or losses, and foreign activities, is required in most of the Major Markets.[204] In the United States, the disclosure requirements cover the three most recent fiscal years, and include the amount of revenues, operating profits or losses, and identifiable assets attributable to each of the issuer's segments[205] and geographic areas.[206] Japanese requirements concerning segmented information include revenues, and operational profits and losses for each industry segment and foreign market.[207] The United Kingdom requires a breakdown of net turnover during the three preceding financial years by category of activity and by geographic market insofar as such categories and markets differ substantially from one another.[208]

In the Global Prospectus, information about industry segments—including foreign activities—would include a narrative describing the company's operations in different markets and a breakdown of revenues and operating profits and losses for each market. The identification of assets attributed to each segment—as required in the United States—would be part of the description of property.[209]

b. Subsidiaries — Details about subsidiaries are required in all Major Markets, except for Australia and the United States.[210] The United States requires only the disclosure of the name and the juris-

204. CADRE, *supra* note 113, at 17 (providing tabular information on industry segment disclosure); *id.* at 24 (presenting information on foreign and domestic operations and export sales).

205. 17 C.F.R. § 229.101(b) (1997). Alternatively, the information can be provided in the financial statements. *Id.*

206. 17 C.F.R. § 229.101(d). Alternatively, the information can be provided in the financial statements. *Id.*

207. Form 7, *supra* note 128, § 21(5).

208. Yellow Book, *supra* note 130, § 6.D.3.

209. *See infra* text accompanying notes 216-19.

210. CADRE, *supra* note 113, at 17.

diction of incorporation of significant subsidiaries.[211] Japanese requirements concerning subsidiaries are much broader. For each subsidiary, the issuer must disclose its name and address, its capital, the type of business, the issuer's holding of voting rights, and the basis of the issuer's relationship with the subsidiary.[212] In the United Kingdom, for each subsidiary which meets certain requirements,[213] a very detailed description is required. This description includes the field of activity, capital, proportion of capital held by the issuer, and financial information.[214]

In the Global Prospectus, issuers would be required to provide a chart of the corporate structure. The chart would include the issuer's parent company, if any, and any significant subsidiaries. A significant subsidiary would be defined as one which accounts for 10% or more of the issuer's consolidated assets or net profits or losses. For each significant subsidiary, the following information would be required: name and address, the issued capital and the issuer's holdings, and the fields of activity. Additional information would be presented in the financial statements.[215]

4. Description of Property

The United States requires issuers to state briefly the location and general character of the principal plants, and other materially important physical properties owned or leased by the issuer and its subsidiaries.[216] In addition, issuers are required to identify the industry

211. 17 C.F.R. § 229.601(b)(21) (1997). Additional information is required, however, in the financial statements for non-consolidated subsidiaries. *See* 17 C.F.R. § 210.3-09.

212. Form 7, *supra* note 128, § 19(9).

213. These requirements include if the book value of the issuer's participating interest represents at least 10% of the issuer's capital and reserves or if the interest amounts to at least 10% of the consolidated net profit or loss. Yellow Book, *supra* note 130, § 6.E.11(b).

214. The United Kingdom further requires issuers to disclose the value at which the issuer shows the subsidiary in its accounts, any amount still to be paid on shares held, the amount of dividends received in the course of the preceding financial year with respect to shares held, and the amount of debt owed to and by the issuer with regard to the subsidiary. *Id.* § 6.E.11(a). Certain items may be omitted for subsidiaries which do not publish annual accounts, *id.* § 6.E.11(c), or which are consolidated into the issuer's financial statement, *id.* § 6.E.11(d).

215. Subsidiaries in which the issuer's holdings exceed 50% would be consolidated into the financial statements. The equity method of accounting would be used for investments in associate companies in which the investments provide the issuer with the ability to exercise significant influence over the operations and financial policies of the investee company. Under the equity method, the issuer's share of profits and losses of associate companies is included in the consolidated income statements. *See* IASC-U.S. Comparison Project, *supra* note 51, at 367-92 (analyzing the new international standards concerning accounting for investment in subsidiaries and in associate companies).

216. 17 C.F.R. § 229.102 (1997). In determining whether properties should be described, both quantitative and qualitative factors should be taken into account. *Id.*

segments which use the properties described, and any major encumbrances.[217] Japan requires disclosure of the general character of the properties, their location, products manufactured there, number of employees in each facility, encumbrances on the properties, and the amount of the issuer's invested capital in the properties.[218] The United Kingdom requires a description of the location, size, and tenure of the group's principal establishments and summary information about land or buildings owned or leased.[219]

The Global Prospectus would require a description of any fixed assets which account for 10% or more of the issuer's consolidated assets or revenues, or are otherwise material for the issuer's operation. The description would include the location, general character and use of the assets, as well as identification of the industry segment in which the asset is used, production information and major encumbrances.

C. *Discussion and Analysis of Financial Condition and Results of Operations*

This section focuses on information which investors cannot readily obtain from the financial statements. This includes management's explanation of any unusual factors that have affected historical performance as described in the prospectus, and management's projection of future performance. In the United States, management's discussion of financial condition and results of operations is provided in specific line items,[220] while in Japan and the United Kingdom, such information, if provided, is part of the general description of the firm.

