This Article grows out of an on-going debate among U.S. legal academics over the extent to which foreign corporations should be permitted to abide by the securities laws of other jurisdictions rather than complying with the securities laws of the United States when gaining access to U.S. capital markets. Advocates of such reforms claim that allowing issuers to choose among national systems of securities regulation would foster “regulatory competition” and thereby promote better legal rules than our current legal structure, which gives the Securities and Exchange Commission (SEC) a “regulatory monopoly” over securities transactions in the United States. Within this literature, reference is frequently made to European capital markets. For one thing, the European Union currently provides a regulatory structure analogous to what proponents of issuer choice advocate for the United States. Thus, Europe presents a natural laboratory for testing theoretical disputes arising out of the regulatory competition literature.

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1 Throughout this Article, the term “gaining access to U.S. capital markets” is defined to embrace both capital raising efforts in the United States through the sale of securities to U.S. resident investors and also the facilitation of trading in foreign securities in U.S. markets such as the New York Stock Exchange, the Nasdaq and U.S. over-the-counter markets.
European capital markets were also of particular interest to the regulatory competition debate because if the United States was to begin accepting compliance with foreign legal regimes as a substitute for U.S. securities regulation, Europe would be a logical place to start given the level of sophistication of the European securities markets and the volume of capital that European issuers raise in the United States through cross-border transactions. Understanding how European issuers might respond to such a change in U.S. law therefore has considerable practical significance for the debate over issuer choice in the field of international securities.

The goal of this Article is to gain a better understanding of the mechanisms of regulatory competition by investigating how European corporate issuers are currently raising capital in both European and trans-Atlantic transactions. To this end, we conducted a series of interviews with roughly fifty professionals working in London and other leading European financial centers during the summer and fall of 1999. Our interviewees were principally lawyers, but also included a number of investment bankers and regulatory officials familiar with European capital raising practices. During our interviews, we asked a series of questions designed to elicit both specific information about particular issues relevant to the debate over regulatory competition as well as more open-ended responses about the legal environment in which European issuers currently raise capital. For the most part, our investigations focused on corporate issuance of common stock and not capital-raising practices involving debt or hybrid instruments.

The results of our research will appear in two installments to be published in consecutive issues of *The Business Lawyer*. In this first installment, we focus on the aspect of our research dealing with capital raising practices within Europe. In the second installment, we present our findings with respect to European issuers that seek access to U.S. capital markets and related issues. The first part of the current installment begins with a summary of the current academic
debate over regulatory competition and a discussion of the principal areas of dispute our research was intended to illuminate. The second part explains the scope and structure of the interviews. The last part presents our findings with respect to intra-European capital-raising practices in 1999 and explores the implications of these findings for the debate over regulatory competition in international securities markets.

In brief, for the debate over regulatory competition, the most notable feature of capital-raising practices in Europe in 1999 is the fact that market forces, and not formal legal requirements, appear to be the most important determinant of the manner in which European issuers raise capital in pan-European offerings. Even though E.U. directives authorize European issuers to utilize disclosure documents prepared in accordance with an issuer’s home country laws to access capital markets in other member states, very few European issuers are taking advantage of this authority. Instead, when European issuers want to reach investors across Europe, they tend to engage in what is known as an “International-style Offering”—a transaction analogous to a private placement in the United States and limited to institutional investors in other European countries. Outside of the issuer’s home jurisdiction, these International-style Offerings are not subject to any formal system of securities regulation, but rather are governed by an evolving system of market standards that currently requires issuers to prepare disclosure documents modeled upon and roughly comparable to disclosure documents prepared for private placements in the United States. Although various interpretations are possible, we believe this aspect of emerging capital-raising practices in the European Union has two important implications for the debate over regulatory competition:

- First, to the extent that critics of issuer choice in international securities markets predict
that such a regime will force countries to adopt more lenient regulations (a “race to the bottom”), the evidence from Europe offers some comfort to proponents of issuer choice. Issuers from less well-regulated European jurisdictions do not seem to be taking advantage of the issuer choice provisions of the E.U. law. Moreover, on numerous dimensions--involving both the form of securities disclosure and the intensity of due diligence efforts--market forces seem to require European issuers of common stock to disclose more information and prepare disclosure documents more carefully than legal rules formally require. At least in 1999, the race in the quality of securities regulation seems to be headed upwards and not downwards. So on this dimension, our findings were generally supportive of the proponents of issuer choice.

- Second, our findings about European capital-raising practices raise questions about the value of issuer choice in terms of reducing the costs of securities regulation. In International-style Offerings in Europe, market forces have raised the levels of disclosure and due diligence for European issuers beyond the levels formally mandated under most national systems of securities regulation in Europe. The existence of such strong market forces casts doubt upon assertions of proponents of issuer choice that such regimes might substantially lower the costs associated with securities offerings. Indeed, for many European issuers, our research suggests that market forces seem to be raising legal and other direct costs of accessing capital markets.

Another important finding of our research is the growing importance of cross-border linkages between European securities markets. These secondary market linkages, according to
our interviewees, have reduced the need of European issuers to make special efforts to reach retail investors in other European countries. Increasingly, European retail investors are able to invest in the securities of issuers from other European countries by purchasing securities on a stock exchange located in the issuer’s home country. Efficient secondary market linkages of this sort have clearly reduced the need for European issuers to undertake additional listings on stock exchanges in other European countries to reach new pools of investors. They also may have diminished the need for European issuers to engage in the sort of pan-European public offerings that E.U. directives were designed to facilitate.

Secondary market linkages also may have important implications for issuer choice and regulatory competition in international securities regulation. In much of the debate over this topic, both sides proceed on the assumption that the critical question is which legal regime governs the public distribution of a foreign issuer’s securities into the United States. Evidence from Europe suggests, however, that if there are efficient secondary market linkages with foreign stock exchanges, then the rules governing trans-border listing and offerings may be less important than is commonly assumed. Indeed, a more critical issue of regulatory policy may concern the manner in which legal rules police secondary market linkages and the issuers and securities firms that participate in such transactions.

In short, our research into European capital-raising practices in 1999 suggests that the system of issuer choice established under E.U. directives has not evolved in precisely the manner predicted by either the advocates or critics of regulatory competition. European issuers have not migrated either to the most lenient or to the most protective system of public laws governing securities regulation. Rather, at least as far as the vast majority of pan-European offerings are

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2 That is, British retail investors can buy common stock in French companies by placing an order through British brokers that have remote access to the Paris Bourse.
concerned, standards set by market forces and roughly comparable to practices developed in U.S. private placement transactions have been the most influential determinants of disclosure and due diligence practices. In addition, cross-border secondary market linkages have diminished the need for European issuers to comply with the legal requirements of other member states, clearly in the area of dual listings and possibly also in the area of primary offerings.

ISSUER CHOICE, REGULATORY COMPETITION AND THE SIGNIFICANCE OF EUROPEAN CAPITAL MARKETS

ISSUER CHOICE AND THE THEORY OF REGULATORY COMPETITION

In a series of recent papers, Professors Roberta Romano of Yale Law School and Stephen Choi and Andrew Guzman of Boalt Hall School of Law have proposed that the United States replaces its current system of securities regulation, which imposes a mandatory and uniform system of disclosure and liability rules on all issuers that seek access to U.S. capital markets, with a new legal regime that would allow issuers to choose whichever jurisdiction’s system of securities regulation the issuers preferred. If these proposals were applied to international

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3 Professor Romano’s treatment of the subject can be found in Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 YALE L.J. 2359 (1998). While Romano is principally concerned with fostering competition in securities regulation within the United States, her analysis extends to international transactions: “Foreign issuers selling shares in the United States could opt out of the federal securities laws and choose those of another nation, such as their country of incorporation, or those of a U.S. state, to govern transactions in their securities in the United States.” Id. at 2362. The Choi-Guzman treatment appears in Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. CAL. L. REV. 903 (1998), but is further developed in Stephen Choi, Regulating Investors not Issuers: A Market-Based Proposal, 88 CAL. L. REV. 279 (2000) and Andrew T. Guzman, Capital Market Regulation in Developing Countries: A Proposal, 39 VA. J. INT’L L. 607 (1999). [hereinafter Guzman, Capital Market Regulation]

securities regulation, a French company, for example, could choose to sell its securities in the
United States in accordance with the requirements of French securities law, while a Mexican
issuer might comply with Moroccan law. According to the proponents of issuer choice in
securities regulation, this approach would force national authorities to compete among
themselves in providing the most attractive regime of securities regulation and thereby to
enhance the quality of securities regulation, better satisfying the interests of both investors and
issuers. Competition in this framework thus occurs not at the level of individual firms, but rather
among governmental authorities in producing new and potentially superior systems of regulation.

These proposals for issuer choice in securities regulation represent an extension of a
familiar argument in U.S. corporate law scholarship: the debate over whether corporations in the
United States should be allowed to choose the state law under which to organize themselves. For many years, U.S. corporations have had that latitude, and most large U.S. corporations have
chosen to organize themselves as Delaware corporations, prompting a heated debate among legal
academics, stretching back over nearly three decades, as to whether this structure facilitates a
desirable “race to the top,” in which the quality of corporate governance is improved over time,
or a destructive “race to the bottom,” in which issuers migrate to regimes with the lowest-quality
systems of corporate governance. Recent proposals to allow issuer choice in securities

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regulation fall squarely in the “race to the top” camp, emphasizing the potential benefits of regulatory competition in securities regulation while discounting potential drawbacks of such a regime.

In a separate article, we explore the relationship between the case for issuer choice in international securities regulation and the traditional debate over regulatory competition in U.S. corporate law. For current purposes, we need only highlight three basic elements of regulatory competition in legal regimes. The first two elements constitute the legal prerequisites of issuer choice; the third entails a prediction about the behavior of governmental actors, which is the engine of most models of regulatory competition.

- **Diversity of Eligible Regimes:** First, for regulatory competition to occur, entities must have some degree of choice over which legal regime governs their activities. In the debate over corporate governance in the United States, the issue is typically framed as whether U.S. corporations should be allowed to choose among the corporate laws of the various U.S. states (a considerable diversity of eligible regimes) or whether the federal government should impose a mandatory system of corporate law for all large public corporations in the United States (a system with no diversity of eligible regimes and

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See Jackson, *supra* note 4. The topic of regulatory competition has been widely discussed in other contexts, including a conference at Yale Law School in the Fall of 1999 and a related issue of the *Journal of International Economic Law* (June 2000). For an earlier but still helpful introduction to the subject, see Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 Harv. Int'l L.J. 47 (1993) (exploring the possibilities of regulatory competition in the international context, drawing on the relevant economic literature).

See Jackson, *supra* note 4. Entity mobility is what distinguishes regulatory competition from ordinary pressures that governments face to change the content of legal rules to lower the costs and improve the competitiveness of domestic firms.
hence no potential for regulatory competition).

• **Entity Mobility:** Second, entities must also have the ability to move between eligible regimes without excessive cost or inconvenience. Under U.S. law, corporations are relatively free to change their place of incorporation from one state to another, thus providing considerable entity mobility. Under European corporate law, by contrast, the situs doctrine severely limits entity mobility.\(^8\) This difference in legal structures may explain why regulatory competition in corporate governance has not traditionally been a common subject of European corporate legal scholarship.

• **Governmental Responsiveness:** A final element of most models of regulatory competition concerns the propensity of governments to change their legal rules in response to the choices entities make in selecting among eligible regimes.\(^9\) Implicit in the debate over regulatory competition is an assumption that at least some governments will make meaningful changes in their legal regimes in order to preserve or expand the number of entities under the governments’ regulatory oversight. Incentives for governments to compete would include filing and registration fees plus the many

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\(^9\) One could imagine a static model of regulatory competition, in which governmental authorities do not change their legal requirements in response to issuer choice, but legal commentators typically assume a more dynamic market for legal regimes.
collateral benefits of becoming a financial center. Proponents of regulatory competition predict that governmental responsiveness will lead to better legal regimes; whereas critics of the phenomenon fear the emergence of less desirable legal regimes.

