

# THE EFFECT OF THE SARBANES-OXLEY ACT OF 2002 ON FOREIGN ISSUERS LISTED ON THE U.S. CAPITAL MARKETS

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The Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act)<sup>1</sup> came as a tremendous shock to foreign private issuers<sup>2</sup> listed on the U.S. capital markets (hereinafter “foreign issuers”) who had long enjoyed generous accommodations and exemptions the U.S. Securities and Exchange Commission (SEC) had provided under the previous securities regulations. Many commentators and practitioners immediately voiced grave concern about the Sarbanes-Oxley Act’s negative impact on foreign issuers and lent credence to the threat of some foreign issuers to delist from the U.S. securities markets.

This paper aims to refute those concerns and criticisms about the SEC’s movement towards the uniform application of the securities regulations to foreign issuers by analyzing empirical research on foreign issuers’ listing and delisting patterns

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

2. According to the definition in Rule 405 under the Securities Act of 1933 (“Securities Act”) and Rule 3b-4(c) under the Securities Exchange Act of 1934, a foreign private issuer is “any foreign issuer other than a foreign government except an issuer meeting the following conditions: 1. More than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and 2. Any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) More than 50 percent of the assets of the issuer are located in the United States; or (iii) The business of the issuer is administered principally in the United States.” 17 C.F.R. §§ 230.405, 240.3b-4(c) (2003).

from 2003 to 2006. Although heightened securities regulation by the SEC may impose extra costs on foreign issuers, such extra costs will not necessarily outweigh the benefits of listing in the U.S. securities markets, notably, access to a huge amount of capital and a rise in a company's credit which follows from complying with more stringent securities regulations. More importantly, as the global standard is itself starting to resemble the one set by the Sarbanes-Oxley Act, these additional costs may become unavoidable. Thus, this paper aims to demonstrate that despite numerous concerns, the attractiveness of U.S. capital markets to foreign issuers has not been affected in a significant way.

Part I provides an overview of the historical transformation of the SEC's policies with regard to foreign issuers and outlines the key provisions of the Sarbanes-Oxley Act. It is followed by a discussion of the comments on the effects of the Sarbanes-Oxley Act on foreign issuers.

Part II examines the listing and delisting patterns of foreign issuers since the effectuation of the Sarbanes-Oxley Act in 2002. This paper starts with the hypothesis that the U.S. securities markets provide more than capital liquidity to foreign issuers, and that the more uniform regulation inaugurated through the Sarbanes-Oxley Act has therefore not driven foreign issuers out of the U.S. securities markets. The hypothesis is proven by the relatively stable pattern of listings on and delistings from the New York Stock Exchange (NYSE) over the period between 2003 and 2006. It bears noting that the American Depositary Receipts (ADR) level I and IV programs are not subject to the Sarbanes-Oxley Act.<sup>3</sup> Thus, the new addi-

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3. Level I ADRs are traded in the over-the-counter market, and Level IV ADRs are privately placed with Qualified Institutional Buyers (QIBs) under Rule 144A – not listed and thereby outside of the Sarbanes-Oxley Act. Level I ADR issuers must file an F-6 registration statement but are exempted under Rule 12g 3-2(b) from full SEC reporting requirements. Thus, they need only provide the SEC with the same information they file in their home country. 17 C.F.R. § 240.12g3-2(b) (2003). Issuers with Level IV ADR programs, commonly known as RARDs, are only required to provide the same information as issuers with Level I ADRs. Michael A. Perino, *American Corporate Reform Abroad: Sarbanes-Oxley and the Foreign Private Issuer*, 4 EURO. BUS. ORG. L. REV. 213, 219 (2003); see DEUTSCHE BANK, DEPOSITARY RECEIPTS HANDBOOK (2003), available at <http://adr.db.com/shared/DepositaryReceiptsHandBook.pdf> (providing more detailed explanations about different levels of ADR programs).

tions and the termination of ADR level I and IV programs over the same period allow us control for the possibility that some foreign issuers might have delisted from the U.S. markets for reasons other than the increasing costs of compliance with U.S. securities laws. If similar patterns of movement are revealed among the foreign issuers listed on the NYSE and the ADR level I and IV issuers, it would seem that foreign issuers' decisions with regard to listings or delistings were little affected by the Sarbanes-Oxley Act.

Part III analyzes the global movement towards a heightened standard for securities regulation by other countries. In a world in which integration of the global economy is accelerated, the Sarbanes-Oxley Act cannot be understood in isolation. In fact, the U.S., in passing the Sarbanes-Oxley Act, seems to have been not so much an outlier as a standard setter for subsequent securities regulation reforms in other countries. Shortly after the enactment of the Sarbanes-Oxley Act, the European Union, Canada and South Korea joined the U.S. government's efforts toward enhancing shareholder protection and undertaking more rigorous measures to ensure the integrity of the audit system. A close examination of these reforms reveals that they mirrored most of the major provisions of the Sarbanes-Oxley Act.

## I.

### FROM EXCEPTIONS AS A RULE TO EXCEPTIONS AS AN EXCEPTION

The main criticism against the Sarbanes-Oxley Act is that the Act is retrogressive. Historically, the SEC had made efforts to adjust to economic globalization in order to make the U.S. capital markets more competitive internationally. Thus, exceptions for foreign issuers had long been taken for granted. However, the Sarbanes-Oxley Act provided no exceptions or accommodations for foreign issuers, although the SEC did eventually carve out some narrow exceptions.

Initially Congress did not intend to provide exemptions for foreign issuers in the Securities Act of 1933 ("Securities Act") or the Securities Exchange Act of 1934 ("Exchange Act").<sup>4</sup> However, the SEC promulgated exemptions to facili-

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4. Kenji Taneda, *Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation*, 2003 COLUM. BUS. L. REV. 715, 719 (2003). See also Roberta S.

tate foreign issuers' access to the U.S. capital markets in 1935: sections 14 (the proxy rule) and 16 (the reporting requirement of the insider transaction and liability for short swing profits) of the Exchange Act do not apply to foreign issuers.

Whereas the early days of the SEC could be characterized as "isolationist," starting in the early 1980s, the SEC began to embrace the trend towards the internationalization of capital markets.<sup>5</sup> The SEC provided further exceptions for foreign issuers in order to accommodate the differences in foreign corporate environments and the existence of other regulatory systems imposed by countries in which foreign issuers were incorporated. As a result, foreign issuers could disclose only aggregate compensation paid for executive officers.<sup>6</sup> Further, not only are foreign issuers exempted from the quarterly reporting requirements, they are given more time to file Form 20-F (the equivalent of Form 10-K for foreign issuers), which is due within 6 months, as opposed to the 90 day deadline imposed on U.S. companies' filing of annual reports on Form 10-K.<sup>7</sup> Foreign issuers were also exempted from Regulation FD.<sup>8</sup>

In an effort to relieve the burden of foreign issuers producing an additional set of financial statements, the SEC allowed foreign issuers to file their financial statements either by using the U.S. Generally Accepted Accounting Principles (U.S. GAAP) or by reconciling financial statements to it. Moreover, the SEC had long been working on the issue of permitting foreign issuers to use International Accounting Standards (IAS), instead of the U.S. GAAP, which was thwarted by the enactment of the Sarbanes-Oxley Act.<sup>9</sup> Subsequently, in the 1990s, this long-standing requirement was further modified and the SEC permitted foreign issuers to reconcile only the two most

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Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 STETSON L. REV. 849, 853-54 (2004).

5. Karmel at 855.

6. Taneda at 720.

7. Robert G. DeLaMater, *Speech: Recent Trends in SEC Regulation of Foreign Issuers: How the U.S. Regulatory Regime is Affecting the United States' Historic Position as the World's Principal Capital Market*, 39 CORNELL INT'L L.J. 109, 112 (2006).

8. *Id.*; U.S. SEC. & EXCH. COMM'N, FACT SHEET: REGULATION FAIR DISCLOSURE AND NEW INSIDER TRADING RULES (2000), at <http://www.sec.gov/news/extra/seldsfct.htm>.

9. Karmel, *supra* note 4, at 860.

recent fiscal years of financial results upon their initial registration, instead of the previous five years.<sup>10</sup>

Rule 144A, a safe harbor for the redistribution of restricted securities to qualified institutional investors, also seems to have been promulgated with foreign issuers in mind. Although Rule 144A is not exclusively available to foreign issuers, in combination with Regulation S, it dramatically facilitated foreign issuers' efforts to tap the U.S. capital markets and actually resulted in a substantial increase in the volume of offerings by foreign issuers into the United States during the 1990s.<sup>11</sup>

Most importantly, the federal securities laws had stayed away from excessive interference with corporate governance, which had long been left to state laws. In *Santa Fe Industries, Inc. v. Green*, the Supreme Court drew the line between state corporation laws and the federal securities law by rejecting the notion that the securities laws "federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden."<sup>12</sup> Consequently, the regulation of the corporate governance of foreign issuers was rarely regarded as the SEC's business.<sup>13</sup>

In 2002, to the great shock of foreign issuers registered on the U.S. capital markets, the Sarbanes-Oxley Act put an end to the era in which exemptions for foreign issuers were the rule and marked the beginning of possible future movement towards a uniform application of the securities regulations to foreign and domestic issuers. To the legislators who enacted the Sarbanes-Oxley Act, the tremendous repercussions of the Enron and WorldCom scandals seem to have been a more vivid and immediate concern than the unpleasantness of a strong outcry from foreign issuers who threatened to leave the U.S. capital markets for more favorable markets, such as London or Hong Kong.

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10. DeLaMater, *supra* note 7, at 112.

11. *Id.* at 111.

12. 430 U.S. 464, 479 (1977).

13. Karmel, *supra* note 4, at 850.

### A. *Key Provisions of the Sarbanes-Oxley Act*

The passage of the Sarbanes-Oxley Act signified a marked departure from the lenience foreign issuers had previously enjoyed and from the general trend towards making the U.S. capital markets more favorable for foreign issuers.<sup>14</sup> Thus, even a brief discussion of the Sarbanes-Oxley Act's key provisions will suffice in delineating the concerns about driving foreign issuers from the U.S. capital markets.

Most conspicuously, §101 established the Public Company Accounting Oversight Board (PCAOB) and entrusted it with the regulatory and supervisory role which had long been played by the American Institute of Certified Public Accountants.<sup>15</sup> Thus, PCAOB was granted rulemaking power under

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14. Coffee outlines key provisions of the Sarbanes-Oxley Act which affect foreign issuers as follows:

Among the principal provisions of the Public Company Accounting Reform and Investor Protection Act of 2002 (the Act), Pub. L. No. 107-204, 116 Stat. 745, that would impose new requirements on foreign issuers are the following: (1) section 301 ("Public company audit committees") (mandating audit committees composed exclusively of directors meeting a statutory standard of independence); (2) section 302 ("Corporate responsibility for financial reports") (requiring sworn declarations from senior financial officers); (3) section 303 ("Improper influence on conduct of audits") (criminalizing actions to "coerce, manipulate, or mislead" the firm's auditors); (4) section 304 ("Forfeiture of certain bonuses and profits") (requiring forfeiture of incentive or equity compensation received, or stock trading profits made, during the initial twelve month period covered by an earnings restatement); (5) section 306 ("Insider trades during pension fund black-out periods") (restricting the ability of directors and executive officers to sell during certain "black-out" periods when holders of individual account plans are prohibited from trading); (6) section 307 ("Rules of professional responsibility for attorneys") (requiring securities attorneys to report "a material violation of securities law or breach of fiduciary duty or similar violation" to chief legal counsel, chief executive officer, and, under specified circumstances, to board of directors); and (7) section 402 ("Enhanced conflict of interest provisions") (barring most loans by firms to their corporate executives).

John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1824 n.279 (2002). For a more detailed and in-depth analysis of the effects of the Sarbanes-Oxley Act on foreign issuers, see Karmel, *supra* note 4, and Perino, *supra* note 3.

15. 15 U.S.C. § 7211 (2000).