The Global Prospectus would follow the American approach. Investors should be provided with information that enables them to fully comprehend the numerical data provided in the financial statements. The discussion would cover the three year period of the financial statements and would include, in addition to the information required in the United States, management's assessment of the issuer's future performance. Management's discussion should not be limited to the specific line items provided below. The discussion should include any information required for a true understanding of the issuer's financial position.

a. Unusual Factors Affecting Income from Operations — Discussion of this item is required to clarify how certain matters, not evident on historical financial reports, affect future operating results. In the United States, issuers are required to describe any unusual or infrequent events or transactions, or any significant economic changes, that

217. *Id.*

218. Form 7, *supra* note 128, § 22.

219. Yellow Book, *supra* note 130, § 6.D.4 . A principal establishment is defined as any establishment which accounts for more than 10% of net turnover or production. *Id.*

220. 17 C.F.R. § 229.303 (1997).

materially affected the amount of reported income from operations, and to indicate the extent to which income was so affected.[221] Japan requires disclosure of unusual factors affecting income from operations during the two preceding fiscal years.[222] In the United Kingdom, an indication must be given if exceptional factors influenced the group's activities, products, or the net turnover during the three preceding financial years.[223]

The Global Prospectus would require the discussion of any event or condition that materially affects income from operations. In addition, an explanation for any material change in income or profit during the most recent three years should be provided.

b. Liquidity and Capital Resources — U.S. rules require the disclosure of any factor which might lead to a material increase or decrease in the issuer's liquidity. If a material deficiency is identified, the issuer is required to indicate the course of action that it has taken, or proposes to take, to remedy the deficiency. Internal and external sources of liquidity are also required to be discussed.[224] The United Kingdom requires a statement by the issuer that its working capital is sufficient for the group's present requirements; if it is insufficient, and if the issuer has securities already listed, it must explain how it will provide the additional working capital thought to be necessary.[225] Unlike the United States and the United Kingdom, Japan does not require a specific discussion of liquidity, other than a statement of cash flow.[226]

In the Global Prospectus, to the extent that it is not reflected in the statement of cash flow and accompanying notes, the issuer would be required to describe its sources of liquidity and cash flow. In addition, a description of the company's capital resources, including a description of the company's debts, credit facilities, off-balance sheet finances, and established funding plans would be disclosed. This information is important to investors, as it enables them to evaluate companies' financial strength and ability to fund their capital expenditures.

c. Capital Expenditures — In the United States, issuers are required to describe material commitments for capital expenditures as of the end of the latest fiscal period, and to indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments.[227] Moreover, issuers are required to identify any anticipated material trends in capital resources and

221. *Id.* § 229.303(a)(3)(i).
222. CADRE, *supra* note 113, at 41.
223. Yellow Book, *supra* note 130, § 6.D.5.
224. 17 C.F.R. § 229.303(a)(1) (1997).
225. Yellow Book, *supra* note 130, § 6.E.16.
226. Discussion of liquidity is provided, however, in annual or periodic reports. *See* CADRE, *supra* note 113, at 40.
227. 17 C.F.R. § 229.303(a)(2)(i) (1997).

changes in sources of capital.[228] Japanese disclosure concerning capital expenditures covers only investment in plants, equipment,[229] and established financing plans.[230] The United Kingdom requires the disclosure of information concerning the group's principal future investments—including new plants, factories, and research and development—to which the issuer's directors have already made firm commitments.[231]

There is no reason to limit the discussion of capital expenditures to investments of a certain type. Consequently, the Global Prospectus would require discussion of all of the issuer's plans for material capital expenditures for the following three years, unless such plans have not yet been made public, and management reasonably believes that disclosure of such information would have a material adverse effect on the issuer.

d. Business Prospects — In the United States, issuers are required to describe all known trends and uncertainties that have had, or are reasonably expected to have, a material impact on net sales, revenues, or income from continuing operations. Issuers are also required to disclose events that are reasonably expected to occur, and are likely to cause material changes in the relationship between costs and revenues.[232] Although no profit forecasts are required, issuers are provided with a safe harbor for forward-looking statements.[233] In the United Kingdom, issuers must provide information on the group's prospects for at least the current financial year.[234] Where a profit forecast or estimate appears, the principal assumptions upon which it is based must be stated by independent accountants.[235] No such information is required in Japan.

The Global Prospectus would require the disclosure of both trend information (as required in the United States), and future forecasts (as required in the United Kingdom). Trend information is critical for understanding the volatility to which the issuer's operation is exposed. Future forecasts are essential for the valuation of securities. Forecasts of future performance need not include exact figures. Rather, they should present management's estimate of the issuer's future profits, the assumptions underlying these estimates, as well as any risk factors that might affect the forecast. The information should be accompanied by cautionary language stating that this information is the management's forecast and that there is no assurance that actual results

228. 17 C.F.R. § 229.303(a)(2)(ii).
229. Form 7, *supra* note 128, § 22(1)(a).
230. *Id.* § 26(2).
231. Yellow Book, *supra* note 130, § 6.D.13.
232. 17 C.F.R. § 229.303(a)(3)(ii) (1997).
233. Section 27A of the Securities Act, 15 U.S.C. § 78u-5 (1997).
234. Yellow Book, *supra* note 130, § 6.G.1(b).
235. *Id.* § 6.G.2. In addition, the sponsoring member firm must have satisfied itself that the forecast was made after a due inquiry by the directors. *Id.*

will be similar. Information provided pursuant to this section, and which meets the above standards, would be shielded from legal action.[236]

