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Suspension and Disbelief (or, How Managed Should a Market Be?)

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SUSPENSION AND DISBELIEF (OR, HOW MANAGED SHOULD A MARKET BE?)

Caroline Bradley*

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1.0 INTRODUCTION

The rhetoric of securities market regulation is a rhetoric of “fair and orderly markets,” of the maintenance of public confidence in the markets, and of investor protection.¹ If the regulators

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¹ See, e.g., SECURITIES EXCHANGE COMMISSION, DIVISION OF MARKET REGULATION, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS 14-15 (Jan. 1994); Sir George Young, Financial Secretary, Address to the Financial Crime Conference at the Cafe Royal (June 6, 1995), in HM Treasury Press Release 77/95 (“[T]o generate the investment and to attract the skills on which a successful financial centre depends, the market must show that it is capable of operating, and actually does operate in practice, in a respectable and orderly way. It is the Government’s view that markets only flourish where they are free, fair and adequately regulated.”). See generally ECONOMICS AND LANGUAGE (Willie Henderson et al. eds., 1993) (discussing the language and rhetoric of economics).

can ensure that the markets operate in a fair and orderly manner, investors will have the confidence to invest in securities issued by businesses that need to raise capital. Disclosure requirements and restrictions on insider trading are meant to make securities markets fair by giving all people equal access to information about securities on those markets.² Regulations that control the way in which securities trades are handled and cleared, or that attempt to limit the price volatility of securities in the markets, are meant to make the markets more orderly.

One of the techniques regulators use to ensure that their markets are "fair and orderly" is the trading halt. If some market participants seem to be trading in a security on the basis of information not available to all, the regulator may halt trading in that security until the information is made generally available. If the market in a particular security, or the market as a whole, is particularly volatile, the regulator may halt trading in an attempt to calm the market down. New rules to provide for general market halts were introduced after the 1987 market crash, and gave rise to conflicting views amongst commentators. Some argued that the markets should be allowed to operate as they will, others argued that markets should be rigidly controlled in the interests of investors and the public at large who must be protected from the dangers of excess volatility.³

In all the discussion of general trading halts, however, little attention has been paid to the problem of trading halts (or suspensions) which apply to the securities of individual corporations, and which raise similar questions.⁴ Specific suspensions have been

² See, e.g., HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, H.R. DOC. NO. 9323, 73d Cong., 2d Sess. (1934) (stating that manipulative practices should be banned to ensure fair and honest markets). This article seeks to challenge some of the methods used to achieve this objective; however, that objective is, itself, subject to question. See Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 652 (1995) ("[T]he remediation of information asymmetries endures as a policy justification for important aspects of federal securities regulation. But the need for a mandatory disclosure system varies significantly from context to context and is not static over time.").

³ See, e.g., Bruce C. Greenwald & Jeremy C. Stein, *Transactional Risk, Market Crashes and the Role of Circuit Breakers*, 64 J. BUS. 443, 461 (1991) ("A system of continuous trading involving market and limit orders sacrifices some degree of informational efficiency for timeliness."); Tamar Frankel, *What Can be Done about Stock Market Volatility?*, 69 BOS. U. L. REV. 991, 995-96 (1989) (objecting to market halts as an answer). For a suggestion that not all types of volatility in investment markets are harmful, see Lawrence Harris, *The Dangers of Regulatory Overreaction to the October 1987 Crash*, 74 CORNELL L. REV. 927, 928 (1989).

⁴ But see generally Charles M.C. Lee et al., *Volume, Volatility, and New York Stock Ex-*

used as a tool of regulation for some time, but they are at least as suspect as (and may be even more suspect than) general trading halts for a number of reasons. Specific suspensions are supposed to protect investors from trading at an "inaccurate" price. However, it may be difficult to ensure that all trading in a specific security is halted. Even if this is possible, it is at least arguable that the halt of trading in a corporation's securities may harm investors who are unable to obtain a remedy for the harm they suffer. The role of corporate managements and financial intermediaries in the pursuit of a decision to halt trading is also suspect. Suspension of trading is an easy solution to a perceived problem, but too often it is the wrong answer.

This Article poses a number of questions, comparing and contrasting the practice of halting trading in securities in the United States (U.S.) and the United Kingdom (U.K.).⁵ First, as to the substance of trading halts, why do suspensions occur, and in what circumstances? Second, as to the process of halting trading, who initiates halts, who has the power to order a halt, who is consulted during the process, and who is allowed to challenge an order to halt trading? The Article suggests that the answers to these questions raise serious concerns about the substance and process of trading halts, which should be addressed.

This Article also examines the rhetoric of "fair and orderly markets." Periodically, there are challenges to this rhetoric: the insider-trading scandals of the 1980s suggested that the markets are not always fair, and the 1987 stock market crash emphasized that the markets do not always operate in an orderly way.⁶ But rather than taking these challenges seriously and asking whether fair and

change Trading Halts, 49 J. FIN. 183 (1994) (suggesting that firm-specific trading halts on the New York Stock Exchange do not reduce trading volume or price volatility).

⁵ The United Kingdom (U.K.) and the United States (U.S.) are compared as the sites of two of the major securities markets and as jurisdictions with which I am familiar. Examination of the rules in the U.K. requires reference to European Community (EC) law because the objectives of the European Union involve the attainment of a European capital market through harmonization of rules and the removal of barriers to entry.

⁶ See, e.g., PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS, SPECIAL REPORT NO. 319, Comm. Fut. L. Rep. (CCH) (Jan. 1988); SECURITIES EXCHANGE COMMISSION, DIVISION OF MARKET REGULATION, THE OCTOBER 1987 MARKET BREAK, SPECIAL REPORT NO. 1271, Fed. Sec. L. Rep. (CCH) (Feb. 1988); see generally Greenwald & Stein, *supra* note 3; Frankel, *supra* note 3; Lewis D. Solomon & Howard B. Dicker, *The Crash of 1987: A Legal and Public Policy Analysis*, 57 FORDHAM L. REV. 191 (1988); Jerry W. Markham & Rita McCloy Stephanz, *The Stock Market Crash of 1987—The United States Looks at New Recommendations*, 76 GEO. L.J. 1993 (1988); Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907 (1989).

orderly markets are really attainable, politicians and commentators continue to operate within the terms of this rhetoric. This Article argues that the rhetoric of "fair and orderly markets" misleads the investors whom securities regulators claim to protect.

2.0 FAIR AND ORDERLY SECURITIES MARKETS

The Securities Exchange Act of 1934⁷ was designed to control abuses in the secondary market in securities.⁸ In particular, section 2(3) of the statute suggested that volatility in the markets caused by manipulation and speculation impeded the financing of industry and hindered the proper appraisal of the value of securities.⁹ Section 2 of the Act set out the objective of ensuring "fair and honest markets." The Act provided for the registration of securities exchanges with the Securities Exchange Commission (SEC), and allowed the SEC to take measures that were "necessary or appropriate in the public interest or for the protection of investors."¹⁰ The Act also referred to the need to ensure "just and equitable principles of trade,"¹¹ and "fair dealing."¹² A specialist who could act as a dealer under the rules of a stock exchange should be restricted by those rules to dealings which were "reasonably necessary to permit him to maintain a fair and orderly market."¹³

In 1934, "fair and orderly markets" were markets which were free from manipulation, speculation, and insider abuses. The term has developed a rather different meaning over time. This is partly because Congress decided in 1975 to change the SEC's mission for the control of exchange activity. The 1975 amendments to the Securities Exchange Act of 1934 directed the SEC to facilitate a national market system having regard to public interest, protection of investors, and maintenance of fair and orderly markets.¹⁴ As a result of this amendment, the SEC was charged with managing the

⁷ 15 U.S.C. §§ 78a-u (1994) [hereinafter 1934 Act].

⁸ See 4 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 1731-34 (3d ed. 1990).

⁹ See CHARLES H. MEYER, *THE SECURITIES EXCHANGE ACT OF 1934 ANALYZED AND EXPLAINED* 28 (Rothman & Co. 1994) (1934); see also HOUSE COMMITTEE, *supra* note 2.

¹⁰ 15 U.S.C. § 78f(a)(2).

¹¹ *Id.* § 78f(b).

¹² *Id.* § 78f(d).

¹³ *Id.* § 78k(b)(2).

¹⁴ See Securities Acts Amendments, Pub. L. No. 94-29, § 7, 89 Stat. 97, 111-12 (1975) [hereinafter 1975 Amendments] (adding section 78k-1 to the Act); MARKET 2000, *supra* note 1, at I-2 (concerning Study I: Introduction and Historical Background).

securities markets.¹⁵ The change in our understanding of the phrase is partly due to developments in financial economics. The debate about how securities markets should be regulated is no longer simply a debate about the best way to eliminate market abuses, but is a debate about whether regulation should and can be designed to promote market efficiency.¹⁶

An efficient capital market is one in which prices fully and instantaneously reflect all available information so that prices are accurate signals for resource allocation. A fair and competitive marketplace and rational profit-seeking investors should give rise to an efficient capital market.¹⁷ The efficient capital markets hypothesis has been described in the U.S. as "the context in which serious discussion of the regulation of financial markets takes place."¹⁸ The SEC and the courts have used the efficient capital

¹⁵ See, e.g., MARSHALL E. BLUME ET AL., *REVOLUTION ON WALL STREET* 173-74 (1993); *Ludlow Corp. v. SEC*, 604 F.2d 704, 708-11 (D.C. Cir. 1979) (extending unlisted trading privileges to be "consistent with the maintenance of fair and orderly markets and the protection of investors"). Congress adopted this standard in the 1975 Amendments, *supra* note 14, § 8, at 117-18. This language replaced the standard that had been in effect since 1964, under which the Commission was required to find that extending unlisted trading privileges would be "necessary or appropriate in the public interest or for the protection of investors." Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 3, 78 Stat. 565, 565-66 (1964). "Thus, Congress retained the 'protection of investors' requirement but substituted 'fair and orderly markets' for the 'public interest' standard. Although the meaning of this change is not obvious on its face, we take it to be that henceforth unlisted trading applications are to be evaluated, at least insofar as their effect on the securities markets is concerned, with primary reference to the congressional purposes of the 1975 Amendments." *Ludlow Corp. v. SEC*, 604 F.2d 704, 709 (D.C. Cir. 1979).

¹⁶ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 613 (1985). The authors note:

The stated objective of securities law is to make markets function efficiently—not to redistribute income or reshape preferences. True, people sometimes say that the function of securities law is "the protection of investors" or "compensation for wrongs," but these are just restatements of the objective of efficient operation of the markets. When markets efficiently respond to information, the price of securities adjusts, and this protects all investors—even uninformed ones.

Id.

¹⁷ The hypothesis has different forms: the strong form, which suggests that all information, public and private, is incorporated into prices; the semi-strong form, which suggests that all publicly available information is incorporated into prices; and the weak form, which suggests that historical information is incorporated into prices. See, e.g., Michael Firth, *The Efficient Markets Theory*, in *ISSUES IN FINANCE* 7 (Michael Firth & Simon M. Keane eds., 1986); see generally RICHARD A. BREALEY, *AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS* (2d ed. 1983); EUGENE FAMA, *FOUNDATIONS OF FINANCE* (1976).

¹⁸ Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 550 (1984).

markets hypothesis in the development of the law¹⁹ but, increasingly, commentators argue that regulators and judges should be careful about basing legal rules on this hypothesis.²⁰ Some criticisms of the use of the hypothesis as a policy tool are normative, others are positive. The efficient capital markets hypothesis may not be an accurate description of how the securities markets work; even if it is, this may not really be relevant for the policy goals of securities regulation.

The Financial Services Act of 1986²¹ is the basis for the control of investment business in the U.K. by the Securities and Investments Board. As the Securities Exchange Act of 1934 was enacted in response to scandals in the securities markets, so was the Financial Services Act enacted.²² Before the draft legislation was introduced into Parliament, the government of the U.K. expressed its aim to achieve efficiency, fairness, competitiveness, and flexibility in the regulation of investment business.²³ Schedule 4 of the Act sets out the requirements for the recognition of investment exchanges, and provides that "[t]he rules and practices of the exchange must ensure that business conducted by means of its facilities is conducted in an orderly manner and so as to afford proper protection to investors."²⁴ The exchange must also be "able

¹⁹ See, e.g., SEC, Securities Act Release No. 33-6235 (Sept. 2, 1980); SEC, Securities Act Release No. 33-6332 to 33-6338 (Aug. 6, 1981); SEC, Securities Act Release No. 33-6383 (Mar. 3, 1982); see also *Basic, Inc. v. Levinson*, 485 U.S. 224, 241-45 (1988) (accepting the "fraud on the market" theory based on the efficient capital markets hypothesis); see generally Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945 (1991); William J. Carney, *The Limits of the Fraud on the Market Doctrine*, 44 BUS. LAW. 1259 (1989); Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 U.C.L.A. L. REV. 883 (1990); Jonathan R. Macey, *The Fraud on the Market Theory: Some Preliminary Issues*, 74 CORNELL L. REV. 923 (1989); Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059 (1990).