§103,<sup>16</sup> and investigatory and disciplinary power over auditors of the public under §105.<sup>17</sup> Under §104, PCAOB is also required to conduct inspections of registered public accounting firms.<sup>18</sup>

Section 301 of the Sarbanes-Oxley Act requires an independent audit committee: all companies listed on the U.S. capital markets are required to have an audit committee composed of independent board members who are “directly responsible for the appointment, compensation, and oversight of the work of the accounting firms employed by their company.”<sup>19</sup> Additionally, §407 requires issuers to “disclose whether or not, and if not, the reasons therefore, the audit committee of that issuer is comprised of at least 1 member who is a financial expert,” as defined by the SEC.<sup>20</sup>

Sections 302 and 906 enhanced the internal screening procedures to deter fraud by requiring the Chief Executive Officer (CEO) and the Chief Financial Officer (CFO) to certify that the financial statements “fairly present in all material respects the financial condition and results of operations of the issuer. . .” and do not contain any untrue statement or material omission.<sup>21</sup> Such a certification requirement in combination with liability under § 906 serves to ensure the accuracy and credibility of the reports by making the signing officers responsible for them, and thereby giving them an incentive to establish more reliable and effective internal controls.<sup>22</sup>

Under § 401, the SEC shall issue final rules providing that pro forma financial information<sup>23</sup> in any periodic or other report filed with the SEC should not contain any untrue statement or omission of material facts, and that it should be reconciled with the financial condition and results of operations

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16. *Id.* § 7213.

17. *Id.* § 7215.

18. *Id.* § 7214.

19. *Id.* § 78j-1(m)(2).

20. *Id.* § 7265(a).

21. *Id.* § 7241(a)(2)-(3); 18 U.S.C. § 1350(a)-(b) (2000).

22. 18 U.S.C. § 1350(c).

23. Many companies whose GAAP financials disclosed very large losses announced pro-forma figures that showed operating profits based on hypothetical assumptions. Stanley Siegel and John Slain, Summary of the Sarbanes-Oxley Act of 2002 5 (2003) (unpublished manuscript, on file with author).

of the issuer under the U.S. GAAP.<sup>24</sup> Section 402 prohibits extending credits or loans to directors or executive officers.<sup>25</sup>

B. *Reactions to the Sarbanes-Oxley Act and the SEC's Response*

The Sarbanes-Oxley Act increased the costs of listing by requiring compliance with more stringent and complicated rules.<sup>26</sup> Yet, even before the Sarbanes-Oxley Act, the U.S. had more stringent standards than our European counterparts, but this did not discourage cross-listings by European companies in the U.S. markets as shown in Pagano, Roell and Zechner's study in 2002.<sup>27</sup> Interestingly, according to their study, between 1986-1998, most of the cross-listing by European companies was directed toward the U.S. markets, whereas the cross-listing by U.S. companies in the European market has diminished, even though European countries require lower accounting standards and provide lesser shareholder protection than the U.S.. Therefore, criticisms about the additional costs of complying with the Sarbanes-Oxley Act are not as warranted as might first appear.

A particularly controversial aspect of the Sarbanes-Oxley Act is that it blurred the line of distinction between the federal securities law and state corporation laws for public companies.<sup>28</sup> Traditionally, corporate governance has been regarded as the prerogative of the states, and, accordingly, great deference was given to foreign issuers on matters of corporate governance.<sup>29</sup> However, the Sarbanes-Oxley Act reaches into the ambit of corporate governance. It therefore inevitably generated conflicts and friction with other regulatory systems, as well as arousing immediate and unanimous hostility against its extraterritorial effects.

As NYSE noted in its comment letter to the SEC, a number of companies were considering either delisting or delisting and deregistration in order to avoid compliance with the

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24. 15 U.S.C. § 7261(b) (2000).

25. *Id.* § 78m(k).

26. According to some estimates, the cost amounts to between \$1.3 million and \$2.5 million. Perino, *supra* note 3, at 231.

27. Marco Pagano, Ailsa A. Röell, & Josef Zechner, *The Geography of Equity Listing: Why Do Companies List Abroad?*, 57 J. FIN. 2651 (2002).

28. Karmel, *supra* note 4, at 852.

29. *Id.* at 850.



Sarbanes-Oxley Act.<sup>30</sup> Some international companies, including Porsche of Germany, Daiwa Securities of Japan, and Benfield Group Ltd., announced that they postponed or reconsidered listing in the U.S. markets because of the stringent requirements of the Sarbanes-Oxley Act.<sup>31</sup> Nippon Telegraph and Telephone considered delisting, which ultimately did not happen, while LVMH actually delisted.<sup>32</sup>

More importantly, certain provisions of the Sarbanes-Oxley Act are in direct conflicts with regulations and practices of civil law countries.<sup>33</sup> Specifically, §301 is at the center of many controversies. Some of civil law countries, often require a two-tier board comprised of the lower “managing board” with no independent directors and the upper “supervisory board” which is half composed of representatives of employees, which in Germany is required by the Co-Determination Act of 1976.<sup>34</sup> Consequently, the lower board members are automatically disqualified for serving as the audit committee because they are not independent within the meaning of §301 of the Sarbanes-Oxley Act, and it is questionable whether the upper board members are able to serve as “independent” directors because half of the members are employees of the company and less likely to be given significant substantive responsibilities.<sup>35</sup> Also, whereas § 301 requires the audit committee responsible for the task of appointing, removing or supervising a company’s auditor, in certain jurisdictions home country law vests such authority in its shareholders or another body.<sup>36</sup>

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30. Letter from Darla C. Stuckey, Corp. Sec’y, N.Y. Stock Exch., to Jonathan G. Katz, Sec’y, Sec. & Exch. Comm’n, Standards Relating to Listed Company Audit Committees (Feb. 21, 2003), available at <http://www.sec.gov/rules/proposed/s70203/dcstuckey1.htm>.

31. Taneda, *supra* note 4, at 736; CHRISTOPHER WOO, THE EFFECTS OF THE SARBANES-OXLEY ACT ON FOREIGN PRIVATE ISSUERS 19 (2003), available at [http://www.law.harvard.edu/programs/pifs/pdfs/christopher\\_woo.pdf](http://www.law.harvard.edu/programs/pifs/pdfs/christopher_woo.pdf); Craig Karmin, *World Stock Markets: Foreign Firms Lose Urge to Sell Stock in U.S.*, WALL ST. J., July 24, 2003, at C1.

32. WOO at 19. However, in July 2003, Taiwan Semiconductor Manufacturing placed a \$909 million offering, and Taiwan’s Chungwa Telecom issued a new ADR worth \$1.4 billion. Karmin, *supra* note 31, at C1.

33. DeLaMater, *supra* note 7, at 114.

34. Coffee, *supra* note 14, at 1825 n.281.

35. *Id.* at 1825.

36. Letter from Sullivan & Cromwell, to Giovanni P. Prezioso, Gen. Counsel, Sec. & Exch. Comm’n, (Oct. 11, 2002), available at <http://www.sec.gov/rules/proposed/s72102/sullivanuk1.htm>.

Some foreign jurisdictions such as Japan, Italy, and Brazil require or provide for auditor oversight through a board of statutory auditors.<sup>37</sup>

As a result of intense lobbying efforts at the SEC by foreign issuers,<sup>38</sup> and the SEC's own contemplation of the practical problems of literal enforcement of some provisions, the SEC bent to the pressure and promulgated some limited exemptions. Addressing "concerns regarding the specific areas in which foreign corporate governance arrangements differ significantly from general practices among U.S. corporations," the SEC in final rules gave deference to home country regulations and practices in order to ameliorate the hardship foreign issuers face in having to meet conflicting requirements by their home countries and the U.S..<sup>39</sup>

As to the requirement of an independent audit committee, the SEC made a series of specific accommodations for foreign issuers.<sup>40</sup> First, recognizing that some countries, such as Germany, require that non-management employees serve on the supervisory board or audit committee, the SEC crafted an employee representation exemption and permitted non-executive employees to sit on the audit committee "if the employee is elected or named to the board of directors or audit committee of the foreign private issuer pursuant to the issuer's governing law or . . . other home country legal or listing requirements."<sup>41</sup>

Second, in the case of foreign issuers with two-tier board systems, the SEC clarified that it will treat the supervisory or non-management board as the "board of directors," recognizing that "the supervisory or non-management board is the body within the company best equipped to comply with the requirements." Accordingly, the supervisory or non-management board can either form a separate audit committee or if the entire board is independent within the meaning of the rule, be designated as the audit committee.<sup>42</sup>

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37. Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18,788, 18,803 n.160 (Apr. 16, 2003).

38. Taneda, *supra* note 4, at 736.

39. Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. at 18,788, 18,802-04.

40. *Id.* at 18,802.

41. *Id.*

42. *Id.*

Third, mindful of the fact that controlling shareholders are more prevalent and have played a more prominent role in corporate governance in foreign countries, the SEC accommodated this practice through a limited exception that permits one shareholder or representative of a shareholder or group to have an observer status on the audit committee, "if the 'no compensation' prong of the independence requirements is satisfied, the member in question has only observer status on, and is not a voting member or the chair of, the audit committee, and the member in question is not an executive officer of the issuer."<sup>43</sup>

Fourth, the SEC provided an exemption for foreign governments, noting that "[f]oreign governments may have significant shareholdings in some foreign private issuers or may own special shares that entitle the government to exercise certain rights relating to these issuers."<sup>44</sup> Thus, foreign governmental representatives can sit on audit committees "provided the 'no compensation' prong of the independence requirements is met and the member in question is not an executive officer of the issuer" regardless of the type of their holdings.<sup>45</sup> If the listed issuers are themselves a foreign government, they are granted outright exemption.<sup>46</sup>

Fifth, as some foreign jurisdictions require or provide for a board of auditors or groups of statutory auditors that are separate from the board of directors, the SEC created a series of exemptions if "those boards operate under legal or listing provisions intended to provide oversight of outside auditors that is independent of management, membership on the board excludes executive officers of the issuer and certain other requirements were met."<sup>47</sup> The SEC noted that "these boards of

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43. *Id.*

44. *Id.* at 18,803.

45. *Id.*

46. *Id.*

47. *Id.* at 18,804. The specific requirements are:

- The foreign private issuer has a board of auditors (or similar body), or has statutory auditors (collectively, a "Board of Auditors"), established and selected pursuant to home country legal or listing provisions expressly requiring or permitting such a board or similar body;
- The Board of Auditors is required to be either separate from the board of directors, or composed of one or more members of the

auditors or statutory auditors are intended to be independent of management, although their members may not in all cases meet all of the independence requirements” and “the establishment of an audit committee in addition to these bodies, with duplicative functions, might not only be costly and inefficient, but it also could generate possible conflicts of powers and duties.”<sup>48</sup> At the same time, the SEC eliminated the requirement that issuers must be listed on a market outside the U.S. and did not adopt a sunset date for the exemption.<sup>49</sup> However, the exemption is not extended to foreign issuers that have audit committees.<sup>50</sup>

In addition, the SEC delayed the compliance date for foreign issuers. Foreign issuers, along with small business issuers, must comply by July 31, 2005, whereas the rest of domestic issuers must be in compliance by the earlier of their first annual shareholder meeting after January 15, 2004, or October 31, 2004.<sup>51</sup>

With regard to restrictions on non-GAAP financial information, a big break for foreign issuers came from a new disclo-

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board of directors and one or more members that are not also members of the board of directors;

- The Board of Auditors are not elected by management of the issuer and no executive officer of the issuer is a member of the Board of Auditors;
- Home country legal or listing provisions set forth or provide for standards for the independence of the Board of Auditors from the issuer or the management of the issuer;
- The Board of Auditors, in accordance with any applicable home country legal or listing requirements or the issuer’s governing documents, is responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including, to the extent permitted by law, the resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer; and
- The remaining requirements in the rule, such as the complaint procedures requirement, advisors requirement and funding requirement, apply to the Board of Auditors, to the extent permitted by law.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 18,788.

sure regulation, Regulation G.<sup>52</sup> In the implementation of § 401(b), Regulation G has a general disclosure requirement<sup>53</sup> and a reconciliation requirement of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure in the disclosure.<sup>54</sup> Balancing the interests of U.S. investors in receiving information communicated by the issuer outside the U.S. and the interests of foreign private issuers in having information available globally, the SEC provided a safe harbor from the application of Regulation G.<sup>55</sup>

## II.

### EMPIRICAL EVIDENCE OF COMPETITIVENESS IN THE U.S. CAPITAL MARKETS

Today, after almost five years since the passage of the Sarbanes-Oxley Act, it is time to assess the two opposite scena-

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52. Conditions for Use of Non-GAAP Financial Measures, 17 C.F.R. §§ 228, 229, 244, 249 (2003).