D. *Information for Foreign Investors*

One of the main objects of harmonization is to enable investors to invest in any market without incurring the costs of gathering information privately.[237] To achieve this goal, the Global Prospectus would provide foreign investors with material information on the issuer's home market. This information would appear in two different sections of the Global Prospectus. General information on the issuer's home market which is relevant to all foreign investors would be part of the Basic Form.[238] This would facilitate investors' access to foreign markets and promote investment in companies which do not offer or list their securities in the investors' home markets. Specific information which is relevant only to investors from the countries in which the issuer is conducting a multinational offering would appear in the Global Form.[239]

1. Information in the Basic Form

The Basic Form would include general information which is important to foreign investors. Because this information is generic, in order to reduce issuers' costs, each competent authority would maintain a central database containing the following information.[240]

a. Summary of the Corporate System — To save on the transaction costs involved in each investor becoming familiar with the corporate system of foreign markets, each prospectus would include a description of the corporate system in the country in which the issuer has been organized.[241] The description would focus on issues that are material to investors, such as corporate governance and shareholder rights.

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236. For the important role of projections and the need to provide forward-looking statements with a safe harbor, see Safe Harbor for Forward-Looking Statements, Securities Act Release No. 7101, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,436, at 85,779 (Oct. 13, 1994).

237. *See* Geiger, *supra* note 4, at 301-02.

238. Part of the information would also be useful for domestic investors who are not fully familiar with the corporate and tax systems in their own market.

239. The information would be provided only in the Global Forms because it is not practical to require every domestic company to supply this information with respect to foreign markets in which it does not offer securities.

240. This would enable issuers to copy the information into their offering documents with no significant costs. Issuers would be required, however, to make adaptations to the generic material if specific rules applied to them.

241. A similar summary is required in Japan. *See* Form 7, *supra* note 128, § 14(1). The Japanese requirements, however, apply only to foreign companies which offer securities in Japan.

b. Restrictions on Foreign Ownership of Securities and Exchange Control — This line item would include limitations on the rights of foreign investors to hold, transfer, or vote the securities.[242] The information also would be provided with respect to any exchange control regulations affecting the export of capital, remittance of dividends, and any other payments to shareholders.

c. Taxation — The Basic Form would provide a brief description of the method by which securities are taxed in the issuer's home country.[243] In addition, issuers would be required to disclose information on any taxes to which foreign investors are subject, including a description of any withholding tax provisions to which non-residents are subject.

2. Additional Information in the Global Form

The Global Form would be a "wrap around" of a translation of the Basic Form into the language of the host market. In addition, the Global Form would include an appendix which would supply information important to investors from the host market. Such information would include the following:

a. Restrictions on Foreign Ownership of Securities and Exchange Control — This section covers specific restrictions, if any, which apply to investors from the host country.

b. Exchange Rate Translation — A table of the exchange rate for the three preceding fiscal years, plus any subsequent interim period, should be provided.

c. Taxation — a brief description of the withholding tax and capital gains provisions of any tax treaty between the issuer's home market and the host country should be provided.

d. Paying Agent — The issuer would be required to designate an agent for payment of dividends, transfer of securities, and delivery of information to shareholders in the host market. Details on the identity of the agent, and the procedures of payment and transfer of securities should be disclosed in the Global Form. If depository facilities

242. This information is required in most Major Markets. *See* CADRE *supra* note 113, at 38.

243. Disclosure concerning taxes, to which security holders may be subject in accordance with the issuer's home country regulations, is required or customary in all Major Markets but Australia. *See* CADRE, *supra* note 113, at 39.

are established,[244] information on their procedures and the identity of depositors would be provided.[245]

e. Method and Expected Schedule for the Multinational Offering — Multinational offerings involve a review process by at least two authorities from the home and host countries; they also require the coordination of distribution systems among markets. The method of coordination and the distribution arrangements should be provided, as well as the date until which the offer will be open and the expected timetable for the offering.[246]

f. Material Changes — Mutual recognition would be required for a period of three months after the prospectus becomes effective in the issuer's home market.[247] Any material changes after the effective date would be disclosed in the Global Form.

IV. Some of the Problems with Harmonization

The majority of this article is devoted to discussing the form and content of the proposed harmonized standards. Harmonization, however, is not a perfect solution.[248] This part identifies four of the most significant problems associated with the harmonization of disclosure rules. First, there are the costs of governmental intervention that have to be weighed against the advantages of harmonization. Second, we must consider the cultural and structural differences among nations, which might hinder the creation and implementation of efficient disclosure standards. Third, there are the transition costs incurred by market participants and regulators as a result of the changes in the

244. In the United States, depositary facilities are called ADRs (American Depositary Receipts). An ADR is a certificate issued by a U.S. depositary bank representing shares of a non-U.S. company deposited with the bank or its custodian. *See* Joseph Velli, *American Depositary Receipts: An Overview*, 17 Fordham Int'l L.J. S38, S39 (1994). For a description of the different forms and uses of ADRs, see *id.* at S43-50 (describing the different kinds of ADRs used by foreign issuers to enter U.S. capital markets).

245. Such information includes: (i) a conversion ratio; (ii) the voting procedures; (iii) collection and distribution of dividends; (iv) transmission of information; (v) sale or exercise of rights; (vi) deposit or sale of securities resulting from dividends, stock splits or reorganization; (vii) amendment, extension, and termination of the deposit; (viii) inspection rights; (ix) restrictions on the right to deposit or withdraw the underlying securities; and (x) limitations upon the liability of the depositary. *See* 17 C.F.R. § 229.202(f)(2) (1997).

