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# Three Proposals for a Latin American Stock Exchange in Miami: Full-Service Exchange, Private Offshore Market, or a Computerized Financial Information Service

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# THREE PROPOSALS FOR A LATIN AMERICAN STOCK EXCHANGE IN MIAMI: FULL-SERVICE EXCHANGE, PRIVATE OFFSHORE MARKET, OR A COMPUTERIZED FINANCIAL INFORMATION SERVICE

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## I. INTRODUCTION

Recently, a number of Miami business leaders proposed the creation of a Latin American stock exchange in Miami.<sup>1</sup> Some of the proponents envision a full service stock market trading in

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1. Jeffrey S. Solocheck, *Local Backers Urge Action on Latin American Stock Exchange*, MIAMI TODAY, Sept. 7, 1995, at 23.

Latin American securities,<sup>2</sup> while others suggest a restricted "private" or "offshore" exchange limited to institutional investors and non-U.S. citizens.<sup>3</sup> A third group proposes an electronic service bureau that initially trades in financial information, but aspires to assist in the settlement and facilitation of trades.<sup>4</sup> Although there are major differences between each of these proposals and a number of local business leaders question the viability of a full-service exchange, there is a groundswell of support for the exchange concept locally and throughout Latin America.<sup>5</sup> All proponents do agree that such an exchange would greatly benefit Miami.<sup>6</sup> Irrespective of the different proposals, the overriding common goal of the local proponents is to establish Miami as the second largest capital market in the United States.<sup>7</sup>

The main hurdle to a Latin American exchange in Miami is the application of U.S. securities laws to Latin American companies. The central conflict involves federal registration requirements which mandate extensive disclosure of an issuer's operations. The Security and Exchange Commission (Commission or SEC) supports the internationalization of securities markets and has worked closely with a number of foreign issuers to facilitate their entry into the U.S. securities market.<sup>8</sup> In addition, the Commission introduced a number of rule changes that lessen the disclosure obligations of foreign firms.<sup>9</sup> However, the SEC still maintains a fundamental commitment to both the disclosure concept and the U.S. disclosure scheme.<sup>10</sup>

The availability and quality of financial information provides the foundation of a successful capital market. For instance, the principle of disclosure provides the main source of trust and

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2. See LATIN AMERICAN INSTITUTE FOR PRIVATIZATION AND DEVELOPMENT, A NOTE ABOUT US, FINANCING AND PRIVATIZATION IN LATIN AMERICA, (Miami, Fla.) Nov. 1992. This proposal includes Caribbean markets.

3. See James D. Whisenand, *Florida and Miami as an Emerging International Merchant Bank/Capital Markets Center* (Aug. 10, 1995) (on file with the U. MIAMI INTER-AM. L. REV.).

4. See CYBERPORT MIAMI: A PROPOSAL FOR THE AMERICAS, (Jan. 8, 1996) (on file with the U. MIAMI INTER-AM. L. REV.) [hereinafter CYBERPORT MIAMI].

5. Solocheck, *supra* note 1.

6. *Id.*

7. *Id.*

8. See *infra* note 172 and accompanying text.

9. See *infra* notes 172-173, 179-192 and accompanying text.

10. See *infra* notes 173-174 and accompanying text.

confidence which investors place in the U.S. securities market.<sup>11</sup> Further, the concept of complete disclosure of financial information has been embraced by regulators and companies world-wide.<sup>12</sup> Despite this acceptance, many criticize the U.S. disclosure scheme as rigid and obsolete.<sup>13</sup> In fact, some experts see the U.S. regulatory approach as a barrier to the international integration of securities markets.<sup>14</sup>

This Comment explores the baseline of financial disclosure through a discussion of the competitive efforts to attract foreign capital to U.S. markets. An understanding of these issues offers insight into the proper strategy to establish a Latin American Exchange in the United States. Part I of this Comment discusses the internationalization of securities trading and Latin America's participation in the global market. Part II introduces the proposal for a Miami-based, full service Latin American Stock Exchange and discusses the applicable federal regulatory regime. Part III explores the issue of complete financial disclosure. Part IV presents an alternative proposal for a private "off-shore" market dealing exclusively in international securities. Part V considers the proposal to create an "informational" exchange and discusses the ability of the United States to effectively regulate international securities trading. Finally, Part VI concludes that either a Latin American "stock" or "informational" exchange would not only succeed in establishing Miami as a major capital market, but would also advance efforts to integrate hemispheric securities markets. This conclusion supports a policy shift to a regional disclosure system which focuses more on market transparency than the uniform disclosure of financial information.

## II. THE INTERNATIONALIZATION OF SECURITIES MARKETS AND THE EXPERIENCE OF THE EMERGING MARKETS OF LATIN AMERICA

The single factor most likely to change the scope of securities regulation in the United States is the internationalization of the securities market.<sup>15</sup> The main hurdle to foreign entry into

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11. See *infra* note 121 and accompanying text.

12. See *infra* note 203 and accompanying text.

13. See *infra* notes 123-124 and accompanying text.

14. See *infra* note 16 and accompanying text.

15. See Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach*

U.S. securities markets is the application of the federal securities laws which implement an extensive registration and disclosure scheme. A number of commentators have argued that the disclosure system should be overhauled or abandoned altogether. Joel Seligman, in a recent article, noted that differences between U.S. and foreign approaches to securities regulation make it difficult, if not impossible, to integrate regulatory mechanisms without an overhaul of the mandatory disclosure system.<sup>16</sup>

Ultimately, as Seligman suggests, the trend toward internationalization may pose a type of "Hobson's choice" for the United States. Either traditional standards to protect individual investors will be maintained, risking that U.S. issuers will increasingly sell abroad, or there will be an erosion of the disclosure standard, creating greater risk for the individual investor.<sup>17</sup> At the core of the debate is not only the question of whether the disclosure system is still necessary to protect the individual investor,<sup>18</sup> but also whether it is an essential asset that if lost would detract from the pre-eminence of the U.S. market.<sup>19</sup>

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to the *Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 652 (1995). While international emerging markets have drastically changed the way securities are sold, U.S. participation in international markets is nothing new. In fact, the period before the New Deal's adoption of the federal securities laws witnessed the first significant, and distinctly unsatisfactory, experience of U.S. public investment in foreign securities. *Id.* at 654. Between 1923 and 1930, American investors purchased close to \$6.3 billion in foreign bonds. *Id.* Then, in rapid order, the collapse of the world economy led to substantial depreciation of over ninety percent of all foreign bonds sold in the United States. *Id.* For instance, by December 1931, the aggregate market price for fourteen Latin-American nations' bonds was twenty-six percent of their face value. *Id.* Peruvian bonds were selling at less than seven percent of par. *Id.*

16. *Id.* at 653.

17. *Id.* at 663.

18. The New York Stock Exchange argues that if regulatory adjustments are not implemented to allow U.S. exchanges to fully participate in the growth of international trading, the U.S. will lose its pre-eminence among world capital markets. James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58, S58-59 (1994). *But cf.* Richard Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L.J. S77, S78 (1994) (criticizing NYSE proposals as a "free pass" to foreign companies).

19. James R. Silkenat, *Overview of U.S. Securities Markets and Foreign Issuers*, 17 FORDHAM INT'L L.J. S4, S5 (1994). These commentators indicate that the regulatory costs involved in entering the U.S. markets are lower than before. *Id.* They also point-out that not only has the SEC made significant adjustments to the disclosure requirements in order to attract foreign firms, but regulators have successfully facili-

International firms are increasingly raising capital in the United States and the emerging markets of Asia and Latin America are driving this movement.<sup>20</sup> The main attraction of these emerging markets lies in their potential for economic growth.<sup>21</sup> Not only are many of these foreign countries the stars of the developing economic world, but their growth potential now exceeds even the mature industrial economies.<sup>22</sup>

Latin American markets provide unique insight into the benefits and pitfalls of investing in developing countries. Despite increasing interest in Latin American securities, these markets lagged behind other emerging nations in economic growth and foreign investment.<sup>23</sup> This pattern developed from political and

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tated the transition of foreign companies into the U.S. disclosure system by helping these companies to understand how the system works. *Id.* Finally, proponents of the disclosure standard insist that maintaining confidence in the market through principles of full disclosure and investor protection is the premier reason that capital is available in such quantities in the U.S. market. *Id.* at S6. Investors trust that the U.S. markets are fair. *Id.*

20. See Antoine W. van Agtmael, *Investing in Emerging Markets*, in *THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES* 17 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993). For instance, in 1980 emerging markets had a combined market capitalization rate of only \$78 billion. *Id.* at 25. By 1991, market capitalization increased to \$628 billion. *Id.* Not only did emerging markets exhibit staggering growth in dollar terms, but their real share of global capitalization doubled. *Id.*

21. *Id.* at 27-28. Traditional arguments in support of investment in emerging markets include risk diversification, high economic growth, expansion of the investment orbit to select "winners," access to some of the most competitive global producers, limited international investment and low levels of institutional ownership. *Id.* at 17. One commentator indicated that although international investment has "discovered" the emerging markets, most of the traditional reasons remain valid. *Id.* Mature economies also have the most transparent securities markets. Thus, the market price of market securities, in theory, reflects their "true" value. Emerging markets securities, to the degree that their securities markets are less transparent, are discounted due to the lack of perfect information. Thus, these securities arguably contain inherent price growth potential that may be realized as their own markets become more transparent. Of course, the lack of transparency also indicates a higher degree of risk.

22. Initially, access to vast labor pools, cheap land and limited environmental regulation drove economic growth in the emerging markets. *Id.* at 23. Also, machinery tends to be modern and technologically advanced because of the late industrialization of many of these countries. *Id.* These advantages, combined with a shift in emphasis to service and technology based economies, have paved the way for industrial growth. *Id.* In addition, most of these countries shifted their focus from the debt to the equities markets. *Id.* at 27-28. As a result, new listings, rights offerings, and the wave of privatizations have significantly increased the supply of capital. *Id.* Thus, the cost of capital has declined, permitting many emerging markets to maintain a competitive edge. *Id.* at 23.

23. *Id.* at 19.

economic choices that were designed to limit direct foreign investment.<sup>24</sup>

In the late 1960s a wave of economic nationalism swept over Latin America.<sup>25</sup> As one commentator noted, "many Latin American countries feared becoming dependent on foreigners for their economic, and consequently, political stability . . . ."<sup>26</sup> As a result, many Latin American governments adopted foreign investment laws (FILs) that severely restricted foreign investment.<sup>27</sup> Two key policies were uniformly embraced across the region. First, many "basic" or key industries in Latin America were nationally operated and owned.<sup>28</sup> Second, Latin American nations adopted severe restrictions on foreign investment, including limitations or outright prohibitions on foreign ownership of local corporations.<sup>29</sup> In addition, these countries virtually eliminated displacement of local ownership by foreign capital.<sup>30</sup>

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24. See Ricardo J. Diez, *Securities: Problems in Selling Securities in Latin American Private and Public Markets*, in MULTINATIONAL CORPORATIONS: INVESTMENT, TECHNOLOGY, TAX, LABOR AND SECURITIES: EUROPEAN, NORTH AND LATIN AMERICAN PERSPECTIVES 333 (Alain A. Levasseur & Enrique Dahl eds., 1986) (surveying restrictive foreign investment laws (FILs) in Latin America).

25. *Id.*

26. Mark B. Baker & Mark D. Holmes, *An Analysis of Latin American Foreign Investment Law: Proposals for Striking a Balance Between Foreign Investment and Political Stability*, 23 U. MIAMI INTER-AM. L. REV. 1, 2 (1991). Latin American fears of foreign domination of the economies is rooted in their collective experience with the United States. See *id.* (quoting Ewell E. Murphy, Jr., *The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 TEX. INT'L L.J. 135 (1982)) (partially reprinting an allegory "which told of the 'Giant People who roamed the North' in reference to greedy U.S. investors who took much in the way of resources from the people of Mexico and left them with very little gold and skills in return.").

27. Baker & Holmes, *supra* note 26, at 9.

28. Mexico reserved to State ownership enterprises such as petroleum, basic petrochemicals, railroads, electricity, nuclear power and communications. See Diez, *supra* note 24, at 333.

29. *Id.* Mexico required local ownership in the following industries: radio and television, transportation, timber, gas distribution, insurance, investment, and some petrochemicals. *Id.* Venezuela and other Andean Pact nations have similar exclusions and, in addition, bar foreign investment in internal marketing of goods and certain professional services. *Id.* In Brazil, foreign portfolio investors could invest only through the Brazil Fund or a limited number of specialized funds. See Resolution 1289, promulgated by the CMV in March 1987, or Decree 4131 of September 1962 which first allowed foreign portfolio investment. Andre Pires de Oliveria Dias, *Brazil*, in THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES (Keith K.H. Park & Antoine W. van Agtmael eds., 1993).

30. Diez, *supra* note 24, at 335. Mexico required government authorization for foreign acquisition of twenty-five percent or more of an existing company, or forty-nine percent of its fixed assets. See *id.*; General Resolution No. 5 of the National

Latin American governments also instituted procedures for placing investments, which caused excessive paperwork and extensive delays.<sup>31</sup> Some countries imposed cumbersome bureaucratic oversight on foreign investors postapproval.<sup>32</sup> Most experts regard these application and approval requirements as specifically designed to discourage, rather than control, foreign investment.<sup>33</sup> Not surprisingly, this resulted in a mass exodus of foreign capital from the region.<sup>34</sup>

Despite the significant withdrawal of foreign equity investment, Latin America experienced a period of high growth during the 1960s and 1970s.<sup>35</sup> This growth, fueled primarily by international debt, "gradually fossilized."<sup>36</sup> One writer attributed this to "inefficient import substitution (rather than export orientation) and a high degree of government intervention, which sought a 'soft' path to economic development by creating state

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Commission of Foreign Investment of July 25, 1984 (Mex.). Such authorization was difficult to obtain in practice. See Diez, *supra* note 24; General Resolution No. 4 and 8 of the National Commission of Foreign Investment of July 25, 1984 (Mex.). Purchases in violation of the ownership limits resulted in rescission of the transaction. Diez, *supra* note 24, at 335. Exceptions were permitted but rare. *Id.* In Venezuela it was virtually impossible for a foreigner to buy into a locally owned company. *Id.* Approval of such acquisitions were seldom granted and then only in bankruptcy. Even then, the company would remain a "national" company which under Venezuelan law required eighty percent local ownership. *Id.* Argentina conditioned approval of a foreign acquisition of the existing shares of a local investor on "a clear benefit to the national economy." *Id.* at 336.