53. 17 C.F.R. § 244.100(b).

54. *Id.* § 244.100(a).

55. *Id.* § 244.100. The safe harbor applies if:

- the securities of the foreign private issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
  - the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with generally accepted accounting principles in the United States; and
  - the disclosure is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States.
- More generously, the safe harbor applies even if:
- a written communication is released in the United States as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;
  - foreign journalists, U.S. journalists or other third parties have access to the information;
  - the information appears on one or more web sites maintained by the registrant, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or
  - following the disclosure or release of the information outside the United States, the information is included in a submission to the Commission made under cover of a Form 6-K.

rios Karmel projected as to the effects of the Sarbanes-Oxley Act on foreign issuers: either foreign issuers decline significantly and move to London to the detriment of the U.S. markets, or corporate-governance standards converge into U.S. models which may lead to a worldwide harmonization of standards.<sup>56</sup> As discussed in this and the following section, the latter scenario is the likelier of the two.

There has been a fair amount of research on the impact of the Sarbanes-Oxley Act. The research conducted by Kamar et al. clearly showed that the burden imposed by Sarbanes-Oxley Act mainly induced small companies to go private, while large companies were little affected.<sup>57</sup> However, their research is limited to U.S. companies. As to the impact on foreign issuers, most of the empirical studies focus on the stock price reactions to cross-listed foreign companies. The paper by Berger et al. compares returns to cross-listed foreign companies with returns to U.S. issuers.<sup>58</sup> Litvak's study solved the problem of a lack of control group by using the non-cross-listed companies from the same industry and country which are similar in size. Their papers show how the market reacted to major events related to the adoption of the Sarbanes-Oxley Act that were expected to negatively affect foreign issuers. However, the major weakness of these papers is that they tell us about the market's perception of those events, not about the real and actual impact of those events on foreign issuers. So, even if the market forecasted that a certain event would be very detrimental to foreign companies, it may nevertheless turn out that foreign companies can overcome or are willing to bear the burdens imposed by the new requirements.

Quite contrary to this research, according to the survey conducted by Broadgate Capital Advisors LLC and the Value Alliance working together with the Bank of New York with re-

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56. Karmel, *supra* note 4, at 886.

57. Ehud Kamar et al., *Going Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis*, (Univ. S. Calif. Ctr. in Law, Econ. & Org. Research Paper No. C06-05, 2006), available at <http://ssrn.com/abstract=901769> (noting that while large companies were little affected, a large number of small companies exited the public capital market after the enactment of the Sarbanes-Oxley Act).

58. Philip G. Berger et al., *The Impact of Sarbanes-Oxley on Cross-Listed Companies* (January 8, 2005) (unpublished manuscript, on file with the New York University Journal of Law & Business).

spect to the ADR issuers with market capitalizations predominantly in excess of \$500 million, 52% of the 143 respondents representing companies headquartered in 43 different countries answered that the governance standards in the U.S. are more rigorous than that of their home country, while 32% believed they were as rigorous as that of their home country, and 14% even reported that their home country has more rigorous governance practices (3% answered that they are not sure).<sup>59</sup>

Notably, only 8% of respondents believed that "the Act's requirements would lead them to reconsider U.S. market participation," while 55% said that they planned to comply with Sarbanes-Oxley, and 38% answered that the requirements of the Sarbanes-Oxley Act were either irrelevant or covered by their country's domestic law.

Thus, this paper looked into the actual reactions of foreign issuers who bear the increased costs of the Sarbanes-Oxley Act by comparing new listings on NYSE to (1) new additions to ADR level I and level IV programs which are not subject to the Sarbanes-Oxley Act, and (2) delisting from NYSE in 2005 and 2006 (in case of Form 15-15D delistings, after 2002). New additions to or terminations of ADR level I and level IV are used as a control group against new listings or delistings on NYSE in order to isolate the effect of the Sarbanes-Oxley Act. Additionally, this paper looked into the financial soundness of delisting companies around the time of their delisting in order to assess the desirability of those companies to the U.S. investors.

Unlike the unanimous frustration and criticism expressed by foreign issuers, the reality presents a more mixed picture. Even a rough glance at the numbers in Table 1 reveals that the overall number of listed foreign issuers has remained relatively stable, and that there has not been a dramatic stampede away from the U.S. capital markets. This is all the more noteworthy given the world-wide recession in the years following the enactment of the Sarbanes-Oxley Act which might also have affected the decline of foreign company listings.<sup>60</sup>

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59. Survey: ADR Issuers Complying with Sarbanes-Oxley Governance Standards (June 2004), available at [http://www.adrbny.com/dr\\_pub\\_survey.jsp](http://www.adrbny.com/dr_pub_survey.jsp) (last visited Jan. 2, 2007).

60. Karmel, *supra* note 4, at 857. A current list of foreign issuers is available at <http://www.nyse.com/pdfs/07nonUSIssuers.pdf>.

Detailed research was conducted on the listing of foreign issuers on the NYSE during the period between 2003 and 2006. Because of a lack of publicly available information about foreign issuers listed in general, this paper had to rely heavily on data from the NYSE, which publishes a list of non-US listed issuers annually. Although less comprehensive than the statistics provided by the SEC,<sup>61</sup> the statistics published by the NYSE cover the years up to 2006 and show similar movement as the SEC statistics from the overlapping period.

New listings and delistings were sorted out by cross referencing the listed foreign issuers in 2003, 2004, 2005, and 2006, respectively. So, if a company appears in the 2004 list but disappears in 2005, it was regarded as a delisting in 2005. Sometimes the filing date of forms for delisting with the SEC does not correspond to the dates inferred from the cross-reference. Since the NYSE is the authority to determine the delisting, the data from the NYSE was given more weight.

61. Data compiled from 2000 to 2005. International Registered and Reporting Companies, <http://www.sec.gov/divisions/corpfin/internatl/companies.shtml> (last visited Jan. 4, 2007). Data for 2006 is not yet available.

Region	2000	2001	2002	2003	2004	2005
Africa	14	13	14	16	14	12
Asia	89	95	95	99	102	102
Australia/NZ	36	38	38	34	30	37
UK/Ireland	160	160	149	129	119	100
Europe	207	219	221	199	185	175
Canada	481	503	498	480	497	515
Caribbean	84	85	81	66	83	91
Latin America	138	140	133	123	124	118
Israel	101	91	90	86	86	86
<b>Total</b>	<b>1310</b>	<b>1344</b>	<b>1319</b>	<b>1232</b>	<b>1240</b>	<b>1236</b>

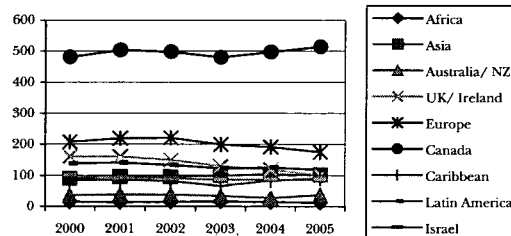




TABLE 1: NON-U.S. COMPANIES LISTED ON NEW YORK STOCK EXCHANGE (2002-2006) (BY REGION)

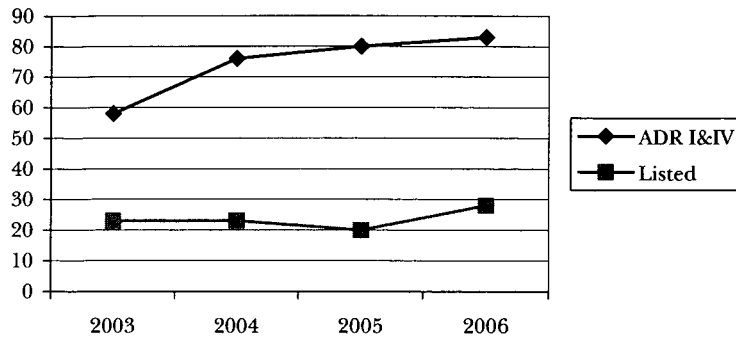
Region	02	+/- during 2002	03	+/- during 2004	04	+/- during 2005	05	+/- during 2006	06
Africa	7	+2, 0	9	0, -2	7	0, 0	7	0, 0	7
Asia	62	+5, -2	65	+5, 0	70	+2, -1	71	+6, -3	74
Aust/NZ	13	+1, 0	14	0, -3	11	0, -1	10	0, -1	9
UK/Ireland	54	+4, -3	55	+1, -4	52	+2, -7	47	+2, -3	46
Europe	123	0, -9	114	+4, -7	111	+2, -5	108	+5, -8	105
Canada	79	+5, -6	78	+2, -2	78	+10, -4	84	+8, -8	84
Carib.	41	+4, -5	40	+6, -5	41	+3, 0	44	+4, -3	45
Latin Amer	91	+2, -5	88	+5, -7	86	+1, -8	79	+3, -4	78
Israel	4	0, 0	4	0, 0	4	0, -1	3	0, 0	3
<b>Total</b>	<b>474</b>	<b>+23, -30</b>	<b>467</b>	<b>+23, -30</b>	<b>460</b>	<b>+20, -27</b>	<b>453</b>	<b>+28, -30</b>	<b>451</b>

Overall, the numbers both in issuers with ADR level I and IV programs and in issuers listed on the NYSE show little fluctuation, despite regional variations.

TABLE 2: COMPARISON OF THE ADDITIONS OF FOREIGN ISSUERS WITH ADR I & IV PROGRAMS<sup>62</sup> AND THE NEW LISTINGS OF NON-U.S. COMPANIES ON NYSE

Region		2003	2004	2005	2006
Africa	ADR I&IV	4	6	3	4
	Listed	2	0	0	0
Asia	ADR I&IV	31	32	27	26
	Listed	5	5	2	6
Australia & New Zealand	ADR I&IV	6	12	16	7
	Listed	1	0	0	0
United Kingdom & Ireland	ADR I&IV	8	9	6	4
	Listed	4	1	2	2
Europe	ADR I&IV	13	16	20	28
	Listed	0	4	2	5
Canada	Listed	5	2	10	8
Caribbean	Listed	4	6	3	4
Latin America	ADR I&IV	10	12	6	12
	Listed	2	5	1	3
Israel	ADR I&IV	0	0	3	1
	Listed	0	0	0	0
Total	<b>ADR I&amp;IV</b>	<b>58</b>	<b>76</b>	<b>80</b>	<b>83</b>
	<b>Listed</b>	<b>23</b>	<b>23</b>	<b>20</b>	<b>28</b>

62. The data for the new additions to ADR level I and IV programs was provided by Dori Flanagan, Vice President of the Bank of New York. The

FIGURE 1<sup>63</sup>

same data has also been published by the Bank of New York, [http://www.adrbny.com/dr\\_directory.jsp](http://www.adrbny.com/dr_directory.jsp) (last visited Jan. 11, 2007). However, the online list does not include the ADRs terminated.