²⁰ See generally Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546 (1994); Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information and Securities Research*, 60 N.Y.U. L. REV. 761 (1985); Henry T. C. Hu, *New Financial Products, The Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273 (1991); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613 (1988).

²¹ Financial Services Act 1986, ch. 60 (Eng.) [hereinafter Financial Services Act].

²² See L.C.B. GOWER, REVIEW OF INVESTOR PROTECTION: A DISCUSSION DOCUMENT (HMSO 1982); L.C.B. GOWER, REVIEW OF INVESTOR PROTECTION REPORT: PART 1, (1984) Cmnd. 9125.

²³ DEPARTMENT OF TRADE & INDUS., FINANCIAL SERVICES IN THE UNITED KINGDOM: A NEW FRAMEWORK FOR INVESTOR PROTECTION, (1985) Cmnd. 9432, at 6.

²⁴ Financial Services Act, *supra* note 21, Schedule 4, ¶ 2(1). The exchange must

and willing to promote and maintain high standards of integrity and fair dealing” and to cooperate with regulators.²⁵ The U.K. legislation seems to reflect the same rhetoric of fair and orderly markets that appears in the U.S. federal legislation, although the implementation of the rhetoric is different in the different jurisdictions. In the U.K. the efficient capital markets hypothesis has had much less impact on the law than in the U.S.²⁶

The European Union’s (EU) objective of achieving a European capital market is similar to the objective of achieving a national market system in the U.S., although the EU legislator has the power to make general rules that must be implemented in the various member states, rather than being able to control securities markets in the EU directly. While there is no EU securities regulatory body, EU legislation does reflect the rhetoric of fair and orderly markets. For example, the insider dealing directive refers to the “smooth operation of the market.”²⁷ The directive states that the smooth operation of the market depends on investor confidence, which in turn depends on the assurance that investors are on an equal footing and will be protected from the improper use of inside information.²⁸ The explanation of the term “smooth operation of the market” suggests that it refers to what would be described in U.S. terminology as fairness, but the term would seem more appropriate in reference to orderliness of the market. In the investment services directive, the term is used in the context of transparency requirements.²⁹

Ideas of fair and orderly markets are therefore important in

only allow dealings in investments in which there is “a proper market” and require the provision of the proper information for determining the current value of investments. *Id.* ¶ 2(2). There must be arrangements for clearing and recording transactions, and there must also be systems for monitoring and enforcement of compliance with the exchange’s rules and for the investigation of complaints. *Id.* ¶¶ 2(4), 2(5), 3, 4.

²⁵ *Id.* ¶ 5.

²⁶ *But see, e.g.*, DEPARTMENT OF TRADE & INDUS., Consultative Document, *Listing Particulars and Public Offer Prospectuses, Implementation of Part V of the Financial Services Act 1986 and Related EC Directives* 13 (1990); DEPARTMENT OF TRADE & INDUS., Consultative Document, *Summary Financial Statements for Listed Public Limited Companies* 2 (1989).

²⁷ Council Directive 89/592/EEC, 1989 O.J. (L 334/30) recital 6 (coordinating regulations on insider dealing).

²⁸ *Id.* at recitals 3, 4.

²⁹ Council Directive 93/22/EEC, 1993 O.J. (L 141/27) recital 42 (“Whereas, with the two-fold aim of protecting investors and ensuring the smooth operation of the markets in transferable securities, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose in this Directive for regulated markets apply both to investment firms and to credit institutions when they operate on the market.”).

the U.S. and the U.K. The power of securities regulators or exchanges to suspend trading in securities in certain (or uncertain) circumstances is supposed to contribute to the achievement and maintenance of these fair and orderly markets.

3.0 WHEN DOES THE POWER TO SUSPEND ARISE?

3.1 *In the United States*

The SEC and national securities exchanges have power to suspend trading in securities in the United States. The bases for these powers are set out in the Securities Exchange Act of 1934.³⁰ The SEC may summarily suspend trading in any security (other than an exempted security) for a period not exceeding ten business days if, in its opinion, the suspension is necessary in the public interest and for the protection of investors.³¹ In order to ensure the effectiveness of an order under this provision, members of a national securities exchange, brokers and dealers are prohibited from using the mails or any means or instrumentality of interstate commerce to effect transactions in, or to induce the purchase or sale of, suspended securities.³² Review of an order to suspend trading is to be based only on an examination of all the information available to the SEC at the time of the order, and a court must not enter a stay, writ of mandamus, or similar relief unless it finds that the SEC's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.³³

In addition to the power to suspend trading summarily for up to ten days, the SEC also has the power, under section 12(j) of the

³⁰ See 1934 Act, *supra* note 7, § 781(k) (as amended by the Market Reform Act of 1990, Pub. L. 101-432, 104 Stat. 963); Securities Reforms of 1990, 1424 Fed. Sec. L. Rep. (CCH) ¶ 2062 (Dec. 6, 1990) (providing also for general trading halts).

³¹ 1934 Act, *supra* note 7, § 781(k)(1)(A). On the legislative history of this provision, see generally Comment, *Summary and Successive Suspension of Trading Under the Exchange Act of 1934: The Constitution, the Congress and the SEC*, 18 CATH. U. L. REV. 57 (1968). Section 781(k)(1)(B) provides for summary suspensions of all trading on any national securities exchange or otherwise for a period of up to 90 days, and § 781(k)(2) gives power to the Securities Exchange Commission (SEC) to take action in emergencies. This provision was originally in § 19(4) of the Act. For commentary on this provision, see MEYER, *supra* note 9, at 122 ("This action, being of an emergency character, may be taken without notice to the issuer, and in that respect differs from the more drastic action of complete withdrawal or longer suspension of registration. One of the purposes of this power is to permit the Commission, in cases which appear to it to be flagrant, to stop trading in a security pending the hearing which the issuer is entitled to receive before registration can be entirely revoked or suspended for a greater period of time.")

³² 1934 Act, *supra* note 7, § 781(k)(4).

³³ *Id.* § 781(k)(5).

Securities Exchange Act of 1934, to suspend the registration of a security for up to twelve months for the protection of investors on finding, after notice and the opportunity for a hearing, that the issuer has failed to comply with any provision of the Act. Under the same provision, the SEC may also decide to revoke the registration of the security in question. This provision has been criticized by one commentator as draconian, harmful to innocent security holders, and unnecessary, because even minor contraventions of the rules may lead to a suspension of trading.³⁴ However, this provision does not allow for the summary suspension of trading in a security and is the provision that should be used for lengthy periods of suspension.³⁵

The SEC is not the only body in the U.S. with authority to suspend trading in securities, because Rule 12d2-1 under the 1934 Act³⁶ provides that national exchanges may suspend trading in accordance with their own rules, provided that they notify the SEC of the suspension, and that the suspension is not designed to evade the provisions of Section 12(d) of the Act.³⁷

³⁴ See LOSS & SELIGMAN, *supra* note 8, at 1897 ("When a registrant fails to comply with some provision of the statute or the Commission's rules, it makes little sense to visit the sin on the innocent security holders by depriving them of an exchange market, not to mention the statutory advantages of registration. More than that, the remedy is unnecessary in view of the availability of a judicial action for mandatory injunction to require the filing of adequate reports.")

³⁵ In *SEC v. Sloan*, 436 U.S. 103, 110-23 (1978), the Supreme Court held that although there may be periodic redetermination of whether such action is required by "the public interest" and for "the protection of investors," the Commission is not empowered to issue, "based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period." Concurring Justices Brennan and Marshall emphasized that the Court's opinion did "not reveal how flagrantly abusive" the SEC's use of its summary suspension power had been. 436 U.S. 103, 123 (Brennan, J., and Marshall, J., concurring) (stating that "the record is replete with suspensions lasting the better part of a year").

³⁶ 17 C.F.R. § 240.12d2-1 (1994).

³⁷ That section provides, in part:

If the exchange authorities certify to the Commission that the security has been approved by the exchange for listing and registration, the registration shall become effective thirty days after the receipt of such certification by the Commission or within such shorter period of time as the Commission may determine. A security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission; whereupon the issuer shall be relieved from further compliance with the provisions of this section and [section 78m] of this title and any rules or regulations under such sections as to the securities so withdrawn or stricken. . . .

1934 Act, *supra* note 7, § 78l(d).

The New York Stock Exchange's (NYSE) Rule 499 states that: "[s]ecurities admitted to the list may be suspended from dealings or removed from the list at any time."³⁸ The NYSE "may make an appraisal of, and determine on an individual basis, the suitability for continued listing of an issue in the light of all pertinent facts whenever it deems such action appropriate." Factors which may be considered include "any other event or condition which may exist or occur that makes further dealings and listing of the securities on the Exchange inadvisable or unwarranted in the opinion of the Exchange."³⁹ The NYSE Listed Company Manual identifies "Numerical and Other Criteria" for continued listing of securities, but these are expressed to be guidelines that do not limit the Exchange's powers.⁴⁰ These criteria include a substantial reduction of operating assets, breach of listing or other agreements with the Exchange, and operations involving the company or its management which "in the opinion of the Exchange, are contrary to the public interest."⁴¹ The Exchange may hold a public hearing in connection with its consideration of the suspension of trading in a security.

Brief suspensions of trading in securities may also occur as a result of Rule 11b-1, under which stock exchanges must require each specialist to "assist in the maintenance, so far as practicable, of a fair and orderly market" and to engage only in dealings that are "reasonably necessary to permit him to maintain a fair and orderly market."⁴² The duty imposed on specialists as a result of this rule is at times onerous, because the maintenance of a fair and orderly market involves trading against the market: during the 1987 crash, the resources of specialists were strained considerably.⁴³ Exchange rules do, however, provide some protection for specialists, allowing trading in a security to be suspended where at the start of the trading session there is an imbalance of buy and sell

³⁸ NYSE Rule 499, 2 N.Y.S.E. Guide (CCH) ¶ 2499 (1993).

³⁹ *Id.* ¶ 2499, at 4225-26.

⁴⁰ *See id.* ¶ 2499, at 4226. The manual also sets out a procedure for the delisting of securities. *See id.* ¶ 2499, at 4229-30.

⁴¹ *Id.* ¶ 2499, at 4226.

⁴² Rule 11b-1, 17 C.F.R. § 240.11b-1 (1992); NYSE Rule 104, 2 N.Y.S.E. Guide (CCH) ¶ 2104 (1994).

⁴³ *See, e.g.*, Frankel, *supra* note 3, at 999; *cf.* Jonathan Macey & Hideki Kanda, *The Stock Exchange as a Firm: The Emergence of Close Substitutes for the New York and Tokyo Stock Exchanges*, 75 CORNELL L. REV. 1007, 1032-34 (1990) (suggesting that specialists may impede liquidity); Dale Arthur Oesterle et al., *The New York Stock Exchange and its Out-Moded Specialist System: Can the Exchange Innovate to Survive?*, 17 J. CORP. L. 223, 282-95 (1992) (suggesting that specialists may induce price volatility in markets).

orders relating to that security.⁴⁴ Although these suspensions are supposed to occur only in "unusual situations," two researchers found in 1978 that almost three temporary suspensions, on average, occurred per trading day on the NYSE.⁴⁵

The Constitution of the American Stock Exchange (AMEX) gives its Board of Governors the power, at any time and without notice, to suspend dealings in any security (or to remove a security from listed or unlisted trading). The Exchange will consider suspending trading in a security where the issuer's financial condition and/or operating results appear unsatisfactory; where it appears that public distribution of the security or its aggregate market value is reduced to a level where further dealings on the Exchange are inadvisable; where the issuer has disposed of its principal operating assets or is not an operating company; where the issuer is in breach of its listing obligations; or where "any other event shall occur or any condition shall exist which makes further dealings on the Exchange unwarranted."⁴⁶

The American Stock Exchange has adopted guidelines that indicate when circumstances may result in a suspension of trading. For example, the public distribution of a security is likely to be regarded as inadequate where the number of shares of common stock that are publicly held is less than 200,000, or where the total number of round lot shareholders of common stock of record is less than 300.⁴⁷ AMEX emphasizes, however, that the guidelines should not be regarded as limiting its discretion to suspend dealings in a particular security when it deems such action to be appropriate.⁴⁸ In addition, some of the guidelines are very general. For example, AMEX may suspend dealings in a security where "the company or its management shall engage in operations which, in the opinion of the Exchange, are contrary to the public interest."⁴⁹ The AMEX Company Guide sets out in some detail the procedures

⁴⁴ Cf. SEC, Order for Suspension of Trading, 46 Fed. Reg. 37,146 (1981) (relating to Chipola Oil Corp.).