31. In Argentina, a foreign investor needed Executive approval to acquire a locally owned company with a net worth in excess of \$20 million. Companies with a net worth between \$5 million and \$20 million were required to obtain approval from the Ministry of the Economy. *Id.* Argentina permitted foreigners to trade on its national exchange without approval or registration provided, however, that (1) acquisitions do not convert a company into a domestic enterprise of foreign capital, (2) holdings of individual foreign investors are limited to \$2 million or two percent of the capital of the local company, and (3) total foreign purchases are limited to twenty percent of the capital. *Id.*

32. See van Agtmael, *supra* note 20, at 12. For instance, Mexico required after-the-fact registration for broad categories of persons and events, including: (1) foreigners who made regulated investments in Mexico; (2) Mexican companies in which foreign investors took shares; (3) Mexican trusts in which foreigners participated; and (4) stock certificates owned by, or pledged to, foreigners. *Id.* at 12-13.

33. In fact, some Latin American countries developed a second, or fast track, for foreign investments in high priority industries. Diez, *supra* note 24, at 336.

34. *Id.* In tandem with the substantive restrictions on ownership, many Latin American countries adopted similarly severe restrictions on the outflow of capital that effectively blocked foreign access to the return on their investments. *Id.* at 333.

35. van Agtmael, *supra* note 20, at 24.

36. *Id.*



monopolies, private cartels, and uncompetitive labor legislation."<sup>37</sup> Furthermore, over-indebtedness at both national and corporate levels created a debt crisis which led to "a decade of stagnation and restructuring."<sup>38</sup>

In response, Latin Americans returned to the international equities markets. Antoine van Agtmael noted that Latin Americans "embraced (or were forced to accept) monetary discipline, trade liberalization, deregulation and a private sector focus . . ." in order to attract foreign capital.<sup>39</sup> Restrictions on the level of foreign ownership,<sup>40</sup> approval of foreign investment,<sup>41</sup> reparations of profits and capital,<sup>42</sup> barriers to reinvestment,<sup>43</sup> and access to local exchanges dissipated or were completely removed.<sup>44</sup> Most Latin American nations created tax and foreign exchange incentives to attract foreign investors.<sup>45</sup> Additionally,

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37. *Id.*

38. *Id.*

39. *Id.*

40. The 1989 revision of the 1976 Law to Promote Mexican Investment and Regulate Foreign Investment relaxed restrictions of foreign ownership. See Felicia Morrow, *Mexico*, in *THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES* 229 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993). Foreigners now may own up to one hundred percent in seventy-three percent of Mexico's economic sectors. *Id.* In thirty-six other sectors previously closed, including insurance, foreigners may now hold up to forty-nine percent. *Id.* Foreigners are now permitted to hold a thirty percent stake in Mexican banks. *Id.* Venezuela essentially grants the foreign investor the same rights as a domestic investor. Luis E. Muro, *Venezuela*, in *THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES* 293 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993). Argentina, likewise, has removed most ownership restrictions and does not discriminate between foreign and national capital. Eduardo Tapia, *Argentina*, in *THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES* 321 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993). In Brazil, Institutional investors are now allowed to set up "omnibus accounts" which are essentially portfolios of one or more shares held in local custody. Pires de Oliveria Dias, *supra*, note 29.

41. Muro, *supra* note 40, at 360 (reducing paperwork and eliminating prior authorization requirement).

42. *Id.*

43. *Id.*

44. *Id.*

45. Even most Latin American countries which have attempted to maintain control over foreign ownership of local businesses have instituted favorable tax and exchange rate policies. See Muro, *supra* note 40; Jaime Valenzuela, *Chile*, in *THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES* 305, 318 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993) (indicating that restrictive Chilean foreign investment regulations incorporate incentives to foreign investment through a preferential tax rate and guaranteed access to the Foreign Exchange Market).

the wave of privatizations in Latin America sparked the unprecedented flow of investment into Latin American equities markets.<sup>46</sup> Experts agree that the flow of capital has positively impacted the region.<sup>47</sup> Corporate earnings, investments, and purchasing power are on the rise.<sup>48</sup> More importantly, increased investment has accelerated economic integration within Latin America.<sup>49</sup>

Arguably, increased investment in Latin American securities has also positively addressed regional fears concerning foreign interference in and control of local economies. The historical basis of these Latin American fears is set in a thin market dominated by organized investors. This, of course, is the antithesis of a liquid and diverse market. What seems counter-intuitive, and yet is quite true, is that liquid and diverse markets favor management control.<sup>50</sup> For instance, an increase in American Depositary Receipts (ADRs)<sup>51</sup> ownership of foreign stocks, although an increase in foreign investment, also suggests enhancement in the liquidity and diversity of the market for those securities shares. Thus, diverse foreign ownership is less likely to be organized into an effective voting block.<sup>52</sup> Management control is favored as a result.<sup>53</sup>

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46. The Argentinean privatization process retired approximately \$7.3 billion of the country's external debt through debt to equity swaps. Valenzuela, *supra* note 45, at 327. This represented approximately twelve percent of Argentinean debt with commercial banks. *Id.* Mexican private banks were auctioned in 1991 and 1992 and are now open to a limited thirty percent foreign ownership. Morrow, *supra* note 40, at 275.

47. Tapia, *supra* note 40, at 327.

48. van Agtmael, *supra* note 20, at 25.

49. *Id.*

50. See Alan R. Palmiter, *Symposium: Securities Regulation: The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 904 (1994) (indicating that dissatisfied public shareholders who "have a liquid market into which to sell their shares, traditionally vote with management . . .").

51. See *infra* note 66 for a description of ADR programs.

52. See Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997, 2000 (1994) (indicating that the "exit option of selling into a liquid securities market further reduce[s] the likelihood that even large shareholders will organize to resist management . . .").

53. Of course, if foreign ownership is seated in a limited number of institutions, management is more susceptible to outside foreign control. Since disclosure provides the underpinnings for a liquid and diverse market, and, as a result, increases diverse foreign investment, Latin American management arguably should embrace a strict disclosure regime. Thus, the argument follows, disclosure and management control are directly related.

While not every Latin American country embraced foreign capital with equal vigor, all definitively moved in that direction. By comparison, Chile, with arguably the strongest economy in the region, opted to maintain a number of restrictions on foreign investment despite incentives in areas of capital movement and foreign exchange.<sup>54</sup> On the other hand, Argentina, like many other Latin American nations faced with severe economic crises, eliminated nearly all restrictions.<sup>55</sup> In fact, Argentina no longer makes any distinction between foreign and national investment.<sup>56</sup> However, while most experts view investment in Latin America as essential to regional success, not all agree that the pace of international investment is entirely positive. In *An Analysis of Latin American Foreign Investment Law*, Baker and Holmes noted that "[a]lthough . . . the FIL cycle has not yet run its course, there is strong evidence to suggest that the pendulum has swung completely in the other direction. Instead of being too restrictive, Latin American FILs are becoming too permissive."<sup>57</sup> Although the return of foreign investment to Latin America has occurred partially by necessity, it does not necessarily suggest that Latin Americans are less concerned with control over their economies or less distrustful of U.S. investor motives.<sup>58</sup>

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54. "Currently, the best alternative for foreign investors interested in investing in Chile is through the Foreign Capital Investment Fund (FCIF)." Valenzuela, *supra* note 45, at 318. Law 18,657 governs the organization of FCIFs and imposes several restrictions:

- Capital cannot be redeemed through the first five years of operations, Realized dividends and capital gains may be redeemed at any time;
- The FCIF should have a local administrator;
- An FCIF may neither invest more than ten percent of its assets in a single issuer nor own more than five percent of the voting capital at any time. *Id.*

55. In November 1989, Argentina instituted a new foreign investment regime to combat hyperinflation, high interest rates, unemployment, and uncompetitive industries. Tapia, *supra* note 40, at 326. This plan embraced foreign investment by guaranteeing equal treatment of national and foreign capital; doing away with the approval process for most industries; removing legal limits to the type and nature of foreign investments and instituting a foreign exchange regime. *Id.*

56. *Id.*

57. Baker & Holmes, *supra* note 26, at 2.

58. In fact, recent events in Latin American markets, especially Mexico, have given investors reason to pause. One advisor recently opined that "Latin America today is only for the very brave, and only for the trader, not for the investor." Ted Reed, *Risky Business: The Bold See Opportunity; All Others Tread Carefully*, MIAMI HERALD, Apr. 10, 1995, at B22. In early 1994, share prices for Latin securities began to decline. For instance, the assassination of the presidential candidate of Mexico's ruling party in the Spring of 1994 spurred a flight of capital from the

The opportunities and dangers of foreign investment are reflected in the recent performance of the Latin markets. During the early 1990s Latin American investments became very popular among international investors. Between 1993 and 1994 U.S. investors engaged in what has been described as "frenzied buying of a limited supply" of Latin American stocks.<sup>59</sup> Prices rose dramatically throughout the region. In December, 1994, a fifty percent devaluation of the Mexican peso led to a proportionate collapse of the Mexican stock market.<sup>60</sup> The stock markets in developing nations followed suit.<sup>61</sup> In some instances, Latin American markets suffered a fate worse than Mexico.<sup>62</sup> While experts believe that this recent market collapse stems from market volatility and correlated investor behavior, there are still serious issues regarding the underlying integrity of the market and the availability of information.

If recent history is a guide, the participation of foreign issuers in the U.S. securities markets is expected to increase at a rapid pace.<sup>63</sup> The progression to the U.S. market, especially for

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Mexican stock market. Juanita Darling, *Mexico Stocks and Peso Tumble Amid Inaction on Economic Plan*, LOS ANGELES TIMES, Feb. 28, 1995, at D2. By the winter of 1994, the stock index for the Mexican market dropped thirty percent; markets in Venezuela, Argentina, and Brazil fell fifteen percent; and Chile's stock index declined ten percent. N.Y. Times Service, *A Market Safety Net: Regulators in America Sign Accord*, MIAMI HERALD, June 8, 1993, at C1. Finally, the Mexican devaluation of the peso in December of 1994 "scared investors away from every Latin American stock market," further depressing securities prices.

59. The SEC estimated that U.S. holdings in Latin American stock doubled from \$2.6 billion in 1992 to \$4.4 billion in 1993. N.Y. Times Service, *supra* note 58.

60. Roy C. Smith, *The International Politics of Global Finance*, WASH. Q., Autumn 1995, at 117.

61. *Id.*

62. See Mariana Crespo, *Latin Lessons*, FIN. WORLD, Mar. 14, 1995, at 74 (discussing impact of Mexican market drop on Latin American Deposit Receipts).

63. For instance, in the first half of 1993, sixty-three new foreign stock issues, valued at \$5.5 billion were sold in the United States. Silkenat, *supra* note 19, at S7. The 1993 sales figures for foreign stocks are approximately the same as the prior year. *Id.* However, bond sales have been dramatically larger, almost double over 1992. *Id.* According to former SEC Chairman Arthur Levitt, "the U.S. public markets are attracting an increasing number of foreign companies." *International Markets and Individual Investors: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs*, Federal Document Clearing House, Sep. 28, 1994, available in LEXIS, News file (prepared testimony of Arthur Levitt, Chairman, SEC). Since January 1, 1993, 191 foreign companies from twenty-six countries have entered the United States reporting system, including countries from Latin America. *Id.* Since January 1, 1993, 224 foreign companies have registered more than \$81 billion in securities in 329 U.S. public offerings. *Id.* Over \$41 billion of that amount represents registered equity offerings. *Id.* As of September 9, 1994, there were a total of 637 foreign re-

Latin American issuers, is natural. There is more capital available in the United States, at less cost than anywhere else.<sup>64</sup> As noted, Latin Americans have historically depended on U.S. investment to fuel their economies. Furthermore, the integration of hemispheric markets, as proclaimed by regional heads of state at the Summit of the Americas, is a stated policy goal which envisions a permanent U.S.-Latin American partnership.<sup>65</sup> Even though there are dramatic differences between the various "Miami" exchange proposals, each plan stresses the integration of hemispheric markets. This aspect is central to the common vision of Miami as the gateway to Latin America.

Despite the importance of hemispheric integration, the integrity of the Latin American Securities markets still raises serious questions regarding investor protection. In fact, the very reason that more capital is available via U.S. securities markets is directly related to the stringent disclosure requirement mandated by U.S. law. The volatility of Latin American securities, the high degree of U.S. investor correlation when trading these securities, and the recent setbacks suffered by the Latin American securities markets argues for greater oversight and regulation. The vast difference between the U.S. economy and the less developed Latin American nations further underscores this problem. Thus, the "Hobson's choice" of integration versus investor protection threatens the ability to ever attain a balance between these important policy goals. It is in this light that the various proposals to establish a Latin American stock exchange in Miami must be considered.

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porting companies representing forty countries listed or quoted on the U.S. public markets. *Id.*

64. Silkenat, *supra* note 19, at S4 n.1 (citing William E. Decker, *The Attraction of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From the Issuer's Perspective*, 17 *FORDHAM INT'L L.J.* S10, S11 (1994) (noting that United States is world's largest, most open market)).

65. See U.S. GOV'T, SUMMIT OF THE AMERICAS (1994), DECLARATION AND PLAN OF ACTION, PROMOTING PROSPERITY THROUGH ECONOMIC INTEGRATION AND FIELD TRADES NO. 10 (Aug. 10, 1995). Specifically, the Summit called for steps to promote the liberalization of capital movement, uniform regulations that promote transparent hemispheric markets, and regulatory efforts to integrate these markets. *Id.*

### III. ESTABLISHING A PERMANENT LATIN AMERICAN STOCK EXCHANGE IN MIAMI: U.S. SECURITIES REGULATION AND THE DISCLOSURE REGIME

#### A. Overview

U.S. investors purchase shares of foreign corporations through mutual funds, ADRs,<sup>66</sup> or directly from the home market.<sup>67</sup> Foreign firms invest in the U.S. market in three ways. The foreign company may (1) attempt to raise capital through the private placement of their securities similar to the procedure available to domestic companies;<sup>68</sup> (2) seek a listing on a U.S. Stock exchange without a public offering in order to provide a secondary market for circulating shares;<sup>69</sup> or (3) choose to sell their securities directly to U.S. investors in a public sale or offering.<sup>70</sup> The rules governing each option vary; however, the main

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66. The primary mechanism for purchasing foreign securities in the United States is through a device known as an American Depositary Receipt (ADR). Joseph Velli, *American Depositary Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38, S38-40 (1994). An ADR is simply a receipt issued by a U.S. depository bank which represents the underlying foreign security. *Id.* A foreign company establishes an ADR program by appointing a U.S. depository bank to facilitate its entry into the U.S. market. *Id.* There are essentially two types of ADR programs: sponsored and unsponsored. *Id.* at S43. Sponsored ADRs, which are created by the foreign issuer, are preferred. Unsponsored ADRs are now considered obsolete. In fact, since 1983 there have only been three new unsponsored ADRs established. *Id.* As one writer noted, unsponsored ADRs are typically created by U.S.-investor demand without the consent of the issuer, as compared to sponsored ADRs, which are established by a non-U.S. issuer and are required for an exchange or NASDAQ listing. Inherent problems with unsponsored ADRs include fees charged by depository banks for distributing dividends, lack of voting rights, and little or no information flow to investors and issuers. John R. Evans, *ADRs and Opportunities for Investment in the Emerging Asian and Latin American Equity Markets*, in THE WORLD'S EMERGING STOCK MARKETS: STRUCTURE, DEVELOPMENT, REGULATIONS AND OPPORTUNITIES 475-76 (Keith K.H. Park & Antoine W. van Agtmael eds., 1993).

