NATIONAL COMPANY DISCLOSURE REGULATORY FRAMEWORKS: SUPERFICIALLY SIMILAR BUT SUBSTANTIVELY DIFFERENT

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Abstract

The United States has led the world for many decades with regard to company disclosure rules and standards; other national company disclosure structures are based largely on the U.S. model. In December 2013 the U.S. Securities and Exchange Commission (the "SEC") indicated that it intended to review Regulation S-K, which contains many important rules governing listed company reporting in the United States. This Article calls for the SEC to maintain its comprehensive approach to corporate disclosure regulation and practice as an essential platform for the future health of global financial markets. This Article highlights the importance of the global leadership of the United States in this regulatory space and the strength of its existing structure by comparing and contrasting the periodic and continuous disclosure rules that apply to companies listed on the major exchanges in the United States, Europe, and Asia.

I. Introduction

"Great companies exist only because they are created and safeguarded by our institutions; and it is our right and our duty to see that they work in harmony with these institutions. . . . The first requisite is knowledge, full and complete—knowledge which may be made public to the world."[1]

Complete, balanced, and timely listed company disclosure is vital for the health of corporations and financial markets, sustainable and competitive economies, and the well-being of national and global communities. The International Organization of Securities Commissions ("IOSCO") indicates that the primary rationales for company disclosure regimes are "protecting investors[,] ensuring that markets are fair, efficient and transparent[,] [and] reducing

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1. Theodore Roosevelt, U.S. President, State of the Union Message to Congress (Dec. 3, 1901).

systemic risk."[2] While some scholars question the rationales and net benefits of company disclosure regimes,[3] most developed nations have established regulations requiring listed companies to report periodically and on a continuous (or ad hoc) basis. This Article compares and contrasts the national disclosure structures that apply to companies listed on major global exchanges in the United States, Europe, and Asia. This Article provides individual country profiles for the United States, Germany, the United Kingdom (the "U.K."), Japan, and Hong Kong that summarize the important periodic reporting, continuous disclosure rules and obligations, and the overarching regulatory framework. This Article finds there are many common features, but also important differences across the disclosure regimes of the countries examined.

This Article contends that there are substantive differences between the periodic reporting rules and practices in the United States and the rest of the world. Regulation in the United States generally requires the following features within listed company periodic reports:

- preliminary full year reporting on Form 10-K and quarterly reporting on Form 10-Q, including financial statements;
- comprehensive management discussion and analysis (MD&A) and detailed financial notes within the periodic reports that fully comply with accounting standards;
- broadly consistent content in the preliminary final (Form 10-Ks) and annual reports;
- five year financial performance tables in the Form 10-Ks; and
- regular reviews of the full year and quarterly reports by the federal securities regulator.

Many of these features are either only partially required by other jurisdictions or not required at all. Moreover, the gap between periodic disclosure standards and practices in the United States and those in other jurisdictions continues to widen.

The most striking finding from this Article's comparative regional analysis is the marked differences between the company disclosure frameworks in the United States and in Europe. The U.S. periodic disclosure framework provides the most comprehensive and regular base of listed corporate information in the world and this information is readily available to the public.[4] The position in Europe is very different because:

2. INT'L ORG. OF SEC. COMM'NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 3 (2010). To focus on key issues, this Article assumes that the IOSCO rationales are valid and that company reporting regimes are broadly beneficial.

3. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2380 (1998); *see, e.g.*, Anne Beyer, Daniel Cohen, Thomas Lys, & Beverly Walther, *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. ACCT. & ECON. 296 (2010).

4. The SEC is the primary federal securities regulator in the United States. The federal agency provides public access to listed company reports and disclosures that are mandated by federal regulation from the Electronic Data Gathering, Analysis, and Retrieval System website, commonly referred to as EDGAR. *See generally* U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/ (last visited July 1, 2015).

- quarterly reporting was recently abolished;[5]
- there is minimal regulation governing the content and form of preliminary full year reporting;[6]
- the mandated notes and MD&A within the half year and preliminary full year reports are limited and the MD&A may reference financial measures that do not fully comply with accounting standards;[7]
- standard forms are not required for the presentation of the narrative content of the half year and preliminary full year results;[8]
- long-term financial performance reporting is not obligatory in the periodic reports;[9]
- there is no centralized European company information repository;[10] and
- the level and transparency of supervisory monitoring and enforcement of continuing disclosure listing rules appears to be minimal.

This Article argues that the continuous disclosure regimes are inherently a weak form of disclosure regulation. First, securities exchanges have primary responsibility for continuous disclosure regimes around the globe. Most of these entities are deeply conflicted because the exchanges are listed corporations in their own right. While all of the exchanges reviewed have some mechanisms in place to mitigate commercial and regulatory conflicts, such mechanisms are only partially effective. Second, all of the jurisdictions reviewed in this Article use a form of "stockwatch" program[11] to monitor compliance with continuous disclosure obligations, and these automated computer programs are limited in application and effect. Third, most of the monitoring and supervision of national continuous disclosure regimes has shifted to identification of failures to disclose inside information. These factors have moved the essential core of the continuous disclosure regimes from legal frameworks, which positively and proactively promote cultures of continuous public disclosure in the long-term interests of corporations and the broader community, to much narrower, reactive, and predominantly negative constructs that sometimes require only irregular and minimal public disclosures from listed companies.

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5. *See* Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU) (amending both the European Transparency Directive 2004/109/EC and the European Commission Directive 2003/71/EC). For more detail on the debate in Europe on the Transparency Directive review processes, see Gill North, *Listed Company Disclosure and Financial Market Transparency: Is This A Battle Worth Fighting or Merely Policy and Regulatory Mantra?*, 6 J. BUS. L. 486 (2014).

6. The rules relating to preliminary final reporting in Europe are imposed by securities exchanges. This Article outlines these requirements for companies listed on the London Stock Exchange and the Frankfurt Stock Exchange in Part III.

7. The European Parliament Directive 2013/50/EU (which amends the European Transparency Directive 2004/109/EC and European Commission Directive 2003/71/EC) does not prescribe the form or content of management discussion and analysis in company reports and disclosures. *See* Parliament Directive 2013/50/EU 206.

8. Council Directive 2013/50, art. 26, 2013 O.J. (L 294) 17 (EU) (stating that the preparation of annual financial reports in a single electronic reporting format should be mandatory with effect from January 1, 2020, subject to cost benefit analysis). This recommendation proposes standard form reporting for the financial statements within periodic reports only. It does not include the accompanying management discussion and analysis. *Id.*; *see also* Memorandum 13/544 from the European Comm'n on the Revised Directive on Transparency Requirements for Listed Companies (Transparency Directive) – Frequently Asked Questions 4 (June 12, 2013) (on file with author).

9. Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU) (does not require listed companies to include long term financial performance reporting within any disclosures).

10. Memorandum 13/544, *supra* note 8.

11. A stock watch program is a software program that is used by regulators to identify security trades that may be using "inside information" and that may, therefore, require investigation.

Claims are made that transparency in financial markets has become a regulatory mantra and that investors are being overwhelmed by information.[12] Reviews of listed company reports and disclosures within public spheres reveal that available company information is in practice often relatively sparse, sanitized, and dated.[13] Global financial market investment and activity is now dominated by the largest financial institutions.[14] Behind the public facade, the main game is increasingly returning to its roots, namely who among the largest institutional participants can win the most valued access to corporate managers and privately obtained inside information. Many jurisdictions permit or even encourage regular private exchanges between corporate executives and selected institutional participants. However, this Article suggests that corporate and financial market communication structures that predominantly rely on private exchanges between select participants are inefficient, unfair, opaque, and ultimately toxic.

Effective company disclosure frameworks are not easy to develop or sustain due to the power struggles involved. Company disclosure policies and practices are of course determined as a result of political compromise.[15] Each constituency uses democratic processes to lobby for a regulatory environment that puts it in the best position. Many company managers prefer to retain total discretion over communication processes and advocate for a reduction, rather than a strengthening, of disclosure regulation.[16] Large market participants use their powerful financial positions to lobby against reforms that diminish their superior access to company managers and information. Other corporate investors and stakeholders call for rules to enable equal access to listed company information. As a group, institutional investors generally hold majority stakes in listed companies and therefore often have effective control.[17] In such instances, the company executives may elect to "manage" the company disclosure frameworks by satisfying the demands of a small number of large institutional investors.

Incentives are also a critical element of corporate disclosure frameworks. Public company directors and managers naturally want to present company developments with which they are associated in the best possible light. They have compelling monetary and other incentives to restrict or delay the public dissemination of information, particularly when there are conflicts between managerial and corporate interests or when the information contains negative

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12. *E.g.*, JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING: FINAL REPORT 70-71 (2012).

13. The author reviewed company disclosures in each of the jurisdictions. She has also read and analyzed company reports and disclosures from around the world for more than thirty years as a scholar, an institutional analyst, and a retail investor.

14. *See, e.g.*, Mats Isaksson & Serdar Çelik, *Who Cares? Corporate Governance in Today's Equity Markets* 28-32 (OECD Corporate Governance, Working Paper No. 8, 2013), *available at* http://dx.doi.org/10.1787/5k47zw5kdnmp-en.

15. *See* ARCHON FUNG, MARY GRAHAM, & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 7 (Cambridge Univ. Press 2007).

16. *E.g.*, JOHN KAY, *supra* note 12. For discussion on the commentary in John Kay's Final Report on company disclosure matters, and the arguments this report makes on behalf of listed companies in the UK to support removal of quarterly reporting obligations, please refer to North, *supra* note 5.

17. ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 66-67 (Transaction Publishers 1932).

news.[18] Large institutional participants are clearly incentivized to obtain information privately in order to gain informational advantages vis-à-vis other participants.[19] The parties in the most vulnerable position in the power struggle are smaller institutional investors, retail investors, and those in the community who are or may be adversely affected by corporate developments.[20] These groups must generally rely on public disclosures and are the least likely to get timely access to regular and comprehensive information.[21]

This Article calls for a renewed commitment to public disclosure frameworks as the primary means of corporate communication and engagement. Individual countries and the global community need to acknowledge once again that public scrutiny and accountability of large corporations is critical and that public disclosure structures serve long-term national interests. To sustain broad participation and vigorous competition in financial markets, listed company information needs to be released through non-discriminatory public channels. Company disclosure structures only achieve their intended purposes when publicly available information is sufficiently regular, complete, and timely in order to enable well-informed decision-making by all groups with a warrantable interest, including members of the public. Strong and concerted policy commitment to established disclosure frameworks is required, so that aspirations and statements about financial market efficiency, fairness, transparency, and systemic risk do not become mere platitudes.

Part II of this Article discusses the IOSCO company disclosure principles. Part III outlines the country profiles. Part IV provides additional critique. Part V concludes.

II. Company Disclosure Principles

IOSCO is the primary international cooperative forum for securities market regulatory agencies. Its membership is very broad with representation spanning ninety-five percent of global markets. The Technical Committee of IOSCO indicates that:

> periodic reports facilitate investor decision making and monitoring of the markets by making it possible for investors to compare the performance of the same company over regular intervals, and by enabling investors to make useful comparisons among different companies.[22]

IOSCO notes that financial information in periodic reports is the core information around which related information such as management discussion and analysis of

18. *See, e.g.*, Victor Brudney, *Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws*, 93 HARV. L. REV. 322, 345 (1979); Jill Fisch & Hillary Sale, *The Securities Analysts as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035, 1090 (2003); Donald Langevoort, *Investment Analysts and the Law of Insider Trading*, 76 VA. L. REV. 1023, 1041, 1044-46 (1990).

19. *See, e.g.*, Brudney, *supra* note 18; Fisch & Sale, *supra* note 18; Langevoort, *supra* note 18, at 1046, 1048-50.

20. *See* Langevoort, *supra* note 18, at 1046, 1048-50; Ernst Maug, *Insider Trading Legislation and Corporate Governance*, 46 EUR. ECON. REV. 1569, 1588 (2002).

21. *See* Brudney, *supra* note 18, at 357; *see also* Langevoort, *supra* note 18; Maug, *supra* note 20.

22. TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'N, PRINCIPLES FOR PERIODIC DISCLOSURE BY LISTED ENTITLES FINAL REPORT 4 (2010).

historical results and prospects is framed.[23] It acknowledges the need for, and importance of, regular reporting by public companies in addition to disclosure on a continuous basis.[24]

The principles of a disclosure framework that IOSCO regards as essential can be split into two categories: (i) public access and review; and (ii) the form and content of disclosure. The IOSCO principles with respect to public access and review encompass the following: reports should be provided to the public on a timely basis; the reports should be stored in a central location that facilitates public access to the information; all investors should have equal access to the material information contained in the periodic reports; when a company is listed in more than one jurisdiction, the material information should be released promptly to the relevant markets; and the reports should be filed with the relevant regulator for review.[25] The principles concerning the form and content of disclosures indicate that: the periodic reports should contain relevant information; the reports should be presented in a form that facilitates ready analysis of the information; the information disclosed should be fairly presented in a clear and concise manner; the information should not be misleading or deceptive, omit any material information, or rely on boilerplate language; the persons responsible for the financial statements should be clearly identified and required to state that the financial information provided is fairly presented; and the financial reporting internal controls should be subject to ongoing review.[26]

Established disclosure regulatory frameworks generally encompass some, but not all, of the IOSCO recommended disclosure principles and features. Part III of this Article considers these national frameworks. Country profiles outline the significant continuing disclosure obligations that apply to listed companies, including an introductory overview and a summary of the important periodic reporting and continuous disclosure rules. These national profiles span a range of geographies, including countries with the largest securities exchanges internationally and regions that are expected to become more prominent in future decades. The profile content is sourced from information available on public websites upon the assumption that regulators in modern financial markets, as well as those regulated, should operate on a broadly transparent basis.