63. The regional data is as follows:

FIGURE 2-1: AFRICA

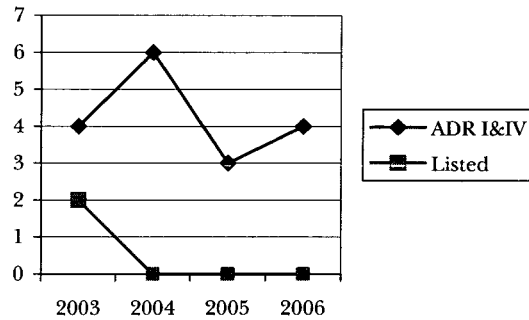


FIGURE 2-2: ASIA

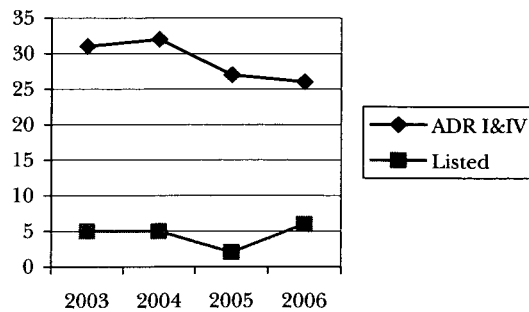


FIGURE 2-3: AUSTRALIA & NEW ZEALAND

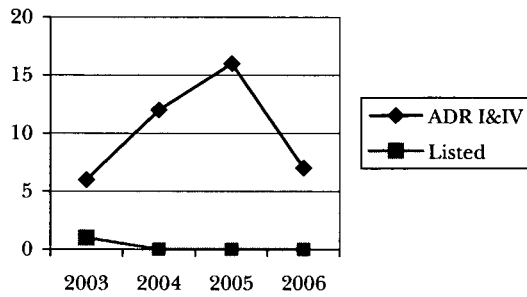


FIGURE 2-4: UNITED KINGDOM & IRELAND

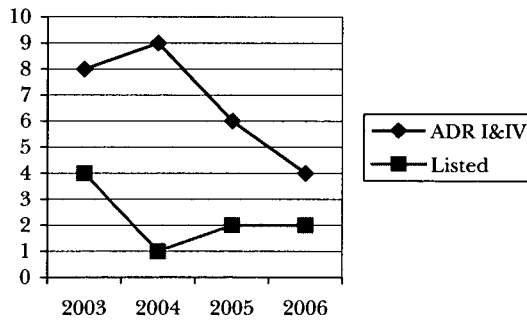


FIGURE 2-5: EUROPE

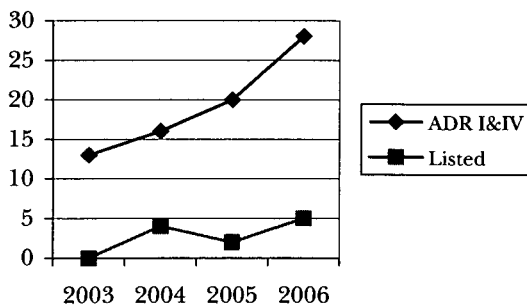


FIGURE 2-6: LATIN AMERICA

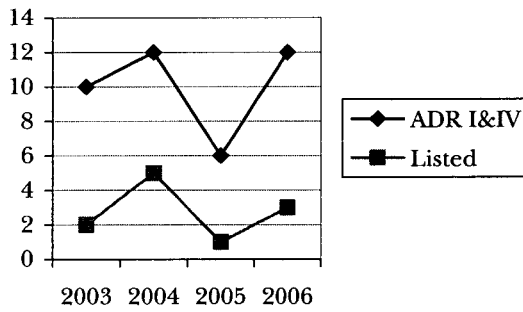


FIGURE 2-7: ISRAEL

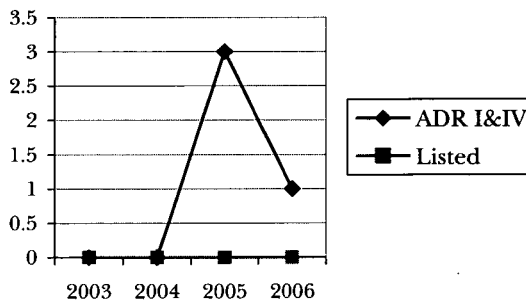
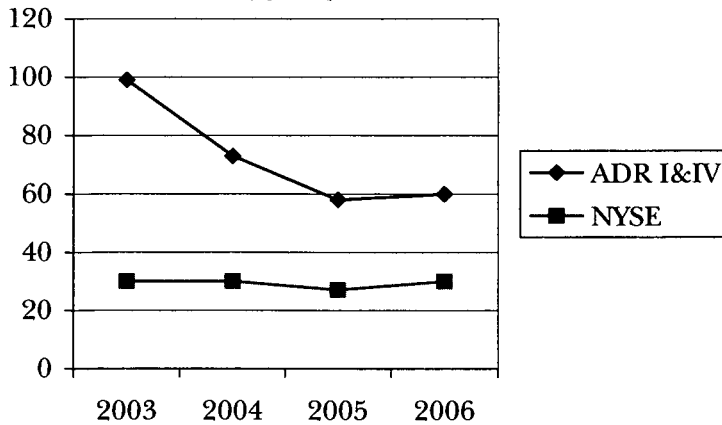


TABLE 3: COMPARISON OF THE TERMINATION OF FOREIGN ISSUERS WITH ADR I & IV PROGRAMS<sup>64</sup> AND THE DELISTINGS OF NON-U.S. COMPANIES ON NYSE

Region		2003	2004	2005	2006
Africa	ADR I&IV	4	9	2	4
	NYSE	0	2	0	0
Asia	ADR I&IV	22	19	5	17
	NYSE	2	0	1	3
Australia & New Zealand	ADR I&IV	9	2	7	3
	NYSE	0	3	1	1
United Kingdom & Ireland	ADR I&IV	13	9	11	9
	NYSE	3	4	7	3
Europe	ADR I&IV	25	24	19	15
	NYSE	9	7	5	8
Canada	NYSE	6	2	4	8
Caribbean	NYSE	5	5	0	3
Latin America	ADR I&IV	21	9	13	9
	NYSE	5	7	8	4
Israel	ADR I&IV	3	0	0	0
	NYSE	0	0	1	0
Total	ADR I&IV	99	73	58	60
	NYSE	30	30	27	30

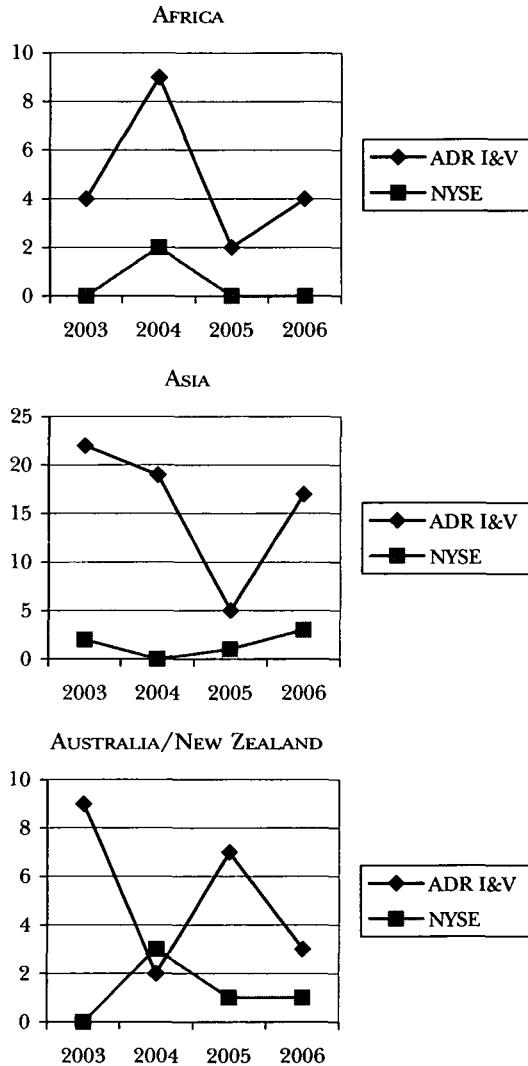
FIGURE 2<sup>65</sup>



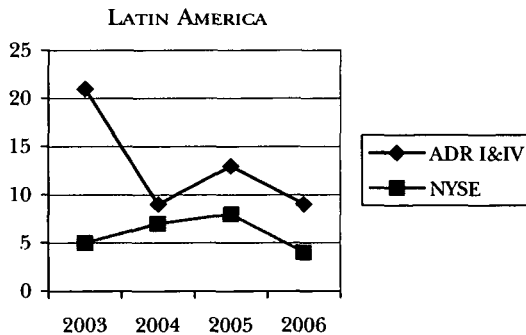
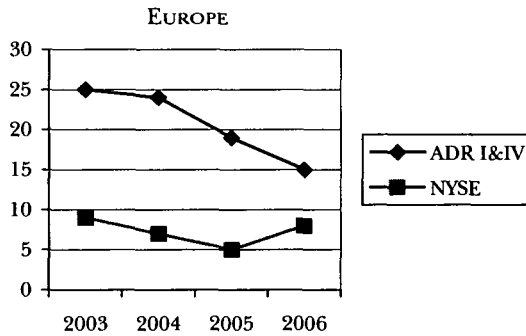
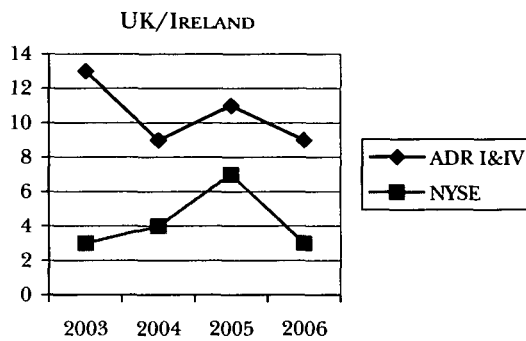
64. The data for the terminations of ADR level I and IV programs was provided by Dori Flanagan, Vice President of the Bank of New York.

65. The regional data is as follows

After the relatively greater increase of new additions to ADR level I and IV programs than the new listings on NYSE in 2004, the two groups have showed a similar growth pattern during 2005. In 2006, the NYSE reveals higher growth rate than ADR level I and IV programs, which may signify that foreign issuers became more ready to bear the burden of additional compliance costs of the Sarbanes-Oxley Act.

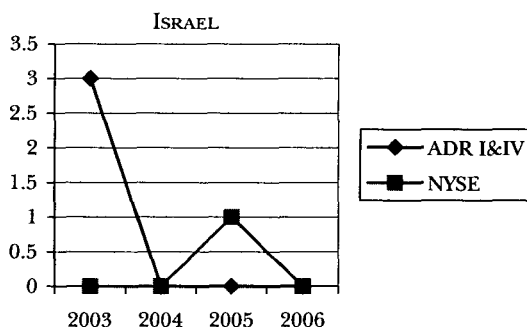


As to the termination/delisting, the two groups show relatively similar movement except in 2003 and thus the Sarbanes-Oxley seems to have little impact on the delisting of foreign issuers. Yet, this interpretation calls for a caveat. Foreign issuers listed on the NYSE may have stronger ties with the U.S., or might be seeking for more than raising capital, as discussed below. Therefore, the same rate, not a lower rate, of delisting may be read as proof that Sarbanes-Oxley influenced foreign



issuers to some degree, although less than expected, in their delisting decision. Further analysis of the reasons behind delistings is clearly warranted before we can conclude that most of the delistings are not attributable to the Sarbanes-Oxley Act.

In order to delist from the NYSE, a company must certify that it has less than 300 beneficial shareholders resident in the US or less than 500 beneficial shareholders resident in the US, where the total assets of the issuers have not exceeded \$10 million on the last day of each of the issuer's most recent three fiscal years.<sup>66</sup> Alternatively, a company can suspend its duty to report under § 15(d) of the Exchange Act if its securities are held by less than 300 shareholders at the beginning of a fiscal year.<sup>67</sup> Thus, only Form 15-15D delistings were counted in 2003 and 2004. But since such suspension is temporary in nature and since a complete delisting takes at least three years, the Sarbanes-Oxley Act affect on delistings could not have materialized earlier than 2005.<sup>68</sup> Therefore, 2005 and 2006 are more important than 2003 and 2004 in terms of delistings. The Table 4 summarizes the result of the research into reasons for delisting detailed in full length in the Appendix.



66. 17 C.F.R. § 240.12g-4(a)(2) (2007).

67. *Id.*

68. *Id.* § 240.15d-6.



TABLE 4: REASONS FOR DELISTING

Reasons	03	04	05	06	Total
M&A, Reincorporation, Name change	12	10	14	15	51
Non voluntary delisting	8	2	1	4	15
Form 15-12B or 15-12G	4	10	0	0	14
Negative Cash Flow	0	0	0	2	2
No Data	4	5	1	1	11
Current Ratio > 1	1	1	3	3	8
Current Ratio 1.5 > > 1	0	0	1	3	4
<b>Current Ratio &gt; 1.5</b>	<b>0</b>	<b>1</b>	<b>7</b>	<b>2</b>	<b>10</b>
Increasing Cash Flow	1	1	0	0	2
<b>Total</b>	<b>30</b>	<b>30</b>	<b>27</b>	<b>30</b>	<b>117</b>

Presumably, the termination (under section 12g-4 with the filing of Forms 15-12B, 15-12G, 25, 25-NSE) since 2005 and the suspension of the duty to report (under section 15(d) with the filing of Form 15-15D) since 2003 may have been caused by the Sarbanes-Oxley Act. As to non Form 15-15D delisting during 2003 and 2004, this paper for the sake of argument, assumes delistings which were not specified as Forms 15-12B or 15-12G were affected by the Sarbanes-Oxley Act.