Recent proposals for issuer choice in securities regulation advocate a legal regime under which the securities laws of any country would be eligible for application in the United States (complete diversity of eligible legal regimes). Issuers seeking access to U.S. capital markets--whether domestic or foreign--would be free to choose whichever of these legal regimes they wanted and would simply be required to disclose their choice to investors (a high degree of entity mobility). Finally, proponents of issuer choice predict that the imposition of this legal system would break the current legal monopoly of the SEC and either force the United States to develop better laws or cede jurisdiction over an increasing number of entities seeking access to U.S. capital markets to countries with better legal regimes (governmental responsiveness).

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11 In an article dealing with developing countries, Andrew Guzman has recommended that issuers could be limited to a small number of jurisdictions with established systems of securities regulation. See Guzman, Capital Market Regulation, supra note 3. For a similarly spirited proposal regarding the regulation of international banks in a developing country, see Jackson, supra note 10.

12 See Romano, supra note 3, at 2362 (“As a competitive legal market supplants a monopolist federal agency in the fashioning of regulation, it would produce rules more aligned with the preferences of investors, whose decisions drive the capital market.”). Choi & Guzman, supra note 3, at 923 (“The increased regulatory mobility that [regulatory competition] grants issuers and investors . . . affects the incentives of domestic lawmakers to fashion regimes designed to maximize the welfare of securities market participants.”).

Romano and Choi-Guzman have slightly different perspectives as to how regulatory competition is likely to play out. Structuring her proposals as an extension of U.S. state competition over corporate charters, Romano seems to assume the emergence of a Delaware-style dominant and optimal jurisdiction. See, e.g., Romano, supra note 3, at 2361 (“The market approach to securities regulation advocated in this Article takes as its paradigm the successful experience of the U.S. states in corporate law . . .”). Choi-Guzman, on the other hand, envision the emergence of a heterogeneous set of regimes from which investors and issuers will select the system that best suits their needs. See Choi & Guzman, supra note 3, at 949 (“[A] diverse set of national regulations will arise and issuers will choose from this set of possible regimes.”). For a discussion of this difference in perspective, see Romano, supra note 3, at n.216.
Since proposals for issuer choice in securities markets first appeared several years ago, a number of legal scholars have commented upon these proposals. All sides of the debate have implicitly accepted the basic framework for analysis outlined above. In particular, both proponents and critics of the proposals agree that allowing issuer choice in securities regulation would constitute a considerable change in the United States’ current system of securities regulation by allowing issuers a substantial diversity of eligible regimes and a considerable amount of entity mobility. Where the critics have parted company with proponents of issuer choice is in their assessment of the likely outcome of governmental responsiveness under these conditions. For example, some critics postulate that issuer choice proposals would unleash a race to the bottom in which at least some issuers would migrate to the laxest of legal regimes and impose uncompensated costs on investors and potentially broader injuries to U.S. capital markets. Other critics have focused on the practical difficulties of enforcing systems of securities regulation across international boundaries, raising questions regarding the adequacy of investor protection under the issuer-choice proposals.

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13 Paul Mahoney, writing a bit earlier than Romano and Choi-Guzman, advanced a similar proposal that would allow issuers to adopt disclosure standards of various securities exchanges, thus offering even greater diversity of eligible regimes than Romano and Choi-Guzman. See Mahoney, supra note 3. See also Adam Pritchard, Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers, 85 VA. L. REV. 925 (1999) (concerning the adoption of liability rules set by exchanges). But see Marcel Kahan, Some Problems with Stock Exchange-Based Securities Regulation, 83 VA. L. REV. 1509 (1997).

14 See James D. Cox, Regulatory Duopoly in U.S. Securities Markets, 99 COLUM. L. REV. 1200, 1229-37 (1999) (questioning several assumptions underlying the Romano and Choi-Guzman proposals); Fox, supra note 4 (exploring theoretical difficulties (both principal-agent costs and negative externalities) with a legal regime that allows issuers to choose their own disclosure rules). See also Joel P. Trachtman, Regulatory Competition and Regulatory Jurisdiction, 3 J. INT’L ECON. L. 331 (2000).

15 See Hal S. Scott, Internationalization of Primary Securities Markets, 63 LAW & CONTEMP. PROBS. 71 (2000). For a discussion of the potential difficulties of enforcement under a regime of regulatory competition and a comparison of enforcement issues under other legal regimes, see Choi & Guzman, supra note 3, at 927-34. See also Romano, supra note 3, at 2422.
Our goal in this Article is not to repeat past criticisms of issuer choice proposals in the field of securities regulation, but rather to use recent developments in the European capital markets as a mirror through which to examine their proposals. For a variety of reasons, Europe offers an interesting context in which to study regulatory competition. First of all, E.U. directives establish within the boundaries of the European Economic Area (EEA) a regulatory system analogous to what proponents of issuer choice are recommending for the United States. Thus, we are interested in exploring the extent to which developments in European financial markets shed light on the hotly debated question whether regulatory competition in international securities markets is likely to engender a race to the top or a race to the bottom. Another reason to study European capital markets is because if the United States was to adopt a system of issuer choice, European companies would likely be one of the first group of issuers allowed to participate in such a regime. Accordingly, it is relevant to the debate over issuer choice in securities regulation to have a better understanding of the likely impact of such a regime on European issuers.

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17 The United States already allows certain Canadian issuers to use Canadian disclosure documents to sell securities in the United States. See Anna T. Drummon, Internationalization of Securities Regulation--Multijurisdictional Disclosures System for Canada and the U.S., 36 Vill. L. Rev. 775 (1991). At the time the Canadian rules were put into place, the SEC indicated that it was considering expanding the concept to the United Kingdom and perhaps other jurisdictions. See id. at 803. Subsequently, however, the Commission has indicated a lack of enthusiasm about the initiative, and at times it has seemed possible that the experiment would be terminated. See, e.g., Katherine Macklem, Cross-border Finance Post Preserved: Helped Raise Billions: Canada’s Special Disclosure Status in U.S. is Saved, Nat’l Post, May 20, 2000, at C1.
Regulatory Competition Under Current E.U. Directives

The E.U. securities regulation regime is based upon the dual principles of minimum standards and mutual recognition. Within the European Union, member states are required to implement and maintain national securities regulations that incorporate the minimum standards articulated in the E.U. directives. These standards, however, serve only as a floor, and member states are free to impose more stringent requirements if they choose.\textsuperscript{18} Mutual recognition, however, ensures that these stringent requirements by desirable host countries do not serve as barriers to outside issuers. The mutual recognition provision creates a “passport” under which an issuer from a different member state can choose to access the capital market of a host member state on the basis of having met the requirements of its home and not the requirements of the host. Thus, an issuer needs only to satisfy its home country’s securities laws—with modest modification—in order to legally access any market in the European Union. In the field of securities regulation, two E.U. directives are of particular importance: (i) the Listing Particulars Directive (LPD),\textsuperscript{19} which allows a European issuer with securities listed on its home country exchange to list its securities on exchanges of other European countries without complying with the full listing requirements of the other exchange; and (ii) the Public Offers Directive (POD),\textsuperscript{20} which allows an issuer from one European member state to use public offering documents prepared under the laws of the issuer’s home jurisdiction to make a public offering in other


member states. Together the directives create the framework for a common European offering prospectus.  

Within the boundaries of the EEA, the LPD and POD formally establish the basic preconditions of limited regulatory competition in securities regulation. First, there is diversity in eligible legal regimes. National governments can establish disclosure standards at or above minimum standards set by E.U. directives. Some E.U. jurisdictions, most notably the United Kingdom, have reportedly established regulatory standards substantially in excess of minimum E.U. requirements, and apparently there has also been some degree of variation in the rigor with which other E.U. member states have brought their regulatory standards into compliance with the minimum standards of the directives. Second, there is an element of entity mobility. If a host member state has a more stringent set of requirements than an issuer’s home state, the issuer can select and rely on the more lenient requirements of the home state to gain access to the host state’s market. Alternatively, the issuer, if it concludes that it is in its best interest to do so, can choose to comply with the tougher disclosure requirements of the host member state. On the dimension of governmental responsiveness, the European Union satisfies the formal prerequisites of regulatory competition, at least for levels of supervision greater than the minimum standards required by the E.U. directives.

21 For a good overview of the structure of these directives, see Manning G. Warren III, Regulatory Harmony in the European Communities: The Common Market Prospectus, 16 BROOK. J. INT’L L. 19, 25-48 (1990). U.S. securities lawyers may be unfamiliar with the usage of the terms “public offers” and “listings” in the context of European securities regulation. European regulators distinguish between offerings made to the public and offerings made on an exchange. A “listing” would be the same as an initial public offering in the United States where the offering is accompanied by a new listing on a regulated stock exchange. In contrast, “public offers” are first-time offers made to the public, but are not immediately accompanied by a stock exchange listing. In Europe, issuers that want to make non-listed public offers must meet the requirements set out by the POD, and issuers that seek also to make a listing must meet the requirements set out by the LPD and POD.

22 See, e.g., Scott-Quinn, supra note 18, at 123; BENN STEIL, REGIONAL FINANCIAL MARKET INTEGRATION (1998).

23 Entity mobility in the European Union is less than the sort of entity mobility Romano and Choi-Guzman propose because issuers are not generally free to choose the legal regime of a second, non-home member state and then use that legal regime to raise funds in a third member state or to raise capital within their home jurisdiction.
The notion that the legal structure of the European Union might present a venue of regulatory competition has been recognized for some time now.\textsuperscript{24} In fact, the principle of mutual recognition has been associated with regulatory competition since its inception. Mutual recognition, as envisioned by the European Commission in its 1985 White Paper\textsuperscript{25} and applied in the LPD and POD, was meant to generate a “competition among rules” and force regulatory harmonization among the member states.\textsuperscript{26} Several commentators predicted in the early 1990s that the passport concept could force all member states to lower regulatory protections to the minimum standards of the directives (a race to the bottom)\textsuperscript{27} while others speculated that member states might converge on some other standard (potentially a race to the top).\textsuperscript{28} Within the U.S. debate over regulatory competition in the field of securities regulation, Europe has been expressly cited as an important case in point. Romano and Choi-Guzman offer the European Union as a successful illustration of regulatory competition in this field.\textsuperscript{29} In particular, they cite reports that European issuers have tended to comply voluntarily with U.K. securities laws, which are considered to be the most stringent in the European Union, rather than the minimal


\textsuperscript{25} Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final.


\textsuperscript{27} See, e.g., Charny, supra note 24. See also Steinberg & Michaels, supra note 18, at 262-63.

\textsuperscript{28} See, e.g., Warren, supra note 21, at 23 (an early and optimistic assessment regarding the prospects for harmonization of European law).

\textsuperscript{29} See Choi & Guzman, supra note 3, at 924 & n.74 (“European firms often choose to comply with the disclosure requirements of British securities laws even though it would be permissible to comply with the weaker requirements of their home countries.”). See Romano, supra note 3, at 2374 & n.41 (“In addition, European firms listing in London typically comply with the higher United Kingdom disclosure requirements rather than with the lower ones of their home countries, although they need not comply with U.K. rules under the European Community disclosure directives.”).
requirements of other member states.  

According to proponents of issuer choice, the apparent preference of European issuers for U.K. law is evidence that regulatory competition is effecting a race to the top in the European securities markets.

One of the goals of our research was to explore the state of regulatory competition in European securities markets. In particular, we were interested in seeing whether we could verify the claim that European issuers were migrating to London in order to obtain the benefits of U.K. legal requirements. More broadly, we wanted to get a more current perspective on European capital-raising practices, which have evolved considerably since the mid-1990s and earlier, when the evidence upon which proponents of issuer choice base their claims about Europe was originally produced.