The United States was the first country to establish comprehensive company disclosure rules in the 1930s and it remains the global leader of corporate disclosure standards. Hence, it is appropriate to outline its disclosure regulatory structure and rules initially, followed by consideration of comparative regimes in Europe and Asia.

23. *Id.*
24. *Id.*
25. *Id.* at 7-28.
26. *Id.*

III. Company Disclosure Regulation: Country Profiles

A. United States

1. Overview

The SEC is an independent federal regulatory agency that was established in 1934 following the Great Depression.[27] Section 2 of the *Securities Exchange Act of 1934* (the "Exchange Act") states that:

> transactions in securities as commonly conducted upon securities exchanges . . . are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including . . . to require appropriate reports.[28]

The SEC has primary responsibility for enforcing federal securities laws and regulation. The agency can issue rules pursuant to specific provisions to ensure they are effective and it can sanction, fine and otherwise discipline market participants that violate federal securities laws.

Securities exchanges in the United States operate largely as self-regulatory organizations, but must be registered with the SEC. A registered stock exchange is required to comply with the rules and regulations under the Exchange Act. It must also be able to ensure that its members comply with its rules and any relevant statutory provisions. Thus, an exchange is responsible for ensuring its members satisfy the listing criteria and continue to comply with the exchange rules, including the disclosure obligations. The largest securities exchange in the United States (and in the world) by market capitalization and trade value is the New York Stock Exchange Euronext ("NYSE").[29] Most of the largest companies and many medium sized companies in the United States are listed on the NYSE. Other global companies are listed on the NYSE as foreign issuers.

Within the NYSE group, a subsidiary called NYSE Regulation, Inc. ("NYSER") operates as an independent not-for-profit corporation. The majority of its directors are not affiliated with any other NYSE board.[30] An Issuer Oversight area monitors and enforces listed company compliance with the original listing criteria and the continuing listing standards.[31] It provides hyperlinks to pages that outline noncompliant issuers and delistings. The noncompliant issuer web page lists the name of the issuer, its symbol, a noncompliant indicator, the deficiency, the notification date, and the relevant market.[32] The noncompliant indicators include a ".BC", "LF", and "BC-FC". These terms are not explained on the web page, but the deficiency explanations suggest that "BC" indicates a breach of the continuing listing standards and "LF" applies where a company has not

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27. Securities Exchange Act of 1934, 15 U.S.C. § 78d (1934) (establishing the U.S. Securities and Exchange Commission).
28. *Id.*
29. *See, e.g.*, Alexandr Oleinic, *The 8 Largest Stock Exchanges in the World*, INSIDER MONKEY (Oct. 14, 2013, 12:33 PM), http://www.insidermonkey.com/blog/largest-stock-exchanges-237624/.
30. *Overview*, NYSE REGULATION, INC., https://www.nyse.com/regulation (last visited Aug. 27, 2015).
31. *Id.*
32. *Noncompliant Issuers*, NYSE REGULATION, INC., https://www.nyse.com/regulation/noncompliant-issuers (last visited Aug. 27, 2015).

timely filed the required quarterly or annual reports with the SEC.[33] The delistings web page outlines issuers that have been removed from listings.[34] These issuers are searchable by removals from listing initiated by the Exchange for cause and voluntary delistings initiated by the company. At the time of review, all of the delistings on this web page were voluntary delistings.[35]

The NYSE regulatory home page states that the NYSER conducts "limited real-time monitoring of trading activity on the facilities of U.S. securities as well as market watch functions to determine whether to halt a listed security."[36] The extent to which this real-time monitoring may lead to formal disciplinary actions against issuers, including actions involving breaches of the disclosure listing rules, is unclear. At the time of review, all of the actions listed on the "NYSE Disciplinary Action" page involved the conduct of financial intermediaries.[37]

The Market Surveillance division of the NYSE is responsible for monitoring securities trading activity for possible violations of federal securities laws and the exchange trading rules. This monitoring includes real-time and post trade reviews. The stockwatch group conducts "limited real-time monitoring of trading on the facilities of the U.S. securities exchanges."[38] Its surveillance program flags unusual price and volume changes above predetermined thresholds, and these changes trigger a review by exchange staff. The extent to which surveillance and monitoring by the exchange leads to formal enforcement against issuers is unclear. While the NYSER enforcement web page references actions going back as far as 1972, none of those listed at the time of writing involved violations by issuers of the disclosure listing rules.[39]

The compliance unit of the NYSE is responsible for ensuring compliance with the listing rules. The exchange publishes a list of companies that are noncompliant. It inserts a "BC" indicator over companies that are noncompliant with the NYSE quantitative or qualitative continued listing standards and it inserts a "LF" indicator where companies are delayed in filing the quarterly or annual reports with the SEC. These companies are added to the noncompliant issuer list a specified number of days after being notified by NYSE Regulation of a deficiency or delinquency. They are removed from the list after the issue is resolved or the company is determined to be of good standing. While the non-compliant list on the exchange web page provides a general description of the company, details of the noncompliant conduct are not provided.[40] The profiles of the individual companies listed as noncompliant and coded BC simply indicate

33. Note, the meaning of BC-FC is unclear.

34. *Removal from Listings*, NYSE REGULATION, INC., https://www.nyse.com/regulation/delistings (last visited Aug. 27, 2015).

35. *Id.*

36. *Overview*, *supra* note 30.

37. *NYSE Disciplinary Actions*, NYSE REGULATION, INC., http://www.nyse.com/regulation/nyse/1022221394131.html (last visited Aug. 27, 2015). All of the disciplinary actions involve financial intermediaries. Suspicious activity may be referred to the Financial Industry Regulatory Authority (FINRA) for further investigation. FINRA is an independent regulator with responsibility for writing and enforcing rules that govern the activities of nearly 4,400 securities firms that encompass approximately 630,000 brokers. *See generally* FIN. INDUS. REGULATORY AUTH., http://www.finra.org/ (last visited Aug. 27, 2015).

38. *Noncompliant Issuers*, *supra* note 32.

39. *NYSE Disciplinary Actions*, *supra* note 37.

40. *Noncompliant Issuers*, NYSE REGULATION, INC., https://www.nyse.com/regulation/noncompliant-issuers (last visited July 15, 2015).

that the "issuer is noncompliant with NYSE quantitative, qualitative, and/or corporate governance listing standards."[41]

2. Periodic Reports

A company defined as a "reporting company" or one that registers its securities in the United States is subject to the periodic and reporting requirements of Sections 13(a) and 15(d) of the Exchange Act.[42] The reporting obligations include a requirement to file annually using Form 10-K, to file quarterly using Form 10-Q, and to file specified events using Form 8-K.

Public companies in the United States must prepare two full year reports, one for the SEC and another for shareholders. Form 10-K is the full year report provided by listed companies to the SEC and federal regulation governs its form and content. The 10-K reports must contain detailed financial and operating information, as well as discussion of the company's performance and operations. The content of these reports includes financial and non-financial information and is provided within a standard template. The reports are formatted in three parts under standard item headings. Part I provides an overview, including a description of the business and an outline of any legal proceedings. Part II presents the financial statements, notes, MD&A, quantitative and qualitative disclosures about market risk, an outline of controls and procedures, and any disclosure changes or disagreements with the auditors. It also includes a link to the relevant company website where additional information can be found. Part III covers the director, executive, and professional advisor matters.

The deadlines for filing a 10-K report depend on the size of the company and whether it is classified as a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. These classifications are determined according to the size of the company's public float. Large accelerator companies with a public float of $700 million or more are required to file the 10-K within sixty days, accelerated companies with a float of more than $75 million but less than $700 million have seventy-five days to file, and all other companies (including a non-accelerated filer or smaller reporting company) with a float below $75 million have ninety days.[43]

Listed companies previously had some discretion over the content of annual reports provided to shareholders. However, the SEC has gradually standardized the disclosure framework and the differences in the two full year reports are now minimal. The annual reports must contain certified financial statements and specified items. The certified financial statements include audited balance sheets for two years and audited statements of income and cash flow for three years. The annual reports must also provide five-year summary financial data, including net

41. *E.g.*, *General Steel Holdings, Inc.*, N.Y. STOCK EXCH., http://www.nyse.com/listed/gsi.html (last visited July 15, 2015).

42. A company may register its securities under *Securities Exchange Act of 1934* §§ 12(b) or 12(g). Companies with more than $10 million in assets whose securities are held by more than 500 shareholders must file annual and other periodic reports. *Id.*

43. *Form 10-K*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/form10k.htm (last modified June 29, 2009).

sales or operating revenues, income or loss from continuing operations, total assets, long-term obligations, and cash dividends declared and paid.[44]

Listed companies in the United States are required to provide comprehensive quarterly reports (Form 10-Q). The Form 10-Qs are formatted in two parts; part one contains financial information and part two contains other information. The financial information includes condensed financial statements, MD&A of the financial conditions and results, and disclosures on market risks. The deadlines for filing the 10-Q reports also depend on the size of the company. Companies with a public float of $75 million or more are required to file the 10-Q within forty days, and companies with a float below $75 million have forty-five days.[45]

Non-financial disclosures such as MD&A have been recognized as an important component of company reporting in the United States for many years. Item 303 of Regulation S-K requires listed companies to include extensive MD&A in the full year (10-K) and quarterly reports (10-Q).[46] The mandated MD&A includes commentary on the company's financial condition and operational results and a description of the business including the main products and services. The reports must include outlines of the critical accounting policies,[47] and information on liquidity, capital resources,[48] operational results,[49] favourable or unfavourable industry trends, significant events or uncertainties, off-balance sheet arrangements,[50] and contractual obligations. Forward-looking disclosures are also required for "known trends, demands, commitments, events or uncertainties" in relation to these matters.[51] The stated objectives of these MD&A requirements are:

> (1) to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management, (2) to enhance the overall financial disclosure and provide the context within which financial information should be analyzed, and (3) to provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that

44. *Id.*; *see also* Regulation S-X, 17 C.F.R. Part 210 (2015); Regulation S-K, 17 C.F.R. § 229.301 (2015).

45. *Form 10-Q*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/form10q.htm (last modified Sept. 2, 2011).

46. Management's Discussion and Analysis of Financial Condition and Results of Operations, 17 C.F.R. § 229.303 (2005); *see* Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Conditions and Results of Operations, Securities Act Release No. 33-8350, Exchange Act Release No. 34-48960, FR Release No. 72 (Dec. 19, 2003), *available at* http://www.sec.gov/rules/interp/33-8350.htm.

47. Cautionary Advice Regarding Disclosure about Critical Accounting Policies, Securities Act Release No. 33-8040, Exchange Act Release No. 34-45149, FR Release No. 60 (Dec. 12, 2001), *available at* https://www.sec.gov/rules/other/33-8040.htm.

48. Disclosure Relating to Liquidity and Capital Resources, Off-Balance Sheet Arrangements, Trading Activities and Related Party Transactions, Securities Act Release No. 33-8056, Exchange Act Release No. 34-45321, FR Release No. 61 (Jan. 22, 2002), *available at* http://www.sec.gov/rules/other/33-8056.htm.

49. SEC Interpretation: Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 33-6835, Exchange Act Release No. 34-26831, FR Release No. 36 (May 18, 1989), *available at* http://www.sec.gov/rules/interp/33-6835.htm.

50. Final Rule: Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Securities Act Release No. 33-8182, Exchange Act Release No. 34-47264, FR Release No. 67 (Jan. 28, 2003), *available at* http://www.sec.gov/rules/final/33-8182.htm.

51. Cathy Cole & Christopher Jones, *Management Discussion and Analysis: A Review and Implications for Future Research*, 24 J. ACCT. LITERATURE 135, 138-39 (2005).

investors can ascertain the likelihood that past performance is indicative of future performance.[52]

The SEC operates a centralized depositary system for listed company documents provided under federal law. Companies must file the mandated reports and disclosures with the SEC using its Electronic Data Gathering, Analysis, and Retrieval System (EDGAR). The EDGAR website enables public access to filed company documents.[53] The documents available from the EDGAR website include the full year reports (10-K and annual), quarterly reports (10-Q), prospectuses, event disclosures (Form 8-K), and press releases submitted to the SEC. The EDGAR website allows tailored searches by company name, type of document, date, and industry code.[54]

The SEC proactively supports the disclosure framework by providing companies with guidance on how to meet their disclosure requirements and satisfy the MD&A rules and objectives.[55] It also actively monitors and supervises the disclosure processes. Section 408 of the *Sarbanes-Oxley Act of 2002* requires the SEC to review a company's periodic reports at least once every three years.[56] The SEC may elect to do a full cover-to-cover review, a financial statement review, or a targeted issue review. When the SEC believes a company can improve its disclosure, it issues a "comment letter."[57] The company may respond by letter (a "response letter") or, if appropriate, may amend its filings. SEC comments and company responses are made available on the EDGAR website after the review is completed. When required, the SEC uses its enforcement powers. It has a track record of successful enforcement actions across the full spectrum of periodic disclosure rules, including those pertaining to preliminary full year reporting (10-K) and quarterly reporting (10-Q),[58] and the MD&A content within these periodic reports.[59]

Some of the company disclosure rules in the United States are currently under review. The SEC was mandated by Congress in the 2012 *Jumpstart Our Business Startups (JOBS) Act*[60] to report on its disclosure rules for U.S. public

52. U.S. SEC. & EXCH. COMM'N, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K 42 (2013), *available at* http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

53. *Filings and Forms*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/edgar.shtml (last modified Feb. 21, 2012).