⁴⁵ See Michael H. Hopewell & Arthur L. Schwartz, Jr., *Temporary Trading Suspensions in Individual NYSE Securities*, 33 J. FIN. 1355, 1355 (1978).

⁴⁶ See Policies With Respect to Continued Listing, Am. Stock Ex. Guide (CCH) ¶ 10,376 (1992).

⁴⁷ See Application of Policies, Am. Stock Ex. Guide (CCH) ¶ 10,377 (1993).

⁴⁸ The guidelines "in no way limit or restrict the Exchange in applying its policies regarding continued listing and the Exchange may at any time, in view of the circumstances in each case, suspend dealings in, or remove, a security from listing or unlisted trading when in its opinion such security is unsuitable for continued trading on the Exchange. Such action will be taken regardless of whether the issuer meets or fails to meet any or all of the guidelines." See *id.* ¶ 10,377, at 3599-600.

⁴⁹ *Id.* ¶ 10,377, at 3601.

that apply to the delisting of securities,⁵⁰ but no such detailed procedures apply to suspensions of trading.

In order to protect investors and the public interest, the National Association of Securities Dealers (NASD) may halt trading in securities traded through the National Association of Securities Dealers Automated Quotations (NASDAQ) system pending the dissemination of material news.⁵¹ For the same purposes, the NASD may halt trading on the over-the-counter market in securities which are listed on a national securities exchange where the exchange has halted trading to permit the dissemination of material news,⁵² or may halt trading by ITS/CAES (Intermarket Trading System/Computer Assisted Execution System) market makers in listed securities where a national securities exchange has halted trading because of an order imbalance or influx.⁵³

3.2 *In the United Kingdom*

Rules governing the official listing of securities in the EU have been harmonized by means of a number of EU directives that require the Member States to introduce national implementing measures.⁵⁴ In addition to regulating the admission of securities to listing, the Admissions Directive allows Member States to impose on issuers obligations to inform the public regularly about their financial position and the general course of their business⁵⁵ and to publicize an issuer's failure to comply with continuing obligations

⁵⁰ See Delisting Procedures, Am. Stock Ex. Guide (CCH) ¶ 10,379A (1992).

⁵¹ See Trading Halts, NASD Manual (CCH) Schedule D, ¶ 1806A, § 5(a)(1) (1994) (stating that such halts usually last for half an hour after the appearance of the material news on wire services). "A trading halt provides the public with an opportunity to evaluate the information and consider it in making investment decisions. It also alerts the marketplace to the fact that news has been released." *Id.* ¶ 1980A, at 1573. The NASD's authority to suspend trading in securities derives from sections 15A(b)(6) and 15A(h)(3) of the Securities Exchange Act of 1934.

⁵² *Id.* ¶ 1806A, § 5(a)(2), at 1572.

⁵³ See *id.* ¶ 1806A, § 5(a)(3), at 1572. Article III, section 42 of the NASD's Rules of Fair Practice prohibit NASD members from effecting transactions in the over-the-counter market in a security subject to an NASD trading halt.

⁵⁴ See generally Council Directive 79/279/EEC, 1979 O.J. (L 66/21) [hereinafter the Admissions Directive] (coordinating the conditions for the admission of securities to official stock exchange listing); Council Directive 80/390/EEC, 1980 O.J. (L 100/1) (as amended by Council Directive 87/345/EEC, 1987 O.J. (L 185/81) and Council Directive 94/18/EEC, 1994 O.J. (L 135/1)) [hereinafter the Listing Particulars Directive] (coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing); Council Directive 82/121/EEC, 1982 O.J. (L 48/26) (regarding information to be published on a regular basis by companies with shares admitted to official stock exchange listing).

⁵⁵ See generally Admissions Directive, *supra* note 54, at Article 5(4). For further

of listing.⁵⁶ Issuers must provide the authorities responsible for listing (the "competent authority") with all the information considered appropriate by the authority in order to protect investors or ensure the smooth operation of the market;⁵⁷ the competent authority may also require the issuer to publish information to protect investors or the smooth operation of the market.⁵⁸

Article 14(1) of the Directive provides that: "The competent authorities may decide to suspend the listing of a security where the smooth operation of the market is, or may be, temporarily jeopardized or where protection of investors so requires."⁵⁹ Moreover, the competent authorities may discontinue the listing of a security where they are satisfied that, because of special circumstances, normal regular dealings in a security are no longer possible.⁶⁰ The Admissions Directive requires Member States to ensure that it is possible for decisions refusing admission to listing and discontinuing a listing to be challenged in court.⁶¹ There is no provision for challenges to a decision to suspend a listing.

In the U.K., the provisions of the Admissions Directive are reflected in the Financial Services Act of 1986, which provides that the Council of the Stock Exchange is the authority vested with the powers relating to the listing of shares in the U.K.⁶² Until 1984, when the provisions of the Admissions Directive were first implemented in the U.K.,⁶³ the Stock Exchange was a completely private body with no statutory authority for its control over stock market activity.⁶⁴ Now its statutory powers include the power⁶⁵ to delist

provisions on continuing obligations of issuers of listed securities, see *id.* Schedule C; see also generally Council Directive 82/121/EEC, *supra* note 54.

⁵⁶ See Admissions Directive, *supra* note 54, at Article 12.

⁵⁷ See *id.* at Article 13(1).

⁵⁸ See *id.* at Article 13(2).

⁵⁹ See *id.* at Article 14(1).

⁶⁰ See *id.* at Article 14(2).

⁶¹ See *id.* at Article 15.

⁶² See Financial Services Act, *supra* note 21, at § 142(6). Section 157 of the Act provides that the Secretary of State may transfer these functions to another body if it appears to him: "(a) that the Council is exercising those functions in a manner which is unnecessary for the protection of investors and fails to take into account the proper interests of issuers and proposed issuers of securities; or (b) that it is necessary to do so for the protection of investors." *Id.* § 157.

⁶³ See Stock Exchange (Listing) Regulations 1984, S.I. 716 (1984) (implementing the provisions of the Admissions Directive).

⁶⁴ BOARD OF TRADE, THE COMPANY LAW COMM., REPORT OF THE COMPANY LAW COMMITTEE, (1962) Cmnd. 1749, 1962, ¶ 227, at 84-85 ("Thus it may be argued that the one effective sanction possessed by the Stock Exchange (*viz.* the refusal or suspension of official quotations) is by definition incomplete, and less effective than a plain statutory power, vested in an independent body, of stopping undesirable offers.").

securities if it is satisfied that special circumstances preclude normal regular dealings in the securities and the power to suspend the listing of any securities.⁶⁶ This statutory provision does not contain any real limitation on the power of the Stock Exchange to suspend trading in securities; because of the doctrine of the supremacy of Community law,⁶⁷ however, it is invalid to the extent that it conflicts with Community law.⁶⁸ National courts within the EU must interpret domestic law in accordance with Community law.⁶⁹

The London Stock Exchange's Listing Rules (the "Yellow Book") contain the listing rules which apply in the U.K. and emphasize that the Exchange has the power to suspend "with effect from such time as it may determine, the listing of any securities at any time and in such circumstances as it thinks fit (whether or not at the request of the issuer or its sponsor on its behalf)."⁷⁰ This power may be exercised "[w]here the smooth operation of the market is, or may be, temporarily jeopardised or where protection of investors so requires."⁷¹ Suspension of a listing may occur at the

⁶⁵ These powers are subject to the detailed listing rules, rules which are laid down by the Stock Exchange itself, but which could be invalid to the extent that they contravened relevant provisions of EC directives.

⁶⁶ See Financial Services Act, *supra* note 21, § 145.

⁶⁷ See, e.g., Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585 (July 15, 1964); Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629 (Mar. 9, 1978); Case C-213/89, *Regina v. Secretary of State for Transport ex p Factortame*, 1990 E.C.R. I-2433, [1990] 3 W.L.R. 818.

⁶⁸ The U.K. statutory provision is clearly broader than the power contemplated by the Admissions Directive. Note, however, that Article 5(2) of the Admissions Directive, *supra* note 54, provides that: "Member States may make the issuers of securities admitted to official listing subject to more stringent obligations than those set out in Schedules C and D or to additional obligations, provided that these more stringent and additional obligations apply generally for all issuers or for individual classes of issuer." This provision could be interpreted to extend the suspension power of competent authorities in some ways.

⁶⁹ See, e.g., Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, [1986] 2 C.M.L.R. 430; Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. I-4135, [1992] 1 C.M.L.R. 305, ¶ 8, at 322-23 ("[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC."); Case C-421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb/Opf eV, E.C.J.*, (Sixth Chamber) 1994 I.R.L.R. 364, [1994] 2 C.M.L.R. 681.

⁷⁰ London Stock Exchange, *The Listing Rules*, ch. 1, ¶ 1.18 (1993) [hereinafter the Yellow Book]; see also London Stock Exchange, *The Listing Rules—Consultation Draft*, ch. 1 at ¶ 1.18 (1992).

⁷¹ Yellow Book, *supra* note 70, at ch. 1, ¶ 1.18; see also London Stock Exchange, *The Listing Rules—Consultation Draft*, ch. 1, ¶ 1.18 (Nov. 1992). The wording reflects that of the Admissions Directive.

issuer's request made by its sponsoring member firm, or may be imposed on the issuer. One concrete circumstance in which a suspension may be imposed upon an issuer is where the Exchange has censured a director of the issuer because of willful or persistent failure by the director to discharge his responsibilities and has stated that, in its opinion, the director's retention of his office is prejudicial to the interests of investors.⁷² The Stock Exchange states that the procedure for lifting a suspension depends on the circumstances, and that it reserves the right to impose conditions for the lifting of the suspension.⁷³ Where a suspension continues for a long time without the issuer taking adequate action to have the listing restored, the Committee on Quotations may cancel the listing.⁷⁴

The actions of the Stock Exchange are subject to judicial review, which could result in the quashing of a decision of the Exchange. However, judicial review actions in the U.K. against commercial regulatory bodies are rarely successful. For example, in one case the Court of Appeal suggested that it would be most unlikely for the Take-over Panel to act unfairly in exercising its regulatory functions.⁷⁵ In the same case, the court emphasized that timing was a crucial factor in the regulation of takeover activity and that challenges of the Take-over Panel's decisions should be historic, rather than contemporaneous. It is likely that a court would find that the same considerations applied in relation to a suspension of a listing of securities.

⁷² London Stock Exchange, *The Listing Rules*, *supra* note 70, at ch. 1, ¶ 1.8. The consultation draft also explicitly states that non-compliance with the listing rules may result in suspension of a listing. See London Stock Exchange, *The Listing Rules—Consultation Draft*, *supra* note 70, ¶ 1.5(c).

⁷³ *Id.* ("In some cases (for example a temporary suspension pending an announcement) the suspension will be lifted when the announcement is made. In other cases (for example a reverse take-over) the suspension will be continued until the proposal has been approved by the shareholders in general meeting and listing particulars have been published. . . ."); see Yellow Book, *supra* note 70, at ¶ 1.20.

⁷⁴ Yellow Book, *supra* note 70, at ¶¶ 1.21-22. Paragraph 1.22 states that special circumstances which might lead to cancellation of a listing would include "a suspension lasting longer than six months without the issuer taking adequate action to obtain the restoration of listing. During a suspension the Exchange will review the progress made by the issuer towards obtaining restoration and will notify the issuer in advance of the intention to cancel the listing on a specified date." *Id.* ¶ 1.22; *cf.* London Stock Exchange, *The Listing Rules—Consultation Draft*, *supra* note 70, at ch. 1, ¶ 1.22 (stating that cancellation would normally follow "a suspension lasting longer than six months without the issuer taking adequate action to obtain restoration of listing" and that the Exchange will review the progress by the issuer to obtain restoration after a suspension has lasted for three months).

⁷⁵ See *R v. Panel on Take-overs and Mergers ex p Datafin*, [1987] 2 W.L.R. 699; see also *R v. Panel on Take-overs and Mergers ex p Guinness*, [1989] 1 All E.R. 509.