67. Cochrane, *supra* note 18, at S62 (indicating that institutional investors purchase foreign securities in foreign markets).

68. See Decker, *supra* note 64, at S10.

69. Velli, *supra* note 66, at S38, S44 (1994). In order to list on an exchange it is necessary to file a Form 20-F, Form 20-F, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (1995), which, with some exceptions, mandates compliance with U.S. accounting and disclosure requirements. Velli, *supra* note 66, at S44.

This approach permits trading of the companies previously issued shares or ADRs in the secondary market and is often a precursor to a public offering. See M. Shane Warbrick, *Practical Company Experience in Entering U.S. Markets: Significant Issues and Perspectives from the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S112, S115 (1994).

70. See Decker, *supra* note 64, at S17; Velli, *supra* note 66, at S44. In order

factor which companies appear to consider in choosing between these alternatives depends on an issuer's willingness to meet the requisite disclosures under U.S. law.<sup>71</sup>

### *B. The Full Service Exchange Proposal*

While there are significant barriers to its implementation, a permanent, full service exchange most directly embraces the policy objective of complete U.S.-Latin integration and the concept of complete disclosure. Detractors argue that the expense of establishing a new exchange-based capital market is prohibitive and the regulatory hurdles are insurmountable.<sup>72</sup> Further, these critics claim that it is questionable whether such an exchange can compete with existing markets.<sup>73</sup> As one expert noted, "building a bricks and mortar trading facility . . . would just repeat the New York Stock Exchange."<sup>74</sup> This criticism is particularly relevant since the special niche of a Miami-based exchange targets companies, many of which would not presently qualify under federal regulations for access to the U.S. securities markets.<sup>75</sup>

The concept of a full-service exchange, however, is important to our notions of a securities market, even if it is outdated and obsolete.<sup>76</sup> A full service exchange has an important sym-

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for a foreign company to conduct a public offering in the United States it must file a Form F-1, 2 Fed. Sec. L. Rep. (CCH) ¶ 6952, at 6061 (Apr. 7, 1993), with the SEC which requires compliance with accounting and disclosure procedures. Some exceptions from these rules which are available to companies only listed on U.S. exchanges are unavailable here.

71. Decker, *supra* note 64, at S44.

72. See Robert Johnson, *Latin Stock Exchange: Is Its Time About To Come?*, WALL ST. J., Apr. 10, 1996, at F1 (outlining full service exchange proposal); Solocheck, *supra* note 1 (discussing barrier posed by U.S. securities laws); see also *supra* notes 150-160 (discussing foreign concerns regarding disclosure requirements).

73. Johnson, *supra* note 72, at F1.

74. *Id.* (quoting James Whisenand). Compare the statement of an Inter American Development Fund official that active trading of Latin stocks on the NYSE suggests that a specialized exchange would encourage further investor demand. *Id.*

75. See Whisenand, *supra* note 3. The efforts are geared to attract small to medium size firms in the one to forty million dollar range. *Id.*

76. See Lewis D. Solomon & Louise Corso, *The Impact of Technology on the Trading of Securities: the Emerging Global Market and the Implications for Regulation*, 24 J. MARSHALL L. REV. 299, 318 (1991). "Advocates of the electronic market argue that there is no question, but that the financial markets of the future will be electronic and that the floor of the New York Stock Exchange is destined to become an historical relic." *Id.*

bolic value as a market centerpiece.<sup>77</sup> This belies the hope that an exchange would "spawn an influx of Latin corporate headquarters to Miami . . . that want to be part of a sort of little Latin Wall Street . . . ." <sup>78</sup> Proponents of the exchange, focusing less on regional or global markets, emphasize the theme of a U.S.-Latin American axis.<sup>79</sup> In this light, a full service exchange represents more than just the market it serves, but the permanence of U.S.-Latin American economic integration.<sup>80</sup> Such a proposal seeks to establish the United States as a base to supply Latin America's capital needs.<sup>81</sup> Backers see the proposed exchange as a source of "harmony" that will match the financial and technological ability of the U.S. with the great resources and talent of emerging Latin markets.<sup>82</sup> This view envisions such an exchange as the primary, if not exclusive, source of Latin American and Caribbean securities transactions.

The promoters of the full-service exchange believe they have the necessary support. As one supporter claimed, the exchange plans to file for permits with the SEC in the near future and expects the necessary regulatory approvals to be granted in time for a 1998 opening.<sup>83</sup> As the Wall Street Journal reported, "[i]nitial plans call for a downtown Miami office with 25,000 square feet of space, about 50 broker-traders including a chief executive hired from the management ranks of the New York Stock Exchange, and a budget derived from the sale of seats priced as low as \$25,000."<sup>84</sup> Roberto Gonzalez-Pelaez, a supporter of this effort, estimates that the exchange will require \$20 million in start-up capital.<sup>85</sup>

A number of potential participants have expressed interest.<sup>86</sup> The president of at least one U.S. mutual fund company with Latin American investments indicated that his company

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77. See Johnson, *supra*, note 72 (noting that a full service exchange is "a true business center" where people "visit, watch, talk and gather investment information together . . .").

78. *Id.*

79. See *A Note About Us*, *supra* note 2 (establishing a regional market exclusively trading in Latin American and Caribbean stocks).

80. *Id.*

81. *Id.*

82. *Id.*

83. Johnson, *supra* note 72, at F1.

84. *Id.*

85. *Id.*

86. *Id.*



would purchase a seat.<sup>87</sup> A spokesperson for the Inter American Development Fund, also a potential investor, expects such an institution to further spark U.S. investor interest in already popular Latin securities.<sup>88</sup> Latin American firms are also likely to find an exchange in Miami attractive. An attorney representing exchange proponents claimed that these companies will benefit from enhanced liquidity and will "be the stars of an institution dedicated to them right in the heart of a huge, politically stable and affluent Latin community."<sup>89</sup> Supporters estimate initial listings of over 200 companies and a daily trading volume as high as 500,000 shares a day.<sup>90</sup> This is expected to double by the year 2000.<sup>91</sup>

### *C. U.S. Securities Regulation*

Federal law, however, poses a significant barrier to such a plan. In addition to federal rules governing the formation and operation of a trading exchange, a call for a traditional exchange acknowledges acceptance of the principles of registration and full disclosure which accompany entry and continuing access to the U.S. securities markets. Proponents of the full-service exchange recognize the application of U.S. law, but view this as desirable and beneficial. As Gonzalez-Paelez argues, an exchange operating under U.S. oversight will entice investors to the market.<sup>92</sup> This position, while perhaps true, does not address the ability of Latin American issuers to participate in such a market in the first place.

Foreign issuers entering the United States public markets, usually through a public offering, are required to register under the Securities Act of 1933,<sup>93</sup> the cornerstone of the federal dis-

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87. *Id.* (quoting Thomas Herzfeld, chairman and president of Herzfeld and Company).

88. *Id.*

89. *Id.* (quoting James Doty, an attorney for Roberto Gonzalez-Paelez).

90. *Id.*

91. *Id.*

92. *Id.*

93. A public offering occurs when a company wants to come to the U.S. public markets to raise funds. An offering requires registration with the SEC, usually on a Form F-1. Form F-1, 2 Fed. Sec. L. Rep. (CCH) ¶ 6952, at 6061 (Apr. 7, 1993). This entails substantial disclosure of information relating to the company's operations. See Frode Jensen III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From a Legal Perspective*,

closure policy.<sup>94</sup> The registration statement required under the act includes a prospectus, the portion of the registration statement delivered to the investor.<sup>95</sup> If material facts are withheld from the registration statement, or if an offer or sale of a security is made without a registration statement, an investor may challenge the issuer under the liability provisions of the 1933 Act.<sup>96</sup> Thus, the foreign issuer runs the risk of being haled into a United States court by a dissatisfied investor. In addition to the extensive liability exposure, the issuer is also potentially subject to extensive discovery.<sup>97</sup> Further, the registration statement, including the prospectus, must be approved by the SEC before sales can be confirmed.<sup>98</sup> Thus, the SEC has great leeway in blocking or suspending a public offering if 1933 Act disclosures are inadequate or ignored.

In addition to the registration requirements, many foreign issuers are faced with continuous disclosure obligations under the Securities Exchange Act of 1934.<sup>99</sup> Such disclosure is necessary to ensure an issuer future access to the U.S. markets for both public offerings and secondary transactions. Section 12 of the Securities Exchange Act requires any issuer with securities

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17 FORDHAM INT'L L.J. S25, S26 (1994). Form F-1 requires three years of income and cash flow statements, two years of balance sheets, five years of selected financial information, and the accounting reconciliations. *Id.* at S30-31. This is a full disclosure, long form registration statement, analogous to the domestic Form S-1, which does not permit incorporation by reference. *Id.* at S30.

94. Jensen, *supra* note 93, at S76.

95. *Id.* at S30.

96. *Id.* See generally Securities Act of 1933, §§ 11-12. In addition, Rule 10b-5, the SEC's antifraud provision, provides investors with additional protection.

97. See generally Federal Rules of Civil Procedure.

98. Jensen, *supra* note 93, at S76.

99. Any issuer with securities listed on a U.S. stock exchange must register the securities pursuant to section 12(b) of the Exchange Act. Any other issuer with assets over \$3 million on the last day of its most recent fiscal year, and an outstanding class of equity securities held of record by 5000 or more persons, must register the securities under Section 12(g). This latter registration may be terminated (a) when the number of shareholders of the class falls below 300 or (b) when the number of such shareholders falls below 500 and the issuer's assets have not exceeded \$3 million at the end of each of the three latest fiscal years. Section 15(d) of the Exchange Act, in turn, requires that the issuers of securities which have not been registered under either Sections 12(b) or 12(g), but which have been registered under the Securities Act in connection with their public offerings, comply with periodic reporting requirements similar to those companies registered under Section 12. The requirement is suspended for foreign issuers if the class of securities has fewer than 300 resident U.S. shareholders. In each case, qualification for termination must be certified to the SEC on Form 15.

listed on a national exchange to register under the Act.<sup>100</sup> In addition, companies that are not listed on an exchange, but which have in excess of 500 shareholders or \$1 million in assets, are also required to register under the 1934 Act.<sup>101</sup> The disclosure mandated by the Act is outlined in Section 13 and generally requires continuous filing of annual and quarterly reports.<sup>102</sup> The 1934 Act, like the 1933 Act, contains a number of liability provisions which permit shareholders to seek damages where the shareholder relies on a false or misleading statement within a filed document.<sup>103</sup> Finally, Rule 10b-5 liability protects shareholders against fraud. This coverage extends to any materially fraudulent statement in relation to the issuer's securities.<sup>104</sup>

For instance, the public listing alternative,<sup>105</sup> which incorporates the registration requirements under the 1934 Act, provides an issuer with access to the secondary U.S. securities markets by listing on U.S. exchanges.<sup>106</sup> In order to list on a U.S.

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100. Securities Exchange Act of 1934, § 12.

101. *Id.* § 12 (a), (g). However, Rule 12g-1 exempts an issuer with less than \$5 million in assets from disclosure requirements.

102. *Id.* § 13.

103. *Id.* § 18, § 14.

104. 17 C.F.R. § 240.10b-5.

105. Interestingly, many foreign companies ignore the listing alternative when contemplating entry into the U.S. markets. Decker, *supra* note 64, at S16. The advantage of the listing approach prior to conducting a public offering is the company's ability to develop a presence in the U.S. marketplace and prepare a document that goes through the SEC registration process. *Id.* In addition, listing on a U.S. exchange enhances liquidity and thus adds value. *Id.* For example, a listing on the New York Stock Exchange has meant a major revaluation for Teléfonos de México (TELMEX), a trend which could effect other Mexican issuers and result in a higher multiple for the overall market. Morrow, *supra* note 40, at 265. If the company then decides to go to the public markets, it is well positioned to do so. *Id.*; Warbrick, *supra* note 69. In fact, there are short form registration statements available once a company is listed for a period of time. These statements incorporate by reference the financial information that is included in the annual accounts required to be furnished by these companies. Warbrick, *supra* note 69.

106. Decker, *supra* note 64, at S15. In addition to the federal and state regulation, an issuer must meet the listing standards and comply with reporting and other requirements of any U.S. exchange on which it shares will be listed. Alan S. Mostoff, *Application of U.S. Securities Laws to the Purchase and Sale in the U.S., in MULTINATIONAL CORPORATIONS: INVESTMENT, TECHNOLOGY, TAX, LABOR AND SECURITIES: EUROPEAN, NORTH AND LATIN AMERICAN PERSPECTIVES* 347, 348 (Alain A. Levasseur & Enrique Dahl eds., 1986). Certain exchanges provide alternative criteria for foreign issuers. Listing standards for the New York Stock Exchange generally require that an issuer have 2000 U.S. holders of 100 or more shares and have at least one million shares worth at least \$16 million publicly held in the U.S. *Id.* Foreign issuers that cannot meet this requirement may list their securities on the

exchange, the foreign issuer must register with the SEC on Form 20-F,<sup>107</sup> an integrated annual report form with somewhat less extensive disclosure than the comparable forms for domestic issuers such as Forms 10 and 10-k.<sup>108</sup>

The disclosure requirements of Form 20-F are less extensive in several respects. For example, issuers are not required to report profits by business segment within annual reports. Issuers are also not obligated to report information on salaries of officers and directors on an individualized basis, unless the issuers already publish such information.<sup>109</sup> In addition, foreign private issuers are exempt from the proxy rules under Section 14 of the 1934 Act and foreign management is exempt from the insider trading limitations of Section 16 of the 1934 Act.<sup>110</sup> Furthermore, the securities of foreign private issuers are not subject to the registration provisions of Section 12(g) if the class of securities are held by fewer than 300 U.S. residents or the issuer annually furnishes material information made available in its home market.<sup>111</sup>

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NYSE if they can meet the following requirements on a world wide basis: 5000 round lot shareholders, 2.5 million publicly held shares outstanding worth at least \$100 million. *Id.* The issuer must also have achieved a minimum of \$25 million outstanding or pre-tax income in each of the last three years, with cumulative pre-tax income over the three year period of \$100 million. *Id.* at 355. The American Stock Exchange also provides an alternative set of standards. *Id.* at 336.

107. Form 20-F, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (1995); see Form F-1, 2 Fed. Sec. L. Rep. (CCH) ¶ 6952, at 6061 (1995) (requiring disclosure of information required by Part I, Item 17, and Item 18 of Form 20-F).