54. *EDGAR*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/edgar/searchedgar/companysearch.html (last visited July 15, 2015).

55. Interpretation: Commission Guidance Regarding Management's Discussion, *supra* note 46; *see also Sample Letter Sent to Public Companies on MD&A Disclosure*, U.S. SEC. & EXCH. COMM'N (Mar. 2008), https://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0308.htm.

56. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 408, 116 Stat. 745 (2002).

57. *Comment Letters*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/commentletters.htm (last modified Apr. 11, 2011).

58. *Accounting and Auditing Enforcement Releases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/divisions/enforce/friactions.shtml (last modified July 8, 2015) (detailing many actions taken by the SEC relating to the content of quarterly reports (Form 10-Q) and preliminary reports (Form 10-K)).

59. *E.g.*, Bank of Am. Corp., Exchange Act Release No. 72888 (Aug. 21, 2014), *available at* https://www.sec.gov/litigation/admin/2014/34-72888.pdf; Sony Corp. & Sano, Exchange Act Release No. 40305 (Aug. 5, 1998), *available at* http://www.sec.gov/litigation/admin/3440305.txt; Bank of Bos. Corp., SEC Initial Decision Release No. 81, Administrative Proceeding File No. 3-8270 (Dec. 22, 1995), *available at* http://www.sec.gov/litigation/aljdec/id81bpm.txt.

60. Jumpstart our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 101, 126 Stat. 306 (2012); Securities Act of 1933 § 2(a)(19), 15 U.S.C. 77b(a)(19) (amended 2010) (noting that the specific mandate is to analyze the "registration requirements" of Regulation S-K).

companies, as a means to "modernize and simplify disclosure requirements and reduce compliance costs for emerging growth companies."[61] To achieve these aims, the SEC issued a Staff Report entitled *Report on Review of Disclosure Requirements in Regulation S-K* that documents the developments of Regulation S-K.[62] Regulation S-K was created in 1982 to provide an "integrated disclosure system" of the registration statement disclosure requirements under the Securities Act and the periodic reporting disclosure rules under the Exchange Act.[63] The Staff Report concludes that Regulation S-K should be comprehensively reviewed.[64]

3. Continuous Disclosure

Continuous disclosure obligations in the United States are imposed on listed companies under exchange listing rules. As the NYSE is the largest and most prominent global exchange, its rules are outlined in more detail than those in subsequent country profiles.

Section 2 of the NYSE Listing Manual governs the disclosure and reporting of material information. It states that the listing agreement generally seeks to achieve the following objectives:

- "Ensure timely disclosure of information that may affect security values or influence investment decisions, and in which shareholders, the public and the Exchange have a warrantable interest."[65]
- "Ensure frequent, regular and timely publication of financial reports prepared in accordance with generally accepted accounting principles."[66]
- "Provide the Exchange with timely information to enable it to efficiently perform its function of maintaining an orderly market for the company's securities, to enable it to maintain necessary records and to allow it the opportunity to make comment as to certain matters before they become established facts."[67]
- "Preclude certain business practices not generally considered sound."[68]

More specifically, NYSE Listing Rule 202.05 requires timely disclosure of material news developments. It provides that:

> A listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities. . . . A listed company should also act promptly to dispel unfounded rumors which result in unusual market activity or price variations.[69]

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61. Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Staff Report on Pub. Co. Disclosure, (Dec. 20, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982#.VGF5dckrgek.
62. *See generally* U.S. SEC. & EXCH. COMM'N, *supra* note 52.
63. *Id.* at 8.
64. *Id.* at 104.
65. N.Y. STOCK EXCH., NEW YORK STOCK EXCHANGE MANUAL, sec. 201.00 (Introduction), *available at* http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F3%5F2%5F6&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F (last visited July 15, 2015).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* sec. 202.05.

The Listing Rule 202.05 commentary confirms that "this is one of the most important and fundamental purposes of the listing agreement which the company enters into with the Exchange."[70] Importantly, the wording of Listing Rule 202.05 and the introduction to section 2 of the NYSE Listing Manual indicate that the audience of listed company disclosures includes "the public", thereby acknowledging the breadth of persons with a warrantable interest.[71] Additionally, the NYSE Listing Rule 202.06 notes that:

> Unfavorable news should be reported as promptly and candidly as favorable news. Reluctance or unwillingness to release a negative story or an attempt to disguise unfavorable news endangers management's reputation for integrity. Changes in accounting methods to mask such occurrences can have a similar impact.[72]

The explicit wording of Listing Rule 202.06 indicates that the NYSE is fully aware of the practical challenges and difficulties in obtaining balanced and frank public disclosure of negative corporate developments.[73] Listing Rule 202.06 discourages the use of financial measures within the company reports and disclosures that exclude negative components in an attempt to present the events or results in a positive light.[74] In practice, this exhortation generally refers to the use of financial measures within the company reports and disclosures that are not prepared in accordance with relevant accounting standards.

NYSE Listing Rule 202.02 governs the relationship between company officials and outsiders. It states that:

> Security analysts play an increasingly important role in the evaluation and interpretation of the financial affairs of listed companies. Annual reports, quarterly reports, and interim releases cannot by their nature provide all of the financial and statistical data that should be available to the investing public. The Exchange recommends that companies observe an "open door" policy in their relations with security analysts, financial writers, shareholders, and others who have legitimate investment interest in the company's affairs.
>
> A company should not give information to one inquirer which it would not give to another, nor should it reveal information it would not willingly give or has not given to the press for publication. Thus, for companies to give advance earnings, dividend, stock split, merger, or tender information to analysts, whether representing an institution, brokerage house, investment advisor, large shareholder, or anyone else, would clearly violate Exchange policy. On the other hand, it should not withhold information in which analysts or other members of the investment public have a warrantable interest.
>
> If during the course of a discussion with analysts substantive material not previously published is disclosed, that material should be simultaneously released to the public.[75]

Listing Rule 202.02 reflects the real and significant tensions that arise in corporate disclosure spheres when companies that are obliged to report publicly also meet with analysts, investors and other stakeholders privately on a regular

70. *Id.*
71. *Id.* sec. 201.00.
72. *Id.* sec. 202.06.
73. *See id.*
74. *See id.*
75. *Id.* sec. 202.02.

basis. While the rule states that information should not be given to one inquirer that is not given to another, it also indicates that mandated reports and disclosures cannot provide all of the data that should be available to the investing public. The nature of the additional data that should be publically available, but which is not included in the mandated reports and disclosures, is not indicated or discussed within the NYSE Listing Manual. While such ambiguities are potentially problematic, the continuous disclosure obligations in the United States are supported by Regulation Fair Disclosure (Reg. FD).[76] Under Reg. FD, companies, or those acting on a company's behalf, are prohibited from selectively disclosing material non-public information to securities industry professionals, institutional investors, and specified other persons.[77] When a listed company chooses to disclose material information to one group of investors, the same information must be disclosed publicly. Reg. FD applies to closed-door meetings, conference calls with analysts, and any situation where material information is communicated, verbally or in writing.[78]

Section 303A of the NYSE Listing Manual contains the corporate governance rules. Companies listed on the NYSE must comply with most of the corporate governance standards.[79] These mandated requirements are stricter than in other jurisdictions reviewed. In most countries, corporate governance rules operate as a code containing broad recommendations or principles. These codes are voluntary but when companies do not follow any of the recommendation either partially or fully, they must explain their reasons for not doing so in the annual report.[80]

B. Germany

1. Overview

In 2004 the European Commission adopted the Market Abuse and Transparency Directives (the "Transparency Directive").[81] The Transparency Directive applies to listed companies trading on a regulated market, and it includes corporate disclosure obligations.[82] The European Commission began a review of the Transparency Directive in 2009.[83] After a curious series of twists and

76. Final Rule: Selective Disclosure and Insider Trading, Securities Act Release No. 33-7881, Exchange Act Release No. 34-43154 (Oct. 23, 2000), *available at* http://www.sec.gov/rules/final/33-7881.htm.

77. *Id.*

78. *Id.*

79. N.Y. STOCK EXCH., *supra* note 65, sec. 3.

80. *See, e.g.*, FIN. CONDUCT AUTH., LISTING RULES § 7.2.3 (July 2015), *available at* http://media.fshandbook.info/content/FCA/LR.pdf.

81. *See generally* Directive 2004/109 of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market and amending Directive 2001/34/EC, 2004 O.J. (L 390/38); *see Reinforcing the Transparency of Information About Issuers of Securities*, EUR-LEX, http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l22022_en.htm# (last updated May 29, 2014).

82. *See* Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU) (amending both the European Transparency Directive 2004/109/EC and the European Commission Directive 2003/71/EC).

83. *See generally* European Comm'n Staff, *Executive Summary of the Impact Assessment* (European Comm'n, Working Paper, 2011), *available at* http://www.parliament.bg/pub/ECD/111764SEC_2011_1280_EN_DOCUMENTDETRAVAIL_f.pdf. The Mazars Group was chosen by the European Commission to review "the functioning of certain requirements imposed on listed companies by the Transparency Directive."

turns, the European Commission amended the Transparency Directive in October 2013.[84] The amendments to the Transparency Directive abolish the requirement to publish interim management statements or quarterly reports, and extend the deadline for the publishing of half-yearly reports to three months after the end of the reporting period.[85]

The prior Transparency Directive was a "minimum harmonisation directive" which allowed the European Union (the "E.U.") Member States to impose additional requirements. Surprisingly, the amended Transparency Directive prohibits Member States from imposing a requirement in their national legislation to publish periodic financial information more frequently than on a half-yearly basis.[86] Member States are only permitted to require companies to publish additional financial information if compliance with the request is not financially burdensome and the information is proportionate to factors influencing investment decision-making.[87] The Transparency Directive amendments came into force on November 26, 2013 and Member States have two years to implement the changes.[88] The stated rationale for the amendments is to "make regulated markets more attractive to small and medium issuers raising capital in the Union."[89] It is claimed that the obligations to publish interim management statements encourage short-term performance and discourage long-term investment, thereby representing "an important burden . . . without being necessary for investor protection."[90]

There is no centralized public repository of listed company disclosures in Europe.[91] Regulated information must be disseminated using processes that ensure the information is accessible to "as wide a public [audience] as possible" and with the timing of its release across Europe "as close to simultaneously as possible."[92] However, the Amending Directive notes that access to financial information on listed companies is difficult because this requires interested parties to go through twenty-seven national databases.[93] It indicates that the

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Transparency Directive Assessment Report, MAZARS GRP., http://www.mazars.co.uk/Home/News/Our-publications/General-publications/Transparency-Directive-Assessment-Report (last visited July 1, 2015).

84. Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU); *see* North, *supra* note 5 (providing more detail regarding the debate in Europe on the Transparency Directive review processes).

85. Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU).

86. European Commission, COM (2011) 683 final 2011/0307(COD) Amending Directive 2004/109/EC & 2007/14/EC ¶¶ 5 (2011).

87. *Id.* ¶¶ 5-6. Member States can require the publication of additional periodic financial information by financial institutions. Moreover, a regulated market can require issuers which have their securities admitted to trading to publish additional periodic information in all or some segments of the market. *See* Council Directive 2013/50, 2013 O.J. (L 294/14) (EU).

88. Council Directive 2013/50, 2013 O.J. (L 294) (EU); *see also UK Corporate Update*, LINKLATERS (Nov. 20, 2013), http://www.linklaters.com/Insights/Publication1005Newsletter/Index/Pages/Transparency-Directive-amendments.aspx.

89. European Commission, COM (2011) 683 final 2011/0307(COD) Amending Directive 2004/109/EC & 2007/14/EC ¶ 2 (2011).

90. *Id.* ¶ 4.

91. Memorandum 13/544, *supra* note 8.

92. Commission Directive 2007/14/EC of 8 March 2007 Laying down Detailed Rules for the Implementation of Certain Provisions of Directive 2004/109/EC on the Harmonisation of Transparency Requirements in relation to Information about Issuers Whose Securities Are Admitted to Trading on a Regulated Market, 2007 O.J. (L 69) art. 12(2), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007L0014.

93. Memorandum 13/544, *supra* note 8.

European Commission proposes to develop technical standards to enable a pan-European access point to regulated information.[94]

Frankfurter Wertpapierbörse (FWB® or the Frankfurt Stock Exchange) is the largest of Germany's seven stock exchanges, with a turnover share of more than eighty-five percent.[95] The FWB is operated by Deutsche Börse AG, a German public company.[96] The FWB operates a tiered market, and companies that wish to list on a European-regulated market can elect to list under either a general or prime standard.[97] In 2012, eighty-three percent of the companies listed with the FWB were listed under the Prime Standards category.[98]

The Trading Surveillance Office (the "TSO") "is an independent supervisory body of the [FWB]" and is responsible for monitoring market activity, including suspicious trading.[99] The TSO notifies the supervisory bodies and management boards of the exchange of any irregularities. The Sanctions Committee of the FWB may impose fines and may exclude participants from the exchange for up to thirty days.[100]

BaFin monitors listed company compliance with the Securities Trading Act (Wertpapierhandelsgesetz – WpHG) and is responsible for monitoring and enforcing the rules governing insider trading, market manipulation, ad hoc notifications, and financial reporting.[101] The annual financial statements are monitored for compliance with the law by the German Financial Reporting Panel (Deutsche Prufstelle fur Rechnungslegung DPR e.V) on a random sample basis or at the request of BaFin.[102] The condensed financial statements and interim management statements are subjected to examination with cause. Any supervisory or enforcement measures are initiated by BaFin.[103]

The Exchange Supervisory Authorities ("ESAs") are responsible at state level for supervision of the Exchange Act (Borsengesetz) including "pricing processes, the supervision of the proper conduct of trading as well as the investigations of violations of the Exchange Act."[104] The ESAs may impose

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94. European Commission, COM (2011) 683 final 2011/0307(COD) Amending Directive 2004/109/EC & 2007/14/EC, 8.