Romano and Choi-Guzman also cite the empirical study by Meek & Gray to support their argument that issuers will voluntarily exceed required disclosure requirements to attract investors. See Gary K. Meek & Sidney Gray, Globalization of Stock Markets and Foreign Listing Requirements: Voluntary Disclosures by Continental European Companies Listed on the London Stock Exchange, 20 J. Int’l Bus. Stud. 315 (1989) (noting that issuers voluntarily exceed the disclosure requirements of the London Stock Exchange because of the competitive demands of the international capital markets). Additional studies about large issuers by the same authors (not cited by Romano and Choi-Guzman) also offer further evidence that issuers already voluntarily disclose more information than legally required in order to increase stock market valuation and to respond to market pressure. See Gary K. Meek, Clare B. Roberts & Sidney J. Gray, Factors Influencing Voluntary Annual Report Disclosures by U.S., U.K. and Continental European Multinational Corporations, 26 J. Int’l Bus. Stud. 555 (1995) (concluding that voluntary disclosure is positively dependent on size, geographic location, whether the company is internationally listed, and whether the information is non-financial in nature); Sidney J. Gray, Gary K. Meek & Clare B. Roberts, International Capital Market Pressures and Voluntary Annual Report Disclosures by U.S. and U.K. Multinationals, 6 J. Int’l Fin. Mgmt & Acct. 43 (1995) (observing that corporations that raise capital internationally face additional pressures for the disclosure of information).

31 See supra note 29.
Another dimension of interest in European capital markets is their current relationship to U.S. capital markets. In describing their proposals for reforming securities regulation in the United States, proponents of issuer choice proceed on the assumptions that foreign issuers seeking access to U.S. capital markets have no alternative but to comply with U.S. legal requirements governing public offerings in the United States and that the SEC’s current system of regulation constitutes an extremely expensive (if not insuperable) barrier, inhibiting large numbers of foreign issuers from accessing U.S. capital markets. Indeed, one of the principal benefits of regulatory competition, according to its proponents, is that regulatory competition would allow these foreign issuers a low-cost way to reach currently isolated U.S. investors and thereby to generate considerable economic benefits.\[32\]

A second reason we were interested in investigating European capital markets was our sense that this aspect of the case for regulatory competition in international securities markets was incomplete in important respects. The U.S. system of securities regulation affords European corporations and other foreign issuers a number of exemptions from full compliance with U.S. securities regulation.\[33\] By structuring transactions to comport with these exemptions, European issuers have ways of accessing U.S. capital markets without bearing the full burden of U.S.

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32 See Choi & Guzman, supra note 3, at 922 (“[Regulatory competition] increases the range of investment choices available to investors in any one country.”); Romano, supra note 3, at 2362-63 (“[A]doption of [regulatory competition] would facilitate foreign firms’ access to capital [in the United States], as they would be able to issue securities in the United States without complying with U.S. disclosure and accounting rules that differ substantially from their home rules, a requirement that has been a significant deterrent to listings.”) (citing Franklin R. Edwards, SEC Requirements for Trading of Foreign Securities on U.S. Exchanges, in MODERNIZING U.S. SECURITIES REGULATION: ECONOMIC AND LEGAL PERSPECTIVES 57, 57-58 (Kenneth Lehn & Robert W. Kamphuis, Jr. eds., 1992)).

33 For a review of a number of the ways in which foreign issuers are treated more liberally than domestic U.S. issuers, see Daniel A. Braverman, U.S. Legal Considerations Affecting Global Offerings in Foreign Companies, 17 NW. J. INT’L L. & BUS. 30 (1996); Steinberg & Michaels, supra note 18, at 246-51. See also Palmiter, supra note 3, at 44-54.
securities laws. Put otherwise, the current U.S. securities regulation regime already embraces some of the elements of issuer choice in the sense that foreign issuers can already “opt out” of certain elements of U.S. securities law. Accordingly, a careful analysis of European capital markets may tell us a good deal about how regulatory competition might work in this sphere and also what additional benefits might be realized if the United States were to move to a full-fledged system of regulatory competition of the sort that proponents of issuer choice advocate.

Because subsequent sections of this Article will explore the special rules governing foreign issuers under U.S. securities law, a brief introduction to the subject is in order. The rules described here generally apply to “foreign private issuers.” These foreign corporations are entitled to special treatment in three basic areas.

- **Special Accommodations for Foreign Private Issuers Accessing Public U.S. Markets**: The U.S. system of securities regulation is most stringent for companies that make public offerings within the United States or otherwise access U.S. public markets, such as the New York Stock Exchange or the Nasdaq. These rules generally apply to foreign private issuers that access public U.S. markets, but in numerous respects foreign private issuers are held to more lenient standards. Among other things, foreign private issuers do not have to comply with federal proxy rules and are also excused from making the quarterly filings of financial data required for domestic issuers. Even the annual reports foreign

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35 Rule 3a12-3, 17 C.F.R. §240.3a12-3
private issuers must file are on a special form (Form 20-F) which is somewhat less elaborate than those required of domestic companies. In addition, foreign private issuers are excused from the reporting and short-swing profit rules of Section 16 of the Securities and Exchange Act of 1934 (1934 Act). The SEC has also recently expanded and codified a number of exemptions for foreign private issuers engaged in cross-border tender offers, business combinations and rights offerings. Finally, the SEC has developed a number of informal procedures, such as special accommodations for the scheduling needs of foreign issuers and policies allowing for the confidential treatment of filings that would normally be public for domestic companies. All of these accommodations reduce, to some degree, the burdens on foreign private issuers seeking access to U.S. public markets. In some respects, these accommodations make it easier for foreign issuers to access the U.S. public markets than for domestic issuers.

- **The Rule 144A Market:** SEC regulations afford even more favored treatment of foreign issuers seeking access to private U.S. capital markets. The key to this difference is Rule 144A, which allows foreign private issuers to sell securities to what are known as Qualified Institutional Buyers (QIBs) without having to comply with the disclosure and

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36 See International Disclosure Standards, supra note 34.
37 Rule 3a12-3, supra note 35.
liability rules generally applicable to companies accessing the public markets. Under Rule 144A, QIBs are defined to include institutional investors with at least $100 million of assets under their management. Since its adoption in 1990, Rule 144A has become a major path for foreign private issuers seeking to sell common stock in the United States. By structuring an offering to comply with Rule 144A, foreign issuers can avoid the mandatory disclosure rules that govern foreign issuers’ access to U.S. public capital markets as well as the stringent liability rules governing public offerings in the United States. Rule 144A transactions are subject, however, to the more lenient but still substantial liability regime of Rule 10b-5. On its face, Rule 144A is also available to domestic U.S. companies, but with one critical distinction. Rule 144A is not available for any class of security that is traded on U.S. public markets, such as the New York Stock Exchange or the Nasdaq. Thus, public U.S. companies, such as General Electric or Microsoft, cannot use Rule 144A to sell common stock. Large foreign private issuers—even those whose shares are already listed on major foreign exchanges such as the London Stock Exchange or the Paris Bourse—can and do use Rule 144A to sell common stock into the United States, however, provided they do not have a dual listing on the New York Stock Exchange or another public trading market located in the United States. Accordingly, foreign private issuers in Europe and elsewhere have a choice when they are thinking about selling common stock into the United States: they can either make a public offering (facing mandatory disclosure rules and stringent liability regimes) or they

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41 Under Rule 144A(d)(4), purchasers have the right to request certain minimal information about the issuer. While this requirement might have evolved into a low-level on-going disclosure obligation for issuers selling securities under Rule 144A, the requirement has not been interpreted in that way and has not been an important element of Rule 144A practice. See GREENE ET AL., supra note 39.
can sell through a Rule 144A offering (subjecting themselves only to the residual liability requirements of Rule 10b-5). For issuers taking the latter path, the most important mandatory disclosure requirements they typically face will come from the securities laws of their home jurisdiction. In other words, if they choose to access the U.S. capital markets within the requirements of Rule 144A, they will have opted out of the most onerous elements of U.S. securities regulation.

- **Safe Harbors of Regulation S**: Foreign private issuers are also entitled to special rules when it comes to selling securities outside of the United States. With Regulation S, the SEC has created a series of “safe harbors,” defining the terms under which issuers may sell securities outside of the United States and remain exempt from the onerous disclosure and liability rules governing public offerings in the United States. Unless registered with the SEC under the Securities Act of 1933, securities sold in public offerings in Europe are usually structured to comply with Regulation S safe harbors. The requirements of Regulation S are extraordinarily complex, but for our purposes what is relevant is that the regulation imposes substantially fewer restrictions on foreign issuers raising equity in offshore markets than it imposes on U.S. domestic corporations engaged in comparable transactions. Under Regulation S, the vast majority of European issuers raising equity in European capital markets would be considered to be engaging in “Category 1” offerings. The burdens imposed on Category 1 offerings are relatively

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42 See 17 C.F.R. § 230.901-.905 (2000).
43 For an overview of Regulation S and its usefulness to foreign issuers, see MARC I. STEINBERG, INTERNATIONAL SECURITIES LAW 181-202 (1999).
44 A foreign corporation is considered to be a Category 1 issuer as long as there will not be a “substantial U.S. market interest” in the type of security being offered. For equity securities, a “substantial U.S. market interest”
light.\textsuperscript{45} Category 1 issuers need only structure their sales as “offshore transactions”\textsuperscript{46} and refrain from “directed selling efforts”\textsuperscript{47} into the United States to qualify for a Regulation S safe-harbor. Most significantly, resales of securities sold by Category 1 issuers are not subject to substantial resale restrictions under Regulation S, provided the resales are made on a major foreign securities exchange.\textsuperscript{48} In numerous respects, Regulation S imposes more onerous restrictions on U.S. domestic issuers seeking to raise capital in offshore markets.\textsuperscript{49} In particular, when a U.S. issuer raises equity in an offshore transaction, Regulation S imposes substantial restrictions on the resale of the shares so as to prevent repurchase by retail investors from the United States.\textsuperscript{50}

The interaction between these special accommodations for foreign private issuers and the debate over regulatory competition was a second focus of our investigation. To begin with, we were interested in getting a clearer understanding of the extent to which European issuers were

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\textsuperscript{45} In the next installment of this Article, we will discuss these requirements (and associated rules) in more detail.

\textsuperscript{46} “An offer or sale is an ‘Offshore Transaction’ if the offer is made outside the United States and either (i) the buyer (who may be a U.S. person) is (or is reasonably believed by the seller) to be outside the United States when the order is originated, or (ii) the transaction is executed on the physical trading floor of a foreign securities exchange.” \textit{See} Greene \textit{et al.}, \textit{supra} note 39 (interpreting Rule 902(h), 17 C.F.R. § 230.902(h) (1999)).

\textsuperscript{47} “Directed selling efforts” is defined to mean “any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S.” Rule 902(c), 17 C.F.R. § 230.902(c) (2000). Although this language could be read broadly, over time the SEC has adopted a relatively narrow interpretation that allows various sorts of offshore publicity to leak into the United States. \textit{See} Greene \textit{et al.}, \textit{supra} note 39, at 5-9 to -13. \textit{See generally} Offshore Offers and Sales, Securities Act Release No. 7,505, Exchange Act Release No. 39,668, 63 Fed. Reg. 9,631 (1998) (to be codified at scattered sections of 17 C.F.R.) [hereinafter Offshore Offers and Sales].

\textsuperscript{48} \textit{See} Rule 904, 17 C.F.R. § 230.904 (2000).