It was found that 80 out of 117 delistings in total between 2003 and 2006 had nothing do to with the Sarbanes-Oxley Act: 50 delistings due to merger and acquisition, reincorporation or name change; 15 non voluntary delistings for failure to satisfy the NYSE's listing standards; and 14 Form 15-12B/ Form 15-12G delistings between 2003 and 2004.

In order to assess the desirability of the delisted companies as an investment vehicle, this paper used current ratio or cash flow from operating activities (for companies whose current assets and current liabilities are not available) as a measure for a company's financial soundness. The data for current assets and current liabilities are obtained from the latest Form 20-F or Form 40-F filed with the SEC which are available on-line on EDGAR or on the companies' websites. If an absence of data, decreasing cash flow or current ratio below 1.5 is treated as an indicator of a problematic financial state, 25 companies fall into this category. The companies that show increasing cash flows or a current ratio above 1.5 constituted 12 delistings from NYSE, which may be interpreted as a cost of the securities regulations' heightened standards.

Yet, 12 delistings still may overrepresent the cost of the Sarbanes-Oxley Act. Cable and Wireless Plc (U.K.) announced that it intended to terminate its ADR program because ADR trading volumes were very low (less than 1.0% of Cable & Wireless' shares traded over the three months)<sup>69</sup> and Enodis Plc (U.K.) delisted from NYSE as part of its capital restructuring at the approval of the High Court.<sup>70</sup> Pioneer Corporation (Japan) stated that delisting from the NYSE was decided as a part of the global restructuring of its operations which included maintaining the listing of the Security solely on the Tokyo Stock Exchange (TSE).<sup>71</sup> Hence, these delistings were not attributable to the Sarbanes-Oxley Act.

Moreover, even financially sound companies may not necessarily be desirable as an investment vehicle. For instance, among companies whose current ratio is above 1.5, three companies showed decreasing cash flow from operating activities, which is not a good sign of financial soundness.<sup>72</sup> TV Azteca, S.A. (Mexico), which had delisted from NYSE in 2005, entered into an agreement with the SEC to settle charges for the violation of provisions of the Exchange Act in 2006.<sup>73</sup> Thus, the delistings of these companies which appear to be in good financial shape should not be counted as purely a result of the Sarbanes-Oxley Act.

It is worth noting that while no company whose current ratio was above 1.5 delisted in 2003, eight such companies delisted in 2005, which might be interpreted as showing that their delistings are correlated with the Sarbanes-Oxley Act. However, when considered in the overall context of the U.S.

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69. Press Release, Cable & Wireless plc, Intention to Delist from NYSE and Terminate ADR Programme and SEC registration (Sep. 9, 2005) (on file with the New York University Journal of Law & Business).

70. Besides, only a very small portion of the company's total equity (0.27%) and related trading volume is represented by ADRs. Press Release, Enodis plc, EGM Resolutions Passed and Capital Restructuring Update (June 13, 2005) (on file with the New York University Journal of Law & Business); Enodis plc, Report of Foreign Issuer (Form 6-K/A) (May 19, 2005).

71. SEC Issuer Delisting (Jan. 20, 2006), *available at* [http://www.sec.gov/rules/delist/1-07616\\_012006.pdf](http://www.sec.gov/rules/delist/1-07616_012006.pdf) (last visited Jan. 25, 2007).

72. Those companies include: Internacional de Cerámica, S.A. de C.V. (Mexico) in 2004, Premier Farnell plc (United Kingdom), and Cristalerías de Chile, S.A. (Chile) in 2005.

73. SEC News Digest, Issue No. 2006-179 (Sep. 15, 2006), *available at* <http://www.sec.gov/news/digest/2006/dig091506.txt>.

capital markets, including the termination rate of ADR Level I and Level IV and the increase in new listings in 2006, it is clear that the increased burden imposed on companies by Sarbanes-Oxley is not the only relevant factor behind delistings and that the delistings may have more to do with the overall condition of the U.S. capital markets.

Several explanations may be possible, although the verification of each hypothesis is beyond the scope of this paper. It is possible that the companies that cited the extreme burden of complying with the Sarbanes-Oxley as the reason for their decision not to list were serious about listing.<sup>74</sup> Or, the Sarbanes-Oxley Act might be no more than an attempt to codify existing federal regulations, state laws and corporate governance norms, contrary to the general perception of it as being too far-reaching or sweeping.<sup>75</sup>

More fundamentally, listing on the U.S. markets provides substantial benefits to issuers. In addition to the fact that issuers can tap the enormous U.S. markets for raising capital, they may also want to make U.S. acquisitions or bond their promise to make credible disclosures.<sup>76</sup> Overall, cross listing in the U.S. significantly increases liquidity, while reducing the exposure to domestic market risk.<sup>77</sup>

According to Foester and Karolyi's study, equity issuers were found to outperform their home market benchmarks and this is especially the case when the issuers come from markets with lower accounting standards.<sup>78</sup> A significant amount of empirical research supports the bonding explanation, which posits that companies from jurisdictions with weak regulations can generate favorable market reactions and attract more investors by voluntarily subjecting themselves to higher disclosure standards and stricter enforcement because it con-

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74. Some analysts said that they were skeptical about whether Porsche would accede to the requirements of a listing because "having just issued almost \$300 million in bonds," Porsche did not need to raise capital. Mark Lander, *Porsche is Balking at U.S. Auditing Rule*, N.Y. TIMES, Aug. 21, 2002, at W1.

75. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 918-20 (2003).

76. Coffee, *supra* note 14, at 1826.

77. Woo, *supra* note 31, at 4.

78. *Id.* at 5.

veys a message that the management is confident in the company's future earnings.<sup>79</sup>

### III.

#### RACING TO THE TOP?: TOWARDS HEIGHTENED STANDARDS AROUND THE WORLD

The Sarbanes-Oxley Act may have contributed to the acceleration of the movement towards harmonized international standards. As shown above, the concerns about the U.S. markets losing issuers to London and other securities markets abroad because of the Sarbanes-Oxley Act turned out to be more speculative than real. One of the reasons for this phenomenon may be the fact that the U.S. is not the only country whose regulations have global ramifications nor the only country that deeply feels the need for reform in corporate governance for enhancement of investor protection and deterrence of corporate scandals. Shortly after the enactment of the Sarbanes-Oxley Act, the European Commission, Canadian, and Korean securities regulators put forth similarly robust parallel rules while addressing the unique concerns of their own constituents.<sup>80</sup>

In fact, the integration of the European markets brought with it a far-reaching impact on the legislations of member

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79. Coffee, *supra* note 14, at 1783; Perino, *supra* note 3, at 236-38. Interestingly, the reasons for listing in the U.S. and the significance of the U.S. market may vary among the issuers' different countries. Woo's study found that the higher the relative market capitalization of companies and the relative trading volume in the U.S., the more important the U.S. market becomes for issuers. Specifically, the U.S. market is more important for issuers from Israel and Latin America as compared to issuers from Australia, East Asia, and Japan. The data on European companies revealed a mixed pattern. Woo, *supra* note 31, at 31, 58. It is much easier for Israeli companies listed in the U.S. market to list in their domestic market which requires voluntary disclosures or disclosures they make under US laws. *See id.* at 6. Also, listing in the U.S. may signal to investors the firm's value because it was found that high-quality initial public offerings tend to list on the U.S. unlike less promising firms which remain in Israel. *Id.* Financial considerations such as better pricing or greater liquidity followed by greater prestige are the main reason for European and Asian companies to list in the U.S. markets. In case of large Japanese companies, the prestige and greater brand recognition gained from compliance with the strict disclosure in the U.S., rather than liquidity, is a more dominant reason. *Id.* at 6-7.

80. Karmel, *supra* note 4, at 889, 891.

states of the European Union, and, consequently, European policy makers felt more keenly the need for a harmonized and advanced regulatory system for corporate governance. More importantly, the European Union shares with the United States the same interest in sound financial market supervision and efficient capital markets.<sup>81</sup> Citing the Sarbanes-Oxley Act as a rapid response to a series of financial scandals, the European Commission stated that “in many areas, the EU shares the same broad objectives and principles of the Sarbanes-Oxley Act and in some areas robust, equivalent regulatory approaches already exist in the EU.”<sup>82</sup>

The High Level Group of Company Law Experts (hereinafter the “Group”) was initially set up in 2001 with the mandate of establishing a more effective regulatory framework for corporate law.<sup>83</sup> Yet, as a reaction to the market-shaking events of the American corporate and accounting scandals, the Group’s mandate was expanded into the realm of corporate governance and auditing issues, as reflected in its report submitted to the European Commission in November 2002.<sup>84</sup>

Subsequently, on May 21, 2003, the European Commission issued an action plan for “Modernizing Company Law and Enhancing Corporate Governance in the EU” (the “Action Plan”).<sup>85</sup> The Action Plan presented a comprehensive set of legislative and non-legislative proposals extending over three phases through 2009,<sup>86</sup> with the main emphasis on corporate governance issues, but also covering issues such as capital maintenance, groups/pyramids, corporate restructuring,

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81. Maria Camilla Cardilli, *Regulations Without Borders: The Impact of Sarbanes-Oxley on European Companies*, 27 FORDHAM INT’L L.J. 785, 816-21 (2004).

82. COMM’N OF THE EUR. CMTYS., MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION - A PLAN TO MOVE FORWARD 5 (2003), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003\\_0284en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0284en01.pdf).

83. A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts, Financial Reporting & Company Law 12 (Nov. 4, 2002), available at [http://ec.europa.eu/internal\\_market/company/docs/modern/consult\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf).

84. Cardilli, *supra* note 81, at 817.

85. *Id.* at 821.

86. For a list of actions by each term, see COMM’N OF THE EUR. CMTYS., *supra* note 82, at 24-26 .

and mobility.<sup>87</sup> The principal initiatives set forth in the Action Plan include: requirement of “an Annual Corporate Governance Standard” by listed companies, promotion of the role of non-executive or supervisory directors, minimum standards on audit committees, more transparent remuneration of directors, and a legislative framework for shareholders rights.<sup>88</sup>

The same recommendations were confirmed again in the final report of the Group which was produced after an extensive consultation process.<sup>89</sup>

- Annual Corporate Governance Statement [comparable to the Sarbanes-Oxley Act §§ 404 internal control and 406 code of ethics] – Listed companies should be required to include in their annual report and accounts the key elements of the corporate governance rules and practices they apply.<sup>90</sup>
- Audit committees [comparable to the Sarbanes-Oxley Act § 301 independent audit committee] – A committee of non-executive or supervisory directors who are at least in the majority independent is responsible for supervision of the audit of the company’s financial statements.<sup>91</sup>
- Role of (independent) non-executive and supervisory directors [comparable to the Sarbanes-Oxley Act §301 independent audit committee] – The nomination, remuneration of directors, and the audit of the accounting should be decided upon by exclusively non-executive or supervisory directors who are in the majority independent. Listed companies should disclose which of their directors are independent and on what grounds,

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87. LATHAM & WATKINS LLP, THE EUROPEAN COMMISSION PUBLISHES ITS ACTION PLAN ON MODERNIZING EUROPEAN COMPANY LAW & ENHANCING CORPORATE GOVERNANCE IN RESPONSE TO ENRON, AHOLD, AND THE SARBANES-OXLEY ACT (2003), available at <http://www.lw.com/resource/Publications/ClientAlerts/clientAlert.asp?pid=747>.

88. *Id.*

89. See generally HIGH LEVEL GROUP OF CO. LAW EXPERTS, REPORT ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (2002), available at [http://ec.europa.eu/internal\\_market/company/docs/modern/eport\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/eport_en.pdf).

90. *Id.* at 45.