95. *The Frankfurt Stock Exchange*, DEUTSCHE BÖRSE AG, https://deutsche-boerse.com/dbg/dispatch/en/kir/dbg_nav/about_us/20_FWB_Frankfurt_Stock_Exchange (last visited July 1, 2015).

96. DEUTSCHE BORSE GRP., CORPORATE REPORT 2013 16 (2013), *available at* http://deutsche-boerse.com/dbg/dispatch/en/binary/gdb_content_pool/imported_files/public_files/10_downloads/12_db_annual_reports/2013/Annual_Report_2013.pdf.

97. Companies may also raise capital under exchange regulated unofficial markets with an entry standard listing. The entry standard is intended to provide small-to-medium sized companies with an easy, fast and cost-effective way to list their shares for exchange trading.

98. DEUTSCHE BORSE GRP., CORPORATE REPORT 2012 C2 (2012), *available at* http://deutsche-boerse.com/dbg/dispatch/en/binary/dbg_nav/investor_relations/30_Reports_and_Figures/30_Annual_Reports/20_Archive/Content_Files/Archive/Annual_Report_2012.pdf.

99. *The Proper Conduct of Trading Within the Exchanges Is Monitored by Market Surveillance*, DEUTSCHE BORSE GRP., https://deutsche-boerse.com/dbg/dispatch/en/kir/dbg_nav/about_us/20_ FWB_Frankfurt_Stock _Exchange40_Supervisory_Bodies (last visited July 1, 2015).

100. *Trading Surveillance Office Hust*, BORSE FRANKFURT, http://www.boerse-frankfurt.de/en/basics+overview/monitoring/trading+surveillence+office+huest (last visited July 1, 2015).

101. *See The Proper Conduct of Trading* Deutsche, *supra* note 99.

102. *Financial Reporting Enforcement*, BAFIN FED. FIN. SUPERVISORY AUTH., http://www.bafin.de/EN/Supervision/StockExchangesMarkets/FinancialReportingEnforcement/financialreportingenforcement_node.html (last visited July 1, 2015).

103. *Id.*

104. *The Proper Conduct of Trading*, *supra* note 99.

sanctions on market participants in addition to those imposed by the Disciplinary Committee and the management boards of an exchange.[105]

2. Periodic Reports

Pursuant to the periodic reporting provisions of the Transparency Directive,[106] the annual report must include audited financial statements, a management report, a responsibility statement, and an auditor certificate of registration.[107] The annual report must be made available to the public within four months of the financial year end.[108] Companies are required to provide a corporate governance report that indicates whether they have complied with the corporate governance code.[109] Companies may deviate from the code recommendations but any deviations must be explained in the report.[110]

The half-year report must be made available to the public within two months of the relevant reporting period.[111] This report must contain a condensed set of financial statements, an interim management statement, and a responsibility statement.[112] The condensed financial statements must include a condensed balance sheet, a condensed profit and loss account, and notes.[113] The interim management statement must contain information on how the company has performed during the period, including an explanation of material events and transactions and their impact on the financial position of the company, and a descriptive outline of the company's financial position and performance during the period covered.[114]

The statutory periodic reporting obligations imposed on listed companies are enhanced by the exchange's disclosure listing rules. A company listed on the FWB under the Prime Standard is generally required to produce half-year and quarterly financial statements in German and English in accordance with international accounting standards.[115] These reports must be provided to the Management Board electronically within three months of the end of the reporting period.[116] These companies must provide an updated financial calendar on their Internet websites in German and English, including the dates of the annual

105. *Id.*

106. *See* Wertpapierhandelsgesetz [WpH] [German Securities Trading Act], July 26, 1994, Federal Law Gazette § 37v–37z (Ger.)

107. *Id.* § 37v(2).

108. *Id.* § 37v(1).

109. GOV'T COMM'N, GERMAN CORPORATE GOVERNANCE CODE § 2.3.1 (as amended June 18, 2009), *available at* http://www.ecgi.org/codes/documents/cg_code_germany_june2009_en.pdf.

110. *Id.* at 2-3.

111. Wertpapierhandelsgesetz [WpH] [Securities Act], July 26, 1994, Fed. Law Gazette § 37w(1) (Ger.).

112. BAFIN FIN. SUPERVISORY AUTH., ISSUER GUIDELINE 232 XIV.4.1 (May 14, 2009), *available at* http://www.bafin.de/SharedDocs/Downloads/EN/Leitfaden/dl_Emittentenleitfaden_2009_en.pdf?__blob=publicationFile.

113. Wertpapierhandelsgesetz [WpH] [Securities Act], July 26, 1994, Fed. Law Gazette § 37w(2) (Ger.).

114. *Id.* § 37x(2). The provisions relating to interim management statements were still in force when the legislation was viewed on April 7, 2015.

115. *See* FRANKFURTER WERTPAPIERBÖRSE, EXCHANGE RULES FOR THE FRANKFURTER WERTPAPIERBÖRSE § 51 (Dec. 16, 2013), *available at* https://deutsche-boerse.com/dbg/dispatch/en/binary/dbg_nav/metanavigation /30_Regulations?object_id=84XHGZ360NSGDEN.

116. *Id.* An issuer that "has its offices in a non-EU country or outside a contractual country of the Treaty on the European Economic Area . . . [must] submit the half yearly and quarterly financial statements to the Management Board in electronic form within three months after end of the respective reporting period." *Id.*

general meeting, the press conferences, and analysts' meetings.[117] These companies are also required to conduct an analysts' meeting at least once a year in order to "announce the figures from the annual accounts."[118]

3. Continuous Disclosure

The ad hoc disclosure requirements in the European Commission are intended to provide all participants with access to key information and to prevent insider trading.[119] In Germany these obligations are enacted in section 15 of the WpHG, which requires companies that are listed on a Regulated Market to publish inside information that is materially price sensitive without undue delay.[120] These notifications must be released through an electronic information dissemination system and the media.[121]

The listing rules of an exchange may impose higher disclosure standards. For example, a company listed on the FWB under the Prime Standard must provide the ad hoc disclosures in both German and English.[122]

B. The United Kingdom

1. Overview

The London Stock Exchange ("LSE") operates a tiered public market structure. The Main Market exists for more established and larger companies, whereas the Alternative Investment Market (AIM) operates for small and medium sized enterprises,[123] and the Depositary Receipt Scheme enables international companies outside of the European Union to list and raise capital.[124] The disclosure requirements of AIM-listed companies are less onerous than those that apply to the Main Market.[125]

The Financial Conduct Authority ("FCA") is empowered to act as the U.K. Listing Authority ("UKLA").[126] The UKLA is responsible for supervision and enforcement of the LSE listing rules, including the reporting and disclosure rules.[127] The FCA Handbook includes a block entitled "Listing, Prospectus and Disclosure United Kingdom Listing Authority rules".[128] The "Disclosure Rules and Transparency Rules" ("DTR") are provided in seven chapters. Chapter 2 governs

117. *See id.* § 52.
118. *Id.* § 53.
119. BAFIN FIN. SUPERVISORY AUTH, *supra* 112, at 45 IV.1.
120. *Id.*
121. *Id.* at 74 IV.6.1.1.
122. FRANKFURTER WERTPAPIERBÖRSE, *supra* note 115, § 54.
123. LONDON STOCK EXCH., A GUIDE TO AIM 4 (2010), *available at* http://www.londonstockexchange.com /companies-and-advisors/aim/publications/documents/a-guide-to-aim .pdf.
124. LONDON STOCK EXCH., A GUIDE TO LISTING DEPOSITARY RECEIPTS 6 (2009), *available at* http://www.lseg.com/sites/default/files/content/documents/guide_to_listing_depositaryreceipts.pdf.
125. *See* LONDON STOCK EXCH., *supra* note 123, at 60-64.
126. FIN. CONDUCT AUTH., *supra* note 80, § 1.1.1.
127. *Id.* The prior Financial Services Authority was split into the Financial Conduct Authority and the Prudential Regulation Authority on April 1, 2013. *See History of the FCA*, FIN. CONDUCT AUTH., http://www.fca.org.uk/about/history# (last modified Jan. 28, 2015).
128. *The Full Handbook*, FIN. CONDUCT AUTH., http://www.fshandbook.info/FS/html/FCA (last visited July 1, 2015).

disclosure and control of inside information by issuers, Chapter 4 details the periodic reporting rules, Chapter 6 deals with continuing obligations and access to information, and Chapter 7 outlines the corporate governance rules.[129]

The FCA has broad powers with respect to potential or actual breaches of the listing rules. It may suspend the listing of a company's securities if required for the smooth operation of the market or if "necessary to protect investors."[130] When a company that has issued securities fails to comply with its obligations under Part 6 of the *Financial Services and Markets Act 2000* (UK), the company or persons connected with the company may be subject to an appropriate penalty.[131] At the time of writing, no suspensions nor delistings of listed companies for violations of the disclosure listing rules were found on the FCA website.[132] The only action on the website found concerning listed company disclosure matters involved a failure to notify the market of share dealings by persons discharging managerial responsibilities.[133]

2. Periodic Reports

The periodic reports in the U.K. include an annual financial report that must be made public within four months following the end of a financial year.[134] This report includes "(1) audited financial statements; (2) a management report; and (3) a responsibility statement."[135] DTRs 4.1.8 and 4.1.9 state that the management report must provide "a balanced and comprehensive analysis" of the company's business developments and position.[136] The review must provide a performance "analysis using financial key performance indicators," and an explanation of the "amounts included in the . . . financial statements" to enable readers to understand the company developments, performance, and position.[137] The type and scope of performance analysis and financial explanation are not prescribed; there is no requirement to provide historical performance data for years earlier than the reporting period and the prior year, and the selected financial performance indicators may include unreported measures that do not comply with accounting standards.[138] Listed companies must include a corporate governance statement in the directors' report or as a separate report.[139] Companies must detail any departure from the corporate governance code and explain the reasons.[140]

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129. *See generally* FIN. CONDUCT AUTH., DISCLOSURE RULES AND TRANSPARENCY RULES (Jan. 2015), *available at* http://media.fshandbook.info/content/FCA/DTR.pdf.

130. FIN. CONDUCT AUTH., *supra* note 80, § 5.1.1; *see* Financial Services and Markets Act, 2000, § 77(2) (U.K.).

131. Financial Services and Markets Act, 2000, § 91 (U.K.).

132. *Enforcement*, FIN. CONDUCT AUTH., http://www.fca.org.uk/firms/being-regulated/enforcement (last visited Jan. 31, 2015).

133. *Search Results*, FIN. CONDUCT AUTH., http://www.fca.org.uk/your-fca/list?ttypes=Final+Notice &ssearch=listing+rules&yyear= (last visited July 15, 2015) (stating that the U.K. Listing Authority imposed a financial penalty of 539,800 pounds on Reckitt Benckiser Group Plc.).

134. FIN. CONDUCT AUTH., *supra* note 129, c. 4, § 4.1.3.

135. *Id.* § 4.1.5.

136. *Id.* §§ 4.1.8, 4.1.9.

137. *Id.* § 4.1.9.

138. *See generally id.*

139. *Id.* c. 7, §§ 7.2.1, 7.2.9.

140. *See id.* § 7.2.3.

The DTRs and Listing Rules do not require companies to release preliminary full-year statements prior to release of an annual report.[141] When companies elect to do so, the statement must be published as soon as possible after it has been approved by the board; the statement must be agreed with the company's auditors; the figures in the financial accounts must be in a form consistent with the presentation to be used in the annual accounts; and the statement must highlight any expected auditor issues.[142] The form of the preliminary final statement is discretionary. The content of the statement must include "any significant additional information necessary for the purpose of assessing the results being announced."[143] While listed companies are required to operate a company website, there are no listing rules that require listed companies to provide public access to briefings or to release copies of briefing presentations or slides.