\textsuperscript{50} \textit{See} Rule 905, \textit{supra} note 49; Offshore Offers and Sales, \textit{supra} note 47.
making use of these regulatory accommodations. In particular, we wanted to get a better idea whether Rule 144A and Regulation S provided European issuers with a viable alternative to direct access to U.S. capital markets. This issue is critical to the debate over regulatory competition because if existing regulatory accommodations do offer a viable alternative to direct foreign access to public U.S. markets then the benefits of moving to a more complete system of regulatory competition are less pronounced than previously assumed. Moreover, if the critics of

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51 Prior academic papers have confirmed, to a limited degree, the inverse correlation between the stringency of a nation’s system of securities regulation and the likelihood that foreign issuers will list securities on that nation’s leading exchanges. See Shahrokh M. Saudagaran & Gary C. Biddle, Foreign Listing Location: A Study of MNCs and Stock Exchanges in Eight Countries, 26 J. Int’l Bus. Stud. 319 (1995); James L. Cochrane, Are U.S. Regulatory Requirements for Foreign Firms Appropriate?, 17 Fordham Int’l L.J. S58, S61 (1994) (noting that there are “2,000 foreign companies eligible to go on [NYSE’s] list . . . were it not for SEC regulations”) (cited in Romano, supra note 3, at n.291). This line of research provides a degree of empirical support for the view that U.S. regulation does impair foreign issuer access to U.S. capital markets, an important premise of Romano and Choi-Guzman’s writings. But these studies are contradicted by research showing that between 1986 and 1997, most cross-listing activity by European companies has been directed at the United States. See Marco Pagano et al., The Geography of Equity Listing: Why Do Companies List Abroad (CSEF Working Paper 28, 2000), available at <http://www.dise.unisa.it/WP/wp28.pdf>.

There are additional reasons to question whether the studies cited by Romano and Choi-Guzman are probative with respect to the current state of securities regulation in international markets. Even the most recent of these studies are based on data compiled in the early 1990s. There are a variety of reasons to suspect that global capital markets have evolved considerably since these studies were completed.

For one thing, the SEC has, in various respects, relaxed the obligation of foreign issuers with securities sold into or traded in the United States. As discussed in the text above, a number of reforms have made it easier for foreign issuers to access public U.S. capital markets. In addition, there has been a more general relaxation of U.S. securities regulation over the past decade—the 1995 Private Securities Litigation Reform Act, the judicial narrowing of Rule 10b-5 liability, the shortening of Rule 144 resale periods and the expansion for various offering exemptions (e.g., Regulations A and D). Both of these developments might have made U.S. markets more hospitable to foreign issuers. So, the burdens imposed on foreign issuers in public U.S. markets are less onerous today than they were when these studies were conducted.

Second, foreign issuers located in London and other European financial centers have much better access to U.S. legal and other advisers than they did at the beginning of the 1990s. Numerous U.S. law firms now have offices in major European financial centers, and many European firms now have strong U.S. legal capabilities. As a result, the costs of complying with U.S. regulatory standards may have fallen considerably over the past decade.

Third, a number of new, quasi-public mechanisms for distributing European securities into the United States have developed in the past decade. The most notable examples are Rule 144A and Regulation S. As a result of these reforms, foreign issuers have viable alternatives to the traditional public offering for accessing U.S. capital markets. Prior studies which did not consider these alternative capital markets may overstate the inhibiting effect of U.S. securities laws.

Fourth, U.S. investors (and particularly institutional investors) now have many more mechanisms for purchasing foreign securities outside of the United States. As a result, the fact that a foreign issuer does not directly enter the U.S. capital market does not mean that U.S. investors are denied access to these investments. As the barrier imposed by U.S. regulations may be less extensive than previously understood, benefits to be derived from their removal may also be less substantial.
regulatory competition are correct that a complete system of regulatory competition presents a number of potential problems,\(^{52}\) then the overall case for a full-blown issuer choice for foreign issuers is diminished. On the other hand, if the current system of securities regulation does impose substantial barriers to foreign private issuers seeking access to U.S. capital markets, then the case for issuer choice for foreign issuers is markedly stronger.

A second topic of interest in this area is getting a better sense of the perspective of market participants on the role of the SEC. As mentioned above, one of the premises of proponents of issuer choice is that national regulators, such as the SEC, are, if not malignant, at least moribund institutions. One of the goals of our research was to find out whether professional advisers who have day-to-day responsibility for helping foreign issuers enter U.S. capital markets share this perception. After all, one of the claimed virtues of issuer choice is the incentives it imposes on governmental authorities, but this virtue is important only if adequate incentives are lacking today.\(^{53}\)

**OVERVIEW OF INTERVIEW METHODOLOGY**

In this part, we present a brief overview of our interview methodology. The results of the interviews and our analysis of those results follow.

During a three-week period in July and an additional ten days in November and December 1999, we conducted interviews with fifty professionals in London, Brussels, Paris and Frankfurt. The average length of each interview was between an hour and an hour-and-a-half.

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\(^{52}\) See *supra* notes 13-15 and accompanying text.

\(^{53}\) Other writers--including Bevis Longstreth, *A Look at the SEC’s Adaption to Global Market Pressures*, 33 COLUM. J. TRANSNAT’L L. 319 (1995) and Palmiter, *supra* note 3, at 44-54--have asserted that, in the international context at least, the SEC has responded to market pressures in various ways, effectively providing a more liberal regulatory environment for foreign issuers seeking access to U.S. capital markets.
The largest group of interviewees (28) were lawyers practicing in Europe (mostly in London), seventeen of these were practicing U.S. law, seven were practicing English law, and the remaining four were practicing law of other European jurisdictions. The second largest group (13) consisted of regulatory officials, and the balance of the interviewees were investment bankers (9). Tables 1 and 2 summarize the interviews by organization and profession.

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In selecting our list of interviewees, we attempted to reach a range of individuals who would have direct personal knowledge of European capital markets and trans-Atlantic securities offerings. In terms of law firm interviewees, we were able to interview representatives of many
of the largest law firms with offices in London and Frankfurt.\footnote{Our regulatory contacts covered most of the principal regulatory agencies in the relevant jurisdictions, and our investment banking interviews included meetings with representatives from approximately one-half of the major firms doing business in London,\footnote{measured by the volume of capital raised for issuers over the past few years.}

Our interview technique varied based on the identity of the interviewee. Our approach

\footnote{In approaching a number of prospective interviewees, a disproportionate number of our initial contacts were alumni of Harvard Law School. We used these initial contacts to identify a pool of potential interviewees. Our actual interviewees, however, received their legal training at a much wider range of U.S. law schools.}

According to one independent survey of the top law firms in Europe, the firms we visited represented eight of the ten leading advisers to issuers by deal value, eight of the thirteen leading advisers to issuers by deal number, nine out of ten of the leading advisers to issuers by deal value, and nine of the ten leading advisers to lead underwriters by deal number. See Rob Mannix, European Equity Clients Favour One-Stop Shops, INT’L FIN. L. REV., Oct. 1999, at 10.

In the year prior to October 1999, these law firms acted as advisers to issuers in 66 equity deals worth $70.78 billion, of which 21 deals were European offerings, 39 deals were Rule 144A offerings and 6 deals were U.S. registered offerings. In addition, the law firms acted as advisers to underwriters in 110 equity deals worth $85.98 billion, of which 40 deals were European offerings, 57 deals were Rule 144A offerings and 13 deals were U.S. registered offerings. See id.

A striking feature of the London legal market is the growing presence of U.S. lawyers practicing in this financial center. The number of lawyers employed at the seven branches of U.S. law firms we interviewed ranged from ten to eighty lawyers, and accounted for between 3.25 and 10.67 percent of the firms’ total number of lawyers employed worldwide. Many interviewees at U.S. law firms commented upon the growth of their London offices. A few of the U.S. law firm branches employed only U.S.-trained lawyers, but others had a number of foreign-educated lawyers in their workforce as well. At one U.S. law firm we interviewed, half of the lawyers were foreign-trained. (A number of the firms mentioned that they were increasingly relying on European-educated lawyers with LL.M. degrees from U.S. law schools and U.S. bar admissions to handle U.S. legal matters. In our statistics, we counted any lawyer with a U.S. bar admission as a U.S. lawyer.)

While U.S. law firms have been increasing their presence in London through the establishment and expansion of local branches, U.K. law firms have responded by hiring an increasing number of U.S. lawyers to satisfy their clients’ needs, particularly in accessing U.S. capital markets. Several of the U.K. law firms we interviewed employed in the vicinity of 40 U.S. lawyers, which accounted for about five percent of the firms’ total worldwide workforce of lawyers. In other words, the number of U.S. lawyers practicing at several of the U.K. law firms we interviewed was equal to or greater than the number of U.S. lawyers practicing at the London branches of U.S. law firms. In several instances, the U.K. firms began their U.S. legal practice by hiring away several partners or senior associates from the London branch of a U.S. law firm, but increasingly these firms hire new associates directly from U.S. law schools, J.D.’s as well as LL.M.’s.

Although interesting in its own right, the rapid expansion in the number of U.S. law firms practicing in London is also relevant to the issue of regulatory competition we proposed to study. To the extent that one of the barriers foreign issuers face in entering U.S. capital markets is a lack of familiarity with U.S. legal requirements, a legal market with substantial expertise in this area has developed in London over the past fifteen years. Furthermore, the number of U.S. lawyers is increasing in Frankfurt, Paris and Brussels. As discussed in the next installment of this Article, this growing expertise has helped European issuers enter both public and private capital markets in the United States.
was most systematic in our interviews of lawyers. We developed two separate questionnaires. One was used for lawyers who specialize in the representation of European issuers accessing U.S. capital markets. The second was used for lawyers who specialize in the capital-raising activities within the European financial markets. A sample questionnaire of the type used for interviews with lawyers who represented foreign issuers seeking access to U.S. capital markets is attached as Appendix A.56

All interviews were conducted in person. Several days to a week prior to each interview, we sent each prospective interviewee a letter outlining our general interests,57 but the interviewees were not informed of the precise questions until the time of the interview. During each interview with lawyers, one of the authors served as the primary interviewer, and both authors took notes of the interviewee’s responses. After each session, we wrote up a summary of our notes and, where our recollections of particular responses differed, we consulted audio tapes on which we recorded most of our interviews with lawyers. Our interviews with regulatory

56 Roberta Romano and Merritt Fox offered extremely helpful suggestions regarding preliminary versions of these questionnaires.

57 These introductory letters included text of this sort:

In anticipation of our meetings, we thought our interviewees might find it helpful to know that we plan to begin each session with a few open-ended questions to be followed by a series of more specific follow-up inquiries. For those attorneys with whom we will be discussing the experience of European issuers seeking access to U.S. capital markets, we will begin the interview with the following question:

If one of your corporate clients were considering entry into U.S. capital markets for the first time and asked your advice on how to proceed, what options would you recommend that they consider and how would you characterize the advantages and disadvantages of each of those options?

For those with whom we’ll be discussing capital raising practices in the European community, our opening questions will be:

Under E.U. directives, the laws governing securities regulation in member states (in particular disclosure standards and listing requirements) are supposed to be harmonized. In your experience, how successful has the E.U. been in achieving harmonization of these standards and to what extent do variation in standards persist across member states?

In your experience, how have changes in European financial markets over the past decade affected the London Stock Exchange and its regulatory functions?

If one of your clients were considering raising capital in Europe for the first time and was trying to evaluate the legal implications of the different choices, what advice would you give that client?
officials and investment bankers were similar in structure--one of us served as primary interviewer, both of us took notes, and if possible we recorded the session--but the interviews did not follow a precise list of questions. We followed this less systematic approach because the expertise and professional roles of these individuals varied considerably from interviewee to interviewee. As a result, confining our interviewees to a prearranged list of questions did not seem a productive use of time. Only a few of the regulatory officials and investment bankers we interviewed consented to having their interviews recorded.