108. Form 20-F, under Items 17 and 18, mandates the disclosure of material information through financial statements and footnotes. Form 20-F, Item 17, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,763 (Nov. 18, 1992); Form 20-F, Item 18, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,764 (Nov. 18, 1992). Form 20-F requires inclusion of audited consolidated financial statements, Form 20-F, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (Nov. 18, 1992), with balance sheets for the two most recent fiscal years, Regulation S-X, 17 C.F.R. § 229.3-19(a)(1) (1993), income statements, cash flow statements, *id.* § 229.3-19(a)(2) (1993), and changes in shareholder equity, *id.* § 229.3-04 (1993). In addition, the SEC requires schedules providing supplemental details of accounts such as marketable securities, reserves, and property, plant and equipment. M. Elizabeth Rader, *Accounting Issues In Cross Border Securities Offerings*, 17 FORDHAM INT'L L.J. S129, S131 (1994).

109. Mostoff, *supra* note 106, at 353.

110. See Rule 3a12-3. A foreign private issuer does not include issuers in which (1) more than fifty percent of the outstanding securities are held by U.S. residents, (2) a majority of the executive officers or directors are U.S. citizens or residents, (3) more than fifty percent of the assets are located in the United States, or (4) the business is administered principally in the United States.

111. See Rule 12g3-2. Form 6-K requires the prompt furnishing of material information which the issuer (1) is required to make public in its country of domicile, (2)

Despite applicable exemptions, both registration under the 1933 Act and continuous disclosure obligations under the 1934 Act can prove burdensome to foreign issuers for a variety of reasons. First, registration under federal laws is expensive. Second, disclosure requirements under this regime, given differences between U.S. and foreign accounting systems, are difficult to meet. Third, issuers often balk at the disclosure of sensitive financial information generally protected in their home country.

For instance, while proponents of the Miami Exchange embrace full disclosure and transparent markets generally, detractors argue that small to mid-range firms in developing markets will not be able or willing to accept the present U.S. regulatory regime. For an exchange specializing in Latin American stocks to work, critics argue, companies in the one to forty million dollar range must list and trade. For firms of this size, the expense of registration is a significant concern. Further, new ventures, especially those involving innovative technology, are disclosure sensitive.<sup>112</sup> These arguments are underscored by the fact that Latin American firms, as a matter of business practice, traditionally shy away from disclosure of their operations and business plans.<sup>113</sup>

#### IV. THE DISCLOSURE DEBATE

While there is still international resistance to complete disclosure, a number of Latin American regulators have embraced this concept, and Latin issuers, for market reasons, have come to accept its necessity. However, there is an important distinction between financial disclosure and the maintenance of the U.S. disclosure regime. As noted, despite the proven success of the U.S. approach, this system has come under attack as an unnecessary barrier to international securities trading.

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has publicly filed with a foreign stock exchange, or (3) has distributed to its shareholders. Form 6-K also requires English translations of versions or summaries of information distributed to shareholders and material press releases, but does not require translations of other information.

112. See *infra* note 256 and accompanying text.

113. Telephone Interview with Roberto Gonzalez-Pelaez, President of Latin American Institute for Privatization and Development (Nov., 1995) (indicating Latin Americans fear disclosing business and proprietary information to U.S. investors). See *supra* notes 23-38 and accompanying text (indicating Latin American foreign investment laws were motivated by distrust of foreign investors).

Understanding the U.S. approach to securities regulation requires an understanding of the historical background of securities trading in the United States. Congress passed the Securities Acts in the aftermath of the stock market crash of 1929.<sup>114</sup> The magnitude of the crash coupled with the ensuing great Depression shook the very roots of the U.S. economy. Investor confidence in the securities market was virtually destroyed.<sup>115</sup>

Congress and the Roosevelt Administration responded to this crisis by passing the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>116</sup> This legislation instituted a comprehensive system of securities regulation which emphasized the disclosure of material information.<sup>117</sup> In light of the public outcry after the collapse of the U.S. securities markets, this response was remarkable since U.S. securities laws do not appraise the fairness or attractiveness of the securities, but rather look to the quality of market in which the securities are sold.<sup>118</sup> The wisdom of this approach is evidenced not only by comparison with state Blue Sky Laws,<sup>119</sup> but also through the

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114. Jensen, *supra* note 93, at S26.

115. *Id.*

116. The Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, deals primarily with public offerings by issuers and their controlling persons. It sets general disclosure and antifraud standards and requires that securities be registered prior to the offer for sale, unless an exemption applies. The fundamental purpose of the Act implements a philosophy of full disclosure. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). The Securities Exchange Act, 15 U.S.C. § 78a *et seq.*, governs secondary market trading in securities, but also expands on the Securities Act's disclosure requirements by requiring, among other features, continuous reporting. "The 1934 Act was designed to protect investors against manipulation of stock prices." *Basic Inc.*, 485 U.S. at 230 (citations omitted). The Trust Indenture Act, 15 U.S.C. § 77aaa *et seq.*, sets special requirements for debt securities which are supplemental to those required by the Securities Act. Procedures under this statute are integrated into Securities Act registration. Of particular interest to foreign borrowers is the requirement under this Act that at least one trustee be a U.S. corporation authorized to execute trust powers and subject to U.S. regulation at either the federal or state level. See Mostoff, *supra* note 106, at 348.

117. See Securities Act of 1933, U.S.C. § 77a-77aa (1988 & Supp. IV 1993) (requiring disclosure of material information); Securities Exchange Act of 1934, 15 U.S.C. § 78a-77ll (1988 & Supp. IV 1992) (requiring disclosure of material information). Note that while Congress initially sought to re-instill trust and confidence in the securities market, regulation under the Securities Acts has evolved as a mechanism to foster "transparent" securities markets. See James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. S77, S79 (1992). "Transparency," in its most technical sense, is the degree to which real-time trade and quotation information are available to market participants." *Id.*

118. Jensen, *supra* note 93, at S27.

119. Some states have enacted Blue Sky laws which are commonly known as

enhanced reputation of the United States as the premier securities market in the world.<sup>120</sup> It is widely recognized, even by critics, that the disclosure principle provides the great trust and confidence which investors place in the U.S. market.<sup>121</sup>

Richard C. Breeden noted that "the United States Market has derived great strength from the simple proposition that anyone wanting to compete for an investment dollar must issue a balance sheet, an income statement and a statement of cash flows prepared on *standard* terms."<sup>122</sup> Breeden's remarks suggest that American investors must have a disclosure tool to effectively compare foreign and domestic investments. While some view standardized financial information as crucial to the protection of U.S. investors, others label this approach protectionist. To some extent, however, this perspective focuses on the standardization of information rather than the quality or effectiveness of disclosure.

The disclosure approach has its share of critics for other reasons as well. The securities markets, in terms of both sophistication and size, are far different than the markets of the 1920s. As one commentator noted, Wall Street in that era "pro-

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"merit regulations." These statutes permit state administrators to block the marketing of a security if the sale of the security is found to be "unfair, unjust, inequitable or oppressive . . ." Seligman, *supra* note 15, at 672-73.

Blue Sky statutes generally reduce compliance burdens when securities are registered with the SEC. Today, over forty state jurisdictions authorize registration by coordination. *Id.* at 675-76. However, a residual tension between federal and state securities law endures. While the federal mandatory disclosure system requires full and complete disclosure of material information, virtually all states specify standards for the denial, suspension, or revocation of registration. *Id.* at 678. In many states, traditional "merit" regulations remains in force. *Id.* To some extent, states have reduced the conflict between merit standards and actual or potential international offerings by adopting a "marketplace exemption" from merit review for securities listed on the exchanges. Some states also exempt securities traded in the over-the-counter market. *Id.* at 681.

Inevitably, the application of merit standards to issuers selling securities abroad should continue to shrink. *Id.* at 681. This is a consequence of the increasingly international context of securities sales. *Id.* A concurrent system runs the risk of becoming self-defeating. *Id.*

120. See Warbrick, *supra* note 69, at 113-15 (adopting U.S. GAAP in order to regain confidence and trust in his firm's securities).

121. See generally Cochrane, *supra* note 18, at S58-59 (despite calls for changes in disclosure system, the U.S. approach is the source of trust and confidence in the U.S. securities market).

122. Richard C. Breeden, *The Globalization of Law and Business in the 1990s*, 28 WAKE FOREST L. REV. 509, 516 (1993).

vided a securities trading market for a very small percentage of the population, dominated by natural persons rather than institutional investors, and featuring domestic securities, human trading intermediation, primitive financial economics, and relatively few types of securities.<sup>123</sup> The simple structure has long been obsolete.<sup>124</sup> The information revolution and the pre-

eminence of computers have transformed the way securities are traded, even to the point where some question the usefulness of traditional exchanges altogether.

By contrast, although institutional investors dominate securities trading,<sup>125</sup> individual investors are participating in the market in record numbers.<sup>126</sup> The United States has a larger number, and a larger percentage, of individual investors than any other nation.<sup>127</sup> Even before the enactment of the Securities Act of 1933, institutional investors did not need mandatory disclosure to protect themselves.<sup>128</sup> Their bargaining power ensured access to information. However, it is widely recognized that individual investors cannot effectively bargain for the same information that is available to financial institutions.<sup>129</sup>

Between 1987 and 1995, several market collapses shook the international financial landscape.<sup>130</sup> However, none of these cases caused a "world-wide financial crisis" of the magnitude of the Great Depression.<sup>131</sup> These situations "seem to have been created by the simple availability of a casino-like market place . . . ."<sup>132</sup> As one expert noted, this suggests not only that "[m]arket forces and disciplines now rule the global economy . . . ,"<sup>133</sup> but that the market is now "more powerful than

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123. Seligman, *supra* note 15.

124. *Id.*

125. *Id.* at 657-58. Institutional investors own slightly over one-half of U.S. equities and are now responsible for sixty to eighty percent of trading on the New York Stock Exchange. *Id.*

126. *Id.* at 659. While institutional ownership has increased spectacularly in the post new deal period, so has individual ownership of U.S. securities. *Id.* A greater number of unsophisticated investors trade today than in the early 1930s. *Id.* at 660.

127. *Id.*

128. *Id.*

129. *Id.*

130. See Smith, *supra* note 60 (discussing volatility of international equities, debt and currencies markets).

131. *Id.*

132. *Id.*

133. *Id.*



national and international regulatory systems currently in place."<sup>134</sup> Despite the increased international access to capital and the benefits of international and regional integration, freer markets and the attending volatility means "accepting increased amounts of uncontrollable money flows, and increases in so called speculative trading . . . and greater risk to those acting as market makers."<sup>135</sup> This increased risk is magnified in the emerging markets.

Emerging markets "tend to be very thin and very fragile."<sup>136</sup> Further, despite the explosion in emerging market research,<sup>137</sup> information is unreliable and dated.<sup>138</sup> As Debbie Galant noted in a 1994 article, "[e]merging-markets research has neither the depth nor the breadth that investors take for granted in mature markets."<sup>139</sup> Additionally, as one expert noted, "[r]umors tend to drive these markets more than actual events."<sup>140</sup> There are also some built-in defects which are not easily dealt with in an international forum. For instance, emerging market governments and companies have been known to bring pressure on analysts for their criticism.<sup>141</sup> Many believe that critical research reports can cause brokers to be cut out of deals.<sup>142</sup> Thus, information issues are crucial.

Latin American markets and issuers reflect these problems. The Latin American position is further complicated by its unique dependence on the United States. Latin Americans have generally found themselves restricted to the U.S. markets.<sup>143</sup> This limitation is due to the significant participation of U.S. investors in Latin offerings as well as the "small and relatively illiquid

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134. *Id.*

135. *Id.*

136. Debbie Galant, *Too Much Too Soon*, INSTITUTIONAL INVESTOR, Sept. 1994, at 79 (quoting John Hsu, an emerging markets investment advisor).

137. A number of firms are in the process of building up their emerging market section, which has placed a premium on analysts with experience in the area. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (quoting Gary Schieneman, director for Latin American Research for New Smith Court). For instance, "[t]he stock of Baesa, the Pepsi bottler in Argentina, was pummeled in 1992 after the company began packaging its soft drinks in plastic; glass bottlers spread stories that plastic packaging made the soda carcinogenic." *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

markets" of these countries.<sup>144</sup> As a result, the regulatory structures of many Latin American nations are patterned after the U.S.<sup>145</sup> Thus, countries like Argentina, Chile, and Mexico have attempted to conform to the U.S. regulatory model.<sup>146</sup>

However, critical differences between the U.S. structure and Latin American systems exist. Inflation accounting is the most important difference.<sup>147</sup> As Cesar Alvarez noted, other "[a]reas requiring special care when reading financial statements from [Latin American issuers] are deferred taxes, financial statement disclosure, extraordinary items, earnings per share, equity accounting, pre-operating and other cost and reserves for contingencies."<sup>148</sup> These are essentially the core disclosure issues, demonstrating that integration is much more encompassing and complex than similarly modeled regulatory regimes.

Foreign issuers facing U.S. disclosure and accounting requirements are concerned about both the availability and sensitivity of the requisite information.<sup>149</sup> Availability concerns are present when a company must assess how difficult it is to collect information and whether the costs associated with presenting that information is prohibitive.<sup>150</sup>

For a first-time issuer, the U.S. registration process is an expensive undertaking.<sup>151</sup> However, most commentators believe

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at S18. The amount of time necessary to complete the registration process is also a significant concern. Some companies have been able to complete the process within a few months. However, six months is a more reasonable estimate. *Id.* at S22. This can be a grave concern if the issuer's need for funds is time sensitive. Additionally, sometimes it can take a significant amount of time to complete the reconciliation statements. In one reported case this process took almost eighteen months. See Warbrick, *supra* note 69, at S113-15.

In addition to the difficulty in converting home account transactions to U.S. GAAP, the company also needs to identify transactions for which U.S. GAAP may not exist. See, e.g., Pat McConnell, *Practical Company Experience in Entering U.S. Markets: Significant Issues and Hurdles from an Advisor's Perspective*, 17 FORDHAM INT'L L.J. S120, S126 (1994) (government grants or concessions, such as those used in Mexico to improve infrastructure); Warbrick, *supra* note 69, at S113-15 (special tax accounting and reserves of certain foreign countries).