91. *Id.* at 70.

and also disclose board positions their non-executive or supervisory directors hold in other companies.<sup>92</sup>

- Remuneration of directors – The general remuneration policy for directors, and individual remunerations of executive and non-executive or supervisory directors should be disclosed in the financial statements of the company. Stock options or related remunerations should acquire the prior approval of the shareholders to whom the remuneration committee should explain the applicable rules and their costs.<sup>93</sup>
- Management responsibility for (financial) statements [comparable to the Sarbanes-Oxley Act §302 corporate responsibility for financial reports] – All board members on a collective basis are responsible for the truthfulness of financial statements and all statements about the company's financial position as well as key non-financial data including the annual corporate governance statement.<sup>94</sup>

Further, the Group recommended special investigation rights of minority shareholders as a way to overcome the collective action problem and encourage a more effective exercise of the shareholders' rights: the right of shareholders, either in a general meeting or holding a minimum of 5 or 10% of the company's share capital, to apply to a court or appropriate administrative body to order a special investigation.<sup>95</sup>

Additionally, in 2005, the European Commission has set up a European Group of Auditors' Oversight Bodies (EGAOB) in order to "ensure effective coordination of new public oversight systems of statutory auditors and audit firms within the European Union."<sup>96</sup> According to the directive, it will be responsible for "the oversight of the approval and registration of statutory auditors and audit firms, and the adoption of standards on ethics, internal quality control of audit firms and au-

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92. *Id.* at 60.

93. *Id.* at 64.

94. *Id.* at 67.

95. *Id.* at 56-59.

96. Press Release, Eur. Comm'n, Internal Market: "European Group of Auditors' Oversight Bodies" Created (Dec. 14, 2005) (on file with the New York University Journal of Law & Business).

ding, and continuous education, quality assurance and investigative and disciplinary systems.”<sup>97</sup>

The Canadian government presented a similar initiative “to restore investor confidence and to bring Canada into line with U.S. standards with three corporate governance rules on auditor oversight, certifications in companies’ reports, and audit committees,” in June 2003,<sup>98</sup> which took effect on March 30, 2004.<sup>99</sup>

In July 2002, federal and provincial financial and securities regulators in Canada announced the creation of the Canadian Public Accountability Board (CPAB) which was incorporated in April 2003, and serves as “a new independent public oversight system for accountants and accounting firms that audit reporting issuers.”<sup>100</sup> As required under § 102 of the Sarbanes-Oxley Act, under National Instrument 52-108 Auditor Oversight, a reporting issuer must have the auditor’s report prepared by a public accounting firm which is a participating audit firm and in compliance with any restrictions and sanctions imposed by CPAB.<sup>101</sup>

Multilateral Instrument 52-109 Certification of Disclosure in Issuers’ Annual and Interim Filings was promulgated with the effect of the Sarbanes-Oxley Act in mind. It noted that “[s]ince our markets are connected to and affected by the U.S. markets, they are not immune from erosion of investor confidence in the U.S. Therefore, we have initiated domestic measures. . .to address the issue of investor confidence and to maintain the reputation of our markets internationally.” Thus,

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97. *Id.*

98. For a more detailed discussion of the Canadian government’s response to the Sarbanes-Oxley Act, *see* Tara Gray, Library of Parliament, Canadian Response To The U.S. Sarbanes-Oxley Act Of 2002: New Directions For Corporate Governance (2005), *available at* <http://www.parl.gc.ca/information/library/PRBpubs/prb0537-e.pdf>.

99. Press Release, Ont. Sec. Comm’n, Notice of Ministerial Approval – National Instrument 52-108 Auditor Oversight, Multilateral Instrument 52-109 Certification of Disclosure in Issuers’ Annual and Interim Filings and Multilateral Instrument 52-110 Audit Committees (Mar. 9, 2004) (on file with the New York University Journal of Law & Business).

100. Canadian Public Accountability Board, <http://www.cpab-ccrc.ca/ContentEnglish/CPAB%20English%20%20Background.htm> (last visited Jan. 24, 2007).

101. National Instrument 52-108: Auditor Oversight, 27 O.S.C.B. 3,227 (2004) (Can.).



Multilateral Instrument 52-109 required certifications by CEOs and CFOs in close parallel to the SEC's certification requirements implementing §302 of the Sarbanes-Oxley Act.<sup>102</sup> The certification requirement of internal control over financial reporting, comparable to § 404 of the Sarbanes-Oxley Act, had been considered as a separate provision under Proposed Multilateral Instrument 52-111 Reporting on Internal Control Over Financial Reporting.<sup>103</sup> But it was decided that the requirement would be implemented under Multilateral Instrument 52-109 as included originally and only its implement was postponed until June 20, 2006.<sup>104</sup>

Multilateral Instrument 52-110 Audit Committees, like § 301 of the Sarbanes-Oxley Act, requires every reporting issuer to have an audit committee composed of independent directors, unless otherwise exempted, which must be responsible for overseeing the work of the external auditor and reviewing the issuer's financial statements.<sup>105</sup>

South Korea joined this stream of efforts to reform securities regulation and audit standards by amending the Korean Securities Exchange Act, the Act on External Audit of Stock Companies, and the CPA Act in December 2003, which came into effect on April 1, 2004. Details of these amendments pretty much mirrored the major provisions of the Sarbanes-Oxley Act.<sup>106</sup>

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102. *See generally* Notice of Multilateral Instrument 52-109: Certification of Disclosure in Issuers' Annual and Interim Filings, 27 O.S.C.B. 877 (2004) (Can.).

103. *See generally* Canadian Securities Administrators Notice 52-313: Status of Proposed Multilateral Instrument 52-111 Reporting on Internal Control Over Financial Reporting, and Proposed Amended and Restated Multilateral Instrument 52-109 Certification of Disclosure In Issuers' Annual and Interim Filings, 29 O.S.C.B. 2,011 (2006) (Can.).

104. Multilateral Instrument 52-109: Certification of Disclosure in Issuers' Annual and Interim Filings, Amendment Instrument, 28 O.S.C.B. 4,979 (2005) (Can.).

105. Multilateral Instrument 52-110: Audit Committees 27 O.S.C.B. 837 (2004) (Can.); Notice of Multilateral Instrument 52-110: Audit Committees, 27 O.S.C.B. 792 (2004) (Can.).

106. For more detailed comparison and discussion of major amendments, *see* BEHDAD NOWROOZI, WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES – REPUBLIC OF KOREA (2004), [http://www.worldbank.org/ifa/rosc\\_aa\\_kor.pdf](http://www.worldbank.org/ifa/rosc_aa_kor.pdf).

The amendments to the Korean Securities and Exchange Act heightened standards for companies' financial reports and imposed higher levels of responsibility regarding financial transparency: (1) they introduced the certification requirement by CEOs and CFOs of public companies, which mandates that their statutory filing documents do not contain any untrue statement or omission of material facts, which is akin to the requirements set by § 302 of the Sarbanes-Oxley Act;<sup>107</sup> (2) the executive compensations should be reported on the statutory filing document;<sup>108</sup> (3) companies are prohibited from providing or arranging loans to directors or senior management, which is akin to the requirements set by § 402 of the Sarbanes-Oxley Act;<sup>109</sup> and (4) the audit committee should include at least more than one audit or financial professionals in order to enhance the specialization of the audit committee, which is akin to the requirements set by § 407 of the Sarbanes-Oxley Act.<sup>110</sup>

The Act on External Audit of Stock Companies requires public companies to put an internal control system in place, and requires auditors to examine and report the overall performance of the internal control system as well as auditing works in the statutory filing documents, which closely resembles § 404 of the Sarbanes-Oxley Act.<sup>111</sup> Starting in 2006, public companies cannot retain the same audit firms for more than 6 business years, unless they are listed in the U.S. or the U.K.,<sup>112</sup> while § 203 of the Sarbanes-Oxley Act requires the audit partner rotation every 5 fiscal years.<sup>113</sup> Moreover, the CPA Act prohibits consulting work by auditors,<sup>114</sup> as the Sarbanes-Oxley Act does under § 201.<sup>115</sup>

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107. Korean Securities and Exchange Act, arts. 8(4) and 14(1)(1)(2) (S. Korea).

108. *Id.* at art. 186(2).

109. *Id.* at art. 191(19)(1).

110. *Id.* at art. 54(6)(2).

111. Act on External Audit of Stock Companies, arts. 2(2) and 2(3) (S. Korea).

112. *Id.* at art. 4(2)(4).

113. Sarbanes-Oxley Act, §203, 15 U.S.C. §78j-1(j) (2000). For discussion of audit firm rotation requirements in other countries, see Mara Cameran et al., *The Audit Firm Rotation Rule: A Review of the Literature* (SDA Bocconi Research Paper, Sept. 2005), available at <http://ssrn.com/abstract=825404>.

114. CPA Act, arts. 21(2) and 33(2) (S. Korea).

115. Sarbanes-Oxley Act, §201(a), 15 U.S.C. §78j-1(g) (2000).

In addition, the Securities Related Class Action Act was enacted to strengthen the protection of investors by facilitating class action lawsuits against public companies engaged in accounting fraud, untruthful disclosures in statutory documents, and illegal insider trading or stock price manipulation.<sup>116</sup> At least fifty shareholders whose combined shareholding exceeds 0.01 % of outstanding shares are permitted to bring a lawsuit against companies with a minimum asset of 2 trillion won (roughly \$2 billion) from January 1, 2005 and against companies with assets below that minimum starting January 1, 2007.<sup>117</sup>

#### IV.

#### CONCLUSION

Initially, it was thought that the Sarbanes-Oxley Act was not the ideal way to manage our securities regulation regime. It has been criticized as being too intrusive and for overlooking the difference between the socio-economic cultures of other countries. At least with regard to regulating corporate governance through securities regulations, there are alternative regimes to the federal securities laws, such as state corporate laws or the corporate laws of other countries. Nevertheless, eventually, the SEC accepted the inevitable differences in corporate culture and legal systems of other countries and promulgated a reasonable set of exceptions and compromises.

Contrary to the speculation about the detrimental effect of the Sarbanes-Oxley Act on the U.S. capital markets, the empirical data evinces that foreign issuers are relatively indifferent to the heightened standards. The overall number of foreign issuers listed on the U.S. capital markets shows little fluctuation since 2003. More importantly, slightly more than 2/3 of the total delistings were M&A related and pursued for company-specific reasons. Those delistings which can be considered pure losses to the U.S. capital markets constituted only 10%, even before excluding those companies whose desirability as investments is questionable. Even though the reasons behind why foreign issuers decided to stay in or enter into the U.S. capital markets should be studied further, it appears that

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116. NOWROOZI, *supra* note 106, at 18.

117. Securities-Related Class Action Act, arts. 12(1) and Notes 1 and 3 (S. Korea).

the Sarbanes-Oxley Act seems to have passed the cost-effective calculation of most of the foreign issuers.

In fact, the Sarbanes-Oxley Act seems to have triggered a race to the top as seen in subsequent reforms in securities regulations by European Union, Canada and South Korea. All of them closely mirrored the principal provisions of the Sarbanes-Oxley Act or made clear movements towards a system resembling the U.S. corporate governance .

Therefore, the enactment of the Sarbanes-Oxley Act and the subsequent reaction to it by foreign issuers urges us to consider more actively engaging with internationalization of capital markets through harmonization of securities regulations. The difference in business and management cultures in foreign companies would not be easily overcome and would be a substantial hurdle in establishing an international standard that could be applied across countries. At the same time, however, there is little reason to treat foreign issuers differently, at least in terms of disclosure, simply because of their status as foreign companies or because of rather poorly grounded concerns about driving them out.

The Sarbanes-Oxley Act dramatically increased the cost of compliance with securities regulations, but this burden is placed equally on all listed companies, both domestic and foreign, although the relative weight of the burden may vary depending on the size or capability of an individual company. Furthermore, if the rest of the world follows the SEC's initiative, as the European Union, Canada, and South Korea did, it would become more difficult to avoid the additional costs of complying with heightened standards. Thus, the argument that the SEC should continue to exclusively provide a break to foreign issuers is both unpersuasive and unfair to similarly situated U.S. companies.