All of our interviews were conducted under the same agreed upon ground rules. We promised each interviewee that we would identify neither the individual nor the organization at which the individual was employed. We did, however, indicate that the interviewee’s responses would be incorporated into one or more academic articles and might be utilized in summary statistics or as quotations or anecdotes attributed in a generic form (e.g., “according to a senior U.S. securities lawyer at a major U.K. law firm”). To maintain the anonymity of our interviewees we created a coding system to identify interviewees.\footnote{Our interviewee code consisted of two elements:}


The second element indicated the order of the interview in our sequences of interviews. Interviews 1 through 14 took place in July 1999; interviews 15 through 28 took place in November and December 1999. In those instances when we interviewed more than one person from an organization, each individual interviewee was given a separate letter designation, in alphabetical order starting with “a” to reflect the order in which the individual interviews occurred.

Thus, Interviewee Lus-14b was a lawyer from a U.K. law firm with expertise in U.S. law. The firm was the fourteenth organization we interviewed and the individual was the second person we interviewed at that firm.
code also reveals the nationality of the interviewee’s firm and also the interviewee’s area of expertise (U.S., U.K. or European law).

Our interview process represents something of a hybrid technique. In prior empirical studies of international securities markets, some legal academics have constructed written surveys consisting of a relatively small number of focused questions and then distributed those surveys to a large number of potential respondents. Others have presented detailed case studies reporting on the experience of a single issuer or practitioner. Our approach essentially combines these two methodologies. At least with respect to our lawyer interviews, we relied on a detailed questionnaire, including some focused questions designed to elicit quantifiable responses. Rather than relying on a broadly-distributed survey, we concentrated our efforts on a more limited number of interviewees, but targeted those interviewees who we felt had the most amount of experience in working on cross-border transactions. We then attempted to use our interviews to obtain both specific answers to focused questions and also more textured responses to open-ended inquiries. As a result we obtained a combination of quantitative data and more qualitative information. Albeit time consuming, this hybrid technique is an improvement on past empirical studies as it is more receptive to greater depth and breadth of responses.


61 One of the problems of broadly-distributed surveys is interpreting the relatively low response rates these surveys usually obtain. See, e.g., Fanto & Karmel, supra note 59, at 61-62 (reporting results of 75 fifteen-question survey responses out of a group of 425 companies initially contacted). We ultimately obtained interviews with representatives of all but one of the firms we initially approached, and the firm that did not respond had a limited market presence.
CAPITAL RAISING PRACTICES WITHIN THE EUROPEAN UNION

In this part, we present the results of our interviews concerning the capital raising practices of European issuers within the legal framework of the European Union. As explained above, our principal interest in European capital raising practices was to determine the nature and extent of regulatory competition within the European Union. This line of inquiry was the focus of our questionnaire for lawyers with expertise in European capital markets and was also a topic that came up in the course of several of our interviews with lawyers who specialize in U.S. capital markets. On a variety of dimensions, our interviewee responses with respect to this issue were noteworthy. First of all, our interviewees uniformly agreed that the most distinctive feature of E.U. financial regulation--the mutual recognition provision present in the LPD and POD (whereby an issuer can comply with the disclosure requirements of the issuer’s home country and then use that disclosure document to list securities on an exchange or sell securities to the general public in other member states)\(^{62}\)--is rarely used by European issuers to make offerings in European capital markets. Thus, the context in which we had originally expected to study issuer choice and regulatory competition in Europe proved largely undeveloped as of 1999. Notwithstanding the low utilization of mutual recognition in the field, our interviewee responses offered other potentially important insights for the debate over regulatory competition in international securities markets. We summarize those insights below and present several tentative conclusions and interpretations.

\(^{62}\) See supra notes 18-31 and accompanying text.
MUTUAL RECOGNITION UNDER THE LISTING PARTICULARS DIRECTIVE AND REGULATORY COMPETITION IN LISTING STANDARDS

Numerous interviewees noted that relatively few European issuers take advantage of their ability under the LPD to obtain a second (or dual) listing on an exchange in another member state.\textsuperscript{63} Although we heard some criticisms of technical aspects of passporting under the LDP,\textsuperscript{64} our interviewees reported that the principal explanation for the lack of passporting under the LDP comes from changes in market structure since 1980 when the directive was approved by the Council of Ministers. These changes have reduced the need for European issuers to obtain secondary listings within the European Union and thus reduced the significance of the LDP.

In the 1980s, it was assumed that, if, for example, a Spanish company wanted to encourage British investors to purchase the Spanish company’s shares on the secondary market, then the company would have to obtain a listing on the London Stock Exchange (LSE). Without a local listing in the United Kingdom, a British investor had no easy way to purchase the shares of the Spanish company. The LPD was designed to solve this problem by granting the Spanish company a passport for relatively easy dual listing. In theory, the Spanish company could “add” a listing in London on the strength of its approval by the Spanish securities authorities. In the course of the 1990s, the structure of European trading markets changed. One of the engines of

\textsuperscript{63} See Interviewees USE-1e; L-3b; Eur-4a; IB-9b; L-14a (characterizing multiple listings in Europe as window dressing). See also Interviewees USE-1e (only the largest firms bother with dual listings any more); Reg-24a. Regulators familiar with the major stock exchanges estimated that only 5 to 10 issuers a year seek mutual recognition access. See Interviewee Reg-17a.

\textsuperscript{64} See, e.g., Interviewees L-2b (noting problems resulting from differences in the continuous disclosure obligations of different exchanges); Eur-4a (certain markets, such as the German Neuer Markt, are reportedly not eligible for passporting under the LPD); IB-9b. The Forum of European Securities Commissioners (FESCO) takes the view that technical barriers are the main reason for the unpopularity of the passport and has recently issued a consultation paper with proposals to standardize the offering documents to make it easier for issuers to use the passport. See FESCO, A “European Passport” for Issuers: A Report for the EU Commission, FESCO/00-1386 (Dec. 20, 2000) [hereinafter FESCO, European Passport].
this change was another E.U. directive--the Investment Services Directive (ISD)--which granted European securities firms the ability to provide investment services in other member state markets without the need for host state authorization. In addition, the directive permitted European exchanges to extend remote membership and access privileges so that London brokerage houses can become members of the Madrid Stock Exchange, the Paris Bourse or any other regulated market. As a result of this change in regulatory structure, British investors now have the ability to purchase the Spanish company’s shares in Madrid through their local investment firm, obviating the need for the company to list on the LSE or other London exchanges. This cross-border linkage between secondary securities markets between member states, apparently, has reduced greatly the need for European issuers to obtain dual listings within the region. Instead, the effect of the ISD has been to encourage greater competition between stock exchanges, resulting in the flurry of recently announced joint ventures, mergers and privatizations of the major European stock exchanges.


66 See, e.g., Interviewees USe-1d; USe-1e; Reg-5c; L-15a (characterizing dual listing under the LPD as a solution to a problem that no longer exists). At least one of our interviewees noted that one victim of ISD has been the LSE’s SEAQ International (SEAQ-I), a dealer market designed for trading in the securities of continental issuers. Remote access to continental markets--coupled with the improvement of those markets in the past decade--has greatly reduced the trading volume of SEAQ-I. See Interviewee L-2b. See also STEIL, supra note 22, at 8-10 (identifying one major reason for SEAQ-I’s decline to be the introduction of electronic continuous auction systems in Frankfurt and Paris).

67 See, e.g., Interviewee L-2b (London investors are happy to make purchases on other exchanges). In the near future, with the potential merger of many of Europe’s leading securities markets, cross-border linkages will likely improve, further diminishing the need for dual listings on European stock exchanges. Another factor reducing the importance of dual listing in Europe, according to our interviewees, is the relatively large amount of off-exchange trading in Europe. See, e.g., Interviewees L-2b; L-2c; Reg-5c (mentioning Germany as a market where off-exchange trading is especially common).

68 One of the earliest stock exchanges to seize upon the opportunity of pan-European trading made possible by the ISD was EASDAQ. See Dana T. Ackerly II et al., Easdaq--The European Stock Market for the Next Hundred Years? 12 J. INT’L BANKING L. 86 (1997). Since then, Easdaq (now Nasdaq Europe) has been joined by an alphabet soup of competing exchanges, such as Jiway (Morgan Stanley and OM Gruppen), Euronext (Belgian, Dutch, and
Thus, the primary effect of the mutual recognition passport and the implementation of ISD has not been to generate more multiple listings in Europe, but rather to encourage competition for issuers’ first and, most likely, only share listings. One question we were interested in answering is whether this competition manifested itself in the form of regulatory competition in listing standards. A European issuer choosing to list on an exchange for the first time must choose in which market to list. In theory, the issuer could choose either a local exchange in its home market or another exchange, such as the LSE or Paris Bourse, and the presence of this choice could stimulate regulatory competition in the listing standards of various exchanges.

When asked whether European exchanges were engaging in this sort of competition, however, most of our interviewees responded in the negative. A few interviewees speculated that the relatively lax oversight of local authorities helped the Luxembourg Exchange

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69 The number of listings on European exchanges by companies from other member states decreased between 1991 and 1997. See Pagano et al., supra note 51, at 17, 42. This period coincides with the approval of the ISD in 1993.

70 See Interviewee US-10c (where local exchange not available, European issuers will need to list on LSE or other major exchanges). If listing or offering in its home state, the issuer must obtain home state approval first. Both the LPD and POD define the home state as the place where the issuer’s registered office is situated. This requirement does not necessarily mean that issuers are tied to their home state. The mutual recognition provision in the LPD states that, if the issuer’s registered office is not located in one of the member states in which it is making its initial offering, the issuer chooses the state whose regulations the issuer must comply with and get approval from. This provision implies that the issuer can “pick-and-choose” the regulatory regime that most benefits it and then expect mutual recognition privileges from all other member states. The only limitation being that it can not later use mutual recognition to sell securities into its home state. See Interviewee Reg-22a. In reality, very few issuers apparently choose to list outside of their home country given that issuers often find the warmest reception for their securities in their home markets. See Interviewees Le-2c; Le-3b.

71 See, e.g., Interviewees US-e-1d; Le-14a. This does not mean that the major European stock exchanges do not attempt to differentiate themselves from each other. Many of the major exchanges produce substantial amounts of marketing material extolling the advantages of their markets. See Interviewee Le-15a. Often the exchanges advertise their higher liquidity and international character (e.g., LSE) or the superiority of their proprietary trading system (e.g., Paris and Frankfurt). See Interviewee Reg-20a. One interviewee, who was an official of a major stock exchange, also indicated that it was common for the major stock exchanges to participate in beauty contests to convince chief executives to list on their exchange. See Interviewee Reg-17a. At least one of our interviewees characterized the potential for a merger between the LSE and other European exchanges as a positive result of competitive pressures among European stock markets. See Interviewee US-e-1d.
maintain its share of bond listings (at the expense of London).\textsuperscript{72} We heard hardly any comparable comments about the oversight of other equity markets, however.\textsuperscript{73} In other words, our surveys revealed little, if any, evidence of the sort of opportunistic weakening of regulatory standards associated with a race to the bottom.

Alternatively, responses about listing standards could be considered consistent with a race to the top within European equity markets. A number of our interviewees mentioned the relatively high disclosure standards established in Germany’s Neuer Markt--a trading market intended to attract high technology companies from Germany and elsewhere in Europe.\textsuperscript{74} Several interviewees reported that the Neuer Markt disclosure standards were intentionally modeled on U.S. rules and designed to be more stringent than the requirements of traditional European exchanges.\textsuperscript{75} Respondents further indicated that, at least in 1999, the Neuer Markt was attracting considerable interest from both investors and issuers, including several U.S. high-technology companies that had chosen to do initial listings on the Neuer Markt as opposed to U.S. trading markets. While our interviewees were hesitant to characterize the emergence of the Neuer Markt as an illustration of regulatory competition,\textsuperscript{76} the description they gave of the legal rules governing this new market and the response of market participants could be consistent with the sort of “race to the top” that Romano and Choi-Guzman anticipate would occur were the United States to adopt their proposals.