151. Jensen, *supra* note 93, at S34 (estimating the cost of a public offering to be between \$500,000 and \$1 million).

that in the long-run the availability issue is not much of a factor.<sup>152</sup> Companies committed to entering the U.S. markets will put forth the effort necessary to obtain the required information. Cost concerns are closely associated with the generation, not the disclosure of financial data.<sup>153</sup> Once this material becomes available, disclosure of company-specific information is not a major impediment. Further, issuers in the private placement market, as a practical matter, may have to provide most of this information anyway in order to attract institutional investors.<sup>154</sup>

Disclosing sensitive business information, however, is often a more important issue than the availability of information or the cost of disclosure.<sup>155</sup> Although a number of non-U.S. companies prepare their primary financial statements using U.S. generally accepted accounting principles (GAAP), the majority provide their home country financial statements along with an audited reconciliation to U.S. GAAP.<sup>156</sup> The sensitive issues resulting from the reconciliation are often what concerns these non-U.S. companies.<sup>157</sup>

For instance, a foreign company may use an aggressive revenue recognition approach that would be highlighted in a reconciliation.<sup>158</sup> A company may have a massive under-funded pension plan, which, under U.S. GAAP would result in an increased pension expense or a large pension liability or both.<sup>159</sup> Other companies, by practice, may have large hidden reserves which might, through reconciliation, result in reported losses or gains that do not reflect actual performance.<sup>160</sup>

An interesting example of the hidden reserve problem is demonstrated by the automobile manufacturer Daimler-Benz AG's entry into the U.S. market. Daimler-Benz was the first German company to become publicly traded in the United States.<sup>161</sup> This event was significant given enormous differenc-

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152. See, e.g., Decker, *supra* note 64, at S18.

153. *Id.*

154. See *infra* notes 229-231 and accompanying text.

155. See Decker, *supra* note 64.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at S18-19.

160. *Id.*

161. Breeden, *supra* note 18, at S85-91.

es regarding disclosure requirements between the United States and Germany.<sup>162</sup> It alleviated some of the pressure to overhaul U.S. disclosure requirements as a means of attracting foreign issuers.<sup>163</sup>

As former SEC Commissioner Breeden noted, German accounting policies permit companies to create "hidden reserves."<sup>164</sup> Although a company may earn profits during a particular period, German accounting permits the company to reduce earnings by creating generous reserves for potential future adverse events.<sup>165</sup> Under U.S. GAAP, an adverse event must be probable and estimable.<sup>166</sup> Thus, if the company incurs losses or low profits in the future, it may then release its reserves into current income in a manner that masks such losses.<sup>167</sup>

In the case of Daimler-Benz, sales plummeted in 1993. Daimler-Benz released DM1.5 billion into income from hidden reserves.<sup>168</sup> Despite significant losses, the company reported a profit for the first quarter of 1993 of DM200 million.<sup>169</sup> For the same period under U.S. GAAP, the company reported a loss of DM1 billion.<sup>170</sup>

The SEC is aware of the need to achieve a balance between the principle of disclosure and the desire to attract foreign capital to U.S. shores. As past and present SEC Commissioners have echoed, the SEC is committed to attracting "foreign issuers to the regulated U.S. markets," as well as strengthening "international regulatory standards and cooperation."<sup>171</sup> The SEC has shown a willingness to work closely with foreign issuers in order to facilitate their transition into the U.S. securities market.<sup>172</sup>

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162. *Id.* at S85.

163. Seligman, *supra* note 15, at 696.

164. Breeden, *supra* note 18, at S85.

165. *Id.*

166. *Id.*

167. *Id.* at S91.

168. *Id.*

169. *Id.*

170. *Id.* Breeden noted, "interestingly, the announcement by Daimler-Benz that it was going to reconcile its financial statements to U.S. GAAP seems to have caused its stock to rise in comparison with other German companies, providing an interesting demonstration of the value the market places on openness and transparency." *Id.*

171. Levitt, *supra* note 63.

172. In terms of dealing with the SEC, a Fletcher Challenger Limited representative indicated that the experience was "very pleasant." He added that "[t]he SEC was always helpful, always trying to assist us through the problems. As uncompro-

In addition, the SEC has instituted or proposed a number of rule changes which have lessened the disclosure burden on foreign companies. However, the SEC still maintains a fundamental commitment to the integrity of the market as a means of providing the investor with the highest possible quality of information.<sup>173</sup> Despite these rule changes, the Commission still considers the disclosure system essential to U.S. strategy to offer investors the highest quality product worldwide.<sup>174</sup>

Former SEC Commissioner Breeden indicated that the SEC's requirements for making full disclosure and providing a "reconciliation" to U.S. GAAP are designed to achieve several fundamental objectives.<sup>175</sup> First, requirements avoid a bias against U.S. companies in their home market.<sup>176</sup> Second, the SEC seeks to provide investors with the tools necessary to rationally compare companies. Specifically, full disclosure enables investors to make meaningful comparisons between United States companies and foreign firms.<sup>177</sup> Third, the SEC approach is geared toward creating a transparent market.<sup>178</sup>

Commentators generally agree that the recent rule changes either implemented or proposed by the SEC have eroded the impact of the disclosure system on the securities market. The SEC has made a number of proposals and adopted a variety of rule changes in order to make the U.S. regulatory environment less daunting to foreign issuers. These changes are significant in terms of both basic disclosure requirements and the policy of reconciling financial statements to U.S. GAAP.

In making several changes to the accounting rules, the SEC announced that it would propose acceptance of cash flow state-

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ming as SEC standards are, the SEC staff was always seeking to help us through the process to find a solution that was workable." Warbrick, *supra* note 69, at S118.

173. See generally Seligman, *supra* note 15.

174. *Id.* at S90.

175. Breeden, *supra* note 18, at S88. When foreign issuers make public offerings of securities to U.S. retail investors, the commission requires that the issuers provide the same disclosures that are required of U.S. issuers. This includes reconciliation with U.S. GAAP of the issuer's equity and net income as shown in its financial statements prepared using the issuer's home country's accounting principles. See generally Doty, *supra* note 117, at 88.

176. Breeden, *supra* note 18.

177. *Id.* at S88-89. If the SEC were to adopt a system of home country exemptions, then U.S. investors would be confronted with financial statements prepared under at least forty different sets of accounting principles. *Id.*

178. *Id.*

ments prepared in accordance with International Accounting Standards for foreign issuers.<sup>179</sup> The Commission also proposed that first time foreign registrants provide reconciliation to U.S. GAAP of select information and the audited financial statements for only two years, instead of three.<sup>180</sup> It extended case-by-case waivers to foreign companies with respect to the reconciliation of select information.<sup>181</sup> Additionally, the SEC proposed to eliminate the requirement to reconcile financial statements of significant acquirers and investees.<sup>182</sup> Moreover, the Commission eliminated the need for reconciliation of financial statements with respect to investment grade preferred stock.<sup>183</sup> Finally, inflation adjustments are no longer required for foreign issuers.<sup>184</sup>

The Commission has also suggested changes to the registration process. The SEC focused on initiatives to streamline the eligibility criteria for short form registration for foreign issuers.<sup>185</sup> It also expanded the access of foreign issuers to unallocated shelf registration, which permits the issuer to register securities without designating specific share amounts for each class.<sup>186</sup> Additionally, foreign issuers may use, in their registration statements, financial statements that are ten months old,<sup>187</sup> providing foreign issuers, if they meet certain requirements,<sup>188</sup> uninterrupted access to U.S. markets on stale

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179. Richard Kosnik, *The Role of the SEC in Evaluating Foreign Issuers Coming to U.S. Markets*, 17 FORDHAM INT'L L.J. S97, S104 (1994) (referring to International Accounting Standard No. 7).

180. *Id.*

181. *Id.* at S105. The SEC recognizes that first time foreign issuers have a very difficult time in reviewing historical information as a means to reconcile financial statements. *Id.*

182. *Id.* The SEC recognizes that, in some situations, it is very difficult for a company that does not have control of the acquirer to obtain financial information on a timely basis. *Id.*

183. *Id.* The SEC's current position is that investment-grade preferred securities should be treated like debt. *Id.*

184. Form F-20, Item 18 (c)(3)(iii) (exempting foreign issuer from reconciling inflation adjustments). The Commission recognizes that during periods of inflation, unadjusted historic financial cost statements show illusory profits and capital erosion is masked. Kosnik, *supra* note 179, at S104.

185. Kosnik, *supra* note 179, at S103.

186. *Id.* at S104.

187. 17 C.F.R. § 210.3-19(b), (c) (1996).

188. Foreign issuers must either produce their annual reports within four months of the end of their fiscal year or provide unaudited financial statements for one interim period in addition to their semi-annual interim reports. 17 C.F.R. §

disclosures as compared to U.S. counterparts.<sup>189</sup> Finally, the Commission proposed two changes to existing safe harbor rules. Proposed Rule 135c provides foreign issuers a safe harbor for announcements in the context of contemplated unregistered offerings.<sup>190</sup> The Commission also expanded the existing Rule 139<sup>191</sup> safe harbor relating to broker dealer research reports to cover foreign offerings.<sup>192</sup>

The New York Stock Exchange appears to be the most vocal U.S. institution calling for fundamental changes in U.S. reliance on the disclosure system. The NYSE argues that the U.S. should "continue or accelerate the SEC's ad hoc accommodation of foreign issuers on a case-by-case basis and relax the standards for what can pass as 'equivalent to' U.S. GAAP."<sup>193</sup> The NYSE goes even further than the SEC proposals by suggesting mutual recognition of national accounting and disclosure statements, with some agreed-upon minimum standard or, in the alternative, recognition of International Accounting Standards.<sup>194</sup> James L. Cochrane notes that over 2000 foreign companies would be eligible to list on the NYSE were it not for SEC regulations requiring U.S. GAAP reconciliation.<sup>195</sup>

The NYSE argues that there is a lot of flexibility and room to maneuver within U.S. GAAP, even for domestic compa-

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220(f) (1996).

189. Kosnik, *supra* note 179, at S102-03.

190. *Id.* at S104. Proposed Rule 135c tracks the existing Rule 135, 17 C.F.R. § 230.135 (1996), with the added requirement that the announcement cannot be made for the purpose of conditioning the U.S. market. Kosnik, *supra* note 179, at S106. The SEC proposed this change because foreign issuers were often faced with a dilemma. *Id.* In cross-border offerings, issuers have conducted Rule 144A offerings using a public-styled distribution in order to access a large pool of institutional buyers. *Id.* Occasionally, the issuer simultaneously undertook a Regulation S offering offshore (with the attendant dissemination of information to potential investors). *Id.* The two rules conflicted. *Id.*

191. 17 C.F.R. § 230.139 (1996).

192. Kosnik, *supra* note 179, at S106-07. Under the existing rule, broker dealers that participate in distributions can distribute information about eligible F-3 issuers fairly easily, 17 C.F.R. § 230.139 (1996). See Kosnik, *supra* note 179, at S107. The difficulty arose when large foreign issuers came to the U.S. market for the first time. *Id.* Although the foreign issuer met all of the size requirements, it did not have a reporting history in the United States and, as a result, was denied the safe harbor benefits. The proposed rule removes the reporting requirement if the issuer has traded offshore for at least twelve months. *Id.* at S107.

193. Cochrane, *supra* note 18, at S64-65.

194. *Id.* at S65.

195. *Id.*

nies.<sup>196</sup> Further, there is a danger that reconciling foreign accounting data to U.S. GAAP will often convey an illusion of comparability that does not exist.<sup>197</sup> The NYSE claims that "in order to understand a foreign company's financial position, one must ultimately come to terms with the home country's legal and regulatory environment as well as its accounting standards."<sup>198</sup>

In addition, the New York Stock Exchange adds, retail investors are not protected by current SEC policy, which compels the securities of world-class foreign companies that have not reconciled to U.S. GAAP to trade on the over-the-counter electronic bulletin board where no financial information is made available to investors at all.<sup>199</sup> In contrast, Cochrane notes that U.S. companies currently issue shares in most major foreign markets without having to conform to foreign financial disclosure or accounting rules.<sup>200</sup>

Proponents of the disclosure regime focus primarily on the value of maintaining trust and confidence in the U.S. market. The proponents of this position, while somewhat discordant as to the changes that have already taken place, clearly agree that further adjustments are undesirable. While U.S. markets have strong competition from secondary trading markets, the U.S. has a dramatic competitive edge in primary offerings.<sup>201</sup> This is significant in that securities markets are now the only real source of capital.<sup>202</sup> Proponents of the disclosure model believe that maintenance of the U.S. system is necessary to ensure U.S. competitiveness.

The acceptance of complete disclosure is growing in foreign markets. For instance, regulators from Latin America, Canada, and the United States recently embraced disclosure principles as

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196. *Id.* at S61-66. For example, Exxon and IBM both use U.S. GAAP, but looking at Exxon financial and IBM financial in a line-by-line comparison, is not comparing "apples to apples." *Id.* at S66.

197. *Id.*

198. *Id.*

199. *Id.* at S62.

200. *Id.* at S63.

201. See generally Seligman, *supra* note 15.

202. Breeden, *supra* note 18, at S80. Lenders increasingly channel credit through open capital markets rather than through an intermediate credit channel. *Id.* The last "commercial and industrial" or "C&I" (corporate nonreal estate) loan in the U.S. was made in early 1989. *Id.*



essential to the integration of American markets.<sup>203</sup> In fact, foreign issuers are increasingly recognizing that complete disclosure, specifically the U.S. disclosure regime, enhances share value.

Foreign issuers that have converted to U.S. GAAP can provide interesting lessons. As noted, the Daimler-Benz study suggests that the market will place a premium on large companies that disclose, despite temporary downturns. A New Zealand company, Fletcher Challenger Limited, embraced U.S. GAAP, not simply as a means of entering the U.S. market, but as an attempt to make itself more attractive in its own markets and around the world.<sup>204</sup> As a Fletcher representative noted, "[t]here were just too many equity securities being offered around the world these days for people not to be able to understand and trust your financial statements and your presentations easily. U.S. GAAP gave us that credibility in presentation."<sup>205</sup>

Criticism of the SEC for its focus on the admission of certain foreign issuers to U.S. markets, rather than pursuing a policy of integration, is justified to some degree. The Commission has taken a middle of the road position by insisting on U.S. disclosure, yet at the same time creating exceptions for foreign issuers on an ad hoc basis. This policy, while successful in opening U.S. securities markets to new participants, has in effect

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203. In June 1994, the Council of Securities Regulators of the Americas (COSRA) endorsed a resolution calling for a uniform system of mandatory disclosure in the hemisphere, see Levitt, *supra* note 63, and recently reviewed the supervision of derivatives trading and markets in each of the participating countries in an effort to foster market transparency. See Mary L. Schapiro, *Investment Risks: Full Disclosure Protects Investors and Expands Markets*, *Latin Derivatives 1996*, *LATIN FIN.*, Jan. 1996, at D2.

204. Warbrick, *supra* note 69. Fletcher's story provides an interesting example. *Id.* The New Zealand market appeared unable to recover from the financial crisis resulting from the stock market crash of October 1987. *Id.* at S113. This crisis deepened with the failure of certain large New Zealand companies and was exacerbated by a lack of trust and confidence in New Zealand regulatory and accounting standards. *Id.* Fletcher decided that the only way they could solidify investor confidence in their home market was to adopt U.S. GAAP. *Id.* Fletcher also felt that a switch to U.S. GAAP was essential in order to ensure successful securities offerings in Asia. *Id.* In this vein, Fletcher pursued an initial strategy that involved doing a registration without a public offering. *Id.* at S115. This strategy simplified the process by removing investment banker input from the picture. *Id.* This approach also avoided the market-imposed time pressures associated with public offerings. *Id.* at S115.