4.0 REASONS FOR THE SUSPENSION OF DEALINGS IN SECURITIES

Comparison of statutory provisions for the suspension of trading in securities in the U.S. and EC reveals that legislators and regulators agree on a rationale for suspensions: the suspension must be necessary in the public interest (or, in the EU, if the smooth operation of the market is, or may be, temporarily jeopardized) and for the protection of investors. These provisions do not, however, define when a suspension is necessary to protect the public, investors, or the smooth operation of the market, or what a "fair and orderly market" is.⁷⁶ Where rules of exchanges contain detailed guidelines as to the circumstances in which suspensions may occur, they emphasize that the exchange may suspend even in circumstances not covered by the guidelines. Thus, in order to understand the reach of the statutory provisions, it is necessary to examine instances of suspension which reveal the way in which regulators apply these provisions. Typically, however, announcements of suspensions are brief and relatively uninformative,⁷⁷ and they do not explain why the public interest and the protection of investors require the suspension of trading in the securities in question. Nor do the orders give any suggestion that the decision process that led to the order involved any weighing of the relative costs and benefits of a suspension.

It is common for trading in securities to be suspended for short periods of time due to imbalances of buy or sell orders, or because of pending news announcements that are likely to have a

⁷⁶ See, e.g., Macey & Kanda, *supra* note 43, at 1026 ("Unfortunately . . . no one has ever come up with a good definition of what it means to maintain a fair and orderly market."); see also ANNE M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION* 84-86 (1992) (setting forth the problems faced by a regulator subjected to vague obligations, such as the obligation to maintain fair and orderly markets).

⁷⁷ For example, the SEC's order for suspension of trading in the securities of Sanyo Industries, Inc. stated:

It appears to the Securities and Exchange Commission (Commission) that there is a lack of current and accurate information concerning the securities of Sanyo Industries, Inc. concerning, among other things, (1) questions regarding the identity of persons having undisclosed control of the company, and (2) questions concerning the identities of persons having beneficial ownership of the company's securities, and the resulting impact on the market for Sanyo Industries, Inc.'s securities.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Order of Suspension of Trading, 57 Fed. Reg. 61,465 (Dec. 24, 1992) (suspending trading for 10 business days under section 78l(k) of the Securities Exchange Act of 1934).

significant impact on the price of a security.⁷⁸ Typical trading halts on the NYSE last for one hour, although there are variations depending on the reason for the halt. Trading halts arising from imbalances tend to be shorter, while those caused by pending news announcements tend to be longer.⁷⁹

The circumstances in which regulators decide to suspend trading in securities seem to resolve themselves into three general categories: fraud, inadequate information, and failure to comply with continuing obligations of listing other than those relating to the provision of information. The category of inadequate information includes financial problems and uncertainty about the company's financial position, an impending transaction, and the existence of rumors. Regulators sometimes suspend the securities of one company for more than one reason, so, in one case in the U.K., a suspension initiated because the Chairman of the issuer was accused of insider trading was continued because the Chairman's position remained uncertain, but also because the Stock Exchange was worried about failures to notify dealings in the company's shares and about whether adequate financial information about the company had been made available to the market.⁸⁰

4.1 *Inadequate Information*

The justification for many share suspensions appears to be the desire to protect uninformed investors from insiders where the market price of the investment should be affected by some information that has not yet been disclosed to the market as a whole.⁸¹ Impending transactions provide an example of circumstances where the unavailability of adequate information to the market results in a suspension of trading. For example, in one case, trading was suspended where the company intended to make a tender offer for its own shares and resumed when the offer was announced.⁸² However, suspensions also occur where there is

⁷⁸ See, e.g., Hopewell & Schwartz, *supra* note 45, at 1355.

⁷⁹ See Lee et al., *supra* note 4, at 191.

⁸⁰ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 713 (C.A.).

⁸¹ See, e.g., Phillip Coggan, *Nightmare on Throgmorton Street*, FIN. TIMES, Feb. 12, 1990, at 26 ("The Stock Exchange argues that suspension prevents informed investors benefiting at the expense of the majority. The problem is that suspension is the Exchange's most powerful weapon; once it has been fired, there is little that can be done to protect shareholders.")

⁸² See *Maher v. Zapata Corp.*, 714 F.2d 436, 439, 441 (5th Cir. 1983); cf. James Buxton, *Listing is restored as Bremner meets Stock Exchange demands*, FIN. TIMES, June 20, 1990 at 30 (reporting that the listing of shares in Bremner plc was restored following

"unusual and unexplained" market activity⁸³ and a lack of adequate and accurate information about the issuer's affairs.⁸⁴ The lack of adequate and accurate information may result from the dissemination by the issuer of false or misleading information,⁸⁵ from the issuer's failure to make available information which should be disclosed,⁸⁶ or from general uncertainty about the issuer's financial position.⁸⁷ In the U.S., trading suspensions occur where there are questions about who controls the issuer, and who are the beneficial owners of its securities.⁸⁸ Reports of suspensions in the U.K. regularly refer to a need for "clarification of the company's financial position"⁸⁹ or to suggestions that the company is suffering from financial difficulties.⁹⁰ In both countries, the unavailability of ade-

the issue of a circular by the company's chairman that met the Stock Exchange's demands for information about the current state of the company).

⁸³ See, e.g., Order of Suspension of Trading, 47 Fed. Reg. 16,924 (Apr. 20, 1982) (regarding Safeguard Scientifics, Inc.); Order of Suspension of Trading, 45 Fed. Reg. 55,310 (Aug. 19, 1980) (regarding Electro-Heat Resources Corp.); Order of Suspension of Trading, 48 Fed. Reg. 9723 (Mar. 8, 1993) (regarding Seiscom Delta, Inc.).

⁸⁴ See, e.g., *Davy v. SEC*, 792 F.2d 1418, 1420 (9th Cir. 1986) ("By February 1, 1980, SNG was listed for trading. After two ten-day suspensions for 'unusual and unexplained' market activity and a 'lack of adequate and accurate public information about the [company's] operations and financial condition,' trading in SNG's stock was suspended indefinitely."); *Zurad v. Lehman Bros. Kuhn Loeb, Inc.*, 757 F.2d 129, 132 (7th Cir. 1985) (stating that "a flurry of trading in the stock had caused the New York Stock Exchange to suspend trading twice"); *SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1065-66 (S.D.N.Y. 1973) (suspension for unexplained heavy trading).

⁸⁵ See, e.g., *SEC v. Sloan*, 436 U.S. 103, 106 (1978); Order of Suspension of Trading, 53 Fed. Reg. 24,822 (June 30, 1988) (relating to Shabu Gold Mines Ltd.); Order of Suspension of Trading, 47 Fed. Reg. 34,478 (Aug. 9, 1982) (regarding Goldfield Deep Mines of Nevada (California)); Order of Suspension of Trading, 47 Fed. Reg. 19,499 (May 5, 1982) (regarding International Metals and Petroleum Corp.).

⁸⁶ See, e.g., Order of Suspension of Trading, 46 Fed. Reg. 23,363 (Apr. 24, 1981) (relating to Security America Corp.).

⁸⁷ See, e.g., *Cowan De Groot Properties Ltd. v. Eagle Trust plc*, [1991] B.C.L.C. 1045, 1099 (describing the affairs of the issuer at the time of the suspension as "in a state of crisis").

⁸⁸ See, e.g., Order of Suspension of Trading, 57 Fed. Reg. 61,465 (Dec. 24, 1992) (relating to Sanyo Industries, Inc.); Order of Suspension of Trading, 55 Fed. Reg. 13,347 (Apr. 10, 1990) (regarding Southland Communications, Inc.); Order of Suspension of Trading, 53 Fed. Reg. 27,784 (July 22, 1988) (regarding CTI Technical, Inc.); Order of Suspension of Trading, 48 Fed. Reg. 9723 (Mar. 8, 1983) (regarding Seiscom Delta, Inc.).

⁸⁹ For example, in July 1990, Parkfield Group asked that its shares be suspended "pending clarification of the company's financial position." Andrew Bolger, *Parkfield halts dealings pending finance statement*, FIN. TIMES, July 19, 1990, at 22 ("City analysts immediately speculated that the next step must be to call in the administrators to the company, which employs more than 4000 people. One commented: 'If Parkfield did not have a liquidity problem before the share price crash, it certainly did then.'").

⁹⁰ The shares in Associated-Henriques were suspended on July 17, 1990, after the company said it was suffering from cash flow problems because of overdue payments by some of its clients. The company was negotiating with its bankers about refinanc-

quate information to investors and potential investors to enable them to value the company's shares is believed to justify the suspension. If there is some danger that there has been a leak of information, it may be thought to be desirable to protect those who do not have access to this information from those who do.⁹¹

In the U.K., where suspensions occur because of the inadequacy of the information available to the market, it is common for the Stock Exchange to require the issuer to provide information before the suspension is lifted. In 1990, for example, the Stock Exchange offered to restore the listing of Bremner plc pending the publication of a circular approved by the Stock Exchange to shareholders in the company and the holding of an extraordinary general meeting of shareholders of the company.⁹²

A lack of adequate and accurate information relevant to the value of securities listed on an exchange is contrary to the rhetoric of the fairness of the securities markets. This lack of information would be remediable by the provision of adequate and accurate information, but suspension of trading in a security is not the only possible mechanism for ensuring the provision of this information. A less costly mechanism⁹³ would be for regulatory or exchange authorities to inform the public that, in their belief, the information

ing. See Peter Montagnon, *Associated-Henriques suspended*, FIN. TIMES, July 18, 1990, at 18. Shares in London United Investments were suspended on March 26, 1990 because of uncertainties about the company's financial position, and the company's principal insurance subsidiary was banned by the DTI from taking on any new business. See *'Uncertainties' take their toll on LUI*, FIN. TIMES, Mar. 27, 1990, at 25. Shares in Ketson Group were suspended on October 18, 1990 after restructuring and on the appointment of an administrative receiver. See Andrew Hill, *Ketson calls on bank to appoint a receiver*, FIN. TIMES, Oct. 19, 1990, at 23.

⁹¹ But see, e.g., Richard J. Barclay, *Comment on Macey, Mitchell & Netter*, 74 CORNELL L. REV. 836, 837 (1989) ("If . . . many stock price movements are caused by the revelation of private information and not public information, then any restrictions on trade that encumber the normal flow of information pose a potentially serious concern that we should deal with.").

⁹² See Andrew Bolger, *Bremner listing may be restored*, FIN. TIMES, June 13, 1990, at 22.

The Exchange said that following an appeal to the Committee on Quotations it had been decided that the company's listing could be restored for the remainder of the period of notice of the EGM following publication of a circular approved by the Exchange before issue.

. . . The committee has required the company to issue such a circular on or before June 18 and said it must include: the company's current plans and intentions for its future business activity; the company's present financial position and how it is intended to employ its liquid resources; and a statement that the Exchange has reserved the right to withdraw the company's listing following the EGM.

Id.

⁹³ See *infra* note 108.

available about the securities of a particular issuer is not sufficient to form an accurate view of the value of those securities.

4.2 *Fraud*

Trading in securities is often suspended where a regulator suspects that a securities offering has involved fraud,⁹⁴ or where a person involved with the issuer has been accused of insider dealing.⁹⁵ When trading is suspended based on accusations of previous insider dealing where investors have already suffered loss, rather than on market manipulation which continues to have an effect on the price of the securities, it is difficult to see that the suspension really protects investors. This category of suspension clearly merges with that of inadequacy of information relating to particular securities, and is subject to the same criticisms; disclosure, rather than suspension, is the appropriate action. But cases where trading in a security is suspended because of fraud in the past are often not cases of asymmetric information in the present. What appears to be occurring in such cases, however, is that the Exchange is sending out the message that it takes insider dealing seriously, and individual investors are deprived of access to the market in order to protect general investor confidence in the market. Individual investors may therefore suffer in the interest of preserving general investor confidence in the markets. This may promote the orderliness of the securities markets, but it does not seem to promote their fairness.