\textsuperscript{72} See Interviewees USe-1e; IB-12a; Le-14a.

\textsuperscript{73} Some fudging is in order on this point because one interviewee suggested that the had been under some competitive pressure to relax its requirements for quarterly reports in response to more lenient rules for issuers listed on other European markets. See Interviewee USe-1d. As noted above, other academic commentators have reported competitive pressures on the LSE to relax standards. See supra note 30.

\textsuperscript{74} See Interviewees USe-1e; Eur-4a.

\textsuperscript{75} See Interviewee USe-1e.

\textsuperscript{76} In other words, when asked if they could think of instances in which national securities regulators altered their system of securities regulation in order to gain market share, most respondents answered in the negative. Later in the interview, however, they would also describe the Neuer Markt in the manner described above.
The mutual recognition provision of the POD also has generated little interest among European issuers raising equity.\(^7^7\) A few of our interviewees mentioned the 1999 Deutsche Telekom offering as an example of substantial recent transactions in which a major European issuer did invoke the POD’s mutual recognition provision for a pan-European offering,\(^8^8\) but there was strong agreement among our interviewees that few European issuers were taking advantage of their authority under the POD to employ home country disclosure requirements to raise capital from public investors in other European countries.\(^7^9\) Our interviewees offered a variety of explanations why mutual recognition under the POD was not being utilized more frequently.

First, a number of technical problems inhibit the use of the mutual recognition passport. While disclosure documents can be used across borders in Europe, translations of critical provisions are often required. In addition, issuers have to prepare supplemental information about local taxation rules, which make the passport concept more burdensome than the E.U. directives might suggest.\(^8^0\)

\(^7^7\) One interviewee indicated that passporting was slightly more common under the POD than under the LPD. See Interviewee USe-1e.


\(^7^9\) See Interviewees US-e-1d; USe-1e; Le-2c; Le-2d; Eur-4a; Reg-5c; IB-11a; IB-12a; Le-14a. Although a number of practitioners characterized the Deutsche Telekom deal as the first use of the POD’s mutual recognition provisions, the regulatory authorities that we interviewed—who were in a better position to have a complete picture of market activity—reported that a small number of other transactions had been undertaken under the mutual recognition provisions of the POD, but agree that the rate of utilization was much lower than had been anticipated when the directive was first adopted. See Interviewees Reg-17a; Reg-22a.

\(^8^0\) See Interviewees Le-2b; Le-3b; Eur-4a; Reg-5c; L-14a. The POD states: “Member States may, however, require that the prospectus include information specific to the market of the country in which the public offer is made concerning in particular the income tax system, the financial organizations retained to act as paying agents for the
Second, at least in the minds of some of our interviewees, local authorities in certain jurisdictions were imposing unnecessary barriers to the mutual recognition process. Under the POD, the competent authority of the host country must sign off on a passported disclosure document, and sometimes that approval process reportedly discourages use of the passport.

Third, many of our interviewees explained that issuers do not take advantage of the mutual recognition provision of the POD because European issuers have an alternative and simpler mechanism for raising equity in Europe. According to numerous interviewees, the overwhelming number of European equity offerings consist of a distribution to local investors (including retail investors) plus a pan-European offering limited to institutional investors across Europe (and elsewhere in the world, often including U.S. institutional investors under Rule 144A). According to our interviewees, there are several reasons why this offering structure—often called an “International-style Offering”—is so common in Europe.

In essence, an International-style Offering consists of a public offering in the issuer’s home country, plus a series of private placements under the professionals exemption to

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81 See Interviewees Le-3b; Reg-5c; L-15a.

82 For example, one interviewee commented upon the problem of using preliminary documents under the POD. See Interviewee US-1c. In order to apply for mutual recognition treatment, the issuer must first get the approval of the home competent authority. The problem is that the home authority must approve the final version of the prospectus. Only then can the issuer seek recognition of the prospectus by other member states. See Council Directive, supra note 80, arts. 20-21. The POD seems to require all aspects of the prospectus be completed before recognition can occur, including pricing information. As pricing information is usually determined only immediately before the offering, the POD prevents investment banks from “building the book” on a pan-European basis before first getting the approval of the prospectus by host member state authorities. Thus, the usefulness of the passport is diminished.

83 See Interviewees Le-2b (common for European equity offerings over $100 million to be done in this way); Le-2c (estimating International-style Offerings used for over 70 percent of European equity offerings); Le-3b (most European equity offerings); IB-11a. As indicated in the text, our interviewees often noted that these International-style Offerings often include sales to institutional investors in the United States under Rule 144A. See, e.g., Interviewees Le-2e (Rule 144A pieces common if offering for more than $100 million); Le-3b; IB-11a (often included at the request of investment bankers); IB-12a (particularly common for equity offerings). We discuss Rule 144A offerings in detail in the next installment of this Article.
institutional investors elsewhere in Europe. In compliance with the POD, the securities laws of
member states must include a professionals exemption, which is analogous to the U.S. private
placement exemption. Under this legal structure, as long as a European issuer plans its offering
to include only institutional investors that qualify for the professionals exemption implemented
under local laws, the issuer does not need to worry about local rules governing distribution of
disclosure materials to local retail investors and hence has no need to invoke the POD’s mutual
recognition provisions.

Traditionally, European capital markets--including the Eurobond market--have been
dominated by institutional investors. Outside of the issuer’s home country, the International-
style Offering is targeted at institutional investors. The structure is thus consistent with past
practices and builds on well-established European financial traditions. The pan-European public
offering--which the POD’s mutual recognition provisions are designed to facilitate--lacks a

84 See Interviewees USe-1d; USe-1e; Le-2b; IB-11a; IB-12a; Le-14a.

85 The POD exempts four types of issuing transactions from the prospectus requirement: transferable securities (i)
offered to person in the context of their trades, professions or occupations, (ii) offering to a restricted circle of
persons, (iii) sold at a price not exceeding €40,000, or (iv) can only be acquired if the consideration is at least
€40,000 per investor. See Council Directive, supra note 20, art. 2. These exemptions are included because these
offerings are not considered truly public. Because the directive does not use the term “accredited investors” but
rather relies on the concept of persons in the context of their trades, professions or occupations, E.U. exemptions are
broader than the Regulation D private placement exemptions in U.S. securities law.

Professionals exemptions exist in E.U. member states either as a result of implementation of the POD (see,
e.g., Presidential Decree 52/1992 in Greece) or by virtue of the fact many of the identical exemptions already existed
in the securities regulations of the member state (see, e.g., CONSOB Regulation No. 11971/99 in Italy). See
887, 893-895 (1996) (describing how the exemptions in the POD are similar to the private placement exemption in
U.S. securities law).

One problem with the professionals exemption cited by some of our interviewees was the fact that the
scope of the exemption is not commonly defined across the European Union. See, e.g., Interviewee Le-3b (noting
differences between professionals exemption in various European countries). The precise scope of the professionals
exemptions varies from jurisdiction to jurisdiction, imposing additional compliance costs on issuers and their
advisers. Recently, FESCO issued proposed criteria for defining professional investors. If implemented by all
FESCO members, the European Union will finally have a uniform professionals exemption. See FESCO,
Implementation of Article 11 of the ISD: Categorisation of Investors for the Purpose of Conduct of Business Rules,
00/FESCO/A (Mar. 2000).

86 See Interviewees Le-2b (estimating that institutional investors make up more than ninety percent of Europen
market for new equity); Le-2c (relatively little retail interest outside of home country of issuer); Reg-5c; IB-11a.
similar tradition and thus offers little advantage for most European issuers.

As the foregoing summary suggests, our interviewees’ discussion of mutual recognition under the POD in the context of trans-European offerings was substantially more detailed than their responses with respect to the LPD and multiple listings on European exchanges. In part this is because the transactions the POD was designed to facilitate—pan-European offerings—are an increasingly common feature of the European capital markets. Accordingly, there appears to be potential demand for mutual recognition under the POD, although European issuers are well aware of the POD’s potential and current shortcomings.\textsuperscript{67}

A further reason why respondents were well informed about the POD and its problems is that the directive has been the focus of recent attention in Brussels, and a variety of governmental and private organizations have prepared position papers on the directive, expressly identifying and addressing areas of potential improvement.\textsuperscript{88} Among other things, in its recent \textit{Financial Markets Action Plan}, the Commission has recommended coordinating the professionals exemption under the laws of the various member states and making it easier for

\footnotesize{
\begin{itemize}
\item As described above, \textit{supra} text accompanying note 62, regional dual listings, for which the LPD directive was designed, have apparently become largely unnecessary.
\item As this Article goes to publication, the Committee of Wise Men (a committee of independent experts appointed by the E.U. Economic and Finance Ministers) is due to submit its final report in mid-February 2001, proposing E.U.-based reforms to consolidate the European securities markets. In its initial report, dated November 9, 2000, the Wise Men concluded, \textit{inter alia}, that the E.U. passport needs to be improved by developing common definitions, modernizing listing requirements and eliminating other regulatory differences between local markets. \textit{See Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets}, Nov. 9, 2000, available at <http://europa.eu.int/comm_ internal-market/en/finances/banks/wisemen.htm>.
\end{itemize}
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issuers to raise subsequent installments of capital across Europe. The current focus of the Commission and the intergovernmental working group, Forum of the European Securities Commissions (FESCO), on reforming the POD raises the possibility that European issuers may make greater use of mutual recognition in this area in the future. For our purposes, however, the on-going attention to mutual regulation on these E.U. directives served principally to improve the quality of interviewee responses in this area.

EUROPEAN DISCLOSURE STANDARDS

One of our goals in studying European capital raising practices was to gain a better understanding of the disclosure standards in European securities markets and, in particular, to investigate whether European member states were engaging in some sort of discernable competition in the stringency of disclosure requirements. As a result of the low utilization of mutual recognition under the POD, we did not observe the vigorous form of regulatory competition among European systems of securities disclosure that some observers had anticipated would emerge in the European Union. As explained above, European issuers are clearly not shopping around the continent in search of national disclosure rules most conducive to pan-European public offerings. There remains, however, the possibility that European jurisdictions might be adjusting their disclosure standards in order to encourage issuers from

90 See FESCO, European Passport, supra note 64.
91 Even if the POD’s mutual recognition provisions were being invoked on a regular basis, it is not clear that European law would allow this sort of issuer choice. For example, at least one European regulator indicated to us that an issuer from that jurisdiction would not be allowed to raise capital under the public disclosure rules of another member state and then passport those disclosure documents for use in a public offering back in the issuer’s home state. See Interviewee Reg-22a. Under this view of European law, issuers lack entity mobility with respect to the disclosure rules governing pan-European public offerings.
other member states to raise capital in local markets under local rules for public offerings. According to the proponents of issuer choice, such a process had supposedly been attracting European issuers to raise capital in the London markets, and arguably this is what some of our respondents suggested was how the Neuer Markt was attracting European issuers into the German market. When asked directly, however, our interviewees painted a somewhat different picture of emerging pan-European capital raising practices.