246. Information regarding the method of distribution and the underwriting arrangement for purely domestic offerings would be provided in the Basic Form.

247. When securities are not offered in the issuer's home country, the effective date refers to the end of the review process of the Basic Form by the local authority. For a discussion of the review process of the Global Prospectus and mutual recognition, *see supra* part II.C.2.

248. It is doubtful that we would be able to identify a perfect rule even if we were to see one. While we may not agree, however, on the content of perfect rules, we should look for a process that is likely to produce such rules. *See* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1437, 1506-07 (1992).

regulatory regime. Finally, there may be resistance by certain interest groups who fear losing their power or commercial advantage.

A. *The Costs of Governmental Intervention*

Harmonization can be characterized as a form of governmental intervention that replaces the current regime of competition among nations. Just as market failures occur in regulatory competition, governmental failures affect its intervention in the markets. As a result, such failures might cause a decrease in market efficiency when the government intervenes in the operation of markets.

It is important to note that the area of securities disclosure is already subject to governmental intervention. In fact, there is no securities market in the world that is not subject to some form of regulation.[249] The need for such a mandatory disclosure system has been demonstrated by many scholars.[250] The reality of existing governmental intervention, and the economic need for such intervention, reduces the effects of governmental failures on the process of harmonization.

1. Lack of Information and Incentive

Decision-making based on inadequate information can be very costly.[251] In a regulatory competition regime, participants provide regulators with important information on the optimal rules through their decisions to operate in, or exit from, a certain market ("the exit mechanism").[252] For example, in the 1970s, the development of the Eurobond market as an alternative to the U.S. market put competitive pressure on what was an excessive U.S. regulatory burden.[253] The deregulation of the American securities registration system in the early

249. *See generally* International Securities Regulation (Robert C. Rosen ed., 1997) (providing a description of securities regulation in most securities markets).

250. *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 Va. L. Rev. 717 (1984) (making the case for a mandatory disclosure system based upon the characteristics of information as a public good and the inefficiency of self-induced mechanisms); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669, 697-98 (1984) (describing the third party effects whose control requires a mandatory disclosure system).

251. *See* White, *supra* note 55, at 20 (describing the difficulties government agencies may face in trying to obtain accurate information).

252. *See* Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 Fordham L. Rev. 1855, 1870-72 (1997) (describing the race-to-the-top model of regulatory competition); John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 Bus. Law. 447, 453 (1995) (describing how the fear of market participants exiting theoretically produces regulation that discourages migration); Cox, *supra* note 46, at 159-60 (explaining regulatory competition in securities regulation).

253. *See* Maura B. Perry, Note, *A Challenge Postponed: Market 2000 Complacency in Response to Regulatory Competition for International Equity Markets*, 34 Va. J. Int'l

1980s, through integrated disclosure and shelf registration, was partially motivated by this competitive pressure. The reduction of the regulatory burden on foreign issuers in 1994 was also a response to competitive pressure from London.[254] Without the information provided by regulatory competition, rules developed by bureaucrats might be designed to enhance their own powers, rather than the efficiency of the market.[255]

There is no way to measure how important competition is for restraining excessive regulation; however, several factors limit the effectiveness of the exit mechanism. First, the information provided by the exit mechanism is incomplete because market participants are systematically underinformed.[256] It is also biased because it identifies the desires of those who make the multinational offering decisions, namely managers, whose interests are not always similar to those of the shareholders.[257] The second factor is that regulatory and non-regulatory barriers limit the mobility of market participants, making the operation of the exit mechanism partially ineffective.[258] Third, regulators are likely to be better informed of changes in the global market through the mechanisms of the Global Coordinator than by operating individually.[259] Finally, the officials of the Global Regulator would not have the incentive that domestic regulators have to offer lax disclosure rules or ignore positive externalities in order to attract issuers to a specific market.[260]

Another argument used by advocates of regulatory competition is that government personnel lack the profit incentive of private enti-

L. 701, 703-04 (1994) (explaining how the United States's costly and uncompetitive regulatory policy resulted in market participants' leaving for Europe).

254. *See* Simplification of Registration and Reporting Requirements for Foreign Companies: Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Research Reports, Securities Act Release No. 7053, [1993-94 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,331, at 85,206 (Apr. 19, 1994). Both the reforms of the 1980s and the changes made in 1994 focus on the process of the offering, rather than on the content of the disclosure documents. They both, however, demonstrate the operation of the regulatory competition mechanism.

255. *See* Choi & Guzman, *supra* note 252, at 1890-91 (describing the problems with cooperative agreements among securities regulators).

256. *See* Geiger, *supra* note 4, at 275-76 (exploring the effects of the cost of information on investors' decisions).

257. *See* Bebchuk, *supra* note 248, at 1458-84 (analyzing the problem of managerial opportunism in connection with states' competition for corporate charters).

258. *See* Coffee, *supra* note 252, at 453-54 (describing the assumptions underlying regulatory competition theory); Geiger, *supra* note 4, at 276-80 (analyzing the lack of mobility among securities markets).

259. Through the Global Coordinator, regulators of all markets are to share information on an ongoing basis and monitor the operation of all markets.