205. *Id.*

created two tiers of securities regulation. This is problematic given the SEC's consistent and vocal commitment to the disclosure system in place. While this approach has garnered wide praise, the policy does not adequately address the future of a stable, uniform, and truly integrated international or hemispheric securities market.

The Commission, however, has taken some steps to create widespread agreement on international accounting standards as an alternative to U.S. GAAP. As noted, the SEC is interested in working with the International Accounting Standards Committee in establishing "core standards" for cross-border offerings and listings.<sup>206</sup> In fact, a number of experts believe that given the recent rise in world-wide investment and cross-boarder trading, globally recognized, high quality accounting standards are essential or "investors' interest and capital markets will suffer . . . ."<sup>207</sup>

While the accounting issues are clearly important to market integration, acceptance of international standards will not alone usher in a new era of global securities trading. As SEC Commissioner Wallman noted, the debate "too often focuses on whether the U.S. should lower its accounting standards or the international community should raise its standards."<sup>208</sup> Wallman added that the important question is whether the standards fairly depict the company's financial standing.<sup>209</sup>

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206. *Id.*; see also Bureau of National Affairs, *International Accounting: Need for International Rules Voiced by IASC Chief, FASB Member*, BNA SECURITIES DAILY (May 20, 1996) "The SEC, as a member of IOSCO, will insist that the core standards 'be of high quality' and 'must be rigorously interpreted and applied. . . .'" *Id.* In addition, the SEC has conditioned acceptance of international standards on three "key" elements: (1) the "core" standards must constitute a comprehensive, generally accepted basis for accounting; (2) the standards must provide full disclosure and, in addition, must result in both transparency and comparability; and, as noted, (3) they "must be rigorously interpreted and applied . . . ." *SEC Statement Regarding International Accounting Standards*, SEC NEWS DIGEST, Issue 96-67, available in LEXIS, Fedsec file, 1996 SEC News, LEXIS 873) (April 11, 1996). The Commission has already accepted some international standards. For instance, the Commission, as part of the rule changes noted, now permits foreign issuers to use International Accounting Standard No. 7 in preparing cash flow statements. Warbrick, *supra* note 69.

207. Bureau of National Affairs, *supra* note 206.

208. See *Federal Securities and Corporate Developments*, 28 SEC. REG. & L. REP. 331 (1996) [hereinafter *Federal Securities*] (quoting SEC Commissioner Steven M.H. Wallman).

209. *Id.*

Chairman Wallman believes that the United States must have a more comprehensive view of securities regulation in light of the changing technology and globalization of markets.<sup>210</sup> This approach requires a greater understanding and focus on the international economic environment.<sup>211</sup> This philosophy, Wallman indicated, should focus on macro or goal oriented policies rather than "dictating" . . . substantive regulatory standards for specific problems.<sup>212</sup>

## V. "OFFSHORE" EXCHANGE

The various proposals for a "limited" or "offshore" market rely on the belief that the creation of a traditional exchange is unrealistic. This view considers disclosure obligations as a formidable barrier and sees Miami as a major capital market only if its focus is limited.<sup>213</sup> Rather than view the market as a continuum from private to public transactions, this approach concentrates on technical, specialized transactions which dominate the private market.<sup>214</sup> The "offshore" proposal has met with "lukewarm interest by [local] business executives . . . ."<sup>215</sup>

The strategy of the proponents of the "offshore" exchange is two-fold. First, it attracts developing market firms to the United States through available exceptions to the registration process.<sup>216</sup> Second, it creates a special market, with access limited to non-U.S. nationals and institutional investors, that permits companies to seek capital without application of federal and state restrictions.<sup>217</sup> Supporters of this strategy seek enabling legislation to create a basic minimum regulatory and license approval process for investment advisors and broker/dealers to

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210. *Id.*

211. *Id.*

212. *Id.* Commissioner Wallman outlined a suggested four part plan: (1) understand the typically economic facts that effect the market place; (2) evaluate how market behavior impacts market participants; (3) determine whether the proposed regulation addresses the underlying economic causes or simply provides a short term solution; and (4) permit goal-oriented, regulatory flexibility in administering the rule. *Id.*

213. Whisenand, *supra* note 3.

214. *Id.*

215. Julie Vorman, *Miami Eyes Role as Wall Street for Latin America*, REUTERS, Dec. 7, 1995.

216. Whisenand, *supra* note 3.

217. *Id.*

underwrite issues.<sup>218</sup> This market would function as an electronic exchange with the status of a self-regulatory organization.<sup>219</sup> The exchange, which will be known as the "Electronic Latin American Exchange," will be owned by the regional Latin American stock exchanges.<sup>220</sup>

Sections 3(b) and 4(2) of the Securities Act provide exemptions from registration for limited and nonpublic offerings. Domestic issuers generally use Regulation D<sup>221</sup> to comply with these exemptions.<sup>222</sup> Private placements by foreign issuers are primarily conducted through the structure provided under Rule 144A.<sup>223</sup> Rule 144A is intended to make the private placement alternative more attractive by making it easier for shares to be traded within a two-year restricted period.<sup>224</sup> Rule 144A offerings are made solely to Qualified Institutional Buyers.<sup>225</sup> The criteria for that designation is rather strict and is only satisfied by very large institutions.<sup>226</sup> Registration with the SEC is not required,<sup>227</sup> and the foreign firm may distribute financial statements in accordance with its home country's accounting principles.<sup>228</sup> In addition, transferability of securities is greatly simplified.<sup>229</sup>

The Rule 144A process may suggest that foreign firms are not as concerned with the cost or burden of disclosure as they are with the disclosure of sensitive information. For instance, institutional investors require specific financial information that is consistent with requirements under the registration process. As a result, the offering memorandum almost invariably includes a narrative description of the differences between the

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218. *Id.*

219. *Id.*

220. Vorman, *supra* note 215.

221. Regulation D, 17 C.F.R. § 230.501-50 (1995).

222. Mostoff, *supra* note 106, at 351-52. Although the "safe harbor" aspects of Regulation D make it the most commonly relied on exemption for private placements and limited offerings, an issuer may also prefer to rely on judicial and administrative rulings construing section 4(2). *Id.* at 352.

223. Rule 144A, 17 C.F.R. § 230.144A (1995).

224. Decker, *supra* note 64, at S14.

225. Rule 144A, 17 C.F.R. § 230.144A (1995).

226. *Id.*

227. *Id.*

228. *Id.*; see also Decker, *supra* note 64, at S14.

229. Jensen, *supra* note 93, at S37. In order to transfer a security under the old private placement procedure, in virtually every case an opinion of counsel had to be delivered. This was a huge impediment to liquidity. *Id.*

home country's accounting principles and generally accepted accounting principles.<sup>230</sup> Additionally, investment bankers require a fair amount of financial detail.<sup>231</sup> As a result, at least one commentator has suggested that Rule 144A transactions are not that much different from a public offering in terms of effort and cost.<sup>232</sup>

While foreign participation in the private placement market initially increased after the adoption of Rule 144A, the last two years have seen a decrease in such offerings by foreign issuers.<sup>233</sup> Companies are learning that if they really want to take advantage of U.S. markets, they must make a public offering.<sup>234</sup> The SEC has taken steps to enhance the attractiveness of the private placement option. For instance, a revised registration and reporting process permits access to PORTAL, the National Association of Securities Dealers' secondary trading system for unregistered securities.<sup>235</sup> As Cesar Alvarez notes, "[a] significant number of foreign equity securities not publicly traded in other U.S. markets have also entered the PORTAL market, since in many cases these securities are perceived to be of better quality than U.S. over-the-counter securities . . . ."<sup>236</sup>

In addition to the various methods of offering securities in the United States, foreign and U.S. issuers may take advantage of Regulation S, an exemption that permits the sale of unregistered securities that come to rest offshore.<sup>237</sup> The placement of securities technically in compliance with Regulation S, but which in reality are attempts to evade the registration requirements, will not receive the benefit of the safe harbor.<sup>238</sup> The

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230. Decker, *supra* note 64, at S17.

231. *Id.*

232. *Id.* at S15.

233. Kosnik, *supra* note 179, at S99-100 (1994).

234. See Velli, *supra* note 66, at S54. While the private placement market was substantial in 1991 and 1992, the market died in 1993. *Id.* In 1992, about \$3.8 billion was raised in equity under 144A ADR offerings. In 1994 it was estimated to drop to \$500 million. *Id.*

235. See Cesar L. Alvarez, *Global Markets; Latin America*, LATIN SEC. LAWS 1994, July 1994, at S11. PORTAL is a computerized trading system for restricted securities sold to institutional investors in reliance on Rule 144A. *Id.* PORTAL may be used for securities that have been placed in an offshore distribution. *Id.*

236. *Id.*

237. Regulation S provides that § 5 of the Securities Act, 15 U.S.C. § 77(e), shall not apply to offers or sales of securities outside the United States.

238. SEC Interpretive Release No. 33-7190, 17 C.F.R. § 231.

temporary offshore placement of securities where the incidence of ownership never leaves the U.S. violates the rule.<sup>239</sup> Furthermore, where the economic risk never leaves the U.S. during the restricted period, or where there is no reasonable expectation that the securities "came to rest" abroad, would not come within the rule.<sup>240</sup>

Cross-border tender and exchange offers, however, raise problems for the bidder or issuer under the federal securities laws, despite special exceptions.<sup>241</sup> As a result, U.S. shareholders have been traditionally excluded from such transactions.<sup>242</sup> For instance, LBT acquisitions, in their tender offer for Labatt's stock, expressly excluded U.S. shareholders from the tender offer where, despite Labatt's exemption under Rule 12g3-2(b),<sup>243</sup> the offer would not comply with Regulation S.<sup>244</sup> This exclusion threatens the ability of the U.S. shareholder from realizing the value of his investment in the absence of protection extended by the home country.<sup>245</sup> However, the SEC and the courts have shown some flexibility in the application of the securities laws to tender and exchange offers.<sup>246</sup> For instance, through a liberal reading of Regulation S, the SEC has embraced a policy that encourages inclusion of U.S. investors in such transactions.<sup>247</sup>

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239. *Id.*

240. *Id.*

241. See Smith, *supra* note 60.

242. *Id.*

243. *Labatt* is a foreign private issuer in which U.S. residents own approximately twelve percent of its shares. See *John Labatt, Ltd. v. LBT Acquisition Corp.*, 890 F. Supp. 235, 238 (S.D.N.Y. 1995). *Labatt* opted under the Securities and Exchange Commission Rule 12g3-2(b) to furnish the SEC with certain information including disclosures and filings that it is required to make under Canadian law and stock exchange rules. *Id.* By doing so, it is exempt from registration under Section 12 of the Securities Exchange Act of 1934. *Id.*

244. See *id.*

245. *Id.* In *Labatt*, a second step transaction occurs in which the shareholders who have not tendered are bought out at substantially the same consideration. *Id.* at 239.

246. Interestingly, one of the issue in *Labatt* was the role of press coverage in casting a foreign tender offer as an offer under federal law. *Id.* The court noted that "[n]othing in the U.S. securities laws requires a foreign tender offeror to exclude U.S. press coverage in order to avoid U.S. regulation of its foreign offer . . . . Where a foreign bidder has steadfastly avoided American channels in its pursuit of a foreign target, the American interest in extensive disclosure appears minimal. Where the only acts within the United States are second hand news accounts not directly attributable to the bidder, the American contact which would justify . . . jurisdiction is relatively small and counsels against its use." *Id.* at 245-46.

247. See Smith, *supra* note 60. But cf. *Securities and Exchange Commission v.*

The U.S. exchange and trading regulations are designed to protect investors purchasing securities from paying an artificially inflated price.<sup>248</sup> Of particular concern is an offering by a foreign issuer in the United States, where the principal market making activities are in that issuer's home market.<sup>249</sup> Trading rules prohibit transactions by foreign distribution participants, including affiliates, during a distribution in the United States.<sup>250</sup> Because the primary market maker in the foreign market is the underwriter, and since the underwriter will not withdraw from the market, strict application of the trading rules would prohibit a distribution in the U.S. that is simultaneous with a foreign global offering.<sup>251</sup> Here too, the SEC has adopted a flexible approach that exempts issuers conditioned on certain disclosures and record keeping rules.<sup>252</sup>

The main thrust of the "offshore" approach is to establish Miami as a significant capital market.<sup>253</sup> This proposal de-emphasizes U.S.-Latin American integration. The plan endeavors to match Miami's strategic position as a gateway to the Southern Hemisphere with the specialized skill and resources that drive private capital markets.<sup>254</sup> As James Whisenand notes in his working paper on the subject, the objectives encompass enhancing Miami's existing international investment banking and capital markets;<sup>255</sup> establishing Miami as the "hub" for Latin American and Caribbean markets; passing enabling legislation for an offshore capital market "free zone;" and attracting a reasonable number of private placements and public offerings for transactions in the range of one to forty million dollars.<sup>256</sup>

This approach, while sensible as a first step on the path to a complete market, is troubling for two reasons. First, private placements of securities have declined in recent years and ex-

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Murphy, 626 F.2d 633, 641 (9th Cir. 1980) (indicating that exemptions to the 1933 Act are construed narrowly).

248. Alvarez, *supra* note 235.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Whisenand, *supra* note 3.

254. *See id.*

255. *Id.* Between 1978 and the mid-1980s, Florida became the second largest international commercial banking center and the second largest foreign deposit center in the United States. *Id.*

256. *Id.*

perts believe that this trend will continue.<sup>257</sup> Second, this proposal arguably emphasizes a specialized market for professional expertise, rather than a primary market for capital. This aspect poses practical difficulties; some experts question whether Miami can compete for the professional and legal expertise necessary to sustain such a venture.<sup>258</sup>

## VI. INFORMATIONAL EXCHANGE

The concept of an information exchange, or electronic bulletin board, appears to offer the most promise for centering a capital market in Miami in the near future.<sup>259</sup> This proposal, known as "Cyberport Miami" has broad support in the Miami

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257. See *supra* note 233 and accompanying text. However, while private placements have decreased, evidence suggests that ADR programs associated with private placements have increased. ADR programs are classified according to the level of the sponsoring company's activity in the U.S. market and generally track the method by which the foreign firm has entered the market: Level I tracks private placement, Level II follows an exchange listing, and Level III covers the public sale of securities. The vast majority of companies that come into the U.S. market start off with a Level I ADR program and then upgrade over time. Velli, *supra* note 66, at S44. The number of Level I ADR programs have dramatically increased in recent years. *Id.* at S43. Some foreign companies view the Level I program as a cost-effective means to start building a core group of U.S. investors. *Id.* at S44. According to one industry expert, a Level I company can expect to obtain three to six percent of its shareholder base in the United States; an upgrade to Level II or III will materially increase the investor base ten to fifteen percent on average. *Id.* at S45. A Level I ADR trades over-the-counter in the U.S. on the pink sheets and is established through an information exemption under the Securities Exchange Act of 1934. Securities Act of 1933, U.S.C. § 77a-77aa (1981); see Velli *supra* note 66, at S43-44. In order to qualify for a Level I ADR, all a foreign company has to do is supply the SEC with the material information they produce and distribute in their home country. *Id.* at S44. Registration is not required. *Id.* Since the company is not registered, a Level I ADR cannot be listed on an exchange and cannot be used to raise capital. *Id.* A foreign company reaches Level II when it lists on one of the U.S. exchanges.