Most notably, according to the vast majority of our interviewees, hardly any European issuers are choosing to raise capital through public offerings governed by the formal legal requirements of another member state. That is, continental issuers are not routinely coming to London to raise capital under U.K. disclosure rules governing public offerings. Rather, as described above, European issuers are commonly making International-style Offerings, which combine public offerings to retail investors in their home market with pan-European sales to institutional investors under the professionals exemption. Because International-style Offerings are structured to comply with the professionals exemption, these issuers are not required to comply with the formal disclosure requirements of other jurisdictions. Accordingly, the only disclosure requirements that typically govern these transactions are those of the issuer’s home jurisdiction. Transactions of this sort routinely involve sales to institutional investors in London—which has the largest investor base in Europe—but the transactions are not subject to formal U.K. disclosure requirements. As a result, it is not accurate to characterize issuers making offerings of this sort as gaining some sort of marketing advantage by subjecting themselves to

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92 See supra notes 29-30 and accompanying text.
93 See supra notes 73-74 and accompanying text. One interviewee even asserted that some U.S. companies were choosing to list exclusively on the Neuer Markt as an alternative to U.S. markets. See Interviewee USe-1e.
94 See Interviewees Le-2b; Le-2c; Lus-7b.
95 See supra note 84 and accompanying text.
more stringent disclosure rules imposed by the host country’s system of securities regulation.\textsuperscript{96}

While International-style Offerings are not subject to the formal disclosure standards of the United Kingdom or other member states in which institutional investors may be located, the quality of disclosure documents that accompany these offerings and the due diligence work that underlies this documentation are, according to numerous of our interviewees, of a much higher quality than the formal disclosure requirements of most, if not all, European countries.\textsuperscript{97} In the next installment of this Article, we will present data that quantifies this difference in quality, but for present purposes this reported fact warrants some elaboration. According to a number of our interviewees, if a European issuer—such as an Italian company—makes a public offering in its local market, the issuer will prepare disclosure documents in accordance with Italian law, which will be based on the standards set by European law in the POD. If the issuer chooses to augment the offering by making sales throughout Europe to institutional investors, the transaction will become an International-style Offering. As a result, the issuer will have to prepare two different sets of offering documents—one for its local retail market and the second for institutional investors. Our interviewees reported that the second set of documents are invariably more complete, better researched and more expensive to prepare.\textsuperscript{98} Typically, the second set of documents would be prepared in English, whereas the first set of documents would be prepared

\textsuperscript{96} Of course, these transactions may be subject to U.K. anti-fraud rules, but none of our interviewees suggested that these liability rules were a significant factor in pan-European offerings or that continental issuers gained any pricing advantage by subjecting themselves to these rules. Indeed, one continental lawyer we interviewed characterized London as the “wild west” and argued that the risk of anti-fraud liability was actually greater in certain continental markets. See Interviewee Eur-4a.

\textsuperscript{97} See Interviewees Le-3b; Le-2b; Le-2c; Le-2d.

\textsuperscript{98} See, e.g., Interviewee USE-1d. Apparently different law firms had slightly different practices for coordinating local and pan-European offering documents. Some worked towards a more unified documents; others prepared two completely separate documents. Interviewees also reported variation in the order in which documentation was prepared. From our discussions, it was clear that disclosure in International-style Offerings is not simply the sum of the formal disclosure rules of different members states, but rather a comprehensive disclosure document that was more elaborate than the formal rules of any particular state.
in the local language of the home jurisdiction.

When asked to explain the logic underlying this requirement of duplicative documentation, our interviewees typically made comments such as “the market requires” the higher level of disclosure. Several respondents also made reference to the impact of U.S. disclosure practices in Europe. According to these responses, European institutional investors have become accustomed to seeing U.S.-style disclosure documents in large transactions—particularly the massive privatization transactions of the past two decades—and want to see similar kinds of information (e.g., risk factors and management discussion & analysis (MD&A)) when purchasing equity securities offered by European issuers. Other respondents noted that the investment bankers who advised issuers in pan-European offerings were often either U.S. firms or at least European firms with personnel trained in U.S. investment banking practices and were therefore inclined to require the kinds of disclosure common in analogous transactions in the United States. Others suggested that U.S.-trained lawyers—often brought into the deals by U.S. investment banks—have helped to align the standard of disclosure in International-style Offerings with U.S. standards for comparable transactions. A subset of our interviewees—

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99 See Interviewees Le-2b (claiming that issuers would “not be taken seriously” by institutional investors if they complied only with home country disclosure rules); Eur-4a (issuers “can’t just use home rules”). See also Interviewees Le-2c; IB-11a; IB-12a; Le-14a.

100 See Interviewees Le-2b (disclosure standards comparable to the United States); Le-2c (noting inclusion of U.S.-style MD&A analysis in International-style Offerings); IB-11a. Several interviewees noted that European investors were still willing to accept lower levels of disclosure for traditional debt offerings, perhaps because they have been accustomed to receiving this sort of disclosure in Eurobond offerings for many years. See Interviewees IB-9b (except for high-yield debt, which tends to get equity style disclosure); IB-11a; IB-12a.

101 See, e.g., Interviewees Lus-3a; IB-13a. Many of our respondents offered examples of how U.S. legal practices influence capital raising in European markets. In some European offerings, investment bankers are requiring lawyers to issue “10b-5” letters even when no U.S. purchasers are involved. See Interviewees Lus-15a; Eur-27a. These letters are routinely issued in the United States to insulate issuers and their advisers from liability under Rule 10b-5. (The use of these letters in trans-Atlantic offerings is discussed in greater detail in the next installment of this Article.) In purely European transactions, Rule 10b-5 is not applicable; nevertheless, the letters are still sometimes issued.

102 See, e.g., Interviewees Le-2c; Le-15a. But see Interviewee Le-2b (claiming that British lawyers drive the process).
consisting entirely of British practitioners--noted that the disclosure standards for International-style Offerings were also fairly similar to the U.K. rules governing public offerings and suggested that British standards have also been influential in this area.103

In terms of the debate over issuer choice, the emergence of International-style Offerings in European capital markets is a noteworthy development. While European issuers apparently have not migrated to a high-quality jurisdiction in precisely the manner proponents of issuer choice predicted, issuers appear to have selected another sort of high-quality disclosure regime: one imposed by market participants and modeled loosely on U.S. disclosure standards for private placements.104 On balance, this development seems more reminiscent of a race to the top than a race to the bottom. One must be careful not to over-interpret our survey, however. Most importantly, International-style Offerings are limited to institutional investors. It is not clear that retail investors would be similarly demanding, and, indeed, the accounts we heard suggest that retail investors in local European markets actually require less disclosure than do institutional investors. In addition, the market practices that our interviewees described are a relatively recent development. It is not clear that the high-level of disclosure currently required in International-style Offerings will persist in the future. It is possible that, once equity offerings in Europe become more routine, the race will turn downward.105 In 1999, however, the market standards

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103 See, e.g. Interviewee Le-2b; Le-3; Le-15a (noting “convergence” of U.S. and U.K. disclosure standards). But see Interviewee US-10a (U.S. lawyer noting that disclosure in International-style Offerings is sometimes packaged to follow European form, but content driven by U.S. standards).

104 One alternative reason for higher disclosure standards in International-style Offerings could be that issuers are concerned by more strict liability rules in some European countries (like the United Kingdom). As discussed in the next installment of this Article, liability issues were frequently mentioned in response to questions regarding trans-Atlantic capital raising operations. Our respondents did not make similar comments about European markets, and, indeed, the only interviewee who mentioned the issue indicated that disclosure standards in International-style Offerings were not driven by differences in liability rules. See Interviewee USe-1d.

105 Indeed, some responses we received could be interpreted as incipient erosion of standards. In particular, some of our interviewees opined that European bankers and lawyers were satisfied with less stringent disclosure in some
for pan-European International-style Offerings were surprisingly high.

RESALE LEAKAGE AND SECONDARY MARKET LINKAGES IN INTERNATIONAL-STYLE OFFERINGS

The role of the professionals exemption for International-style Offerings also warrants additional comment. In a number of our interviews, we pushed our respondents to explain why so many European issuers were satisfied with an International-style Offering when that form of transaction appeared to deny them access to all of the retail investors outside of their home jurisdiction. Being trained in the U.S. system of securities regulation--where issuers value access to the entire public market--we were initially puzzled that European issuers were willing to limit themselves to a subset of investors. We received two separate responses to this question. First, as explained above, some interviewees noted that retail investors were not as important in Europe as in the United States and so reaching institutional investors was adequate for all but the largest offerings, such as the recent Deutsche Telekom offering. The second--and from our perspective more intriguing response--was that retail investors did, in fact, often participate in International-style Offerings through the repurchase of shares initially sold to institutional investors under the professionals exemption. This second point illuminated for us an important difference between offerings under the professionals exemption in Europe and the seemingly

See, e.g., Interviewees IB-13a; Lus-14b; Le-15a. The same respondents also spoke in terms of the role of the market in enforcing standards, and it was not clear from their responses how these two factors interacted.

See supra notes 77-78 and accompanying text. It is not surprising that the large privatization transactions have pioneered large-scale retail offerings in Europe. Not only do state-owned companies’ offering volumes require deeper investor markets, but their high public profiles make them extremely popular with retail investors, particularly those investors who do not normally purchase equity securities. See, e.g., Brandon Mitchener, Deutsche Telekom to Expand Offering By 20% to as Much as $11.96 Billion, WALL ST. J., Nov. 12, 1996, at A14 (describing how Deutsche Telekom’s offering was six times oversubscribed because of high retail demand). A similar phenomenon has occurred more recently with regards to internet company initial public offerings on the Neuer Markt, AIM and other European small company exchanges that have had great success capturing the public imagination and generating strong retail investor interest.
analogous private placement market in the United States.

Under U.S. law, if an institutional investor purchases a security in a private placement, the security may generally not be resold to retail investors for one to two years. Although private resales to other institutional investors may occur in the interim, privately-placed securities are effectively restricted in the United States for a considerable period of time. Although it is difficult to determine how many securities currently leak through the E.U.’s professionals exemption, our interviews and subsequent research have uncovered two potential sources of leakage.

First, an institutional investor who purchased under the professionals exemption could simply resell its securities to retail investors. Although the terms of the professionals exemption vary from member state to member state, European securities laws generally do not impose resale restrictions nearly as onerous as those imposed on private placements in the United States. Thus, securities distributed in International-style Offerings to institutional investors in Europe might be resold to retail investors fairly quickly and apparently are sometimes even immediately placed with public investors. One of our respondents reported that it is a common practice in the Benelux countries for institutional investors to purchase equity securities in International-style Offerings and then place them with wealthy individual investors. In other European jurisdictions, it is apparently possible for institutional investors to make such resales as long as the number of purchasers is not too large (perhaps under 100).

108 See Interviewees USE-1d; USE-1e; IB-9b. This aspect of the professionals exemption is discussed in greater detail in the next installment of this Article.
109 For example, one interviewee cited the Benelux countries as jurisdictions in which securities sold under the professionals exemption are routinely resold to retail investors. See Interviewee IB-9b.
110 See Memorandum from Antti Ihamuotila, Research Assistant, to Howell Jackson (May 17, 2000) (on file with authors) (reviewing resale restrictions under Finish and Swedish law).
jurisdictions, it is possible that the resale market is wide open.\footnote{111} 

Second, an institutional investor indirectly could resell securities purchased under the professionals exemption through the secondary trading markets. As described earlier, the ISD gives investors in one European country access to trading markets in other member states.\footnote{112} As a result, an institutional investor in London can easily sell securities to Italian investors by executing a sell order on the Milan Stock Exchange. Moreover, a retail investor in the United Kingdom can purchase the same security by placing a buy order on the Milan Stock Exchange. It may even be possible for the U.K. institutional and retail investors to be on the opposite sides of the same buy-sell transaction where the Milan Stock Exchange serves merely as the convenient backdrop for the trade. As far as we could tell, nothing under E.U. law or the law of any member state prevents such transactions in the secondary trading markets.\footnote{113} Indeed, the ISD facilitates precisely these transactions.\footnote{114} While none of our interviewees cited cross-border

\footnote{111}{One question for future research is the extent to which member states implement and enforce resale restrictions on institutional investors who purchase shares through the professionals exemption. If resale restrictions are not in place or are ineffective, it is conceivable that an issuer could avoid the listing and public offers regulations altogether by relying on professionals to distribute securities to the general public. A cursory review of local laws has not revealed any clear prohibition of this practice. One reason why this may be the case is that, unless the country already had in place resale restrictions, the implementation of the LPD and POD alone will not impose restrictions on resale. For example, in the case of Greece, the LPD and POD were implemented into Greek law through Presidential Decrees 350, 348, and 52. These decrees have not been accompanied so far with resale restrictions on Greek professional investors. It is possible that Greek law has inadvertently left a loophole in the disclosure regime. See Memorandum of Vasiliki Vakoula, Research Assistant, to Eric Pan (June 2000) (on file with authors). See also Memorandum of Carol Devito, Research Assistant, to Howell Jackson (June 4, 2000) (on file with authors) (public resales of securities issued in private placements are not effectively restrained in Italy). Research Memorandum of Carsten Berrar, Research Assistant, to Howell Jackson (May 23, 2000) (on filed with authors) (German law is unclear with respect to resale restrictions of securities sold under the professionals exemption). But see Memorandum of Marta Maranon Hermoso, Research Assistant, to Howell Jackson (June 5, 2000) (on file with authors) (Spanish institutional investors are clearly restricted from reselling securities to retail investors in Spain); Memorandum of Denise Lau, Research Assistant, to Eric Pan (Apr. 2000) (on file with authors) (U.K. law restricts blatant efforts to exploit professionals exemption).