4.3 *Noncompliance with Listing Obligations*

Suspensions imposed on an issuer by an exchange sometimes result from the breach by the issuer of the continuing obligations imposed on it through its quotation on the exchange.⁹⁶ For example, breach of a listing obligation to obtain shareholders' approval for all purchases in excess of twenty-five percent of net assets may lead to suspension.⁹⁷ Companies that sell their only operating as-

⁹⁴ See, e.g., *United States v. Rubin*, 836 F.2d 1096, 1098 (8th Cir. 1988); Order of Suspension of Trading, 53 Fed. Reg. 24,822 (June 30, 1988) (relating to Shabu Gold Mines Ltd., where the reason for the suspension was "the circulation of a prospectus containing apparently false and misleading information concerning the company's ownership and assets and the omission of the material information that the Alberta Securities Commission ordered the suspension of trading, an order which remains in effect, of the company's securities on the Alberta Stock Exchange").

⁹⁵ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 713 (C.A.).

⁹⁶ See, e.g., London Stock Exchange, *The Listing Rules*, *supra* note 70, at ch. 1, ¶ 1.5.

⁹⁷ See *Colonnade shares are suspended at 165p*, FIN. TIMES, Feb. 16, 1990, at 27.

sets to become "cash" companies will be suspended, because they no longer meet Stock Exchange requirements.⁹⁸ Failure to pay the annual listing fee,⁹⁹ or failure to seek shareholder approval for the issuance of securities,¹⁰⁰ may also result in suspension of a listing. Suspension of trading in the securities of an issuer in breach of its obligations is the sanction available to the Exchange, but the imposition of this sanction harms the interests of holders of the issuer's securities who have played no part in the breach and, who, realistically, are not responsible for the breach. The suspension of trading in securities in these circumstances could be regarded as fair on the basis of a model of shareholder governance that bears little relation to reality. In large publicly-held corporations, however, most shareholders are not in a position to monitor or control the actions of the issuer's management. As with suspensions of trading based on inadequate information in the market, the exchange could respond to failures to comply with the listing rules by informing the market so that individual investors could take account of the noncompliance in making their investment or divestment decisions.

5.0 USES AND ABUSES OF SUSPENSIONS

Although it is clear that suspensions occur for similar reasons in different jurisdictions, suspension involves a significant interference by regulators or exchange authorities with the operations of the market and is only one of the control mechanisms available to those authorities. Exchange officials believe that without their management, there would be too much volatility in their markets,

⁹⁸ See, e.g., *In Re Samuel Sherman plc*, No. 005846 of 1990, [1991] 1 W.L.R. 1070, 1074-75. The court noted:

During 1978 the company's freehold manufacturing premises were sold at a profit of £91,450, and in 1980 premises in Hanover Square—part being used as offices and showroom and the other part let off—were sold for £600,000, showing a profit of £436,000 odd. The upshot of these transactions was three-fold. (1) The company ceased trading. (2) After paying the creditors the company had about £300,000 surplus cash. That was its main asset. It did not have other assets of any substance at that point. (3) The Stock Exchange listing was suspended at the request of the board in view of the sale of the major asset and running down of the business.

Id.; see also Nikki Tait, *Anglo shares suspended after asset disposal plan revealed*, FIN. TIMES, June 6, 1990, at 23 (concerning the suspension of shares in Anglo on its announcement of plans to sell Anglo Leasing).

⁹⁹ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 713 (C.A.).

¹⁰⁰ See, e.g., *Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984).

transactions would be consummated on the basis of inadequate, or at least asymmetric, information, and fraud would be rampant. Action to combat these evils bolsters an exchange's reputation and allows it to compete effectively with other exchanges,¹⁰¹ but, generally, exchange markets are probably too managed.¹⁰² The twentieth century has seen a dramatic increase in the level of management of exchange activity, through changes initiated by exchanges themselves or in response to outside pressure from regulatory authorities such as the SEC and from politicians.¹⁰³ Each crash and each fraud unearthed gives rise to new pressure for new rules, but this does not mean that the new rules are always desirable. At times, the original objectives of the regulatory system are obscured: a system designed primarily to inform investors about investment products begins to look more like a system of merit regulation, protecting investors from the dangers of investing in unsuitable investment products.¹⁰⁴ The more regulators and exchanges do to manage the markets, particularly through suspending trading in securities, the less credible are their claims that they are not involved in merit regulation.

For exchanges, the decision whether to suspend trading in a particular security may involve a conflict between the objectives of maintaining a liquid (but not too volatile) market for investors¹⁰⁵ and allowing all investors an opportunity to evaluate news announcements.¹⁰⁶ Trading halts or suspensions are not costless: the

¹⁰¹ See Macey & Kanda, *supra* note 43, at 1023 ("[T]he loss to the exchange's reputational capital resulting from a false declaration of quality inevitably will exceed any short term gains the exchange might obtain by making such a false declaration.").

¹⁰² Suspension of trading in securities has been a technique implemented by exchanges since the nineteenth century and has, as a result probably been subjected to less scrutiny than some more recently developed techniques.

¹⁰³ See generally ROBERT SOBEL, *AMEX—A HISTORY OF THE AMERICAN STOCK EXCHANGE, 1921-1971* (1972) (examining the changing levels of regulation at the American Stock Exchange).

¹⁰⁴ See, e.g., Roberta S. Karmel, *Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce?*, 53 BROOK. L. REV. 105, 114 (1987) (maintaining that "despite the selection of disclosure over substantive regulation in the Securities Act, the SEC could well exercise merit regulation under the authority given to it by Congress to establish a national market system"); see generally Manning Gilbert Warren III, *Legitimacy in the Securities Industry: The Role of Merit Regulation*, 53 BROOK. L. REV. 129 (1987) (state merit regulation); Ad Hoc Committee on Merit Regulation of the State Regulation of Securities, *Report on State Merit Regulation of Securities Offerings*, 41 BUS. LAW. 785 (1986) (same).

¹⁰⁵ Stock exchanges provide liquidity, monitoring, standard form contracts, and reputational capital. See Macey & Kanda, *supra* note 43, at 1012, 1018-1024.

¹⁰⁶ See Securities Exchange Act of 1934 Release No. 34-22554, 50 Fed. Reg. 43,825 (Oct. 29, 1985) (concerning a proposed rule change relating to trading halt procedures).

suspension of trading in a security temporarily reduces liquidity and imposes opportunity losses and gains on those who would have traded during the period of the suspension had they been able to do so.¹⁰⁷ Long suspensions of trading are likely to produce greater costs than short suspensions.¹⁰⁸ Those affected include holders of the suspended security, those who would have acquired the suspended security but for the suspension, and those who would have traded in derivative instruments based on the suspended security but for the suspension.¹⁰⁹

Cost-benefit analysis is now an accepted element in the rulemaking process adopted in the U.S. and the U.K., and it could easily be extended to non-rulemaking action by regulators and exchanges. If the gains produced by a suspension exceed the costs imposed by it, there is no reason to criticize the suspension. It is not evident, however, that this calculation forms any part of the decision process of those who have the power to order suspensions of trading in securities. The cost-benefit calculation as applied to the suspension decision should weigh the benefits of improving the dissemination of information, of applying sanctions for wrongdoing, and of reducing volatility and maintaining the confidence

¹⁰⁷ Hopewell & Schwartz, *supra* note 45, at 1357. The authors further suggest that the "[o]perational criteria for evaluating these costs and decision rules which would insure equitable suspensions are not obvious and may not exist. Thus, the relative costs and benefits of suspension in imbalance situations appear to depend upon the judgment exercised." *Id.*

¹⁰⁸ The London Stock Exchange has imposed suspensions of trading for periods of some years. See, e.g., Dep't of Trade & Indus., *Aldermanbury Trust plc Investigation under Section 432(2) of the Companies Act 1985*, Report by George Warren Staple & Thomas Gregory James Tress FCA, ¶ 2.06, at 11 (HMSO 1991) (recording suspension of the company's shares in March 1976 and the continuation of the suspension until the listing was cancelled in January 1988).

¹⁰⁹ See, e.g., Securities Exchange Act of 1934 Release No. 34-26382, 53 Fed. Reg. 52,539 (Dec. 21, 1988) (proposing rule changes regarding trading rotations, halts, and suspensions relating to options on a stock index group on AMEX; circumstances when trading may be suspended include "other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market"); Securities Exchange Act of 1934 Release No. 34-26709, 54 Fed. Reg. 15,280 (Apr. 11, 1989) (approving proposed rule changes relating to halts or suspensions of trading in index participations on AMEX and the CBOT); Securities Exchange Act of 1934 Release No. 34-27382, 54 Fed. Reg. 45,834 (Oct. 31, 1989) (noting that the effect of an SEC-ordered suspension of trading in a basket component stock would be to preclude trading in the basket); Securities Exchange Act of 1934 Release No. 34-35789, 60 Fed. Reg. 30,127 (June 7, 1995) (regarding self-regulatory organizations; order approving proposed rule changes and notice of filing and order granting accelerated approval of amendment numbers one, two, and three to the proposed rule changes by the Chicago Board Options Exchange, Inc., relating to trading halts, trading suspensions, the re-opening of trading after a trading halt or suspension, and the suspension of the retail automatic execution system).

of investors that the market is a fair and orderly place in which to transact against the costs of reduced liquidity and the harm to investor confidence in the market. Moreover, the suspension calculation should not be carried out in a vacuum. The costs and benefits of alternative mechanisms to achieve the desired objective should also be measured. If the regulator or exchange has a choice between different actions to achieve the same objective, it should choose the action that is least costly for those affected by it. If disclosure is a practical solution to the perceived problem, it will usually also be the less costly and, therefore, preferable solution.

Clearly, the rules adopted by exchange authorities are rarely, if ever, the only solution to a perceived problem. In 1964, George Stigler suggested an alternative to the NYSE's practice of suspending trading in situations of order imbalances:

The popular NYSE practice of suspending trading until buy and sell orders can be matched at a "reasonable" price is open to serious objection. To prevent a trade is no function of the exchange, and any defense must lie in a desire to avoid "unnecessary" price fluctuations. An unnecessary price fluctuation is surely one not called for by the conditions of supply and demand of the *week* even though the fluctuation may reflect supply and demand of the *hour*. This suspension of trading means that the exchange officials know the correct price change when there is a flood of buy or sell orders. We need not pause to inquire where they get this clairvoyance; it is enough to notice that the correct way to iron out the unnecessary wrinkles in the price chart is to speculate: to buy or sell against the unnecessary movement. The omniscient officials should be deprived of the power to suspend trading but given vast sums to speculate.¹¹⁰

This proposed solution is unlikely to appeal to exchange officials, but Stigler is surely right in suggesting that exchange officials would need to be clairvoyant to work out what the correct price change for a particular security should be. However, we should note that the NYSE is not alone among exchanges in trying to ensure the maintenance of what exchange officials regard as a "fair and orderly market," which involves an assessment of the correct price of a security.¹¹¹

Where the reason for the suspension of trading is that the

¹¹⁰ George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. Bus. 117, 130 (1964).

¹¹¹ See *R v. International Stock Exchange of the U.K. & The Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677 (Q.B.D.). In this case, members of the Committee on Quotations responsible for delisting an issuer's shares gave evidence that, in their view, the state of the issuer's accounts meant that there could be no orderly market in

market is insufficiently informed about matters relevant to the value of the security in question, there is a similar problem of balancing the costs of insufficient information against those of nonmarketability.¹¹² In *SEC v. Sloan*,¹¹³ the Supreme Court recognized that suspension of trading in a security might be harmful to the issuer itself, and to its shareholders and to other investors. The Court also suggested that disclosure might be an appropriate method of dealing with the problem of inadequate information in the market.¹¹⁴

Suspensions attributed to order imbalances are very temporary, as generally are suspensions pending announcements of significant news. The costs imposed by these suspensions are, therefore, limited. On the other hand, it is clear that the costs of suspensions which last for years are much greater.¹¹⁵

The way in which decisions about suspensions are made may contribute to the problem. Persons whose own interests may be promoted by a suspension, or by the continuation of a suspension, are more likely to be able to influence the suspension decision than those who are likely to be affected adversely by the suspension. Specialists have more influence over suspension decisions than do investors.¹¹⁶ Suspensions of dealings in securities often take place at the request of the issuer's management,¹¹⁷ rather

its shares, and that normal and regular dealings in the shares would be impossible. *Id.* at 684-86.

¹¹² See Hopewell & Schwartz, *supra* note 45 at 1358.

¹¹³ 435 U.S. 103 (1978).

¹¹⁴ *Id.* at 116 ("Even assuming that it is proper to suspend trading simply in order to enhance the information in the marketplace, there is nothing to indicate that the Commission cannot simply reveal to the investing public at the end of 10 days the reasons which it thought justified the initial summary suspension and then let the investors make their own judgments.").

¹¹⁵ See Coggan, *supra* note 82, at 26 (referring to the suspension of shares in Falcon Resources in October, 1985).