Listed companies must publish a half-year financial report within two months after the end of the period.[144] The half-year reports "must include: (1) a condensed set of financial statements; (2) an interim management statement; and (3) responsibility statements."[145] The required content of these disclosures is general rather than prescriptive. The content of the half-yearly management reports must provide a summary outline of important events and their impact on the financial statements. They must also outline the principal risks and uncertainties.[146] The headings must be consistent with those presented in the most recent annual financial statements,[147] and additional line items are required where their omission would give a misleading view. Comparable figures are required for the prior year.[148]

3. Continuous Disclosure

The disclosure obligations that apply between reporting periods are contained in Chapter 2 of the FCA Handbook entitled "Disclosure and Control of Insider Information by Issuers". DTR 2.2.1 provides that "An issuer must notify a Regulatory Information Service (RIS) as soon as possible of any inside information which directly concerns the issuer unless DTR 2.5.1 applies."[149] DTR 2.5.1 allows a delay in the public disclosure of inside information when "(1) such omission would not be likely to mislead the public; (2) any person receiving the information owes the issuer a duty of confidentiality . . . ; and (3) the issuer is able to ensure its confidentiality."[150] DTR 2.5.3 notes that it is legitimate to delay public disclosure where the outcome of negotiations would likely be affected.[151] In particular, public disclosure can be delayed if it might undermine negotiations

141. FIN. CONDUCT AUTH., *supra* note 80, § 9.7A.
142. *Id.*
143. *Id.*
144. *See id.* c. 4, § 4.2.2.
145. *Id.* § 4.2.3.
146. *See id.* § 4.2.7.
147. *Id.* § 4.2.5.
148. *Id.*
149. FIN. CONDUCT AUTH., *supra* note 129, § 2.2.1.
150. *Id.* § 2.5.1.
151. *See id.* § 2.5.3.

aimed at ensuring a company's long-term viability.[152] Once information is no longer confidential, it must be publicly disclosed. DTR 2.5.6 requires an issuer that intentionally discloses any inside information to a third person to simultaneously make "complete and effective public disclosure of that information."[153]

C. Japan

1. Overview

One of the specific responsibilities of Japan's Securities and Exchange Surveillance Commission (the "SESC") is to inspect company reports.[154] The SESC monitors financial statements and requests more detailed reports from companies when necessary. It may caution or warn a listed company when it violates the exchange rules, require the company to voluntarily amend its reports, or demand the submission of an improvement report.[155] The SESC also has authority to initiate preliminary criminal investigations.[156] In some instances, it may recommend imposing a penalty and this may be taken into account in an administrative law hearing.

Japan has six stock exchanges.[157] These six organizations are self-regulatory with oversight from the SESC. The SESC is responsible for ensuring the exchanges comply with their obligations, including their supervisory and enforcement roles. The SESC supports the supervisory and enforcement roles of the exchanges by independently monitoring market trends, prices, and volumes.[158] Suspicious transactions are identified and investigated for possible misconduct, including insider trading, market manipulation, and false statements.[159]

On January 1, 2013 Japan Exchange Group, Inc. ("JPX") was established via a business combination between the Tokyo Stock Exchange Group and the Osaka Securities Exchange.[160] The Tokyo Stock Exchange, Inc. is a cash equities market and Osaka Exchange, Inc. is a derivatives market.[161] JPX is responsible for monitoring its members and ensuring compliance with the listing rules and relevant legislation.[162] The self-regulatory operations at JPX are divided into two main areas: issuer compliance and member compliance. The issuer compliance area investigates and examines the suitability of current and potential listed

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152. *See id.* § 2.5.2. Section 2.5.4 states "an issuer [cannot] delay public disclosure of the fact that it is in financial difficulty or of its worsening financial condition." *Id.* § 2.5.4. The permitted delay is limited to the fact or substance of the negotiations. *Id.*

153. *Id.* § 2.5.6.

154. SEC. & EXCH. SURVEILLANCE COMM'N, REPORT ON SECURITIES AND EXCHANGE SURVEILLANCE COMMISSION 2 (Mar. 2014), *available at* http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf.

155. *See id.* at 8-9.

156. *See id.* at 11. The submission of false financial statements may be a criminal offense. *See id.* at 9.

157. In Japan, there are stock exchanges in Tokyo, Osaka, Nagoya, Fukuoka, and Sapporo, as well as the Jasdaq Securities Exchange. *See Asian Stock Exchanges*, WORLD STOCK EXCHS., http://www.world-stock-exchanges.net/asia.html (last visited July 1, 2015).

158. SEC. & EXCH. SURVEILLANCE COMM'N, *supra* note 154, at 6-7.

159. *Id.* at 7.

160. *About JPX*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/corporate/about-jpx/about-jpx/index.html (last modified Mar. 20, 2015).

161. *Id.*

162. *Japan Exchange Regulation*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/corporate/jpx-profile/jpx-r/ (last modified Mar. 20, 2015).

issuers and products.[163] The member compliance area supervises trading and ensures proper conduct in the market.[164] The issuer compliance area is subdivided into two further areas: listing eligibility and listed company compliance.

The Listed Company Compliance Department (the "Compliance Department") is responsible for examining listed companies' compliance with the disclosure regulation.[165] The Compliance Department conducts examinations regarding violations of the timely disclosure rules and deficiencies in the internal management systems of listed companies.[166] When these examinations find evidence that a company's systems for handling information are not adequate or non-compliant with the rules, the JPX may warn the company, put its securities on alert or require the company to submit an improvement report. It may also impose a listing agreement violation penalty.[167] If the company does not make improvements within the specific period (generally within a year of designation), it may be delisted.[168] Investigation findings may also be reported to the SESC.[169] The non-compliant conduct of any company against which the TSER has taken a disciplinary measure is outlined on the exchange website to enhance corporate disclosure standards and market transparency more generally.[170] At the time of writing, ten companies were listed on the JPX website as having violated their listing agreement.[171] In addition, twenty-five public announcement actions were listed from January 2011 until April 2015, with many involving misstatements of financial items.[172] Finally, a steady number of reminders have been issued by the JPX to listed companies for inappropriate disclosure during the period from 2003 to the present.[173]

2. Periodic Disclosure

Company reporting in Japan is governed by two legal codes: the *Companies Act* and the *Financial Instruments and Exchange Act* (the "FIEA"). The *Companies Act* applies to all companies, while the FIEA is limited to public companies.[174] The Financial Services Authority ("FSA") is responsible for disclosures under the FIEA and the Ministry of Justice regulates disclosures

163. *Outline of Self-Regulatory Operations*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/regulation/outline/index.html (last modified Mar. 20, 2015).

164. *Ensuring Sound Market Operations*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/regulation/ensuring/index.html (last modified Apr. 15, 2015).

165. *Listed Company Compliance*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/regulation/ensuring/listing/compliance/index.html (last modified Mar. 20, 2015).

166. *Id.*

167. *Id.*

168. *Id.*

169. The Financial Supervisory Agency and the SESC were split off from the Ministry of Finance in June 1998. SEC. & EXCH. SURVEILLANCE COMM'N, *supra* note 154.

170. *See Listed Company Information*, TOKYO STOCK EXCH., http://www.tse.or.jp/english/listing/index.html (last visited Jan. 31, 2015).

171. *See Public Announcement Measure*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/listing/stocks/public-announce/index.html (last visited Apr. 7, 2015).

172. *Id.*

173. *See id.*

174. Companies Act, No. 86 of 2005, art. 435(2) (Japan) requires all companies to provide a business report and non-consolidated financial statements. Larger companies are also required to prepare consolidated financial statements. While there are differences under the two sets of regulation, the requirements have converged following a series of revisions. *See* JAPANESE INST. OF CERTIFIED PUB. ACCTS., CORPORATE DISCLOSURE IN JAPAN OVERVIEW 13 (6th ed. 2010).

under the *Companies Act*. Listed companies must file financial statements with the FSA, including an annual report with a statement of cash flow and an internal control report, and quarterly reports with financial statements that have been reviewed by a certified public accountant or an audit corporation.[175] The Commissioner of the FSA may impose a penalty and/or require the submission of amended financial statements.[176]

3. Continuous Disclosure

The continuous disclosure rules (referred to as the timely disclosure rules) are governed by the Securities Listing Regulations ("SLR") of the TSE.[177] Rule 402 of the SLR requires companies to disclose details of specified items immediately. The items requiring disclosure include decisions by listed companies, various factors or events, earnings information, amendments to performance estimates, dividend estimates or amendments to such estimates, and equivalent information relating to subsidiaries.[178] Compliance guidelines published by the TSE state that disclosure of corporate information is examined for its timeliness, accuracy, completeness, balance, and appropriateness.[179]

A company announcements service in English was established in 2011 to enhance communications between listed companies and overseas investors, with announcements posted on the English website of the TSE for thirty-one days.[180] Use of this service by listed companies is voluntary.[181]

D. Hong Kong

1. Overview

The principal regulator of securities markets in Hong Kong is the Securities and Futures Commission ("SFC").[182] The SFC is an independent statutory body that was established in 1989 by the Securities and Futures Commission Ordinance ("SFCO").[183] The SFC comprises four operational divisions: the Corporate Finance Division, the Intermediaries and Investment Products Division, the Enforcement Division, and the Supervision of Markets Division.[184]

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175. *See id.* at 13-14. A quarterly reporting system was introduced in Japan in 2008. *Id.* at 3.

176. *Id.*

177. *See generally* TOKYO STOCK EXCH., INC., SECURITIES LISTING REGULATIONS (Dec. 1, 2014), *available at* http://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/securities_listing_regulations_20141201.pdf.

178. *See generally* JAPAN EXCH. GRP., CORPORATE INFORMATION REQUIRED FOR TIMELY DISCLOSURE, *available at* http://www.jpx.co.jp/english/equities/listing/disclosure/tvdivq00000087hu-att/Disclosure.pdf (last visited July 1, 2015).

179. TOKYO STOCK EXCH., GUIDELINES GOVERNING LISTED COMPANY COMPLIANCE 1 (July 16, 2013).

180. *Company Announcements*, JAPAN EXCH. GRP., http://www.jpx.co.jp/english/listing/disclosure/index.html (last modified Mar. 20, 2015).

181. *Id.*

182. *Introduction to Regulatory Framework*, HONG KONG EXCH., https://www.hkex.com.hk/eng/rulesreg/regintro/introreg.htm (last modified Oct. 31, 2013).

183. *Id.*

184. *Id.*

The Hong Kong Exchange ("HKEx") "owns and operates the only stock exchange in Hong Kong"—the Stock Exchange of Hong Kong Limited ("HKSE").[185] HKEx is a listed company and the SFC is responsible for regulating the HKEx in relation to conflicts of interest and compliance with the listing rules.[186] The HKSE operates a Main Board and a Growth Enterprise Market (GEM).

The HKSE has a duty under Section 21 of the SFCO "to ensure . . . so far as reasonably practicable, an orderly, informed and fair market."[187] The role of the HKSE is closely tied to the development and growth of securities markets in China.[188] The stated mission of HKEx is to "aim to be the global exchange of choice for our China clients and our international clients seeking China exposure."[189] Companies that are incorporated in the People's Republic of China are listed on the HKSE as H-share companies.

2. Periodic Reports

Companies listed on the HKSE Main Board must comply with its disclosure listing rules. They must publish annual reports within four months of the end of a financial year and half-year reports must be released within three months of the end of a period.[190] They must also comply with corporate governance standards and practices, or explain why an individual corporate governance standard has not been followed.[191]

Under the HKSE listing rules, the preliminary full year results must be published within three months of the end of a financial year.[192] The required content of these reports is governed by Chapter 4 and Appendix 16 of the Main Board Listing Rules. While the prescribed content for the interim report and preliminary full year report is basic, companies must include a business review section that includes "a fair review" of business developments, "details of important events," "an indication of likely future developments," and "any supplemental information . . . necessary for a reasonable appreciation of the results."[193]

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185. *Id.* (noting that HKSE is a wholly-owned subsidiary of HKEx).

186. The SFC imposes obligations on the HKEx under Chapter 38 of the Main Board Listing Rules and Chapter 36 of the Growth Enterprises Market Listing Rules. *See Ch. 38, Listing of HKEC, Main Board Listing Rules*, HONG KONG EXCH., http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/vol1_5.htm (last updated July 11, 2014); *Ch. 36, Listing of HKEC, GEM Listing Rules*, GROWTH ENTERPRISE MKT., http://www.hkgem.com/eng/rulesreg/listrules/gemrules/documents/chapter_36.pdf (last visited July 15, 2015); *see generally* Memorandum from the Sec. & Futures Comm'n & Stock Exch. of Hong Kong Ltd. on Understanding Governing Listing Matters (Jan. 28, 2003).

187. Securities and Futures Ordinance, (2002) A231, § 21 (H.K.), *available at* http://www.legco.gov.hk/yr01-02/english/ord/ord005-02-e.pdf.

188. *See* Fanpeng Meng, *A History of Chinese Companies Listing in Hong Kong and Its Implications for the Future*, 11 J. CORP. L. STUDIES 243, 265 (2011).

189. HONG KONG EXCH., HKEX GROUP STRATEGIC PLAN 2013-2015 1, https://www.hkex.com.hk/eng/exchange/corpinfo/mission/Documents/HKEx_Group_Strategic_Plan.pdf (last visited July 1, 2015).

190. *See Main Board Listing Rules*, *supra* note 186, ch. 13, §§ 13.47, 13.48 (Equity Securities – Continuing Obligations). Notably, companies listed on the Growth Enterprise Market must publish annual and half year reports more quickly than companies on the Main Board and these companies must publish quarterly reports. *Continuing Obligations and Fees*, HONG KONG EXCH., http://www.hkex.com.hk/ENG/LISTING/LISTREQ_PRO/CONTINUING_OBLIGATIONS.HTM (last updated May 3, 2015).

191. *Main Board Listing Rules, supra* note 186, App'x 16, p. 31.

192. *See id.* § 13.49.

193. *See id.*, App'x 16, §§ 45(3)–(4).