\footnote{112}{See supra notes 61-63 and accompanying text.}

\footnote{113}{One of our research assistants confirmed that such transactions would be permissible under European law. See Email from Antti Ilhamuotila, Research Assistant, to Howell Jackson (May 30, 2000) (on file with authors).

\footnote{114}{This point illustrates the substantial differences between securities regulation in the United States and European Union. Under U.S. law, many rules would inhibit such secondary market transactions. To begin with, the securities would be restricted for at least a year and therefore not eligible for resale on a public exchange. Moreover,
linkages between European markets as a reason why European issuers are not utilizing mutual recognition procedures for offering documents, we believe the relationship may exist and, at minimum, warrants further study.

Thus, the combination of “resale leakage” and “secondary market linkages” provides a double-decker bypass for European retail investors seeking to purchase securities sold in International-style Offerings that are nominally limited to institutional investors outside of the issuer’s home jurisdiction. The availability of these indirect channels to retail investors further reduces the need for European issuers to invoke the more burdensome pan-European public offering process of the POD’s mutual recognition provisions.

**IMPLICATIONS FOR THE DEBATE OVER REGULATORY COMPETITION**

Although the principal E.U. directives governing European securities authorize the use of mutual recognition procedures, our interviewees informed us that issuers are not in fact making use of these procedures. Our interviewees offered two plausible explanations. First, as discussed above with respect to the POD, practical difficulties in applying for mutual recognition limit the benefits of using the passport. Second, the availability of alternative transactions (e.g., remote membership on stock exchanges through the ISD instead of dual-listings under the LPD or International-style Offerings utilizing the professionals exemption instead of multiple offerings under the POD) reduces the need for mutual recognition procedures. As a result, the relatively more modest sort of regulatory competition permitted by the E.U. directives, it would appear, has not generated much reaction from market participants in European capital markets in

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Regulation S might impose restrictions on secondary market resale to U.S. persons for some period of time. Finally, if a substantial number of U.S. persons purchased shares of a foreign company in this manner, the company would become subject to on-going disclosure obligations of some sort under the 1934 Act.
terms of choosing among the formal disclosure rules applicable in various member states. Although the underutilization of the mutual recognition passport does not speak directly to the merits of issuer-choice proposals, the evidence does raise questions as to how promptly and enthusiastically market participants would respond to the system of regulatory choice they advocate. For a variety of reasons, European issuers have not taken advantage of the menu of regulatory jurisdictions offered by the mutual recognition passport (relatively little entity mobility), nor is there substantial evidence of governmental competition in rules which proponents of issuer choice anticipate their proposals would promote (low levels of governmental responsiveness).

On the other hand, market developments in European capital markets to date do not offer support to critics of regulatory competition who claim that the issuer choice proposals would prompt a race to the bottom in international securities regulation. In the course of our interviews, we found no compelling evidence of a race to the bottom in either listing standards for equity markets or disclosure requirements for public offerings. Most of our interview responses were consistent however with a race to the top in this context. In particular, disclosure practices associated with International-style Offerings suggest that, at least among institutional investors, market forces are pushing disclosure standards above the minimum requirements established in the E.U. directives as well as the formal legal requirements set in most, if not all, member states for local public offerings.

Another lesson to be drawn from the European experience in this area is the apparent importance of cross-border linkages among trading markets. The development of cross-border linkages between European stock exchanges and retail investors throughout Europe has apparently diminished the demand for mutual recognition under the LPD and perhaps also the
POD. When retail investors in one market have easy access to secondary market trading of securities in a second jurisdiction, issuers in that second jurisdiction have less incentives to comply with novel legal requirements (like the European Union’s mutual recognition provisions) to reach retail investors in the first jurisdiction. To the extent that such linkages are evolving across securities markets around the globe, the need for the kind of legal regime that proponents of issuer choice have proposed may also be diminishing.
APPENDIX A

Interview Form – Foreign Issuers Seeking Access to U.S. Capital Markets

Name of Interviewee: 
Email Address: 
Position: 
Firm: 
Date: 

Preliminary Questions

HOW MANY YEARS HAVE YOU BEEN PRACTICING LAW?
OF WHICH BARS ARE YOU A MEMBER?
WHAT IS THE SIZE OF YOUR FIRM (IN LAWYERS)?
WHAT IS THE SIZE OF YOUR LONDON OFFICE?
WHAT PERCENTAGE OF THE LAWYERS IN LONDON ARE MEMBERS OF A U.S. BAR?

IN THIS SURVEY, WE ARE PRIMARILY INTERESTED IN EUROPEAN FIRMS SEEKING ACCESS TO THE US EQUITY AND HIGH-YIELD DEBT MARKETS. HOW MANY TRANSACTIONS INVOLVING SUCH ISSUERS WOULD YOU ESTIMATE THIS OFFICE HAS WORKED ON IN THE PAST YEAR?

PERCENT EQUITY:
PERCENT DEBT:
PERCENT OF TRANSACTIONS INVOLVING SALE OF SECURITIES:
PERCENT WITH ONLY NEW LISTING ON US MARKET:

WITH HOW MANY OF THESE TRANSACTIONS WERE YOU DIRECTLY INVOLVED?
WHAT WAS THE RANGE OF SIZE OF OFFERINGS (U.S. $)?
WHAT SIZE WERE THE ISSUERS (MARKET CAPITALIZATION)?
IS YOUR FIRM PRIMARILY ON THE ISSUER SIDE OR UNDERWRITER SIDE?

1. Offering Options

A. OF THE TRANSACTIONS INVOLVING SALE OF SECURITIES INTO THE UNITED STATES, WHAT INVOLVED

   ___ %  A public offering in the United States?
   ___ %  Making a 144A offering?
   ___ %  Making a 144A/Registered Exchange Offering?
   ___ %  Making a traditional private offering?

B. PUBLIC OFFERING FOLLOW-UP:

   1. IN THE PUBLIC DEALS, TYPICALLY WHAT PERCENTAGE OF THE DEAL IS SOLD INTO THE UNITED STATES? [RATIO OF SHARES REGISTERED TO SOLD]

   2. HOW ARE THE SHARES TYPICALLY HELD, IN ADR FORM OR OFF-SHORE?

C. 144A OFFERING FOLLOW-UP:

   1. IN 144A DEALS, WHAT PERCENTAGE OF THE DEALS ARE TYPICALLY SOLD TO U.S. INVESTORS?
2. **What continuing disclosure obligations do issuers of 144A offerings typically assume? (Level 1 ADRs, pure Rule 12g3-2(b) disclosures, covenants?)**

3. **Trading Options**

   A. **Where an issuer is simply seeking access to US trading markets, what percentage of your transactions involve:**

   - ___% Listing its securities on the NYSE
   - ___% Getting Security Quoted on NASDAQ?
   - ___% Other ADR Programs with 12g3-2 (B) Exemptions?
   - ___% Other rule 12g3-2 (B) Exemptions?
   - ___% Rule 144A trading?
   - ___% Other trading systems?

   B. **Where your clients have offered securities on US exchanges or NASDAQ, for what percentage of their trading volume do these markets account?**

3. **Do you typically assist issuers in deciding how to access US capital markets -- for example choosing between public and private offerings?**

   - Often
   - Sometimes
   - Rarely
   - Never

   A. **Who are the most important individuals in deciding whether and how to raise capital in the United States?**

   - ___ Management of the Issuer
   - ___ Investment Banker
   - ___ Attorney
   - ___ Accountant
   - ___ Other

   B. **Does your firm have any general rules of thumb it uses for advising when and how foreign issuers should access the U.S. capital markets? [E.g., public offerings, for 144A offerings, for ADR programs, for 12g3-2 (B) status.]**

   C. **Are there rules of thumb regarding size of offering or market capitalization for accessing U.S. markets in various ways? [E.g., a company must be offering more than X million dollars to do a public offering in the U.S. or have a worldwide market capitalization of Y million dollars to warrant listing on the NYSE]**

4. **In your experience, what are the principal reasons your clients seek access to U.S. capital markets? [Prompt for non-financial reasons, if not mentioned.]**

   1. 
   2. 
   3. 
   4. 
   5. 

   **Which of these would you rank as the most important?**
5. In your experience, what problems present the most serious impediment to foreign issuers seeking to access the US capital markets? [Prompt for U.S. GAAP reconciliation and liability, if not listed.]

1. 
2. 
3. 
4. 
5. 

Which of these would you rank as the most important?

6. Could you give us estimates of the following items (assuming an offering involving a seasoned European issuer with no prior experience with US capital markets):

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<tbody>
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<td>Lawyers ($)</td>
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<td>Accountants ($)</td>
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<td>Underwriters (% of the deal)</td>
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<tr>
<td>Other ($)</td>
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7. To your knowledge, have clients of your firm ever initially planned or hoped to access the US capital markets in one particular way and, in the course of undertaking the process, changed the form of their capital-raising efforts or dropped the US component entirely?

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<th>Often</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
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A. If so, what happened?

B. Who was responsible for making this decision?

C. When the U.S. component was dropped, was the issuance appropriate for U.S. markets?

8. In your experience, if a foreign issuer chooses not to enter U.S. capital markets, can and do U.S. investors find alternative ways to invest in such an issuer in off-shore markets? For example, through purchases on Foreign Exchanges as permitted under Regulation S? In other ways?

Follow-up Questions on Regulatory Agencies

9. How effective has the U.S. Securities and Exchange Commission been over the past decade in making U.S. markets more accessible to foreign issuers as compared to other capital markets?

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<th>Very effective</th>
<th>Somewhat effective</th>
<th>Not very effective</th>
<th>Ineffective</th>
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A. FROM YOUR PERSPECTIVE, WHAT CHANGES HAVE BEEN THE MOST SIGNIFICANT IN THIS REGARD?

B. DO YOU THINK THE SEC HAS BEEN TOO LAX WITH RESPECT TO ITS TREATMENT OF FOREIGN ISSUERS IN ANY AREA?

C. IF THE SEC WISHED TO IMPROVE FOREIGN ISSUER ACCESS TO US MARKETS, WHAT ADDITIONAL STEPS SHOULD IT TAKE?

D. TO WHAT EXTENT DO YOU BELIEVE THE SEC HAS BEEN LEARNING FROM THE EXPERIENCE OF REGULATORS IN OTHER COUNTRIES?

Final Catch-all Question

10. HAVE WE NEGLECTED TO ASK YOU ABOUT ANY IMPORTANT INFLUENCE ON FOREIGN ISSUERS CONSIDERING RAISING CAPITAL IN THE UNITED STATES?