¹¹⁶ Hopewell & Schwartz, *supra* note 45, at 1358-59 ("It is worth noting that whatever complex factors determine the specialist's incentives, it seems unlikely that his interests would coincide with an optimal balance between the equity costs and benefits of suspension."). On the influence of specialists at the NYSE, see generally Blume et al., *supra* note 15, at 48; cf. Securities Exchange Act of 1934 Release No. 34-26173, 53 Fed. Reg. 40,809 (Oct. 18, 1988) (approving temporary NASD rule change to protect Small Order Execution System (SOES) market makers, noting: "[W]here quotations in a security are changing and where the company has released material news, but trading has not been halted in its security . . . abusive activity is resulting in substantial lost revenue incurred daily by SOES market makers who are limited in their ability to withdraw from SOES.").

¹¹⁷ See, e.g., *Chase Manhattan Equities v. Goodman*, [1991] B.C.L.C. 897, 918; *In Re Samuel Sherman plc*, No 005846 of 1990, [1991] 1 W.L.R. 1070, 1074-75; see also Dep't of Trade & Indus., *Sound Diffusion plc. Investigation under section 432(2) of the Companies*

than being imposed on the issuer, and investors in it, by the stock exchange itself. But a company's management may not have the best interests of the company's shareholders at heart, and may be promoting the idea of suspension in order to forestall potential takeovers that could threaten its position. The company's brokers may also have their own reasons for wanting a suspension; they may wish to prevent the share price from falling to protect the "value" of their own holdings. Reliance by exchanges and regulators on managements as initiators of suspensions does not guarantee that suspensions occur promptly and may also contribute to another undesirable phenomenon: that trading in the securities of one issuer may be suspended while another issuer in what appears to be a comparable position finds that trading in its securities is unimpeded.¹¹⁸ Surely, in a "fair and orderly market," similar situations should be treated similarly.

Of the costs imposed by suspensions, the most significant are those imposed on shareholders of the suspended issuer who are deprived by the suspension of a market for their securities, and locked in to the issuer. Judges have recognized that shareholders' interests are adversely affected by suspensions: in the U.K., Sir Thomas Bingham M. R. has said: "I accept without question that

Act 1985, Report by Edmund James Lawson QC and David Anton FCA, ¶¶ 1.1, 9.20 (HMSO 1991) [hereinafter Lawson & Anton]. The authors of the investigative report stated:

In our view it was entirely justified for the directors to have decided on the morning of 5 December 1988 that at the very least the Company's share listing on The Stock Exchange had to be suspended. At that time the Company had a market capitalisation of just over £40 million. Given the Company's financial difficulties this was an overstatement of its true worth and accordingly a continuance of the listing would have led to a false market in the shares. This was the substance of the advice given by Mr. Lithiby of Panmure Gordon, the Company's brokers.

Lawson & Anton, *supra*, at ¶ 9.20.

¹¹⁸ On the Stock Exchange's functions, see Dep't of Trade & Indus., *Rotaprint plc—Investigation under Section 432(2) and Section 442 of the Companies Act 1985*, Report by Mary Howarth Arden QC & Geoffrey Newton Lane FCA, at ¶ 10.23 (HMSO 1991). The authors noted:

In the course of our investigation we considered whether it was any part of the functions normally performed by The Stock Exchange to bring to a halt dealings in shares where, as in the case of Rotaprint, the share price has ceased to bear any rational relationship to the company's own view of its assets or prospects. So far as we can ascertain this is no part of the functions currently performed by The Stock Exchange. Indeed The Stock Exchange would be unable in most cases to determine whether a share was overvalued since it is not in possession of full financial information about a company.

Id.; see also *id.* ¶ 10.25 (suggesting that the Stock Exchange's monitoring of the Rotaprint share price was inadequate).

shareholders such as the applicants are liable to suffer loss or prejudice if the public listing of a company in which they hold shares is cancelled. But so they may if the listing is suspended or, in a less obvious way, if an application for listing is refused."¹¹⁹ In *SEC v. Sloan*, the United States Supreme Court said that "the power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors."¹²⁰ However, although it is accepted that shareholders may suffer loss as a result of a suspension, shareholders have no role when exchange authorities suspend trading in their shares.

The London Stock Exchange has opposed the idea of consulting shareholders about a proposed delisting or suspension because of the costs and administrative inconvenience this would involve and because time delays caused by consultation could harm the business interests of the issuer.¹²¹ The Stock Exchange argues that shareholders who oppose a delisting or suspension should bring pressure to bear on the company's directors to apply for relisting or lifting of the suspension, rather than putting their views directly to the Exchange's Committee on Quotations.¹²² The Court of Appeal found that shareholders do not have the right either to appear before the Committee on Quotations in relation to a possible

¹¹⁹ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 713 (C.A.).

¹²⁰ *SEC v. Sloan*, 436 U.S. 103, 112 (1978).

¹²¹ See *R v. International Stock Exchange of the U.K. and The Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 697 (Q.B.D.).

It is said that the competent authority would on occasions have to evaluate, reconcile and adjudicate between a possible multitude of differing views and that the identities of shareholders and their views would be continually changing as the shares were traded. The requirement to consult could be detrimental to the business interests of the company because, for instance, of time delays which would inevitably result from consultation; uncertainty affecting the decision-making process where shareholders' views differed from those of the company; and because confidential information given to the authority to enable it to come to an informed decision might have to be disclosed to shareholders which might be in breach of the Financial Services Act.

Id. The Stock Exchange also argued that "if shareholders were alleged to have a sufficient interest, others such as banks who grant loans on the security of shares or persons interested in acquiring shares at the time of listing could similarly have sufficient standing." *Id.*

¹²² *Id.* It is difficult to imagine that shareholders in a company whose shares are suspended are likely to be able to influence management to take the action necessary for the suspension to be ended.

suspension or delisting or to apply for judicial review of a decision by the Committee to delist or suspend a security.

It is not only in relation to the loss of a market for their shares that shareholders of suspended issuers may suffer loss. Creditors of the issuer may react to the suspension by deciding to withdraw credit.¹²³ Although the suspension of trading in a company's shares is not a common event of default in loan agreements, and a lender is likely to be reluctant to test in the courts whether a material adverse change clause is breached by a suspension, many companies rely heavily on uncommitted funds, such as overdraft facilities, to finance their operations. Polly Peck, a company whose shares were suspended in the U.K. in 1990, seems to have had about eighteen percent of its financing in uncommitted funds.¹²⁴ Many companies are technically insolvent and the withdrawal of uncommitted funds by a creditor can have a dramatic impact on a company's financial position, pushing it into bankruptcy or, at least, Chapter 11 reorganization or administration proceedings.¹²⁵ Liquidations are expensive and often do not return much capital to shareholders.¹²⁶

5.1 Do Suspensions Work?

Suspensions of trading in securities do impose costs on market participants, but these costs are limited by the difficulties regulators and exchanges face in ensuring that suspensions work. Where an exchange suspends trading in a security, transactions may sometimes be effected off-exchange¹²⁷ or on another exchange where

¹²³ See Lawson & Anton, *supra* note 118, at 174, ¶ 8.60. Lawson & Anton noted that: The possibility of suspending the Company's listing on the Stock Exchange was discussed. It was considered that the Company's shares were over valued and therefore there was a false market in them. However, Kleinwort Benson considered that suspension would precipitate a receivership and advised that further work should be performed on a business plan over the coming weekend and that the Bank of Scotland's attitude should be clarified.

Id.

¹²⁴ See Nadir looks to Turkey for breathing space, FIN. TIMES, Oct. 5, 1990, at 32.

¹²⁵ Although, for a suggestion that individual creditors have incentives not to initiate bankruptcy, see Douglas Baird, *The Initiation Problem in Bankruptcy*, 11 Int'l. Rev. L. & Econ. 223, 224 (1991).

¹²⁶ See generally Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285 (1990) (discussing the costs of bankruptcy). The costs of private renegotiation may be lower than those of formal procedures such as those of Chapter 11 or bankruptcy. See Stuart C. Gilson et al., *Troubled Debt Restructurings - An Empirical Study of Private Reorganization of Firms in Default*, 27 J. FIN. ECON. 315, 319 (1990).

¹²⁷ NASD members are allowed to continue to trade in securities during trading

trading is not suspended. Even a regulator seeking to suspend or delay trading in securities within its own jurisdiction may not be successful.¹²⁸ Regulators and exchanges encounter difficulties in making trading suspensions effective where trades may be carried out on foreign exchanges. During the suspension of trading in Polly Peck shares in the U.K., there were reports of trading in the shares despite the suspension. Trades happened in two ways: through individuals approaching institutions and large private investors, and through trading in Zurich where the shares were also quoted. These transactions consequently pushed the share price up.¹²⁹ At the time, Polly Peck's serious financial difficulties were well publicized, but there was still investor interest in the shares. In one U.K. case shareholders challenging the delisting of a company had acquired their shares off-market while the shares were suspended and before they were delisted.¹³⁰ If the function of suspensions is to maintain investor confidence in a particular exchange market, it may not matter that such transactions occur. The London Stock Exchange, by suspending trading in a security that may freely be traded in Zurich, may be signaling that it operates a more strictly controlled market than that in Zurich, thereby promoting higher levels of investor confidence in its market.¹³¹

Where the perceived objective of suspensions is not to improve the competitive position of a particular exchange through

halts or suspensions initiated by an exchange, unless the NASD itself halts trading in the security. See NASD Manual, *supra* note 51, at ¶ 1920; see generally Therese H. Maynard, *What is an "Exchange"?*—*Proprietary Electronic Securities Trading Systems and the Statutory Definition of an Exchange*, 49 WASH. & LEE L. REV. 833 (1992) (discussing proprietary trading systems that compete with exchanges); Lewis D. Solomon & Louise Corso, *The Impact of Technology on the Trading of Securities: The Emerging Global Market and the Implications for Regulation*, 24 MARSHALL L. REV. 299, 320-27 (1991) (same).

¹²⁸ See *Markey Seeks Report on Failure to Comply With Delayed Trading Request*, 26 Sec. Reg. & Law Rep. (BNA) No. 13, at 474 (Apr. 1, 1994). The action in question was not a suspension of trading under section 78l(k) of the 1934 Act, but a request to delay trading in Mexican securities after the assassination of Luis Colosia. See *Levitt Cites "Logistical" Problems in Trying to Delay Trading Opening*, 26 Sec. Reg. & Law Rep. (BNA) No. 20, at 731 (May 20, 1994).

¹²⁹ See Robert Waters & Andrew Jack, *Buying spree in Polly Peck shares*, FIN. TIMES, May 3, 1991, at 19.

¹³⁰ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 714 (C.A.).

¹³¹ The London Stock Exchange has produced marketing literature for a listing in London as a product that can ensure investor confidence. See, e.g., THE INTERNATIONAL STOCK EXCHANGE, A LISTING IN LONDON (Nov. 1987); cf. *Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255, 268 (2d Cir. 1984) ("[I]nvestors rely heavily upon the rules of the NYSE to insure fair dealing in corporate matters. Indeed, the fact that Norlin stock continues to be traded on NASDAQ even while it is suspended on the NYSE suggests that this investor confidence may be well placed.").

the imposition of higher regulatory standards, but to ensure that trading in a particular security is halted, additional rules will apply to ensure the effectiveness of suspensions. At the domestic level, the number of trades in suspended securities can be reduced by rules prohibiting regulated market participants from facilitating or participating in transactions in such securities.

Where securities are listed on more than one exchange in different jurisdictions, or may be traded through the facilities of a foreign exchange where they are not listed, a suspension of trading in the securities by one exchange, or even by a regulatory body such as the SEC, will not necessarily be effective to prevent trading in the securities. In some circumstances where one exchange suspends trading, other exchanges also have an incentive to suspend trading if, for example, those exchanges wish to be seen as markets with high regulatory standards. However, as the Polly Peck example illustrates,¹³² the suspension of trading in a security in one market does not always result in the suspension of trading in that security in other markets concerned. The SEC has suggested that such "erosion of trading halts . . . could affect the integrity of the United States securities markets."¹³³

In practice, securities markets in different jurisdictions have cooperated in ensuring the effectiveness of suspensions. For example, in 1987, the NASD stated that the London Stock Exchange would cooperate with it in relation to "suspensions and resumption of trading, and the surveillance and investigation of trading in securities of mutual market concern."¹³⁴ Exchanges have also set up more formal arrangements for cooperation: the plan for a market linkage between AMEX and the Toronto Stock Exchange provided for coordination of actions by the two exchanges in relation to trading halts in dually-listed securities.¹³⁵ Within the EC, there is a system to allow for consultation between regulators of listings.¹³⁶ Such arrangements all contribute to promoting the effectiveness of trading halts or suspensions, but cannot ensure the effectiveness of such actions in circumstances where there are no preexisting ar-

¹³² See *supra* note 130.