260. *See* Bebchuk, *supra* note 248, at 1501-02 (comparing the motives of state and federal officials to offer concessions to managers); Geiger, *supra* note 4, at 290-97 (analyzing the race to the bottom and externalities problems in connection with regulatory competition in the securities markets).

ties.[261] They argue that this, combined with the difficulties that governments face in attracting highly skilled individuals, results in ineffective performance.[262] However, this argument does not meet the reality test. Our experience with the SEC shows that a government agency can function efficiently and attract highly skilled individuals, notwithstanding the lack of private market incentive.[263] Furthermore, as discussed above,[264] securities markets are already regulated by government officials. There is no reason to believe that the officials of the Global Coordinator would be any less motivated or skilled than the officials of domestic regulators.

Finally, it is important to note that even if the lack of competitive pressure resulted in less than optimal common standards, harmonization would still be superior to the current regulatory regime. To improve aggregate social welfare, and to perform better than regulatory competition, the common standards need not be perfect. Harmonization would be successful if the new standards are more efficient than the average efficiency level of current domestic disclosure standards in the Major Markets.

2. Lack of Common Goals

Harmonization would require compromises among regulators holding different views on the desirability of certain standards.[265] The quality of the common standards could be negatively affected by this negotiation process. Although domestic regulators share the same basic goals of protecting investors and maintaining market integrity, their interpretations on how to achieve them could be conflicting and thus, difficult to implement.[266] Countries may differ in their approaches to specific issues and the priorities they give them. As a result, the negotiation process would involve "give and take" which might result in suboptimal rules. Furthermore, small countries might prefer to set the harmonized standards at a low level so they can externalize the effects of such disclosure to countries with large invest-

261. *See, e.g.*, White, *supra* note 55, at 19 (describing the weak incentives of government agencies).

262. *See id.* at 19-20.

263. One of the main reasons for the United States's market strength is the fairness and integrity of the market ensured by the operation of the SEC. *See, e.g.*, Breeden, *supra* note 56, at S81-82 (describing the public confidence and market integrity preserved by the SEC as the most important factors in the U.S. competitive position); James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 Fordham L. Rev. S77, S78 (1992) (explaining that the SEC was created by Congress to ensure that U.S. markets are fair and efficient and that U.S. investors are treated fairly).

264. *See supra* text accompanying note 249.

265. *See supra* text accompanying note 119.

266. White, *supra* note 55, at 19 (describing how a government agent might be buffeted by diffuse goals).

ment communities.[267] Others might look for the private advantages of competition and try to attract market participants by offering lax disclosure.[268] To prevent such "cheating," strong economic, political, and moral commitments must be developed among the member states.[269]

There is no doubt that the negotiation process might result in inefficient standards. However, as demonstrated in this article, a compromise is possible and a set of specific rules could be drawn from the common goals of protecting investors and promoting market efficiency. The mechanism of the Global Coordinator would ensure that those rules were implemented and interpreted in a unified way.[270] The desire of small countries to harmonize at a low level would face the qualified majority mechanism of the Global Coordinator.[271] The "cheating" problem is most likely to involve nations that do not participate in the Global Coordinator, not those developed countries that are voluntary participants. Because the regulators of all Major Markets are expected to participate in the Global Coordinator,[272] the negative effect of nonmembers' efforts to attract market participants by offering lax disclosure would be marginal, if any.

3. Rent-Seeking Behavior

Economic regulation literature emphasizes the influence that interested entities have on regulatory agencies.[273] Rent-seeking occurs when individuals who are most affected by governmental action seek to influence the regulatory process in order to obtain the most favorable outcomes for themselves.[274] The success of those individuals in "capturing" an agency comes at the expense of the general public.[275] However, the rent-seeking argument should not prevent the progress toward harmonization. Rent-seeking is more likely to influence domestic regulators than an international organization such as the Global Coordinator, which has no connection to the specific clien-

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267. Externalities occur when one state's actions affect another state's well-being, and the relevant costs are not reflected in the market price. Tyler Cowen, *Public Goods and Externalities*, *in* The Fortune Encyclopedia of Economics 74, 75 (David R. Henderson ed., 1993).

268. *See* Geiger, *supra* note 4, at 283-95 (discussing managerial opportunism and the race to the bottom in the context of securities disclosure).

269. White, *supra* note 55, at 41 (exploring the feasibility of harmonization).

270. For a discussion of these mechanisms, see part II.D.2-3.

271. *See supra* text accompanying notes 97-99.

272. Currently, the regulators of the Major Markets are participating in the development of the IOSCO Proposal. *See supra* note 5.

273. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 3 (1971) (describing how regulators become representative of their clientele).

274. Coffee, *supra* note 252, at 473-74 (describing rent seeking behavior and agency "capture").

275. Each member of the general public suffers only a fraction of the total loss to the public, thus, finding it too expensive to oppose the rent seeking process. *See* White, *supra* note 55, at 21.

tele of any individual nation.[276] Furthermore, large organizations are considered better protected from "capture."[277] Hence, the Global Regulator would be less exposed to rent seeking than domestic regulatory agencies that currently regulate securities markets.

4. Static Structure

Even when harmonized standards are formed, it will take a long time until they are implemented.[278] By then, economic conditions might have changed, causing the unified standards to become outdated and making renegotiation necessary.[279] Indeed, a static structure would surely render the harmonized standards inefficient. However, the monitoring and decision-making mechanisms of the Global Coordinator are specifically designed to prevent such stagnation and to promote a dynamic regulation process.[280] The voting mechanism of the Global Coordinator eliminates the risk of deadlock, ensures that decisions are taken promptly, and allocates the votes among the member states in proportion to the size of their securities markets. The monitoring and dispute-resolution mechanisms ensure that the Global Coordinator could respond to economic changes within a short time frame, and that the common rules are being interpreted and enforced equally in all member states. Arguably, the Global Coordinator's mechanisms would be no slower than those of domestic regulators.