Level II ADR listings are also on the rise. *Id.* at S48. The rapid pick-up in listings is attributable, in part, to the fact that many companies that established Level I programs two or three years ago had a very favorable experience in the U.S. marketplace and are now upgrading to a listing on an exchange. *Id.* Experts attribute the increase in Level II offerings to the wave of privatization that are occurring throughout the world. *Id.*

258. Note that Mr. Whisenand's comment, which sees a full-service exchange as simply repeating the New York Stock Exchange, *supra* note 74, may have some application to an "offshore" market as well to the degree that other legal markets presently service private placements.

259. Supporters believe that Cyberport, which requires approximately "\$3 million in computer equipment and half a dozen employees, would be relatively quick and easy to set up." Johnson, *supra* note 72.



legal community and is backed by the Florida Department of Commerce.<sup>260</sup> Cyberport provides "a single point of access to accurate and timely information [for Latin American and Caribbean securities] which can be sold to value-added re-sellers worldwide."<sup>261</sup> The concept is not wholly unique. Competition is posed by other information providers, and arguably, by the expanded international access provided by the Internet.<sup>262</sup> In fact, a great deal of international investment information is available via the Internet.<sup>263</sup> Although there appears to be no service that provides all relevant investment and securities information on a global basis, it is now possible to access investment summaries, broker reports, company profiles, company annual reports, daily market indices and even quotes at will.<sup>264</sup>

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260. Julie Vorman, *Miami Eyes Role as Wall Street for Latin America*, REUTERS, LTD., Dec. 7, 1995, available in LEXIS, News Library, Current File.

261. CYBERPORT MIAMI, *supra* note 4.

262. First Call, the electronic vendor of Wall Street research, is expanding its franchise into emerging markets. Galant, *supra* note 136, at 79. In Latin America it has initiated coverage of Argentina, Mexico, Peru, Chile, Colombia, Costa Rica and Brazil. *Id.*

263. See Lenape Investment Corp., *Favorite Links*, available on the internet at <http://www.voicenet.com/~rsauers.html> (listing global financial data services).

264. See *id.* (Austrian Stock exchange offering daily market summary and listed company directory; Bolsa Nacional de Valores, S.A. providing directory of listed companies on Costa Rica's stock exchange; Canada NewsWire furnishing daily news releases from participating companies; Canada Stockwatch producing corporate profiles, charts and quotes; Chamber of Mines of South Africa giving industry based information including market indices; Cyberplex Interactive Media offering information on companies listed on the Toronto Stock Exchange, including the opportunity to order annual reports online; Die Welt Online providing daily German stock prices; Digital Link furnishing profiles and contact information for companies listed on the Vancouver Stock Exchange; Geneva Stock Exchange supplying daily stock and bond summaries; Globes Publishers Ltd. providing quotes for companies listed on the Tel Aviv Stock Exchange; Institute of Commercial Engineering offering Russian securities market news including charts and data files; Italian Stock exchange giving market indices and share price charts; Ljubljana Stock Exchange offering information regarding Slovenia's stock exchange, including daily quote summaries; London International Financial Futures & Options Exchanges producing current and historical quotes as well as trade specifications; Madrid Stock Exchange providing market indices and statistics, company information and quotes of main companies; MAHA Internet Service Inc. supplying daily market indices and the leading share prices on the Korean Stock Exchange; Malaysia Online furnishing market indices, quotes and summaries for the Kuala Lumpur Stock Exchange; Nagoya Stock Exchange offering stock and convertible bond quotes; National Computer Board giving market indices, gainers and losers, and quotes for the Singapore Stock Exchange; Network Information Services providing market indices and unit trust prices for the Johannesburg Stock Exchange; South African Futures Exchange offering historical and current prices and trade specifications; STAT Publishing producing market price updates from the Winnipeg Commodities Exchange; Telenium giving end-day quotes for all

Cyberport, however, attempts specialization and regional coordination to a degree that does not presently exist.

Proponents argue that Cyberport will significantly increase the flow of capital to hemispheric markets by linking these markets together.<sup>265</sup> Organizers contend that a "high-tech bulletin board in Miami would help inject new liquidity into the Caribbean and Latin American stock exchanges."<sup>266</sup> Trading activity data would be easier to obtain, presented in a uniform format, and could help harmonize the region's trading practices.<sup>267</sup> Florida's Secretary of Commerce, Charles Dusseau, estimated that Cyberport Miami could attract billions of dollars to existing Latin American markets.<sup>268</sup> Under the present plan, similar to the "offshore" proposal, Cyberport would be collectively owned by the regional market organizations.<sup>269</sup>

Cyberport Miami, will serve as a service bureau rendering assistance "where 'inter-connectivity' and 'centralized distribution' of data is desired."<sup>270</sup> Exchanges will use it to sell their data on a nonexclusive basis.<sup>271</sup> The type of information that Cyberport expects to gather and then disseminate includes broker research reports and company specific information, including annual reports and price quotes.<sup>272</sup> There is an expectation that this system will ultimately assist in the settlement of trades on a global basis.<sup>273</sup> Other proposals suggest that trade-matching is also feasible.<sup>274</sup> In fact, supporters view Cyberport

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Canadian regional exchanges; Teleserv online Stock Information producing quotes for German stocks; Tokyo Grain Exchange furnishing contact specifications, charts and quotes; University of Vienna supplying quotes for the Vienna Stock Exchange; Vancouver Stock exchange providing a directory of North American venture capital firms and company profiles and statistics; and Zagreb Stock Exchange supplying directories and quote summaries for Croatian companies).

265. Galant, *supra* note 136.

266. Vorman, *supra* note 260.

267. *Id.*

268. Charles Lunan, *Network Could Boost Latin American Stocks; State Compliance Chief Backs Computerized Trading System in Miami*, SUN-SENTINEL (Ft. Lauderdale), Dec. 6, 1995, at D1.

269. CYBERPORT MIAMI, *supra* note 4.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* Cyberport will not compete with settlement banks, but will serve as a hub for trade information, facilitating settlement at less cost. *Id.*

274. Facsimile from the office of Charles Dusseau, Florida Secretary of Commerce (Nov. 28, 1995) (on file with U. MIAMI INTER-AM. L. REV.). An earlier version of this proposal envisioned an electronic medium that served as a high tech service

as an "incremental step towards the establishment of a complete exchange."<sup>275</sup>

Cyberport directs investors to a foreign company's home market.<sup>276</sup> Further, it is claimed that this greater distribution of data will result in "broader investor populations, greater liquidity, and more transparency of initial and secondary trading" which will enhance privatization efforts in Latin America.<sup>277</sup> Finally, such an approach, supporters argue, creates incentives to provide a uniform capital market structure throughout the region.<sup>278</sup>

Backers of the proposal generally do not believe that federal securities laws prohibit the implementation of Cyberport Miami.<sup>279</sup> Secretary Dusseau noted that an information exchange would not require SEC approval because the exchange would be selling information, not stocks.<sup>280</sup> While this may be an overstatement, a preliminary analysis indicates that the federal rules governing securities exchanges do not apply to centralized information providers.<sup>281</sup> Commission letter rulings under the Investment Advisors Act of 1940,<sup>282</sup> to some extent, support this position.<sup>283</sup>

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bureau for settlement of Latin American Securities and/or as a center for posting and processing trades. *Id.* This proposal rejected the notion that servicing trades resulted in exchange status. *Id.* As one report emphasized, Cyberport is a service bureau, not an exchange. *Id.* Thus, regional exchanges are the customers, while Cyberport simply facilitates transactions. *Id.* There is some basis for this logic. The SEC regards proprietary trading systems as nonexchanges because they match rather than execute trades. Solomon and Corso note that "[t]he customer, not the system, directs the execution [of the trade]." Solomon & Corso, *supra* note 76, at 321. Note that while trade matching has been suggested, Cyberport no longer incorporates trade matching. CYBERPORT MIAMI, *supra* note 4.

275. Johnson, *supra* note 72.

276. CYBERPORT MIAMI, *supra* note 4.

277. *Id.*

278. *Id.*

279. Informally, organizers presented the Cyberport proposal to the Director of Market Regulation at the Securities Exchange Commission. Telephone Interview with Carlos Loumiet, securities attorney involved in Cyberport proposal, April, 1996.

280. Mickie Valente, *Investors Who Buy Latin Will Like This*, TAMPA TRIBUNE, Dec. 9, 1995, at Business & Finance 1.

281. CYBERPORT MIAMI, *supra* note 4.

282. 15 U.S.C. § 81b-6.

283. See DATASTREAM INT'L, INC., INVESTMENT ADVISERS ACT OF 1940, § 202(a)(11), No-Action Letter No. 93-33-CC (Mar. 15, 1993) (indicating that entities which primarily collect and disseminate financial information over electronic media are not usually regulated as an exchange).

This position does not, however, address the registration and disclosure requirements of federal securities law. While electronic access to financial information is now commonplace, there is no existing service for the express purpose of attracting capital to a specific developing region and, arguably, to promote the companies based there. The stated purpose of Cyberport Miami is to support integration of the capital markets of the hemisphere and to attract U.S. dollars to existing Caribbean and Latin American stock exchanges.<sup>284</sup> To the extent that companies from these markets are not registered within the United States or have not availed themselves of applicable safe harbors, a question arises as to whether the dissemination of financial information constitutes an "offer."<sup>285</sup> If, in fact, the Commission considers the distribution of information in such a context an offer, then the registration requirements of the Securities Act of 1933 are directly at odds with such a proposal.

Section 2(3) of the Securities Act provides that the term "offer to sell," "offer for sale," or "offer" shall include "every attempt to offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value."<sup>286</sup> The SEC has interpreted "offer" broadly and various courts have accepted this construction.<sup>287</sup> In fact, "offer" has been interpreted to include any communication which is designed to procure orders for a security.<sup>288</sup> In short, any communication which conditions the market may be construed as an offer. Using an oft-quoted passage, the Commission explained:

It apparently is not generally understood, however, that the publication of public information and statements, and publicity efforts, generally made in advance of a proposed financing, although not couched in terms of an express offer,

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284. Lunan, *supra* note 268.

285. Classification of an international communication as an "offer" may raise additional questions regarding the ability of the SEC to monitor or regulate foreign markets and their market participants. See Canada NewsWire, *The Upper Canada Brewing Company Announces Initial Public Offering*, available on the Internet at [http://www.newswire.ca/releases/February 1996/09/C2596.html](http://www.newswire.ca/releases/February%201996/09/C2596.html) (indicating that news release announcing an initial public offering in Canada, easily accessed in the United States via the Internet, was "not for distribution in the United States").

286. 15 U.S.C. § 77b(3).

287. Securities Exchange Commission v. Liberty Petroleum Corp., Fed. Sec. L. Rep. (CCH) ¶ 93,209.

288. *Id.*

may in fact contribute to conditioning the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises a serious question whether the publicity is not in fact part of the selling effort.<sup>289</sup>

Of course construction may vary with the nature of the financing or the identity of the market participants. This suggests a fluid dichotomy, but one that creates doubt when the identity of the participants is unclear or where the financing is particularly sensitive.<sup>290</sup> Thus, where there is a lack of sophistication on the part of the target's investing public, or the investment is particularly risky, or the originating market raises concerns for the Commission, the release of information may approach an offer. The dichotomy is not itself unreasonable even factoring in the element of unpredictability, however, such a shift often occurs as policy objectives change, not simply with a transformation of philosophy. Where the integration of diverse markets is concerned, such a fluid and uncertain process indicates a foundational defect.<sup>291</sup>

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289. J. Robert Brown, Jr. & Stephen M. DeTore, *Rationalizing the Disclosure Process: The Summary Annual Report*, 39 CASE W. RES. L. REV. 39, 92 (citing *Publication of Information Prior to or After Effective Date of Registration Statement*, Sec. Act Rel. No. 3844, 1 Fed. Sec. L. Rep. (CCH) ¶ 3250 (Oct. 8, 1957)).

290. See Solomon & Corso, *supra* note 76 (discussing the meaning of the term "facility" in defining "exchange," and the contention that the definition has the potential to change depending on status).

291. Consider that the SEC recently indicated that the "[e]xperience with Regulation A . . . 17 C.F.R. § 230.251-263, suggests that the 'test the waters' initiative provides issuers of small offerings a useful and cost-effective means of assessing whether there is sufficient potential interest in the investment to proceed with an offering." *Solicitations of Interest Prior to an Initial Public Offering*, Sec. Act Rel. No. 33-7188, 60 Fed. Reg. 35,648 (June 27, 1995). As a result, the Commission proposed a rule change which extends the "test the waters" approach to Initial Public Offerings (IPOs). See *id.* (outlining proposed Rule 135d). This rule permits the solicitation of interest prior to the filing of a registration statement. *Id.*

Certain types of issuers are excluded from this safe harbor. Excluded issuers include issuers of asset-backed securities, partnerships, limited liability companies, and other direct participation investment programs, investment companies, and blank check and penny stock issuers. *Id.* The last group is prohibited from use of this rule due to the substantial abuses that arise in such offerings. *Id.* Thus, the company has a means of gauging investor interest before incurring the significant expense involved in preparing IPO disclosure documents. *Id.*

Communications meeting the requirements of the Rule would not be deemed an offer of a security for purposes of Section 5 of the Securities Act of 1933. *Id.* The type of information that may be disseminated under this Rule includes the amount of securities that will be issued, price information, and forward looking reports, including unaudited financial statements and projections. *Id.* The SEC expressly permits electronic dissemination of such information, including distribution via the

It is clear that the SEC permits data services to distribute information regarding the operation of unregistered companies. In a no-action letter regarding Datastream International, a financial services provider, the SEC outlined its position regarding registration as an investment advisor.<sup>292</sup> The SEC indicated that financial information providers are not investment providers if "(1) the information is readily available to the public in its raw state, (2) the categories of the information presented are not highly selective, and (3) the information is not organized or presented in a manner which suggests the purchase, holding or sale of any security or securities."<sup>293</sup> The no-action letter indicates that the Commission may decline to give no-action assurance where a financial interest in the data exists; or restrictions of the data to geographical location, business type, size, or price range occur; or where the user is equipped to evaluate whether to engage in certain transactions.<sup>294</sup>

These specific restrictions seem particularly significant in light of Cyberport Miami. First, the home exchanges will collectively own the service.<sup>295</sup> This amounts to a financial interest in the sale of securities. Second, Cyberport is established to service an express geographical market.<sup>296</sup> This region is certainly a large and diverse market, suggesting that this factor may not impact the analysis to a great degree. However, it is also true that the correlation of activity in Latin American securities markets suggests treatment as a single market for regulatory purposes. Third, while Cyberport does not incorporate size

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Internet. *Id.* The fact that quotes and forward-looking financial statements are protected under this safe harbor suggests that such material, under certain facts and circumstances, constitutes an "offer" within the meaning of the Act.