The protection of U.S. investors is the primary goal of securities regulation. Moreover, U.S. investors are informationally disadvantaged with regard to foreign issuers and consequently need to rely on the accuracy and sufficiency of the disclosure by those foreign issuers. The risk of harmful effects to the U.S. economy of securities offered by unsound and risky foreign issuers are far graver than the harm resulting from dangerous products manufactured by foreign companies. If goods produced by foreign companies are subject to the same

domestic regulations for product liability as domestically produced goods, there seems to exist an even more compelling reason for a uniform application of the U.S. securities regulation to foreign and domestic issuers, unless an exceptional situation or pressing necessity warrants an exemption.<sup>118</sup>

Thus, instead of continuing to carve out exemptions and safe harbors for foreign issuers merely by virtue of their status, we need to think about a more uniform and harmonized regulation of securities transactions within the U.S., and a differentiated treatment of issuers based on their desirability as an investment vehicle and the amount of information publicly available at the market, not based on the national or regional origin of issuers. In fact, the SEC provides many safe harbors for certain issuers who are followed by many analysts or sufficient information about which is available in the market place.<sup>119</sup> For instance, shelf-registration allows Form S-3 issuers or Well Known Seasoned Issuers (WKSI)<sup>120</sup> to offer their securities without going through the registration processes subject to certain limitations and requirements.<sup>121</sup> Such issuers can benefit from Rule 144A, Rule 163 and other specific provisions in the Gun-Jumping Rules for public offering. Foreign issuers who meet the criteria for such safe harbors or exemptions can enjoy the same benefits as U.S. domestic companies and thus do not need further special treatment.

This does not necessarily mean that investors do not need to be protected at least with regard to those particular issuers.<sup>122</sup> Yet, if an issuer who does not qualify as a Form-3 issuer or WKSI finds itself unable to bear the burden of heightened standards and decides to leave the U.S. markets, we may not be worse off without those companies in the U.S. capital markets,

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118. Taneda, *supra* note 4, at 756-57.

119. According to SEC's research, an average of 12 analysts followed issuers with market capitalization in excess of \$700 million that conducted offerings from 1997 to 2004. Securities Offering Reform, Securities Act Release No. 33-8591, 70 Fed. Reg. 44,722 (July 19, 2005).

120. Section 405 of the Securities Act defines a "well-known seasoned issuer" as an issuer eligible to use Form S-3 or Form F-3 and has either common equity exceeding \$700 million held by non-affiliates or has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities. Securities Act of 1933, § 405, 15 U.S.C. § 77 (2000).

121. 17 C.F.R. § 230.415 (2007).

122. Stephen J. Choi, *Behavioral Economics and the Regulation of Public Offerings*, 10 LEWIS & CLARK L. REV. 85, 119-20. (2006).

since our principal concern is ultimately with potentially risky companies, whether domestic or foreign.

## APPENDIX: REASONS FOR DELISTINGS\*

## A. 2003

Company	Country	Reason
Cordiant Communications Group PLC	U.K.	Acquired by WPP Group plc ("WPP") (Termination notice from the Bank of New York) <sup>123</sup>
P&O Princess Cruises plc	U.K.	changed its name into Carnival plc <sup>124</sup>
Six Continents PLC	U.K.	separated into InternContinental Hotels Group and Mitchells & Butlers plc <sup>125</sup>
Pechiney	France	acquired by Alcan (Canada company listed on NYSE) <sup>126</sup>
A/S Eksportfinans	Norway	redeemed the Preferred Capital Securities in 2003. Yet still registered U.S. Debt Shelf <sup>127</sup>
Banco Comercial Portugues, S.A.	Portugal	de-list its American Depository Shares ("ADSs") from the New York Stock Exchange (the "NYSE"), and its common shares from the London Stock Exchange, Frankfurt Stock Exchange <sup>128</sup>
Centerpulse Ltd.	Switzerland	acquire by Zimmer Holdings <sup>129</sup>
Fahnestock Viner Holdings, Inc.	Canada	changed its name into Oppenheimer Holdings Inc <sup>130</sup>
Hurricane Hydrocarbons Ltd.	Canada	changed its name into PetroKazakhstan Inc <sup>131</sup>

\* Current ratio or cash flow information was acquired from EDGAR at the SEC website unless otherwise specified.

123. <http://www.adrbny.com/files/AC3172.pdf> (last visited Jan. 25, 2007).

124. <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001125259&owner=include&count=40> (last visited Jan. 25, 2007).

125. <http://www.ihgplc.com/index.asp?pageid=326> (last visited Jan. 25, 2007).

126. <http://www.alcan.com/web/publishing.nsf/Content/Alcan+Acquires+Remaining+Pechiney+Securities++Pechiney+becomes+wholly-owned+subsidiary+of+Alcan> (last visited Jan. 25, 2007).

127. [http://www.eksportfinans.no/eprise/main/EF/content/english/1\\_index.htm](http://www.eksportfinans.no/eprise/main/EF/content/english/1_index.htm) (last visited Jan. 25, 2007).

128. <http://www.secinfo.com/d13Wqv.24X1.htm> (last visited Jan. 25, 2007).

129. NYSE News Release (September 17, 2003).

130. [http://www.opco.com/public/about\\_oppenheimer/history.html](http://www.opco.com/public/about_oppenheimer/history.html) (last visited Jan. 25, 2007).

131. <http://www.sec.gov/cgi-bin/browse-edgar?company=Hurricane+Hydrocarbons&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Jan. 25, 2007).

Moore Corporation Limited	Canada	changed its name into Moore Wallace Inc <sup>132</sup>
Pérez Companc S.A.	Argentina	changed its name into Petrobras Energia Participaciones Sa <sup>133</sup>
Télex-Chile S.A. (Chilesat Corp S.A.)	Chile	changed its name into Chilesat Corp S.A. and then agcquired By Telmex Corp S.A. (Mexico) in 2004 <sup>134</sup>
Silverline Technologies <sup>135</sup>	India	Non voluntary delisting
Fila Holdings, S.p.A. <sup>136</sup>	Italy	Non voluntary delisting
LaSalle Re Holdings Limited <sup>137</sup>	Bermuda	Non voluntary delisting
Trenwick Group Inc. <sup>138</sup>	Bermuda	Non voluntary delisting
Supermercados Unimarc S.A. <sup>139</sup>	Chile	Non voluntary delisting
Savia S.A. de C.V. <sup>140</sup>	Mexico	Non voluntary delisting
Corimon C.A. <sup>141</sup>	Venezuela	Non voluntary delisting
Petroleum Geo-Services ASA <sup>142</sup>	Norway	Non voluntary delisting but the company re-listed in 2004
Ek Chor China Motorcycle Co., Ltd.	Hong Kong	15-12B
Canada Life Financial Corporation	Canada	15-12B

132. <http://www.sec.gov/cgi-bin/browse-edgar?company=Moore+Corporation&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Jan. 25, 2007).

133. <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001099205&owner=include&count=40> (last visited Jan. 25, 2007).

134. <http://www.sec.gov/cgi-bin/browse-edgar?company=CHILESAT+CORP&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Jan. 25, 2007).

135. NYSE News release (August 08, 2003).

136. NYSE News Release (October 13, 2003).

137. NYSE News Release (March 20, 2003).

138. NYSE News Release (March 20, 2003).

139. NYSE News Release (March 28, 2003).

140. NYSE News Release (October 13, 2003).

141. NYSE News Release (May 1, 2003).

142. [http://www.pgs.com/Pressroom/Press\\_Releases/NYSE\\_Suspends\\_Trading\\_in\\_PGS\\_/](http://www.pgs.com/Pressroom/Press_Releases/NYSE_Suspends_Trading_in_PGS_/); [http://www.pgs.com/Pressroom/What's\\_New/PGS\\_Celebrates\\_Listing\\_on\\_the/](http://www.pgs.com/Pressroom/What's_New/PGS_Celebrates_Listing_on_the/) (last visited Jan. 25, 2007).



TVX Gold Inc.	Canada	15-12G
Zemex Corporation	Canada	15-12G
BBVA Privanza International (Gibraltar) Limited	Spain	No data
BCP International Bank Limited	Cayman Island	No data
BSCH Finance Limited	Cayman Island	No data
Aktiebolaget Svensk Exportkredit	Sweden	No data
Panamerican Beverages, Inc.	Panama	15-15D (Current Ratio: 0.424946)
Scania AB	Sweden	increasing cash flow

## B. 2004

Company	Country	Reason
News Corporation Limited	Australia	reincorporated in U.S. <sup>143</sup>
Orbital Engine Corporation Limited	Australia	traded on OTC Bulletin Board from July 1, 2004. <sup>144</sup>
Amersham	U.K.	delisted from the London, New York and Oslo stock exchanges at the merger with General Electric. <sup>145</sup>
Carlton Communications PLC	U.K.	merged with Granada and formed ITV plc <sup>146</sup>
STMicroelectronics N.V.	France	reincorporated in Switzerland. <sup>147</sup>
Celanese AG	Germany	acquired by Celanese Europe Holding, formerly known as BCP Crystal Acquisition GmbH & Co. KG on April 6, 2004 <sup>148</sup>

143. [http://www.newscorp.com/news/news\\_2004.html](http://www.newscorp.com/news/news_2004.html) (last visited Jan. 25, 2007).

144. <http://www.adrbny.com/files/AD5713.pdf> (last visited Jan. 25, 2007).

145. <http://www.amersham.com/news/item.jsp?id=240> (last visited Jan. 25, 2007).

146. <http://www.itvplc.com/itv/about/history/> (last visited Jan. 25, 2007).

147. STMicroelectronics N.V. had appeared on the list of French companies on NYSE data for 2003. It appears as an issuer from Switzerland since 2004.

148. Form 20-F filed on 2006-03-31, at <http://www.sec.gov/Archives/edgar/data/1095442/000095013606002557/file001.htm> (last visited Jan. 25, 2007).

Tele Celular Sul Participações S.A.	Brazil	changed its name into TIM Participações S.A. (listed on NYSE) after the merger with Tele Nordeste Celular Participações S.A. . <sup>149</sup>
Tele Nordeste Celular Participações S.A.	Brazil	
Moore Wallace	Canada	Combination with RRDDonnelley <sup>150</sup>
New Skies Satellites N.V.	Netherlands	acquired by the Blackstone Group (a private equity group) <sup>151</sup>
Tricom, S.A.	Caribbean	Non voluntary delisting <sup>152</sup>
Annuity and Life Re (Holdings), Ltd.	Caribbean	Non voluntary delisting <sup>153</sup>
Chilesat Corp S.A.	Chile	15-12B
Alstom	France	15-12B
Ashanti Goldfields Company Limited	Ghana	15-12B
Desc, S.A. de C.V.	Mexico	15-12B
Corporación Durango, S.A. de C.V.	Mexico	15-12B
KLM Royal Dutch Airlines	Netherlands	15-12B
Gucci Group N.V.	Netherlands	15-12B
Fletcher Challenge Forests Limited (Tenon after 2004)	New Zealand	15-12G
British Energy plc	U.K.	15-12B
Celltech Group plc	U.K.	15-12B
Boardwalk Equities Inc.	Canada	increasing cash flow
Internacional de Cerámica, S.A. de C.V.	Mexico	Current Ratio (1.761916) > 1.5 Decreasing cash flow from operating activities <sup>154</sup>

149. Company History at <http://www.b2i.us/profiles/investor/fullpage.asp?f=1&BzID=837&cto=cp&Nav=0&LangID=1&s=0&ID=1717> (last visited Jan. 25, 2007).

150. <http://www.rrdonnelley.com/wwwRRD/FAQ/Investors/Combination.asp> (last visited Jan. 25, 2007).

151. [http://www.blackstone.com/news/press\\_releases/07-19-04.pdf](http://www.blackstone.com/news/press_releases/07-19-04.pdf) (last visited Jan. 25, 2007).

152. NYSE News Releases (05-11-2004).

153. NYSE News Releases (07-27-2004).

154. Form 20-F (filed on 2004-06-30) at <http://www.sec.gov/Archives/edgar/data/1127800/000112780004000017/final20f.htm>.