Additional MD&A is required in the annual report, including segmental information, a risk management outline, and a corporate governance report.[194] The financial statements in the annual report "must normally be drawn up in conformity with" one of the following three standards: Hong Kong Financial Reporting Standards, International Financial Reporting Standards, or China Accounting Standards for Business Enterprises.[195] The Hong Kong Exchange and Clearing, Ltd. has an established annual program that reviews and reports on company disclosures. To promote high quality disclosure standards, its disclosure review reports provide detailed feedback and policy guidance.[196]

3. Continuous Disclosure

Listed companies have continuing disclosure obligations that are intended "to ensure that all users of the market have simultaneous access to the same information."[197] Chapter 13 of the HKSE Main Board Listing Rules outlines the circumstances in which a company must disclose information to the public. Price sensitive information must be publicly announced where "there is, or there is likely to be a false market in [the company's] securities."[198] The HKSE operates an enquiry system that monitors and picks up unusual movements in security prices or trading volumes.[199] When the system is triggered, the relevant company is asked to confirm whether it is in compliance with its disclosure obligations.

The continuous disclosure listing rules are supported by statutory obligations that are imposed on listed companies and their directors to disclose inside information as soon as reasonably practical after they become aware of the information.[200] The Enforcement Division of the SFCO conducts market surveillance to identify possible market misconduct.[201] The SFCO is also responsible for misconduct by licensed intermediaries.[202]

The HKSE operates a disciplinary committee that adjudicates the breaches of some listing rule matters.[203] These disciplinary processes and associated schedule of penalties do not appear to encompass failures to comply with the periodic reporting and continuous disclosure listing rules. At the time of writing, none of the actions shown on the enforcement news page of the exchange involved periodic reporting or continuous disclosure matters.[204]

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194. *Id.,* App'x 16, pp. 6-21.

195. *See id.*, ch. 14, § 4.11, App'x 13, part D.

196. *See generally* HKEX & CLEARING LTD., FINANCIAL STATEMENTS REVIEW PROGRAMME REPORT 2009 (June 2009); HKEX & CLEARING LTD., FINANCIAL STATEMENTS REVIEW PROGRAMME REPORT 2010 (Aug. 2010); HKEX & CLEARING LTD., FINANCIAL STATEMENTS REVIEW PROGRAMME REPORT 2012 (Jan. 2013).

197. *Main Board Listing Rules*, *supra* note 186, ch. 13, § 13.03.

198. *Id.*, § 13.09.

199. *Id.*, § 13.10.

200. These obligations are monitored and enforced by the Hong Kong Securities and Futures Commission. *See Enforcement Reporter (publication)*, SEC. & FUTURES COMM'N, http://www.sfc.hk/web/EN/regulatory-functions/enforcement/enforcement-actions/enforcement-reporter-(publication).html (last updated Aug. 6, 2014).

201. *Introduction to Regulatory Framework*, *supra* note 182.

202. *Id.*

203. *See generally Disciplinary Procedures*, HONG KONG STOCK EXCH., http://www.hkex.com.hk/eng/rules reg/listrules/listdisciplinarypro/disproced.htm (last visited Mar. 11, 2015) (providing links to the Disciplinary Procedures for the Main Board and/or GEM).

204. *Enforcement News*, SEC. & FUTURES COMM'N, http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/ (last visited Mar. 11, 2015).

IV. Comparative Analysis and Critique

A. Periodic Disclosure Regimes

All developed countries and many emerging markets have established disclosure frameworks that reflect at least some of the IOSCO corporate disclosure principles and concepts. Existing company disclosure regulation generally includes federal or national law and exchange listing rules. This regulation is typically monitored and enforced by the securities exchanges with support from national or state regulators. The periodic disclosure regimes generally require full-year reporting and either half-year or quarterly reporting. While the periodic disclosure regimes outlined in Part III may at first glance appear similar, a more detailed review reveals critical differences. The areas containing the most differences and disagreements within the periodic disclosure realm include:

- the timing, structure and content of full year reporting;
- the regularity of periodic reporting;
- the level and quality of MD&A within the periodic reports (and more generally);
- the use of, and reference to, financial measures that are not in accordance with accounting standards within the periodic reports (and more generally);
- the use of standard form reporting; and
- the provision of long-term performance measures and commentary.

These differential factors result in large variations in the quantity and quality of publicly available corporate reports and disclosures across the globe.

A frequently stated purpose of company disclosure regimes is to enable well-informed and timely decision-making. Accepting this goal as valid, a disclosure framework requires publicly available corporate disclosures that are sufficiently complete, accurate, balanced, and timely so that all diligent and competent persons can make informed investment decisions on a broadly equal basis. All of the jurisdictions reviewed in this Article require listed companies to publicly release financial statements at least twice annually. All countries also require some financial notes and MD&A within the periodic reports. However, the mandated content in half-year and preliminary full-year reports in many jurisdictions is generally minimal in comparison to the substantive content provided in the preliminary full-year (10-K) reports in the United States. Indeed, the required content is often considerably less substantive and informative than the MD&A provided in the quarterly (10-Q) reports. Thus, in a search for best practice initiatives within the corporate disclosure sphere, one is compelled to start with the regulatory structure and disclosure practices in the United States. While no country has perfect company disclosure regulation or all of the best practice features, the periodic disclosure rules and standards in the United States generally provide the international gold standard benchmarks.

Securities regulation in the United States expressly states that securities transactions through exchanges are intended to serve the "national public interest."[205] This principle is reflected in the New York Stock Exchange ("NYSE") rules, which explicitly require disclosure of all materially price sensitive information to shareholders and the public.[206] The U.S. disclosure rules have developed over time into an integrated periodic reporting framework that encompasses the following limbs:

- the United States has full-year company reporting processes that are now effectively integrated;
- it uses standard form reporting that ensures comprehensive reporting in accordance with accounting standards;
- it has had full quarterly reporting including financial statements and notes for nearly fifty years;
- it requires five-year performance tables in the 10-Ks; and
- it provides an online and hard copy federal company document repository that is free and easy for the public to use.

The SEC has managed and adapted well in this difficult regulatory space. Among its many roles and responsibilities, it has prioritized company reporting standards and the quality of publicly available information. It operates in a manner consistent with the assumption that listed companies should use public disclosure to release the same financial information and MD&A to all market participants and interested persons at the same time. It has a good appreciation of the appropriate level and scope of regulatory engagement required to achieve financial disclosures that, in the author's view, are generally clear and effective. Its monitoring of company disclosures is systematic and regular, the exchange of queries and answers from submitting companies are available to the public once resolved, and enforcement actions are initiated under the full suite of federal disclosure rules when required. The United States is likely to have benefited economically as a nation from the strength of these regulatory processes and its reputation for high quality company disclosure standards.

There are important differences between the company disclosure structure in the United States and those in operation elsewhere. The structure, timing, and content of full-year reporting in most jurisdictions outside of the United States are especially problematic. It is confounding how the traditional company reporting processes, which provide comprehensive and timely full-year information to only some participants, has survived for so long. Corporate annual reports are published in most jurisdictions up to four months after the financial year-end. By this time, the encompassed information is generally dated and no longer price sensitive, because institutional investors and analysts do not wait for publication of the annual reports to update their spreadsheets, commentary, and forecasts. As soon as a preliminary full-year result is released, these participants use it as the updated base case within security valuation models. In order to enable credible inputs for future years, they expect managers to provide strategic and operational updates during the preliminary full-year reporting season, as well as detailed notes and analysis on the recurring nature of financial line items.

205. Securities Exchange Act of 1934, § 4, codified as 15 U.S.C. § 78d (1934) (establishing the U.S. Securities and Exchange Commission).
206. *Id.*

This detailed feedback is typically provided by managers at preliminary full-year result briefings and at subsequent private briefings in the days following the result release.

Some listed companies release valuable material that explains and analyses the reported results through the relevant exchange or information repository and on the company website. Many also enable public access to the result briefings using webcasts and audios. While these companies and processes should be highly commended, these open access policies are discretionary processes in most jurisdictions. When companies do not provide public access to result briefings and merely comply with minimum regulatory requirements, the content in the half-year and preliminary full-year reports is sometimes limited to financial statements—one or two pages of loosely worded management commentary and a page of financial notes. This level and quality of public disclosure provides inadequate content and explanation of the financial results of a company and its prospects. It does not allow interested persons to use the mandated information to credibly value the company's securities and/or assess its performance on a timely basis over the full financial year. For company disclosure frameworks to achieve their intended purposes, listed companies need to produce and release year-end reports that include comprehensive financial notes and MD&A. The SEC has acknowledged this by gradually merging the required content in the 10-K and annual reports, but other jurisdictions have not followed suit.

Any adverse effects arising from a lack of substantive information in preliminary full-year reports are magnified when quarterly reporting is not mandated. A six-month period is a long time for individuals relying on public disclosures to wait for comprehensive financial statements and management commentary and updates, particularly when the continuous disclosures are incomplete or irregular or when the general business environment is less stable. Listed companies in the United States have provided mandatory comprehensive quarterly reports (Form 10-Q) since 1970. Quarterly regimes have also been adopted in other countries, including Canada, Japan, and Singapore. Nevertheless, the regularity, content, and form of corporate periodic reports remain highly contentious issues in many countries.[207] For example, institutional investors in Europe sought comprehensive quarterly reporting in the period leading up to the introduction of the Transparency Directive in 2004.[208] This step was opposed by listed companies and a compromise was reached that required listed companies to provide interim management statements. These interim management statements were limited to providing a general description of a company's financial position and performance, as well as an outline of material events and transactions and their impact on the financial position. Despite the limited nature of these interim statements and the generally favorable stakeholder response concerning the operation and efficacy of the Transparency Directive during the review consultation period, the European Commission

207. The arguments made against the introduction of quarterly reporting included the cost and undue investor focus on short-term results. Some parties also argued that quarterly reporting in the United States had not prevented fraud. *E.g., For and Against - Cost and Benefit Study Needed* 12 ACCT. AGE 12 (2003); *Europe Drops Quarterly Reporting* 23 INT'L FIN. L. REV. 12 (2004); *Quarterly Reporting System* 27 INT'L FIN. L. REV. 8 (2008).

208. *E.g.,* CHARTERED FIN. ANALYSTS INST., EUROPEAN INVESTMENT PROFESSIONALS BACK QUARTERLY REPORTING (Nov 20, 2003).

abandoned this policy obligation in late 2013.[209] From late 2015, companies listed on European markets will no longer be required to provide quarterly reports or updates and will have up to three months to release half-year reports.

The revised EC transparency policy does not entirely prevent Member States and security exchanges across Europe from establishing higher corporate disclosure standards. It will be interesting to see if Member States that previously had relatively higher disclosure standards—including more regular, timely, and comprehensive reporting—continue to maintain these standards. The comparative cost of market-based capital across European financial markets should be closely monitored, as these costs are likely to increase to compensate for weaker disclosure standards and reduced transparency. The amendments are intended to assist "small and medium issuers raising capital in the Union."[210] Yet any increases in cost of capital are likely to apply most harshly to smaller entities, as these companies are generally a riskier investment class than larger and more established companies due to a higher probability of failure. Therefore, the logical response by investors to the Transparency Directive amendments is an upward adjustment in the return sought to allow for higher risk and lower transparency levels. Over the long term, it will be important to observe any movement in investment capital flows to corporations and markets across Europe, or to other jurisdictions that require or provide higher quality public disclosures from listed corporations.

Some policy makers and commentators suggest quarterly reporting is not needed because continuous disclosure rules require listed companies to publicly disclose material price sensitive information.[211] These arguments imply that companies are releasing all of the substantive information, which would normally be included in comprehensive quarterly reports, within continuous disclosure reports. Such arguments are not credible to individuals who use public disclosures on a regular basis. It is regular and relatively standardized periodic reports that provide the essential base information from which investors assess the episodic, continuous disclosures. While the primary purpose of continuous disclosure regimes is to ensure that all investors and other stakeholders are provided with materially price sensitive information between reporting periods, these frameworks are inherently limited with respect to the nature, scope, and consistency of information provided. Listed companies are not obliged under continuous disclosure regimes in any of the countries reviewed to provide financial statements or financial forecasts (albeit some companies do so voluntarily). And as the SEC has noted, listed company executives retain significant discretion under continuous disclosure rules in relation to what must be, and in practice what is, disclosed publicly and additional information that is permitted to be, and is in

209. Council Directive 2013/50, 2013 O.J. (L 294) 206 (EU).

210. *Id.*; Directive 2004/109 of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market and amending Directive 2001/34/EC, 2004 O.J. (L 390/38); Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and amending Directive 2001/34/EC, 2003 O.J. (L 345/64) ¶ 2.

211. *See* Memorandum 13/544, *supra* note 8, at 2; *see also* COS. & SEC. ADVISORY COMM., COMMONWEALTH OF AUSTL., REPORT ON CONTINUOUS DISCLOSURE 6 (1996).

fact, disclosed privately to some market participants.[212] In reality, continuous or ad hoc company information is only useful to investors and stakeholders when it is timely and sufficiently integrated with the content provided in periodic reports, so that it forms a complete, consistent, and clear mosaic of available information.

Furthermore, publicly available company information should be in a form that allows comparative analysis. The need for company reporting in a way that enables investment comparability has long been accepted and promoted by global regulators. For example, the IOSCO indicates:

> periodic reports facilitate investor decision making and monitoring of the markets by making it possible for investors to compare the performance of the same company over regular intervals, and by enabling investors to make useful comparisons among different companies.[213]

The United States uses periodic reporting templates, with Form 10-K for preliminary full-year reporting and Form 10-Q for quarterly reporting. These standard templates provide benefits for senior executives who complete them and for readers of the reports. The 10-Ks and 10-Qs require companies to fill in and address all of the form sections (including commentary on the recurring and non-recurring elements of the reported result), thereby ensuring comprehensive and uncluttered information is presented on a consistent basis each reporting period. Relevant information can easily be located from these forms because the reports contain an electronic table of contents, have standardized headings, are formatted in self-contained online pages, and do not contain pictures. In addition, all of these mandated reports can be readily accessed and downloaded by all interested parties from EDGAR.[214] This standardized reporting framework outlines and explains company financial, operational, and strategic outcomes and developments, enabling all parties with a warrantable interest to engage in comparative analysis of individual companies, sectors, and financial markets.