¹³³ See Securities Exchange Act of 1934 Release No. 34-21958, 50 Fed. Reg. 16,302, 16,309 (Apr. 18, 1985).

¹³⁴ See Securities Exchange Act of 1934 Release No. 34-24979, 52 Fed. Reg. 37,684, 37,686 (Oct. 2, 1987).

¹³⁵ See Securities Exchange Act of 1934 Release No. 34-22442, 50 Fed. Reg. 39,201, 39,201-03 (Sept. 27, 1985); *cf.* Securities Exchange Act of 1934 Release No. 34-25457, 53 Fed. Reg. 9156 (Mar. 21, 1988) (approving a proposed rule change regarding a pilot program for cooperation between NASD and Stock Exchange of Singapore).

¹³⁶ See Admissions Directive, *supra* note 54, at Article 20.

rangements between the markets in question, no multilateral arrangements for harmonization of the control of market activity, or no willingness to cooperate. If investors wish to trade in suspended securities, a market has an incentive to provide facilities for their trades.

6.0 MARKETS AND REGULATORS

6.1 *Limitations on the Right to Suspend*

Exchanges and regulatory bodies such as the SEC have considerable discretion as to when and whether to suspend or halt trading in securities, and they tend to give little information to the public about the reasons for their decisions. A decision to suspend trading in a security may have an adverse impact on those precluded by the suspension from transacting in that security. People who are adversely affected by a suspension decision, however, may not be able to challenge that decision or obtain a remedy for any loss they incur as a result.

In the U.S. and the U.K. there are limited opportunities for review by the courts of decisions to suspend trading in securities. Despite the successful challenge of the SEC's use of its summary suspension power in *SEC v. Sloan*, the deferential standard of review suggests that challenges are generally unlikely to succeed.¹³⁷ U.K. law imposes few controls on the exercise of power by regulatory bodies and commonly excludes such bodies from liability for their actions.¹³⁸ Courts in the U.K. are unwilling to quash deci-

¹³⁷ See *supra* note 33.

¹³⁸ See, e.g., Mental Health Act 1983, § 139(1) (Eng.). The Act reads, in part: No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the authority having jurisdiction under Part VII of this Act, unless the act was done in bad faith or without reasonable care.

Id. § 139(1); *cf.* Public Health Act 1875, § 265 (Eng.) [hereinafter Public Health Act]. The Public Health Act reads, in part:

No matter or thing done, and no contract entered into by any local authority . . . and no matter or thing done by any member . . . or by any officer of such authority or other person whomsoever acting under the direction of such authority shall, if the matter or thing were done or the contract were entered into *bona fide* for the purpose of executing this Act, subject them or any of them personally to any action liability claim or demand whatsoever; and any expense incurred by any such authority member officer or other person acting as last aforesaid shall be borne

sions of regulatory bodies, particularly decisions relating to commercial matters.¹³⁹ Shareholders do not even have standing to challenge a decision to suspend or delist a company's securities. Only the issuer may bring such a challenge before the courts.¹⁴⁰

It is clear that, in the U.K., a person who feels that her interests have been prejudiced by the Stock Exchange's power to suspend would not be able to claim damages for any economic loss sustained as a result of the suspension.¹⁴¹ The Financial Services Act effectively precludes shareholders from obtaining compensation from the Stock Exchange.

Nor are shareholders who suffered a financial loss as a result of the suspension of trading in their shares likely to be able to obtain any remedy from the management of the company for the loss they incurred, even where they can show that management both created the conditions for suspension and asked for the suspension. Before the Companies Act of 1989,¹⁴² shareholders were unable to obtain remedies in damages against their companies,¹⁴³ although commentators differed in their analyses of the basis for this inability.¹⁴⁴ The Companies Act of 1989 removed the preexist-

and repaid out of the fund or rate applicable by such authority to the general purposes of this Act.

Public Health Act, *supra*, § 265.

¹³⁹ See generally Sir Harry Woolf, *Judicial Review in the Commercial Arena*, 8 COMPANY LAW. 167 (1987).

¹⁴⁰ See *R v. International Stock Exchange of the U.K. and the Republic of Ir. ex p Else*, [1993] 2 C.M.L.R. 677, 720-22 (C.A.).

¹⁴¹ The Financial Services Act of 1986 provides:

Neither the competent authority nor any member, officer, or servant of that authority shall be liable in damages for anything done or omitted in the discharge or purported discharge of any functions of the authority under Part IV of this Act unless the act or omission is shown to have been in bad faith.

Financial Services Act, *supra* note 21, § 187(4). For discussion of this provision in the House of Commons, see *Hansard*, June 11, 1986, at cols. 402-25. The Minister, Michael Howard, suggested that the provision was necessary to enable regulatory bodies to act effectively, without worrying about potential liability. See *Hansard* at cols. 403-05. Bryan Gould stated: "Under the provision we are confronted with self-regulation on the bad old model where self-regulation is undertaken by groups or professional cliques whose real purpose is to defend the interests of their own members against the outside public." *Id.* at col. 410.

¹⁴² Companies Act 1989, ch. 40 (Eng.).

¹⁴³ See *Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. 317 (H.L.) (disallowing shareholders' remedies for damages against their companies).

¹⁴⁴ See L.C.B. Gower, *Contract—Sale of Goods—Innocent Misrepresentations and Conditions*, 13 MOD. L. REV. 362, 367 n.8 (1950) ("The judgments appear to show a confusion between the corporate company and its members and the reasoning is unsatisfactory. The decision would doubtless be followed but the principle is clearly limited to cases of share subscriptions and perhaps partnership contracts. In the case

ing disability of shareholders to claim damages against their companies; just as the precise limits of the disability were unclear, however, so are those of the new ability to claim damages. One distinguished judge has stated that: "One of the interests of a shareholder is in being able to sell his shares at the best price and if he is prevented from doing so, it seems to me that he has been prejudiced in his interests as a member."¹⁴⁵ This does not mean that a shareholder prevented from selling his shares by a suspension of trading will be able to obtain a remedy. The loss of liquidity would be reflected in a reduction in the value of the shares. As a general matter, the English courts tend to see reduction in the value of shares as a reflection of a loss to the company rather than as a loss to the shareholder¹⁴⁶ and, although the action by the directors that caused loss to a shareholder by preventing the shareholder from selling her shares could be characterized as a personal loss to the shareholder, it is not obvious that the courts would accept this characterization. It is unusual for shareholders of publicly held companies in England to succeed in actions for breaches of directors' duties.

In the U.S., the business judgment rule often shields corporate managements from liability for their actions.¹⁴⁷ However, an illegality such as a breach of the securities laws could give rise to liability for breach of the directors' and officers' duty of care.¹⁴⁸ This liability might exist even where the statutory provision establishing the illegality did not give rise to an express or implied private right of action.¹⁴⁹

of other contracts it is clear that damages are recoverable irrespective of rescission."); cf. J.A. Hornby, *Houldsworth v. City of Glasgow Bank*, 19 MOD. L. REV. 54 (1956); K.W. Wedderburn, *Shareholders' Rights and the Rule in Foss v. Harbottle*, [1957] CAMBRIDGE L. J. 194, 211.

¹⁴⁵ *In re A Company*, [1986] B.C.L.C. 382, 387 (per Hoffman, J., as he then was). Section 459 of the Companies Act 1985 provides for a remedy for shareholders who suffer from unfairly prejudicial conduct. After the Companies Act 1989, a shareholder may succeed in an action under section 459 even if all shareholders were affected by the conduct in question.

¹⁴⁶ See, e.g., *Prudential Assurance v. Newman Indus.*, [1982] Ch. 204 (CA).

¹⁴⁷ See, e.g., Revised Model Business Corporation Act § 8.30 (Supp. 1995); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 4.01 (1994); see generally Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993); Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287 (1994).

¹⁴⁸ See *Miller v. AT&T*, 507 F.2d 759, 762-63 (3rd Cir. 1974).

¹⁴⁹ See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

6.2 *The Relationship Between Markets and Regulators in the U.S. and U.K. Compared*

In both the U.S. and the U.K.,¹⁵⁰ the exchanges have a significant impact on the rules that regulate activity on those exchanges. In the U.K., the Stock Exchange is the body responsible, under statute,¹⁵¹ for regulating the listing of securities, subject to the power of the Secretary of State to withdraw this responsibility from it in certain circumstances.¹⁵² As a recognized investment exchange, the Stock Exchange is also subject to the control of the Securities and Investments Board in certain respects.¹⁵³ The Financial Services Act of 1986 sets out various requirements that must be satisfied before an exchange may be recognized. For example, the Exchange must have adequate financial resources,¹⁵⁴ and its rules and practices must ensure that exchange activity is carried out in an orderly manner and that investors are properly protected.¹⁵⁵ In addition, the Exchange must only allow dealings in investments in which there is "a proper market" and require the provision of the proper information for determining the current value of investments;¹⁵⁶ there must also be arrangements for clearing and recording transactions and systems for monitoring and enforcement of compliance with the Exchange's rules and for the investigation of complaints.¹⁵⁷ The Exchange must also be "able and willing to

¹⁵⁰ On comparison of regulatory styles in the U.S. and the U.K., see Keith Hawkins, *Rule and Discretion in Comparative Perspective: The Case of Social Regulation*, 50 Ohio St. L. J. 663, 665-66 (1989), where the author identifies three themes: the balance between rule and discretion; the formality and legalism of U.S. regulatory processes compared with European counterparts; and the degree of stringency, legalism, or punitiveness with which rules are implemented in America. See Deborah A. DeMott, *Comparative Dimensions of Takeover Regulation*, 65 WASH. U. L.Q. 69 (1987); Thomas Hurst, *The Regulation of Tender Offers in the United States and the United Kingdom: Self-Regulation versus Legal Regulation*, 12 N.C. J. INT'L. & COM. REG. 389 (1987); cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 11 (1977) ("[O]ur system was, from the beginning, consciously designed as a sort of formal garden instead of being allowed to come up as it might from the compost heap of the centuries.").

¹⁵¹ See, e.g., James J. Fishman, *Enforcement of Securities Laws Violations in the United Kingdom*, 9 INT'L. TAX & BUS. LAW. 131, 205 (1991) (explaining the change in the U.K. from informal to formal regulation of financial matters and comparing the U.K. system unfavorably with that in the U.S.).

¹⁵² The Stock Exchange is also regulated as a recognized investment exchange under the Financial Services Act 1986.

¹⁵³ Recognized Investment Exchanges do not need to be authorized to carry on investment business in the U.K. See Financial Services Act 1986, *supra* note 21, §§ 36-39.

¹⁵⁴ *Id.* at Schedule 4, ¶ 1.

¹⁵⁵ *Id.* at Schedule 4, ¶ 2(1).

¹⁵⁶ *Id.* at Schedule 4, ¶ 2(2).

¹⁵⁷ *Id.* at Schedule 4, ¶¶ 2(4), 2(5), 3 and 4.

promote and maintain high standards of integrity and fair dealing” and to cooperate with regulators.¹⁵⁸

The London Stock Exchange is subject to some control by the Treasury and by the Securities and Investments Board (SIB), but there are no formal structures for approval by the Treasury of the rules of an investment exchange, including the London Stock Exchange, after it becomes a recognized investment exchange. In the past, the Exchange, as a private body, adopted rules in a relatively informal manner; there is still less formality than with other regulatory bodies, such as the SIB (another private law body with public powers), but there is also an increased juridification¹⁵⁹ of what the Exchange does.¹⁶⁰ The Exchange is subject to the threat of judicial review and now engages in consultation about proposed changes to its rules.¹⁶¹

In the U.K., suspensions are imposed to ensure an orderly market or to prevent a false market. The Stock Exchange is not so concerned about volatility, although the Exchange does at times declare a fast market to protect market makers in relation to the price at which they have to deal.¹⁶² The U.K. authorities do not believe that it is part of their job to bolster the market or to manipulate or distort market conditions,¹⁶³ but the London Stock Ex-

¹⁵⁸ *Id.* at Schedule 4, ¶ 5.

¹⁵⁹ See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field* (Richard Terdiman, trans.), 38 HASTINGS L.J. 805, 835-37 (1987) (concerning juridification, the process whereby activities and relationships which have been regulated outside the legal system become regulated through the legal system).