B. *Cultural and Structural Differences*

Differences in market and regulatory structure present some of the greatest challenges to the process of harmonization. The harmonized rules have to be flexible enough to be useful in various market struc-

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276. A possible example of a domestic agency that represents its clientele is the Japanese Ministry of Finance. The close relationship between the Ministry of Finance, which regulates the Japanese securities market, and its clientele might be the explanation for the scandals which have been unfolding in the Japanese financial industry in recent years. *See* James D. Cox, *Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies*, 16 Hastings Int'l & Comp. L. Rev. 149, 151-52 (1993) (describing the strong connection between the Ministry of Finance and financial institutions); Andrew Pollack, *Japan Considers Opening the Veiled Corporate Ledger*, N.Y. Times, Aug. 5, 1997, at D1 (describing recent scandals in Japan and the connection between these scandals and the structure of Japan's regulatory regime).

277. Coffee, *supra* note 252, at 474-75 (exploring the connection between agency "capture" and organizational size).

278. *See* Lewis D. Solomon & Louise Corso, *The Impact of Technology on the Trading of Securities: The Emerging Global Market and the Implications for Regulation*, 24 J. Marshall L. Rev. 299, 331-32 (1991) (describing the criticism of harmonization due to the long time it takes to negotiate and implement harmonized standards).

279. Gunnar Schuster, *Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts*, 26 Law & Pol'y Int'l Bus. 165, 194 (1994) (referring to the static structure of the harmonized system as a significant disadvantage).

280. *See supra* part II.D.2-3.

tures, yet not provide too much discretion, which could reduce their credibility and uniformity.[281]

1. Differences in Market Structure

Differences in market structure and corporate ownership presumably result in differing demands for corporate disclosure.[282] The difference between the U.S. corporate ownership model and that of the Japanese and German markets illustrates this phenomenon.[283] In the United States, share ownership is divided among many individuals and institutions.[284] In contrast, Japanese companies are divided into business groups (keiretsu) whose members usually own about half of each others' equity.[285] Only a small fraction of each company's equity is publicly traded, and only 24% of that fraction is held by retail investors.[286] In Germany, the securities market is traditionally considered insignificant and is barely regulated.[287] Financial institutions, not the securities market, supply most of the capital needs of local companies. The financial institutions use this dependency to impose significant control over corporate governance.[288] This ownership model, and the interaction between executives of German and Japanese companies with their major shareholders,[289] allegedly results in less demand for corporate disclosure.

Different market structures do not necessarily imply different disclosure levels. An adequate level of information is needed by all investors to make efficient investment decisions. The fact that some investors enjoy access to inside information because they hold a large

281. Mercado, *supra* note 55, at 348 (describing the effect of differing circumstances in various countries on the development of the IAS).

282. *See, e.g.*, Michael A. Schneider, *Foreign Listings and the Preeminence of U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 Minn. J. Global Trade 301, 335 (1994) (alleging that the capital market structure of many foreign nations minimizes the demand for disclosure).

283. For a detailed discussion of differences in corporate structure, see Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 Yale L.J. 1927 (1993).

284. For the classic story of the separation of ownership and control in the large public corporation, see Adolf Berle & Gardiner Means, The Modern Corporation and Private Property (1932).

285. *See* Roe, *supra* note 283, at 1939-41 (describing the structure of the Japanese market).

286. *U.S. Competitiveness and Trade Policy in the Global Economy: Hearing Before the Committee on Banking, Housing, and Urban Affairs*, 103rd Cong., 129, 130 (1994) (testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission, Concerning International Markets and Individual Investors [hereinafter Levitt]. In contrast, in the United States, about 50% of stock is individually held. *Id.*

287. Roquette, *supra* note 8, at 599-613 (describing the German capital market and recent reforms).

288. Schneider, *supra* note 282, at 335-36 (discussing the capital market structure of Japan and Germany).

289. Roe, *supra* note 283, at 1941-46 (exploring structured interaction in Germany).

block of equity in a company should not prevent regulators from insisting that adequate levels of information be supplied to the market. In fact, both Japan and Germany are currently undertaking efforts to improve their disclosure systems. In the face of recent scandals, Japan is struggling to improve corporate disclosure, enhance market integrity, and become a competitor of the United States and United Kingdom in the global market.[290] Germany reformed its disclosure regime as part of the harmonization of the EU disclosure rules.[291]

Another factor that is mentioned as an obstacle to harmonization is the level of involvement of banks in the securities industry. In the United States and Japan, separate institutions engage in banking and securities activities. In other countries, such as Germany and Switzerland, banks play a major role in the securities market ("universal banking system").[292] Pursuant to the universal banking system, the same supervisory authority oversees the banking and securities activities of banks;[293] however, two facts make the "universal banking" argument immaterial. First, the artificial barriers between banking and securities activities are disappearing both in the United States[294] and in Japan.[295] Second, the applicability of the unified disclosure standards is to be based on the substance of the activity rather than the identity of the regulated entity, making any distinctions in financial institutions immaterial.