292. See DATASTREAM INT'L, INC., *supra* note 283. The SEC permitted Datastream to withdraw its registration as an investment adviser. *Id.* Datastream provides economic and financial information services to the securities and financial industry world-wide, including earnings and dividends for over 30,000 companies on a global basis. *Id.* Its customers are predominantly investment managers and institutional investors. *Id.* Datastream collects its data from a variety of financial sources. *Id.* The volume of the information is extensive and without restriction. *Id.* Datastream's customers select the criteria for searching the information. *Id.* The analytical programs do not enable the user to manipulate the data. *Id.* In addition, the company did not have a financial interest in the use of the data connected to the sale of securities. *Id.*

293. *Id.*

294. *Id.*

295. CYBERPORT MIAMI, *supra* note 4.

296. *Id.*

restrictions, it appears to encompass mid-range and small firms.<sup>297</sup>

These factors are not in themselves conclusive. Certainly Cyberport can be organized to reduce or altogether avoid the impact of these issues. In addition, the main thrust of the Cyberport proposal is to sell information to information re-sellers<sup>298</sup> — their customers are not primarily end users.

Note that this discussion centers around Cyberport's status under the Investment Advisers Act of 1940.<sup>299</sup> This is tangential to the issue of whether the dissemination of certain information constitutes an offer, or whether Cyberport's status may be transformed into that of a broker, dealer, or underwriter. As noted, theoretically at least, these issues exist. While Cyberport is primarily a data service provider, given today's technology, it certainly has the promise to achieve its stated goal: to attract billions of dollars to the Latin American securities market.<sup>300</sup> That claim itself is likely enough to give the Commission pause.

The SEC's view of "informational" exchanges as outside the scope of trading markets may exist because of the structure of financial markets. These markets are largely organized into two segments, a trading component and information activities. The SEC monitors and regulates both segments. As one writer noted, "these functions are complimentary, but their coupling in the same agency appears to have led to a split personality in SEC administration of the securities laws."<sup>301</sup> The SEC, in regard to its disclosure role, has "warmly accepted its mandate."<sup>302</sup> However, it has "generally played down, and at times has even disregarded and repudiated" its responsibility to regulate the trading markets.<sup>303</sup>

To the degree that electronic media may be replacing full service exchanges, the distinction between these two segments is no longer clear. If relevant market information is available to the investor, it is then relatively easy for the investor, via tele-

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297. *Id.*

298. *Id.*

299. 15 U.S.C. § 80b(1).

300. Lunan, *supra* note 268.

301. Walter Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 755-56 (1984).

302. *Id.*

303. *Id.*

phone or computer, to execute a trade on any foreign market.<sup>304</sup> This is precisely the challenge posed by an international "informational" exchange. In effect, the information and trading aspects of securities markets are merged.

Computers have revolutionized the way securities are traded.<sup>305</sup> From the coffee house exchange to the vast and prolific electronic network that exists today, tracing the evolution of such markets does not express the challenges presented by a global marketplace.<sup>306</sup> In fact, as Joel Seligman points out, "much of the recent history of the stock markets involves the transaction from manual to computer transactions."<sup>307</sup> Computers are now essential to both the origination and execution of trades.<sup>308</sup> Furthermore, the current availability of financial information on a global basis is unprecedented.

For example, private systems presently exist in the United States which provide real-time market information as well as trading capabilities for institutional investors.<sup>309</sup> In fact, the SEC has granted several no-action letters that permit these systems to operate without registration as an exchange.<sup>310</sup>

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304. See Charles Schwab Advertisement, Charles Schwab & Co., available on the Internet at <http://www.latinolink.com/latino.shtml> (offering Latin American and Caribbean investment and brokerage services including investment literature and real-time quotes).

305. See Solomon & Corso, *supra* note 76, at 299 (discussing the impact of computers on securities markets).

306. *Id.* at 299-300. Note the authors' historical observation regarding Baron von Reuters use of carrier pigeons to transmit stock quotes in the 1800s. *Id.* at 300 (citing Marcom, *Welcome to Hauppauge, the World's Next Financial Capital*, FORBES, Oct. 30, 1989, at 145).

307. Seligman, *supra* note 15, at 665.

308. *Id.* at 665-66.

309. Solomon & Corso, *supra* note 76, at 320.

310. *Id.* at 321-22 n.160 (citing Proprietary Trading Sys., Notice of Proposed Rule-making, Release No. 34-26,708, 54 Fed. Reg. 15,429, 15,431). Under section 3(1) of the Securities Exchange Act of 1953, an exchange is any organization that provides a marketplace or facility which binds together purchasers and sellers of securities. Solomon & Corso, *supra* note 76, at 324 n.174 (citing 15 U.S.C. § 78(c)(a)(1) (1988)). Solomon and Corso agree that while proprietary systems conform to the literal definition of an exchange, they should nevertheless be exempted until they evolve into "mature" markets. *Id.*, at 326. However, some of the systems which fall within the exception, as the SEC presently defines it, execute trades. The authors note that such activities exceed the functions of a "mere broker." *Id.* at 327. The SEC labels such systems as broker/dealers rather than exchanges. This approach has a systematic problem: broker/dealer signifies status. An exchange, as defined, denotes a facility where trades occur. In a computer driven market, there is no central, physical location. For instance, the SEC, in a literal reading of the definition of ex-



However, the ability to monitor and control such "exchanges" causes concern among regulators, particularly where linkage with foreign markets is contemplated. Authors Solomon and Corso believe that under such circumstances the SEC would demand a mechanism to identify violations of U.S. securities law.<sup>311</sup> Presently, it appears that the Commission's position in this regard turns on whether the system facilitates or actually executes a trade.<sup>312</sup> This distinction is less than clear.

The recent proposal by Wit Capital to create an Internet investment bank and brokerage raises further questions regarding both the potential for international securities trading and the SEC's position regarding the use of computers in cross-border trading. Wit Trade, which recently suspended trading at the request of the SEC to provide the Commission more time to study their system,<sup>313</sup> expects to arrange "public offerings of securities through the World Wide Web."<sup>314</sup> In addition, this venture plans to develop "a digital stock exchange" for the secondary trading of securities" through the Internet.<sup>315</sup>

In a letter ruling dated March 22, 1996, the SEC apparently has cleared the way for this system to operate with some modifications. Specifically, the SEC noted that in light of the "innovative nature of the system . . . interpretive relief is appropriate . . . ."<sup>316</sup> The SEC suggested modifications relating to the use of an escrow agent to handle purchaser's funds, provision of price and volume information, with adequate record

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change, has noted that such systems do not have a trading floor. *Id.* at 322-25, n.160-77.

311. *Id.* at 323.

312. *See id.* at 327.

313. *Stock Markets: Brewing Company Founder Cites Plans for Internet Investment Bank, Brokerage*, BNA SECURITIES LAW DAILY, April 3, 1996.

314. Bureau of National Affairs, *Stock Markets: Staff Clears Way for NY Concern to Resume Stock Trading on Internet*, BNA Securities Law Daily, March 27, 1996.

315. *Id.* "[T]he firm's Web site will include a public offering market 'through which the official offering documents of issuers become public . . . .'" *Id.* "[I]nvestors will be able to engage in securities transactions without having to use brokers or pay commissions." *Id.* However, Wit Capital "expects client companies to pay fees and commissions . . . ." both for its public offering services and for transactions occurring in the secondary market system. *Id.* An additional device would entitle purchasers to participate in future offerings in a manner which "would guarantee [that] investors would be purchasing shares in public offerings at the offering price and directly from the issuer." *Id.*

316. Spring Street Brewing Co., Securities Exchange Act of 1933, 1996 No-Action Letter, available in LEXIS, Fedsec file, 435, SEC-Reply-1 (March 22, 1996).

keeping and adding information informing investors of the risks inherent in investing in illiquid securities, such as that the securities are not traded on a registered exchange.<sup>317</sup> Interestingly, the SEC noted that if the system "post[s] quotations simultaneously on both the Buyer and Seller Bulletin Boards" then the system may be classified as a dealer, and thus required to register as such under the applicable federal laws.<sup>318</sup> Finally, the SEC noted that the sale of securities through the system "appears to involve an offer or sale" for purposes of the Securities Act of 1933.<sup>319</sup> Thus, registration requirements are a concern.<sup>320</sup> Such a response, while supportive of this "innovative" trading mechanism, does not clearly delineate the differences between information, trading, offering and disclosure components. However, the SEC does suggest that less-than-simultaneous posting of Buyer-Seller bids will permit trade facilitation, and even trade matching.

The SEC supports the electronic delivery of materials required under the Securities Acts regulations.<sup>321</sup> It also acknowledges that "[a]dvances in computer and electronic media technology are enabling companies to disseminate information to more people at a faster and more cost effective rate than traditional distribution methods . . . ."<sup>322</sup> The SEC adds that the "[u]se of electronic media also enhances the efficiency of the securities markets by allowing for the rapid dissemination of information to investors and financial markets in a more cost efficient, wide-spread and equitable manner than traditional paper-based methods."<sup>323</sup> Interestingly, the release generally avoids the issue of delivery of financial information pertaining to unregistered companies. In a footnote, the SEC noted in conclu-

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317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* The No-Action letter referred Spring Street to the No-Action response to King and Spaulding regarding the application of 1933 Act registration to such services. *Id.* However, the SEC also noted that the Regulation A exemption may be used in connection with such a service. *Id.*

321. Use Of Electronic Media For Delivery Purposes, Securities Act Release Nos. 33-7233, 34-36,345, IC-21,399, 60 Fed. Reg. 534,582 (Oct. 6, 1995). "The Commission believes that, given the numerous benefits of electronic distribution of information and the fact that in many respects it may be more useful to investors than paper, its use should not be disfavored." *Id.*

322. *Id.* at 2.

323. *Id.* at 4.

sive fashion that, "[t]he liability provisions of the federal securities laws apply equally to electronic and paper-based media."<sup>324</sup> However, the scope of the statutes application is unclear.

It is clear, however, that the SEC has commenced enforcement actions against promoters who have made unregistered offers on the Internet. For instance, in *Securities and Exchange Commission v. Odulo*,<sup>325</sup> the SEC announced the filing of a complaint against a promoter who posted false and misleading solicitations on the Internet which, as the Commission noted, is "accessible to hundreds of thousands of individuals across the country and world-wide."<sup>326</sup> While such schemes, often operated by individuals and small groups, target small investors, sophisticated investors also frequently fall victim to fraud. As SEC Commissioner Wallman noted, some of the "frauds are so egregious it makes you wonder about the level of sophistication among even supposedly sophisticated investors."<sup>327</sup>

Traditionally, federal regulations enforce disclosure schemes by controlling and prohibiting disclosure of financial information.<sup>328</sup> Without the ability to regulate global markets, global securities trading makes control of financial information as a means of restricting securities transactions difficult. This creates a number of problems for the SEC. Imposing the U.S. disclosure scheme on international securities transactions poses a significant barrier to the integration of U.S. and Latin American securities markets. Yet, the United States is committed to the concept of complete disclosure as essential to investor protection. Complicating matters is the widespread access of U.S. in-

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324. *Id.* at n.11. The antifraud provisions of the federal securities laws as set forth in § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, apply to any information delivered electronically. Furthermore, § 17(b) of the Securities Act of 1933, 15 U.S.C. § 77q(b)1, applies to any report circulated on the Internet just as if the report were provided in paper form.

325. Civil Action No. 95-424-P (D.R.I. Aug. 7, 1995).

326. *Securities and Exchange Commission v. Odulo*, Litigation Release No. 14591 (D.R.I. Aug. 7, 1995). Odulo sought investors for a venture to acquire and raise eels that, he claimed, was a "very low risk" with an expected "whopping 20%" yield. *Id.*

327. *Federal Securities*, *supra* note 208. For example, "[s]ince October 1993, the SEC has filed 10 administrative and 31 injunctive actions targeting prime bank schemes that lured some 1,200 investors to invest more than \$94 million . . . ." *Id.* (quoting SEC Commissioner Steven M.H. Wallman).

328. *See Federal Securities*, *supra* note 208, at 331. "The SEC is, in essence, a regulator of information. . . ." *Id.* (quoting current SEC Commissioner Steven M.H. Wallman).

vestors to global financial information which threatens to circumvent U.S. disclosure standards, unless there is international support for such standards.<sup>329</sup> Integration of regulatory regimes may become a practical necessity. The various proposals and vast support for a hemispheric securities market on U.S. soil offers the United States an opportunity to take a leadership role in facilitating such integration as a means of supporting both regional development and investor protection. Despite SEC movement in this direction, however, a real question exists as to whether the United States is ready and capable of sacrificing elements of its regulatory scheme which will be necessary to achieve this goal.

## VII. CONCLUSION

Permitting Latin American issuer's greater access to U.S. securities markets is an important policy goal that has widespread support among market participants and regulators. The integration of international securities trading, and specifically hemispheric securities markets, is a stated goal of the governments of North and South America.

While the Securities Exchange Commission has taken a number of steps to increase foreign participation in U.S. markets, further efforts are necessary. These efforts must concentrate on integration issues, economic factors, market conditions and investor behavior throughout the region. Experience shows that similar systems of securities regulation will not necessarily result in equivalent disclosure. Furthermore, adherence to a particular system, such as the U.S. scheme, detracts from market transparency and the availability of high grade foreign stocks. An approach geared towards ensuring adequate disclosure, as opposed to a system that mandates comparative disclosure, will more effectively integrate international markets. The liability provisions presently in place can be easily tailored to address misstatements, nondisclosure and fraud under any system.

The various proposals for a Latin American stock exchange in Miami express both the potential and support for regional integration of securities markets. However, the differences in

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329. See *id.* SEC Commissioner Wallman acknowledges that the Internet underscores the need for greater coordination among international regulators. *Id.*

the proposals reflect confusion and uncertainty in how to best accomplish this goal. Each of the exchange proposals, if instituted, will ensure Miami's status as the gateway to Latin America and the Caribbean. Given the increase in global competitiveness that stems from regional partnerships, this goal is of great importance to the United States. In addition, each of the proposals offers the United States the opportunity and conditions in which to build a workable and sound integration model that will provide issuer and investor access to capital and investment opportunities throughout the hemisphere.

LES RIORDAN\*

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\* J.D. Candidate 1996, University of Miami School of Law. This paper is dedicated to my wife, Stacey. The author would like to thank Professor Elliott Manning for his invaluable guidance and advice.