Most countries, exclusive of the United States, require companies to include some MD&A in the relevant preliminary full-year, half-year and quarterly reports. Nonetheless, the required MD&A is often phrased in broad terms, allowing companies significant discretion over the content and form of the publicly available reports. While such frameworks enable companies to report in a manner they consider most appropriate, a lack of formal structure and prescribed content can present major difficulties for readers. Issues that commonly arise include a lack of important notes and MD&A in the disclosures, MD&A that is poorly connected to the financial statements or that is written to present results in a positive light, the inclusion of lots of pictures that are expensive to print and that dilute the core message, large inconsistencies in the form and content of MD&A provided from period to period by individual companies, and marked differences in the form and content of MD&A and financial notes across sectors and the general market.[215]

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212. Proposed Rule: Selective Disclosure and Insider Trading, Securities Act Release No. 33-7787, Exchange Act Release No. 34-42259 (Mar. 29, 2000), *available at* https://www.sec.gov/rules/proposed/34-42259.htm.

213. TECHNICAL COMMITTEE, *supra* note 22.

214. *Filing & Forms*, U.S. SEC. & EXCH. COMM., http://www.sec.gov/edgar.shtml (last visited Mar. 1, 2015).

215. *E.g.,* CANADIAN SEC. ADMINISTRATORS, STAFF NOTICE 51-339: CONTINUOUS DISCLOSURE REVIEW PROGRAM ACTIVITIES FOR THE FISCAL YEAR ENDED MAR. 31, 2013 11-13 (July 18, 2013); HKEX & CLEARING LTD., FINANCIAL STATEMENTS REVIEW PROGRAMME REPORT 2012 11 (Jan. 2013).

Such variability in listed company reporting makes it difficult, and sometimes impossible, for persons relying on public disclosures to engage in meaningful comparative or performance analysis. In worst case scenarios, the publicly available reports are presented as marketing documents, with a large number of glossy photos, without comprehensive and tailored outlines of the company's strategies, risks, and plans; without substantive discussion and analysis; and without compliant or useful financial measures and commentary that explain the company's short-term and long-term performance and trends.

B. Continuous Disclosure

As highlighted, continuous disclosure obligations support the periodic reporting regime by requiring companies to keep investors informed of any materially price sensitive information between reporting periods. The underlying principle of these regimes is that all investors should have access to this information at the same time, so that trading in the relevant securities takes place by informed participants. While most jurisdictions acknowledge the critical importance of continuous disclosure regulation and practice, global forums and individual countries face significant challenges when seeking to embed or promote a resilient culture of continuous public disclosure. The natural tendency when discussing company disclosure regulation is to narrow the debates and reform agendas to matters involving technical compliance. When this occurs, the intended purposes of the regulation can sometimes be glossed over or forgotten.

While the capacity of regulators to supervise and enforce company disclosure regimes is essential to a meaningful disclosure framework, continuous disclosure has always been a difficult area for regulators. It is the securities exchanges that generally have front line responsibility for monitoring compliance with continuous disclosure rules, and since the late 1980s, most of these exchanges have listed as for-profit self-regulatory organizations.[216] Most continuous disclosure regimes are therefore supervised and enforced by exchanges that are themselves listed on the market they regulate. While the major exchanges have separate legal entities that are responsible for supervision, the group exchange executives still owe conflicting duties and are not always well motivated to enforce the disclosure listing rules. A Singapore Exchange Limited website previously explained:

> the profit motive of a demutualised exchange creates a natural tension between its regulatory responsibilities and duty to the public, and its shareholders. This natural tension gives rise to . . . conflict issues. . . . A mutual exchange needs to balance the interests of its "member-owners" with the interests of the investing public in their decision-making and rule-making.[217]

Scholars have examined federal regulatory structures on varying bases, including consideration of the size and funding of individual regulators and the

216. *See* WORLD FED'N OF EXCHS., 2009 COST AND REVENUE SURVEY 5 (Oct. 2010).
217. *Rule Making and SRO*, SING. EXCH., LTD. (June 7, 2012), http://www.sgx.com/wps/wcm/connect/cp_en/site/regulation/rulemaking_and_sro/Rulemaking+and+SRO+Page?presentationtemplate=design_lib/PT_Printer_Friendly.

number of enforcement actions initiated.[218] An area that has received less focus is the efficacy of stock exchanges as monitors and enforcers of disclosure listing rules. The SEC noted in 2004 that failings or perceived failings with respect to listed securities exchanges fulfilling their self-regulatory obligations had sparked public debate as to the efficacy of the regulatory processes.[219] Concerns about the extent and quality of exchange oversight are enhanced by ongoing developments such as the fragmentation of financial markets, the growing number of alternate trading platforms, increasing levels of high frequency trading, and decreasing supervisory budgets.[220] Securities exchanges are becoming increasingly dependent on trading fees from the largest financial institutions and high frequency traders to survive and prosper. Consequently, at a time when increased surveillance of activity is needed to enhance market transparency, minimize market misconduct, and reduce systemic risk, the profit sources of exchanges are under pressure, potentially undermining their role as effective regulators and enforcers of company disclosure matters.

The monitoring and enforcing of company disclosures by some of the exchanges appear to be limited. The powers of most are restricted to suspension or cancellation of listings, and as these actions constitute extreme measures, they are rarely used, particularly in relation to large companies.[221] Not many of the securities exchanges operate formal disciplinary procedures that encompass company disclosure matters, and most do not have the power to apply deterrent measures such as public censures and fines. Consequently, even if the exchanges choose to become more active in supervising and enforcing disclosure listing rules, the mechanisms for doing so may be limited.

The exchange regulatory entities and national regulators are increasingly using the same empirical processes to detect possible insider trading as those used to monitor compliance with continuous disclosure obligations. Global continuous disclosure regimes were previously related to, but distinct from, insider trading rules; however, the lines between these regimes have blurred over the last decade. These developments are problematic because they change the supervisory and disclosure cultures and frameworks in a subtle, yet profoundly, important way. Continuous disclosure regimes require listed companies to disclose material information as a positive, proactive, and broad obligation. By contrast, insider-trading regulation applies after the relevant event, any losses to uninformed traders or shifts in wealth between groups of investors have already occurred, enforcement actions are generally initiated as criminal prosecutions against individuals, and enforcement actions are generally motivated by deterrence rather than compensation.[222] Therefore, relative to continuous disclosure obligations, the nature of insider trading regulation is negative, reactive, and narrowly focused.

218. *E.g.*, Howell Jackson & Mark Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009).

219. Proposed Rule: Self-Regulatory Organizations—Various Amendments, Exchange Act Release No. 34-60699 (Dec. 8, 2004); *see generally* Peter DeMarzo, Michael Fishman, & Kathleen Hagerty, *Self-Regulation and Government Oversight*, 72 REV. ECON. STUD. 687 (2005); Karessa Cain, *New Efforts to Strengthen Corporate Governance: Why Use SRO Listing Standards?*, COLUM. BUS. L. REV. 619 (2003) (finding that exchanges rarely deny listings as a means to signal their quality reputation).

220. *E.g.*, Tom C. W. Lin, *The New Investor*, 60 UCLA L. REV. 678 (2013).

221. *See* Adam Pritchard, *Self Regulation and Securities Markets*, REG. 32 (2003).

222. Insider trading enforcement actions initiated by national regulators do not typically provide compensation to investors who may have suffered losses as a result of the insider trading.

The essential elements of continuous disclosure rules are timeliness and materiality, but these elements are difficult for outsiders to test or examine empirically, particularly when materiality is defined narrowly or ambiguously. Company information in the United States is generally considered material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[223] BaFin, the German federal regulator, indicates that an assessment of whether company information is materially price sensitive involves two steps. The first step requires an *ex ante* assessment of whether the information in and of itself is reasonably likely to have a significant effect on prices at the time the decision was made.[224] The second step requires consideration of all of the specific circumstances existing or foreseeable at the time the decision was made.[225] BaFin confirms that the test is whether a reasonable investor who is aware of all publicly available information would consider that there is a "reasonable likelihood of a significant impact on prices."[226] It indicates that it is "irrelevant whether the price of an insider security actually changes after the inside information has become publicly known."[227] Thus, in some of the jurisdictions reviewed, the materiality test is legally determined by means of a "reasonable person" test at the time of the relevant event.

In practice though, day-to-day monitoring of company disclosures by the exchanges and other regulators is increasingly reliant on stockwatch programs that review historical trading patterns to identify possible suspicious trading.[228] All of the jurisdictions reviewed operate stockwatch programs. Some also use price query processes that, when triggered, send a letter to the relevant company asking it to confirm whether it is in compliance with disclosure obligations. It is important to understand the role and limitations of these stockwatch programs and price query systems.

First, stockwatch programs and price query notices operate when there is unexplained sharp short-term price or volume movement. This means that the spectrum of disclosure events they encompass is restricted. While most regulators of company disclosure matters do not provide explicit bright line materiality guidance, materiality thresholds are a necessary input or variable within stockwatch programs. As the materiality thresholds and security price movement parameters of these programs are set at higher levels, the percentage of suspicious trades that activate the stockwatch programs declines.

Second, all of the stockwatch processes are limited with respect to the nature of information encompassed. Private or selective disclosure of material

223. Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway, 426 US 438, 459 (1976).

224. BAFIN FIN. SUPERVISORY AUTH., ISSUER GUIDELINES 31 (Apr. 28, 2009).

225. *Id.*

226. *Id.*

227. *Id.*

228. The securities exchanges and or national regulators across the countries discussed in Part III of this Article operate stock watch programs for market surveillance purposes. While other monitoring and supervisory processes may be in operation to ensure that companies are complying with the continuous disclosure listing rules and/or statutory provisions, details of such processes on the websites of the security exchanges and national regulators are limited. The scope of this Article does not allow for comprehensive discussion on the enforcement of continuous disclosure rules in each of the jurisdictions examined. Nonetheless, the processes discussed in Part III highlight some of the limitations of continuous disclosure regimes.

information is the biggest risk faced by investors who rely on public disclosures, particularly when the disclosure events contain prospective company information. The type of trading that can lead to gradual movement in the prices of company securities over days or months often involve accumulating pieces of information that feed into the estimated expected earnings of listed companies. However, stockwatch programs are not activated when a share price reflects materially price sensitive news gradually or in a pattern that is not immediate and sharp.

Third, the stockwatch and query processes are limited in effect. The programs only operate when short-term share price movement or trading volumes suggest materially price sensitive news has not been disclosed. By this time, uninformed investors that traded during the relevant period have already suffered a loss (or have missed a potential gain), which means that any benefits from the stockwatch programs are indirect at best. The stockwatch processes are only productive for investors as a group if sustained monitoring and enforcement by the exchange encourages companies to continuously disclose in the future or reduces the level of disclosure omissions. Such outcomes are only likely when regulators have the capacity to examine the circumstances underlying individual queries and are willing and able to initiate appropriate enforcement actions when contraventions of the disclosure listing rules occur. Benefits of stockwatch programs are negligible when a company responds to a query indicating it has not complied with disclosure obligations, or it makes a subsequent announcement, and no further investigation or enforcement action is then taken by the exchange.

Finally, stockwatch processes operate on an *ex post facto* or hindsight basis. When the materiality of information is determined after the event based on the level of near term share price movement, this effectively shifts the burden to regulators, investors, and stakeholders to establish misconduct after the event using relatively limited tools. In effect, the stockwatch programs require regulators to establish after an event that "inside information" was *not* disclosed, as evidenced by short-term security price movement following public release of the information.

For all of the above reasons, supervision of continuous disclosure regimes that is limited to disclosure omissions identified by significant, unexplained, and short-term price movements is unlikely to serve financial markets, public corporations or global communities well over the long term. Company disclosure regimes need to be framed positively. They should promote a culture in which open and transparent disclosure is the expected norm—a norm that provides long-term benefits to corporations and the countries in which they operate. Material company information needs to be submitted to an exchange or regulatory information repository quickly so that all investors are alerted to developments on a timely basis. Theories or notions which suggest that listed company managers have the capacity and wherewithal to withhold significant news from all market participants for long periods are now largely illusory. When executives delay public disclosure of important news or updates for a period, the probability that the news will either be disclosed privately or will leak to institutional segments of the market is high. And when companies make no public announcements for what may be considered by managers as "short" periods, the level of wealth transferred to those with advance knowledge can be immense.

Participant incentives to obtain informational or timing advantages in financial markets are powerful and consuming because such advantages often lead to reliable trading gains (or reduced losses) without the need for diligent and sophisticated analysis. Institutional participants typically compete to obtain regular private meetings with company managers as a means to obtain the earliest and most substantive updates between reporting periods. This battle for superior executive access continues on a daily basis across the full spectrum of market participants (and not simply between institutional and individual investors). The associated power games are typically based on perceived or actual wealth and political influence, so the financial institutions that control the largest funds or trading portfolios hold the most sway given their voting power and greater ability to pay or maneuver for private access. This intense gamesmanship around privately obtained company information impacts conduct, outcomes, and competition adversely across national and global financial markets.