2. Differences in Regulatory Structure

Governments, statutory agencies, and self regulatory organizations (SROs) regulate the various markets. In the United States, the SEC, a statutory agency, is entrusted with regulating the securities market. The Japanese market is regulated by the Ministry of Finance,[296] while in the United Kingdom, the LSE, an SRO, establishes the rules governing listing and periodic disclosure.[297]

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290. Pollack, *supra* note 276, at D1.

291. For discussion of the EU harmonization plan, see *supra* part I.A.

292. Solomon & Corso, *supra* note 278, at 329 (describing the nature of financial institutions used to market securities).

293. *Id.*

294. *See Regulatory Reform in Transition: The Dismantling of the Glass-Steagall Act*, 47 Admin. L. Rev. 545 (1995) (discussing the increased difficulty in separating banking and securities activities).

295. In November 1996, the Japanese Prime Minister announced a plan to deregulate Japan's capital market. This plan includes the lowering of the wall between the securities and commercial banking industries. *See* Sheryl WuDunn, *Japan Announces New Plan to Deregulate Financial Markets*, N.Y. Times, Nov. 12, 1996, at D9.

296. Cox, *supra* note 276, at 151-52 (describing securities regulation in Japan).

297. *See* Jay D. Hansen, *London Calling?: A Comparison of London and U.S. Stock Exchange Listing Requirements for Foreign Equity Securities*, 6 Duke J. Comp. & Int'l L. 197, 212-17 (1995) (describing the regulatory framework in the United Kingdom). The United Kingdom is currently reforming its securities and banking regulations. Following the reform, the securities and banking industries would be regulated by a single governmental agency.

The variety of regulatory bodies should not hinder the implementation of the harmonized rules. Under the proposed framework of the Global Regulator, each nation would preserve its sovereignty in choosing the method of implementing the standards into local law. Furthermore, the Global Coordinator would not replace local regulatory bodies in supervising domestic markets. Each nation would designate a "competent authority" to carry out the various regulatory functions. The organizational form of this entity is irrelevant to the effectiveness of the harmonization process.

C. *Transition Costs*

The current regulatory regime developed in a period when cross-border securities transactions were rare. This led to the creation of domestic regulatory systems which essentially operate independently of one another. The theme of this article is that a regulatory change is required to adapt these regulatory systems to the new global securities market. However, any change in government regulation imposes transition costs on those who relied upon the old rules and took actions with long-term consequences.[298] A move from the current regulatory regime to a set of common rules might disrupt the investments made by market participants, professionals, and regulators in current market practices.[299] Even if harmonization is a more efficient solution for the regulation of the global securities market, as this article claims, it is not necessarily worthwhile to radically change the current system.[300] This section analyzes the transition costs of harmonization from the standpoints of various parties.

1. Investors' and Professionals' Perspectives

Investors, creditors, accountants, and lawyers would have to become familiar with a new set of rules. These people have invested a significant amount of resources in acquiring the skills needed to prepare and analyze disclosure documents. Changing the standards would require them to undertake a learning process that would have both direct and indirect costs. The direct costs are the actual costs of acquiring the same level of knowledge and skills that they possess with respect to the current standards. The indirect costs include slower

298. For a detailed discussion of transition costs, see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986).

299. *See* David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 Harv. Int'l L.J. 423, 445-46 (1991) (providing an analysis of the transition costs involved in harmonization).

300. This argument follows the semi-strong form path dependence. *See* Mark J. Roe, *Chaos and Evaluation in Law and Economics*, 109 Harv. L. Rev. 641, 648-50 (1996) (explaining that in some situations, the cost of restructuring a system that has developed over a long time outweighs the efficiency that is achieved from this restructuring).

process preparation and analysis of disclosure documents, the inevitable mistakes during the learning process, and possible misallocation of capital as a result of incomplete familiarity with the standards during the transition period. It is difficult to estimate the size and effects of these costs. However, there are several mitigating factors. The transitional costs are a one-time event. When market participants are familiar with the new standards, they will enjoy significant economies of scale resulting from the need to learn how to deal with only one set of rules.[301] This reduction of costs would result in ongoing savings for both current market participants and new players that would have to study only one standard to begin with.

2. Issuers' Perspective

For issuers, the new rules mean not only a different format of reporting but also different substance. Issuers would have to bear at least part of the costs of professionals becoming familiar with the new standards through increased fees and a slower process of preparing registration and reporting documents. Issuers from markets which currently impose disclosure requirements that are less stringent than those of the unified standards would face a more severe problem. Those issuers would incur costs of reporting information that was not required when they made the decision to offer their stock publicly.

For most issuers, the overall reduction in the cost of capital that would result from harmonization is likely to outweigh the additional transition costs they might incur. However, to mitigate the transition effect, a limited grandfathering exemption could be provided.[302] For one year following the implementation of the harmonized standards for periodic reporting, those standards would not apply to issuers that had offered their stock publicly before the implementation of the harmonized rules. During this year, the market would adjust to the harmonized rules and professionals would become familiar with them. This would allow issuers to save on transition costs and to develop a strategy of operation.

3. Regulators' Perspective

Domestic supervisory agencies that would implement the harmonized standards might incur significant costs during the transition period.[303] First, regulators would have to invest a great deal of capital

301. For a discussion of the advantages of harmonization for investors, see Geiger, *supra* note 4, at 307-10 (exploring the reduction in the cost of capital and the enhanced comparability that would result from harmonization).