¹⁶⁰ See, e.g., L.C.B. Gower, *Big Bang and City Regulation*, 51 MOD. L. REV. 1, 9 (1988) (stating that the “Stock Exchange was about to be recognised as the ‘competent authority’ for the purposes of those directives, thus completing its transformation from a private club to a public body”).

¹⁶¹ See generally London Stock Exchange, *The Listing Rules*, *supra* note 70; London Stock Exchange, *Commentary on Consultation Draft of the Listing Rules and Table of Destination*. The term “judicial review” in English law refers to the review by the courts of quasi-judicial decisions of public authorities. See, e.g., Lord Alexander of Weedon, *Judicial Review and City Regulators*, 52 MOD. L. REV. 640 (1989) (examining the impact of judicial review on U.K. regulators); Lord Alexander of Weedon, *Takeovers: The Regulatory Scene*, 1990 J. BUS. L. 203, 212-15 (1990) (same); Jeffrey Jowell, *The Takeover Panel: Autonomy, Flexibility and Legality*, 1991 PUB. L. 149 (1991) (same); Woolf, *supra* note 140 (same).

¹⁶² A fast market is one in which market makers are not obliged to deal at quoted prices. See Christine Buckley, *London Stock Exchange: Equity futures and options trading*, FIN. TIMES, Apr. 19, 1994, at 42; Terry Byland, *London Stock Exchange: Gains reversed following Federal Reserve move—Market report*, FIN. TIMES, Apr. 19, 1994, at 42.

¹⁶³ See Securities and Investments Board, *Regulation of the UK Equity Markets: Report by the Securities and Investments Board*, ¶ 2.4 (1995). The report notes:

[T]he trading process should be determined primarily by market forces; these will include factors such as innovation by intermediaries, increasing technological capability, and pressure from investors. It should be

change has an interest in attracting and keeping business. The London Stock Exchange has more freedom to impose suspensions or halts than the SEC and there are no statutory limitations on its power to prohibit dealings in securities.¹⁶⁴

The U.K. rules were modeled on the U.S. approach to the control of securities exchanges and self-regulatory organizations. In the U.S., exchanges are subject to the control of the SEC, which has the power to approve or reject rule changes proposed by the exchanges. As a result of lobbying by Wall Street, the Securities Exchange Act of 1934 originally allowed the NYSE to police itself.¹⁶⁵ The SEC was to oversee regulation by the stock exchanges rather than to control that regulation. By the time of the 1975 amendments to the securities laws, however, it was clear that the NYSE's rules helped to perpetuate its monopoly position in the market for securities trades.¹⁶⁶ The SEC now has a mandate to act to create a National Market System for securities trading, but commentators agree that such a system has not yet been achieved. The SEC tends to react to proposals for rule changes made by the Self-Regulating Organizations (SROs) rather than proposing rules as a matter of its own initiative. It acts like a mediator rather than an initiator.¹⁶⁷ The SEC has continuing powers under statute to review changes in the rules of a securities exchange that the SIB and Treasury do not have in the U.K. However, just as antitrust concerns led to Mayday and the 1975 securities laws amendments in the U.S., competition law has been invoked as the basis for changes

for markets, operating within such investor protection measures as are necessary, to deliver efficiency and to determine what innovation and adaptation is required to meet changes in user needs.

Id.

¹⁶⁴ The Stock Exchange's functions as a listing authority are regulated under the Financial Services Act, but its other functions are not so controlled. The Stock Exchange is a recognized investment exchange under the Financial Services Act, which means that it is exempt from the Act's authorization requirement for the conducting of investment business in the U.K. See *supra* notes 24-25 and accompanying text (addressing the requirements for recognition of investment exchanges under the Act). Recognition of an investment exchange may be revoked if the exchange does not comply with a requirement of Schedule 4, or with any other obligation under the Financial Services Act. See Financial Services Act, *supra* note 21, § 37(7). The requirements of Schedule 4 of the Act, however, are very general and the Securities and Investments Board is unlikely to challenge the Stock Exchange's views about when it is appropriate to prohibit dealings in securities.

¹⁶⁵ See BLUME ET AL., *supra* note 15, at 34.

¹⁶⁶ The rules still have this effect to some extent. For example, NASDAQ has argued that the NYSE's rule 500, which requires shareholder approval for delisting an issuer's securities from the exchange, prevents transfers of trading in an issuer's securities from the NYSE to NASDAQ and therefore impedes competition.

¹⁶⁷ ANNE M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION* 86-87 (1992).

in the rules in the U.K. London's Big Bang in 1986 was like a British Mayday. The Director General of Fair Trading concluded that the London Stock Exchange's rules distorted competition, and an equity market review was carried out by the SIB and the London Stock Exchange. As part of the review, the Stock Exchange agreed to change its requirements for reporting of trades in order to increase transparency. The review also produced a standard of market integrity for the U.K. comprising transparency, equitable treatment for market users, and a reliable price formation process free from misleading and manipulative behavior.¹⁶⁸

Competition for listings and for trades in securities is now an international rather than a domestic competition. This leads to a convergence in approaches in the major securities markets. In addition, the transnationalization of financial market activity gives regulators incentives to collaborate.¹⁶⁹ Competition and convergence have not affected the statutory bases for suspension of trading in securities. These bases are different in the U.S. and the U.K. The SEC's summary power to suspend trading in securities is a much weaker power than the completely discretionary power of the London Stock Exchange, which can suspend trading for months or years on end.¹⁷⁰ The SIB in the U.K. does not have the power to act to suspend trading in securities, because the statute makes the London Stock Exchange the "competent authority" to deal with listings of securities in the U.K. This means that the Stock Exchange in the U.K. is a regulatory body itself.¹⁷¹

The institutional structures within which suspension decisions are made differ in the two countries; despite these differences, however, the rules in the two countries regulating suspensions, and the circumstances in which suspensions occur, are very similar.

¹⁶⁸ See generally Press Release, SECURITIES AND INVESTMENTS BOARD, *London share trading to be more transparent—SIB publishes final report of equity market review*, PN/SIB/024/95; SECURITIES AND INVESTMENTS BOARD, *REGULATION OF THE UK EQUITY MARKETS: REPORT BY THE SECURITIES AND INVESTMENTS BOARD* (1995); SECURITIES AND INVESTMENTS BOARD, *REGULATION OF THE UK EQUITY MARKETS: MARKET VIEWS. A DIGEST OF RESPONSES TO SIB'S DISCUSSION PAPER* (1995); SECURITIES AND INVESTMENTS BOARD, *REGULATION OF THE UK EQUITY MARKETS: A DISCUSSION PAPER* (1994).

¹⁶⁹ On convergence of the U.S. and U.K. regulatory systems see Michael Moran, *Theories of Regulation and Changes in Regulation: The Case of Financial Markets*, 34 POL. STUD. 185, 185-201 (1986).

¹⁷⁰ In the U.S., an exchange would tend to delist a security in the circumstances where a long suspension period would apply in the U.K.

¹⁷¹ On increasing legal controls and public scrutiny of financial and securities market activity in the U.K., see Michael Moran, *Thatcherism and Financial Regulation*, 59 POL. Q. 20, 27 (1988).

The two countries seem to be developing a shared understanding of what market integrity and “fair and orderly markets” involve.

6.3 *Do the Justifications for Suspensions Work?*

At first blush, the idea that two of the major markets for the trading of securities agree that suspensions of trading in securities are a good idea in similar circumstances suggests that they may be right. However, suspension of trading is a rather clumsy tool for dealing with problems of excess volatility, fraud, and information asymmetries in securities markets. If exchanges and regulators were really serious about using suspensions to ensure pricing accuracy in their markets, they would presumably be more serious than they appear to be about maintaining consistency in the application of their suspensions policy. If suspensions are based on a concern that the market is inadequately informed about matters relevant to the value of a particular security—often as a result of action by the issuer’s management or investigation by journalists—there are likely to be similar situations that are treated differently. Different corporate managements will take different views about their risk of liability if they do not ask the exchange to suspend trading.¹⁷² If similar situations are treated differently, this suggests that the idea of “fair and orderly markets” is being undermined. In any event, federal securities regulation in the U.S. is not supposed to be merit regulation. The term is not used in the U.K., because of different circumstances, but the London Stock Exchange does not claim to provide any guarantees about the merits of securities it lists; it risks no liability if it is negligent in listing a security. The idea that exchanges might carry out suspensions to reduce their own risk of liability is not really credible. Exchanges and securities regulators do not guarantee pricing accuracy in their markets, although they do act to encourage pricing accuracy according to particular views of what is relevant to the price of a security.

Another explanation for suspensions of trading in securities is that they are implemented to protect the exchange’s competitive position. An exchange that suspends trading in securities on the basis of fraud or inadequate information in the market or breach of its listing rules is signaling that it is a market more concerned with ensuring proper behavior than are its competitors.¹⁷³ It could argue that it provides a fairer market than its competitors. For the

¹⁷² The risk of liability is likely to be greater in the U.S. than in the U.K.

¹⁷³ Courts have recognized that action by an exchange to show that it has high standards may promote the confidence of investors in it and therefore help its com-

exchange, this is a difficult calculation: investors may like the idea of a level playing field, but if surveillance to ensure fairness involves high costs, these costs may drive investors away.¹⁷⁴ It has been argued that, because of competition from non-exchange markets that are attracting increasing proportions of trades by institutional investors who wish to ensure that their trades are not transparent, exchange markets are increasingly dependent on small investors and need to work to maintain their confidence. Small investors provide liquidity, which is crucial to an exchange market.¹⁷⁵

6.4 *When are Suspensions Justified?*

Exchanges may have various reasons for deciding to suspend trading in a particular security, or in the market as a whole. As a matter of regulatory policy, however, there should be some restrictions on the ability of exchanges to act in this manner. Suspensions of trading in securities do involve costs, and they are only justified when it is clear that the costs imposed by the suspension outweigh the costs of not suspending trading. This calculation is not likely to be an easy one. Short suspensions are likely to be more easily justifiable than lengthy suspensions, but it is not always easy to predict (from the outside) whether a particular suspension will be lengthy or not. Regulators and exchanges should take into

petitive position. *See, e.g.,* Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 268 (2d Cir. 1984). The court noted:

[T]he company argues that its stock will suffer no loss of liquidity from NYSE delisting, because the shares are and will continue to be traded on NASDAQ, which Norlin asserts is a comparable market in all respects. At best, this undercuts only one of the three reasons for maintaining NYSE listing. It does not respond to the point that investors rely heavily upon the rules of the NYSE to insure fair dealing in corporate matters. Indeed, the fact that Norlin stock continues to be traded on NASDAQ even while it is suspended on the NYSE suggests that this investor confidence may be well placed.

Id.

¹⁷⁴ BLUME ET AL., *supra* note 15, at 214. The authors noted:

Before automation, when virtually all New York Stock Exchange trading occurred on the floor of the Exchange, the Exchange's surveillance costs were simply passed on as a cost of trading to investors and/or to corporations listed on the Exchange. But today—again, thanks to automation—institutional investors enjoy many options for trading stocks. The cost of surveillance is one more factor that makes the New York Stock Exchange more expensive or cumbersome for institutional investors than trading on regional exchanges or directly with each other.

Id.

¹⁷⁵ *See id.* at 239 (“The New York Stock Exchange today benefits from small investors more than small investors benefit from the New York Stock Exchange.”).

account the possibility of alternative action, such as requiring announcements as to the inadequacy of information available to the market, or disciplining corporate officers or others involved in breaches of the rules.

7.0 CONCLUSION

Statutes in the U.S. and the U.K. mandate rules that are supposed to maintain "fair and orderly" securities markets. The regulators and exchanges that implement these rules have adopted their own views of what "fair and orderly" securities markets involve. Others might argue that the rules and their implementation do not, in fact, ensure that the securities markets are either fair or orderly. Markets are inherently unfair; institutions and professional investors are in a better position than an ordinary individual investor to deal in the securities markets. Markets in which arbitrage and speculation are rife are not orderly markets.

The suspension or halt of trading in a security involves an attempt to fix the securities market, in order to protect the public or investors, to ensure the smooth operation of the market, or to maintain the existence of a "fair and orderly market." Suspensions occur where fraud is suspected, where the authorities consider that information relevant to the value of a security is not available to the market, or where the issuer of a security has failed to comply with obligations under its agreement with the exchange. This Article suggests that mechanisms other than the suspension of trading would often be more appropriate and would result in less harm to the interests of market participants generally.