Espirito Santo Overseas Limited (PFD)	Cayman Islands	no data
NewsCorp Overseas Limited (PFD)	Cayman Islands	no data
Capital Re LLC (PFD) B529	Turks And Caicos	no data
ASA limited	South Africa	no data
Rhône-Poulenc Overseas (PFD)	France	no data
Telefónica del Perú S.A.	Peru	0.444144

C. 2005<sup>155</sup>

Company	Country	Reason
Allied Domecq PLC	U.K.	acquired by Pernod Richard S.A. <sup>156</sup>
CP Ship limited	Canada	acquired by TUI AG, <sup>157</sup>
Noranda	Canada	merged into Falconbridge <sup>158</sup> which was later acquired by Xstrata in 2006, <sup>159</sup>
PetroKazakhstan Inc.	Canada	acquired by CNPC International, <sup>160</sup>
Masonite International Corporation	Canada	acquired by Stile, an affiliate of Kohlberg Kravis Roberts & Co. L.P. <sup>161</sup>
Sinopec Beijing Yanhua Petrochemical Co., Ltd.	China	acquired by China Petroleum and Chemical Corporation (China)
WMC Resources Ltd	Australia	acquired by Billiton Limited (Australia)
Stelmar Shipping Ltd.	Greece	acquired by Overseas Shipholding Group, Inc. (U.S.)

155. NYSE, Non-US Additions & Removals – 2005 at [www.nyse.com/pdfs/05foradds1024.pdf](http://www.nyse.com/pdfs/05foradds1024.pdf) (last visited Jan. 2, 2007).

156. *Id.*

157. Milestones of TUI AG, December 2005, at [http://www.tui-group.com/en/konzern/tui\\_profile/milestones/#2005](http://www.tui-group.com/en/konzern/tui_profile/milestones/#2005) (last visited Jan. 25, 2007).

158. Discussion of Merger (June 30, 2005) at [http://archive.xstrata.com/falconbridge/www.falconbridge.com/investor\\_relations/merger\\_info/discussion\\_of\\_merger.htm](http://archive.xstrata.com/falconbridge/www.falconbridge.com/investor_relations/merger_info/discussion_of_merger.htm) (last visited Jan. 25, 2007).

159. Press Release (Nov. 2, 2006) <http://www.xstrata.com/news/200611021.en.pdf> (last visited Jan. 25, 2007).

160. Yahoo Finance, Company Profile, <http://biz.yahoo.com/ic/55/55261.html> (last visited Jan. 25, 2007).

161. NYSE, Non-US Additions & Removals – 2005 at [www.nyse.com/pdfs/05foradds1024.pdf](http://www.nyse.com/pdfs/05foradds1024.pdf) (last visited Jan. 2, 2007).

SC Shell Transport and Trading Company	U.K.	merged into Royal Dutch Petroleum Company
EQUANT N.V.	Netherlands	acquired by France Telecom (France)
Royal Dutch Petroleum Company	Netherlands	continues to trade as an issue of Royal Dutch Shell plc. (U.K.)
Elsclint Limited	Israel	In November 2005, a merger between Elsclint Limited ("Elsclint") and Elbit Medical Imaging Ltd (EMI) <sup>162</sup>
Masisa S.A.	Chile	changed its name to Masisa S.A. (New) after being acquired by Terranova
mmO2 plc	U.K.	reorganized into O2 (only listed on London Stock Exchange). In 2006, it became a wholly-owned subsidiary of Telefónica S.A. and O2's ordinary shares were delisted from the London Stock Exchange. <sup>163</sup>
Banco Bilbao Vizcaya Argentaria	Chile	Non voluntary delisting <sup>164</sup>
Enodis plc	U.K.	1.543501048 <sup>165</sup>
Cable and Wireless Plc	U.K.	2.151890482
Premier Farnell plc	U.K.	2.457861635 decreasing cash flow from operating activities <sup>166</sup>
TV Azteca, S.A.	Mexico	2.480065528
Grupo Imsa, S.A. de C.V. (IMSA )	Mexico	2.631782946 <sup>167</sup>
Cristalerías de Chile, S.A.	Chile	4.439547083 decreasing cash flow from operating activities <sup>168</sup>

162. Form 6-K (2006-08-31) at [http://www.sec.gov/Archives/edgar/data/1027662/000092242306001161/kl08074\\_ex99-1.htm](http://www.sec.gov/Archives/edgar/data/1027662/000092242306001161/kl08074_ex99-1.htm) (last visited Jan. 25, 2007).

163. [http://www.o2.com/about/archived\\_share\\_price\\_information.asp](http://www.o2.com/about/archived_share_price_information.asp) (last visited Jan. 25, 2007).

164. NYSE, Non-US Additions & Removals – 2005 at [www.nyse.com/pdfs/05foradds1024.pdf](http://www.nyse.com/pdfs/05foradds1024.pdf) (last visited Jan. 2, 2007).

165. [http://www.sec.gov/Archives/edgar/data/1116547/000114420404022398/v09354\\_20f.htm](http://www.sec.gov/Archives/edgar/data/1116547/000114420404022398/v09354_20f.htm) (last visited Jan. 25, 2007).

166. <http://www.sec.gov/Archives/edgar/data/1006603/000095015204003958/107573ae20vf.txt> (last visited Jan. 25, 2007).

167. <http://www.sec.gov/Archives/edgar/data/1026735/000119312505135599/d20f.htm> (last visited Jan. 25, 2007).

168. <http://www.sec.gov/Archives/edgar/data/917335/000089375004000391/form20-f.txt> (last visited Jan. 25, 2007).

Grupo Industrial Maseca, S.A. de C.V.	Mexico	7.244475523
BCH Capital Limited (PFD)	Spain	no data
Grupo Iusacell S.A. de C.V.	Mexico	0.102314443
Aventis S.A.	France	0.922409859
Mitchells & Butlers plc	U.K.	0.978461538
Grupo Elektra, S.A. de C.V.	Mexico	1.279330544

## D. 2006

Company	Country	Reason
Tommy Hilfiger Corporation	Hong Kong	acquired by Apax Partners, a global private equity group, on May 10, 2006. <sup>169</sup>
Royal & SunAlliance Insurance Group plc	U.K.	sold its U.S. operation to Arrowpoint Capital <sup>170</sup>
Schering AG	Germany	acquired by Bayer AG, another German company <sup>171</sup>
Falconbridge	Canada	acquired by Xstrata <sup>172</sup>
Placer Dome	Canada	acquired by Barrick Gold Corporation (another Canadian company listed on NYSE) <sup>173</sup>
Glamis Gold	Canada	acquired by GoldCorp (another Canadian company listed on NYSE) <sup>174</sup>
Fairmont Hotels & Resorts Inc.	Canada	acquired by Kingdom Hotels International and Colony Capital <sup>175</sup>

169. [http://usa.tommy.com/opencms/opencms/press/press\\_releases/apax\\_completes\\_acquisition.html](http://usa.tommy.com/opencms/opencms/press/press_releases/apax_completes_acquisition.html) (last visited Jan. 24, 2007).

170. <http://www.secinfo.com/dV59z.vgf.b.htm> (last visited Jan. 25, 2007).

171. <http://www.bayer.com/en/1996-2006.aspx> (last visited Jan. 25, 2007).

172. Press Release (Nov. 2, 2006) <http://www.xstrata.com/news/200611021.en.pdf> (last visited Jan. 25, 2007).

173. Press Release Barrick Completes Acquisition of Placer Dome, March 15, 2006, at <http://www.barrick.com/default.aspx?SectionId=ei655d8c-6398-4251-8ebc-d0c02928bacb&LanguageId=1&ItemId=1652a3d3-1e0c-408c-b47e-52cce3841fee> (last visited Jan. 25, 2007).

174. Goldcorp and Glamis Agree to US\$21.3 Billion Combination Creating the World's Premier Gold Mining Company (August 31, 2006), at [http://www.goldcorp.com/news\\_releases/index.php?mod=cnt&act=cnt&cid=528](http://www.goldcorp.com/news_releases/index.php?mod=cnt&act=cnt&cid=528) (last visited Jan. 25, 2007).

175. [http://www.fairmontinvestor.com/uploads/kingdom/Plan\\_of\\_Arrangement\\_Complete.pdf](http://www.fairmontinvestor.com/uploads/kingdom/Plan_of_Arrangement_Complete.pdf) (last visited Jan. 25, 2007).

INOC	Canada	acquired by CVRD Canada Inc. a wholly-owned indirect subsidiary of Companhia Vale do Rio Doce ("CVRD") (a NYSE listed Brazilian company). <sup>176</sup>
Tele Centro Oeste Celular Participações S.A.	Brazil	merged with Telesp Celular Participações S.A. (now Vivo Participações S.A.) <sup>177</sup>
Tele Sudeste Celular Participações S.A.	Brazil	
Tele Leste Celular Participações S.A.	Brazil	
Intrawest Corporation	Canada	acquired by Fortress Investment Group LLP in 2006
Royal Group Technologies Limited	Canada	Delisted from NYSE and Toronto Stock Exchange <sup>178</sup> following the acquisition by Rome Acquisition Corp <sup>179</sup>
BOC Group plc (The)	U.K.	Merged with Linde into the Linde Group <sup>180</sup>
TDC A/S	Denmark	87.9% of the TDC shares are owned by Nordic Telephone Company ApS (NTC) <sup>181</sup>
Controladora Comercial Mexicana, S.A. de C.V.	Mexico	Non voluntary delisting <sup>182</sup>

176. [http://www.inco.com/newscentre/newsreleases/default.aspx?posting\\_id=3891](http://www.inco.com/newscentre/newsreleases/default.aspx?posting_id=3891) (last visited Jan. 25, 2007).

177. Press Release (January 24, 2006) at <http://www.vivo.com.br/ir/> (last visited Jan. 25, 2007).

178. [http://www.osc.gov.on.ca/Regulation/Orders/2006/ord\\_20061215\\_217\\_royalgroup.jsp](http://www.osc.gov.on.ca/Regulation/Orders/2006/ord_20061215_217_royalgroup.jsp) (last visited Jan. 25, 2007).

179. Form 6-K (July 12, 2006) at <http://www.sec.gov/Archives/edgar/data/1047693/000090956706001221/o32284exv99w1.htm> (last visited Jan. 25, 2007).

180. News (September 6, 2006) at <http://www.linde.com/international/web/linde/like35lindecom.nsf/0/F3045552E8915AD8C12571E100224A1D> (last visited Jan. 25, 2007).

181. [http://tdc.com/publish.php?dogtag=tdccom\\_ir\\_holder](http://tdc.com/publish.php?dogtag=tdccom_ir_holder).

182. NYSE New Release (November 7, 2006).

Jilin Chemical Industrial Company Limited	China	Non voluntary delisting <sup>183</sup>
Smedvig asa	Norway	Non voluntary delisting <sup>184</sup>
Sea Containers Ltd	Bermuda	Non voluntary delisting <sup>185</sup>
Pioneer Corporation	Japan	1.57431
A.O. Tatneft	Russia	3.128393
Kerzner International Limited	Bahamas	1.062161
Coles Myer Ltd	Australia	1.08719
De Rigo S.p.A.	Italy	1.26957, decreasing cash flow from operating activities
BBVA Preferred Capital Ltd.	Cayman Islands	no data
Abbey National plc (PFD)	U.K.	negative cash flow from operating activities
Espírito Santo Financial Group S.A.	Luxembourg	negative cash flow from operating activities
New Skies Satellites Holdings Ltd.	Netherlands	0.534353
Vivendi Universal	France	0.828264
Extencicare Inc.	Canada	0.901901

183. SEC, Self-Regulatory Organizations; Order Granting Application to Strike from Listing and Registration; the New York Stock Exchange, Inc. (Jilin Chemical Industrial Company Limited (American Depositary Shares (each representing 100 Class H Common Shares)) File No. 1-13750 (Feb. 14, 2006) at [http://www.sec.gov/rules/delist/1-13750\\_021406.pdf](http://www.sec.gov/rules/delist/1-13750_021406.pdf) (last visited on Jan. 25, 2007).

184. SEC, Self-Regulatory Organizations; Order Granting Application to Strike from Listing and Registration; the New York Stock Exchange LLC (Smedvig ASA, Class A American Depositary Shares (each representing one Class A Ordinary Share) and Class B American Depositary Shares (each representing one Class B Ordinary Share)) File No. 1-14532 (April 20, 2006) at [http://www.sec.gov/rules/delist/2006/1-14532\\_042006.pdf](http://www.sec.gov/rules/delist/2006/1-14532_042006.pdf) (last visited Jan. 25, 2007).

185. NYSE New Release (October 2, 2006) for failure to satisfy the filing requirements.