302. A grandfathering exemption is commonly employed when a regulatory change is implemented. Such a provision exempts pre-reform investments from newly enacted laws. *See* Kaplow, *supra* note 298, at 584-87.

303. For the political aspects of harmonization and the potential resistance of regulatory agencies, see *infra* text accompanying notes 305-09.

and human resources in developing the rules. Then, the staff would have to be retrained under the new rules. In addition to the retraining costs, there would be costs for sub-optimal monitoring and review processes during the transition period. The same problems also apply to the mechanisms of the Global Coordinator. It would take some time before the institutional mechanisms of the Global Coordinator could perform its tasks efficiently.[304] This problem would occur at a critical time, while the markets were adjusting to the new rules. However, the effects of this one-time transition period should not be overstated. Regulators are accustomed to dealing with regulatory reforms, are trained to handle them, and should therefore be able to overcome these challenges.

D. *Resistance by Interest Groups*

Public choice theory suggests that political incumbents—those who are protected by the current regulatory regime—would resist any change. Incumbents usually exert their influence over political institutions to maintain their own power and to block change.[305] This section analyzes the use of political power by several interest groups that might oppose the adoption of harmonized disclosure rules, and the potential influence of these groups on the process of harmonization.

The first group is domestic regulators. Economic regulation theory suggests that regulators behave like managers of private firms, seeking to maximize the "value," or power, of their agencies. Individual regulatory agencies compete over this "value."[306] In this respect, the Global Coordinator poses a potential threat to domestic regulators. Although it would not replace domestic agencies, the Global Coordinator would take over some of the powers that those agencies seek to maximize. However, without the cooperation of domestic regulators such as the SEC, no significant regulatory reform can be achieved. While there is no sure way to predict the possible objections that domestic agencies might raise, two factors should mitigate their opposition to harmonization. First, domestic regulators would still hold monitoring and enforcement powers in their home markets. Moreover, they would continue to perform review functions, and mutual recognition of foreign prospectuses which would not be possible until the documents had been cleared by their respective domestic authori-

304. Another source of costs is the actual cost of establishing and operating the institutional mechanisms of the Global Coordinator.

305. *See* Roe, *supra* note 300, at 651-52 (suggesting that even when an alternate solution exists and its efficiency exceeds the transition costs, incumbents might use their power to maintain the current status quo).

306. *See* Edward J. Kane, *Tension Between Competition and Coordination in International Financial Regulation*, *in* Governing Banking's Future: Market vs. Regulation 33, 34 (Catherine England ed., 1991).

ties.[307] Second, the increased level of activity in the securities market that would result from harmonization is likely to enhance the "value" which regulatory agencies try to maximize. The demonstrated willingness of the regulators of all Major Markets to work together toward the development of international standards within the framework of the IOSCO may be a sign that regulators would be receptive to harmonization.[308]

Another group that might oppose the harmonized standards is domestic U.S. issuers, who might resist streamlining the access of foreign firms to the U.S. capital market. This resistance would likely be strong if foreign firms' access to the U.S. market were based on disclosure standards that were less stringent than those imposed on domestic firms, as suggested in the IOSCO proposal.[309] The proposal contained in this article, however, advocates the development of unified standards to be used by both domestic and foreign issuers. Such standards would not put U.S. issuers at a competitive disadvantage in their home market. Thus, they are not likely to raise strong political objections on this point.

Finally, opposition is expected from issuers in countries that currently employ a lax disclosure regime. Those issuers would incur significant transition costs if the new rules were implemented. For them, a limited grandfathering exemption and a simple delisting mechanism could be provided.

CONCLUSION

The globalization of the world securities market promises a more efficient and diversified global economy. At the same time, globalization increases the challenges facing the regulators of securities markets worldwide. This article suggests a regime of harmonized disclosure standards to govern the world's securities markets. This proposal provides an alternative to the current regime of domestic disclosure requirements and to the IOSCO's proposed international disclosure standards.

The second part of this article presents two existing models of harmonization, the EU harmonization plan and the United States/Canadian MJDS. It identifies the shortfalls of those models. The third part of this article analyzes alternative structures and forms of harmonization and makes the case for the use of a common disclosure standard

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307. For a discussion of the review process of the Global Prospectus, see *supra* part II.C.2.

308. *See* ISOCO Proposal, *supra* note 5; *see also* Levitt, *supra* note 286, at 132 (expressing the SEC's support for the developments of international disclosure standards within the framework of IOSCO). However, IOSCO does not pose a "threat" to the agencies' powers because all its decisions are made unanimously and are not binding upon the member states. *See* Guy, *supra* note 83, at 296-97.

309. *See supra* text accompanying note 67.

for both domestic and multinational offerings. The third part also provides a detailed description of the scope and structure of the disclosure document (the Global Prospectus) and its review process. This part further describes the institutional framework and powers of the Global Coordinator, which would be entrusted with the harmonization of securities disclosure rules.

The fourth part of this article provides a comparative analysis of the disclosure requirements in the world's Major Markets. Based upon this comparison, this part shows that harmonization is feasible, and suggests a set of unified standards. The last part identifies the possible problems with the proposed model and suggests solutions.

The object of this article is not to provide a complete or perfect model of harmonization. Rather, it is a modest attempt to present a model that can serve as the basis for additional work to be undertaken by regulators, academics, and practitioners. Developing and implementing harmonized rules will be a difficult task; however, when this task is completed and a harmonized system is implemented, a much more efficient capital market can result.