Policy reports commonly acknowledge that market focus on expected earnings results is intense.[229] Indeed, the SEC changed its view on the provision of management forecasts in the 1970s, indicating that an instrumental reason for doing so was the realization that "very often projections were the subject matter of selective disclosure, that is, the information was furnished to selected investors, such as institutions or favored analysts, and was not made available to public investors."[230] Company directors and managers are human, and they are subject to the same personal failings and cognitive biases as everyone else. Even if the news and signals they provide during private briefings are not explicit, body language and disclosure omissions are often more informative than specific verbal responses. As a respected research director stated on Australian television:

> [m]ost companies are very smart these days in massaging analysts' expectations. You know they give you a nod and a wink and stamp their feet on the floor three times so most of the numbers will be pretty close to what the companies report.[231]

Notions still abound within highly respected scholarly and policy circles that large segments of national populations are too naïve, irrational, unsophisticated, or inexperienced to comprehend company financial statements, disclosures, and commentary expressed in plain terms. While this may be a convenient way to argue that informational advantages based on perceived expertise and professionalism should be maintained, such models do not fully accord with empirical evidence and observation.[232] Institutional and retail investors are highly diverse and broad generalizations mask the true spectrum of professionalism, competency, and diligence across both groups. Some institutional investors have a poor fundamental understanding of the securities that they trade or invest in, and some individual investors are skilled, sophisticated, and understand well the

229. *E.g.,* KAY, *supra* note 12, at 64.

230. *E.g.,* A.A. Sommer, Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Forecasting: A Look at the Future Forecasting, (Mar. 29, 1974), *available at* https://www.sec.gov/news/speech/1974/032974sommer.pdf.

231. *Ivor Ries with a Reporting Season Forecast*, Inside Business (Austrl. Broad. Corp. Television July 19, 2009).

232. *E.g.,* Ron Kaniel, Shuming Liu, Gideon Saar, & Sheridan Titman, *Individual Investor Trading and Return Patterns around Earnings Announcements*, 57 J. FIN. 639 (2012); Joshua Coval, David Hirshleifer, & Tyler Shumway, *Can Individual Investors Beat the Market?* (Harvard Univ., Working Paper No. 04-025, 2005).

companies and securities within their portfolios. Simplistic generalizations applied to investors that lack the political clout of large financial institutions should therefore be seen for what they are—arguments that are constructed by those with entrenched privileges that tilt the wealth creation processes in their favor. It is not appropriate in contemporary markets for policy makers, regulators, or companies to predetermine or limit the content and format of publicly available company information based on preconceptions about the capacity and role of investors and others.

Global communities and modern financial markets have embraced technological change, and entire populations are increasingly dependent on digital interfaces. To remain relevant and credible, corporate communication and associated regulatory frameworks must reflect these momentous societal changes. The primary tests of effective digital company reporting and communication include the ease with which information can be sourced and downloaded online, the quality and timeliness of publicly accessible company reports and disclosures, and the adequacy of online facilities and forums that allow interactive dialogue between companies, shareholders, and other stakeholders. The essence of a company's culture is revealed when there is negative news to report or the earnings trend turns downward. Listed companies are generally very willing to communicate with stakeholders publicly when things are going well and performance trends are positive. Most are more reluctant to openly discuss negative events and developments.[233]

Company managers are not always motivated to embrace available technologies to broaden access and improve the quality of public information, so policy makers and regulators should establish strong frameworks to encourage disclosure of all the information needed for well-informed investor decision-making. Listed companies have made large cost savings during recent decades from regulatory changes that permit electronic dissemination of reports. Some of these savings should be redirected to harness the power of digital technologies to enhance the quality of publicly available information.[234] Investors and other stakeholders can only make well-informed decisions if they have access to timely and comprehensive company information in formats that are readily understandable and which allow comparability. As a spokesman for the Association for Investment Management and Research suggested, the "voice of the investor has for too long been marginalized in the debates on financial reporting. . . . [Investors] need . . . *regular*, *comprehensive* reporting of financial information. . . . They need it in *accepted formats* . . . *based on generally accepted accounting*

233. Scholarly empirical research on disclosure consistently finds that some corporate managers attempt to communicate bad news in ways that disguise the negative information or that overstates the optimistic elements. Global regulators are well aware of these challenges and they repeatedly highlight the importance of appropriate balance in the disclosure of positive and negative news.

234. Some of the printing and delivery costs that companies have saved by moving to electronic dissemination of reports have been shifted to users of these reports. Users are required to download company reports and information from electronic files stored on individual company websites, exchange websites, or independent websites such as EDGAR in the United States or an RIS in Europe. The costs incurred can be significant when corporate reports are hundreds of pages long and they contain lots of ink intensive graphs and pictures.

standards."[235] Companies should be encouraged to provide information on a layered basis through public communication modes to enable all interested groups to access relevant information when convenient. In other words, companies should provide information in different formats, with varying degrees of detail and complexity, to enable users to obtain information appropriate for their needs. The provision of comprehensive information through non-discriminatory channels does not preclude companies from providing additional summary or tailored information where this is considered necessary or useful for some investors or stakeholders.

V. Conclusion

Louis Brandeis famously stated more than a century ago that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[236] He argued that the potent force of publicity should be used as a continuous remedial measure in the impending struggle for publicly disclosed information that is real and useful for a broad audience.[237] These calls by Brandeis for "light" in financial markets and for meaningful corporate disclosure within public spheres remain germane and important today. Indeed, public company governance and accountability concerns that existed when company disclosure regulation was first established are more compelling than ever given the immense scale and importance of financial markets and large corporations within modern economies and communities. Comprehensive and effective listed company reporting is critical in the twenty-first century to ensure that established checks and balances can fully operate, discourage managerial, institutional, and individual excesses that inevitably arise in financial markets, and promote genuinely competitive markets. However, as Brandeis emphasized, there are no easy pathways to promote or mandate effective disclosure and communication between listed corporations and stakeholders. Disclosure regimes are highly political and power imbalances mean the strength and efficacy of disclosure regimes tend to be diluted over time.[238] While it is easy to espouse the benefits of public transparency and accountability in financial markets, these goals have to be sought by every community and nation. To embed and sustain cultures of meaningful transparency and accountability across financial markets, it is necessary to move beyond consideration of what is merely technically or legally compliant conduct.

Section 2 of the Exchange Act indicates that securities exchange activity is intended to enhance the "national public interest" and the NYSE's continuous disclosure rules require companies to provide materially price sensitive information to shareholders and the "public".[239] The SEC, in accordance with these aims, appears to promote public disclosure as the primary means of corporate communication. It directs companies to provide comprehensive and timely information to enable all interested persons to assess a company's performance

235. Ass'n for Inv. Mgmt. & Research, *European Investment Professionals Back Quarterly Reporting*, PR NEWSWIRE (Nov. 24, 2003), *available at* http://www.thefreelibrary.com/European+Investment+Professionals+Back+Quarterly+Reporting.-a0110452049 (italics added for emphasis).

236. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT 62 (1914).

237. *Id.*, ch. V.

238. *See* FUNG, GRAHAM, & WEIL, *supra* note 15, at 125-26.

239. Securities Exchange Act of 1934, § 4, codified as 15 U.S.C. § 78d (1934).

and value its securities. The financial statements in the 10-Ks and 10-Qs are supported by comprehensive MD&A and financial notes. The content of these reports is focused and easily dissected by readers because the SEC does not permit companies to include pictures, disconnected commentary, or marketing material within the 10-Qs and 10-Ks. The SEC mandated periodic reports use standard forms that allow comparative company, sectoral and market analysis, and these documents are accessible from the EDGAR website. The SEC processes are transparent. Its monitoring and enforcement of the federal disclosure rules can be readily located on the SEC website. While disclosure structures outside the United States reflect some of these features, no other national company periodic reporting framework is as integrated, comprehensive, or transparent. Other jurisdictions, for various reasons, have elected to take a "lighter touch" approach with respect to listed company periodic disclosure regulation and practice.

The most striking finding from the comparative national analysis is the difference in approach to corporate disclosure law and practice by listed companies in the United States and the European Commission. Serious transparency issues have arisen in Europe over the last decade, including incomplete or inappropriate disclosure from some Member States and some of its financial institutions. Despite these issues, the company disclosure framework recently adopted by the European Commission can best be characterized as a minimalist model. The 2013 Transparency Directive amendments appear to be politically motivated, as they accord with the wishes of Member States with powerful finance sectors. The market participants who will ultimately derive the most benefits from the recent amendments are the largest financial institutions with the best private access to senior executives. The value of information privately obtained from company managers is enhanced by ambiguous or minimalistic periodic and continuous disclosure obligations, longer public reporting periods, and cumbersome access to comparative information. That is, private communications are most valuable in jurisdictions where periodic reporting is restricted to half-year and preliminary full-year reports, the required MD&A and financial notes are limited, access to standardized company information is not available or difficult to construct, monitoring of private meetings is minimal or non-existent, and enforcement of selective disclosure events is unlikely. Disclosure frameworks that are predominantly built around private exchanges and based on power, influence, or wealth, are unlikely to be the optimal long-term framework to achieve the goals of investor protection, market fairness, efficiency, transparency, and low systemic risk.

Disclosure structures that encourage regular private exchanges tend to gloss over the many conflicts and issues that arise. Private access to corporate executives is often paid for either directly (in the form of favors such as silence, positive commentary, or the provision of new capital) or indirectly (in the form of fees to intermediaries such as brokers or investment banks). For instance, the U.K.'s *Financial Times* reported last year that asset managers were paying large sums of money to brokers and investment bankers for arranging meetings with chief executive officers.[240] Analysis by the Financial Services Authority found some large asset managers were making these payments using client

240. Steve Johnson, *FSA Crackdown on Cash for CEO Access*, FIN. TIMES (Mar. 4, 2013), http://www.ft.com/intl/cms/s/0/084a4bdc-84db-11e2-891d-00144feabdc0.html#axzz3D02LvWAR.

commissions.[241] Notably, an anonymous senior figure from a large U.K. asset manager confirmed that payments for corporate access were commonplace and that this was "how . . . the buyside have always operated."[242] Daniel Godfrey, chief executive of the Investment Management Association even suggested that "[p]ayments for access to companies may be something you have to hold your nose to do, but maybe it is in the interests of your clients to do it."[243] While asset managers may consider the practice of paying brokers and investment bankers large amounts of money to arrange access to company executives as "normal", such conduct does not encourage healthy or efficient corporate or financial market environments.

The financial crisis of 2009[244] and continuing financial challenges in some areas of the world starkly remind the global community that the health of modern financial markets, real economies, and the lives of individuals are entirely interconnected. Adverse consequences arising from poor corporate disclosure are often exacerbated during periods of sustained stress. Corporate and financial market developments feed into the real economy, and during significant financial crises, the economic and social costs borne by the community can be immense. Financial markets that operate in a vacuum without clear links to the real economy and that lack broad investor confidence and public trust eventually falter. Liquidity and pricing issues arise and these issues lead to capital withdrawals and higher funding costs.

Bushman and Smith define financial market transparency as "the widespread availability of relevant, reliable information about the . . . governance, value, and risk of publicly traded firms."[245] Accepting this as a reasonable definition, it is periodic reports and continuous disclosures that provide the most relevant and reliable information on publicly traded firms. It is therefore surprising and concerning that the European Commission will operate from 2015 with a Transparency Directive that provides the public with company reports and disclosures that are irregular, dated, and limited in content. The amended rules require corporations to release annual reports four months after the end of the financial year and half-year reports within three months of the end of the relevant period. Additionally, the content and form of the preliminary full year reports (released earlier than the annual reports) are largely discretionary. While all of these periodic reports must include some MD&A and financial notes, companies may reference financial measures in the MD&A sections that do not readily link to the reported figures, nor fully comply with accounting standards. The form of all of the reports is ad hoc and specified long-term financial performance measures and commentary are not mandated. The usefulness and credibility of such limited public disclosure structures are open to question, particularly when jurisdictions encourage regular private briefings between company managers and selected participants without obligations to webcast the briefings and without effective monitoring and enforcement of the private exchanges.

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241. *Id.*
242. *Id.*
243. *Id.*
244. *E.g.,* U.S. FIN.CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT 47 XXII (Jan. 2011).
245. Robert Bushman & Abbie Smith, *Transparency, Financial Accounting Information, and Corporate Governance,* 9 ECON. POL'Y REV. 65, 66 (2003).

All nations, including the United States, should recommit to strong public disclosure frameworks as the primary means of substantive corporate communication and engagement. When countries permit or encourage senior executives and asset managers to regularly engage with selected participants behind closed doors, this results in distinctly tiered communication channels and accountability structures. These hierarchical structures inevitably lead to public disclosure regimes that are weak and heavily sanitized. As Brandeis stressed, transparency or light from public sources can only operate as an efficient monitor and enforcer within financial markets when there are sufficiently regular, adequate, and clear rays to enable all investors (including critics)[246] and the broader community to respond to developing events. Company disclosure regimes work best when listed companies adopt a normative culture of continuous public disclosure. Such cultures are only possible when directors and senior executives acknowledge the substantive benefits derived from timely and frank communication about their company's developments and performance. Long-term benefits derived from corporate disclosure regimes rely on broad participation, investor confidence, and continued public trust in the integrity of financial markets.[247] Such confidence is generated by giving legal weight to principles and rules that provide all participants with a right to comprehensive information on a timely basis and that ensure minority shareholders' rights are protected and market misconduct is enforced.

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246. Companies can exclude or blacklist investors from private meetings who criticise, ask penetrating questions, or publish a sell recommendation. *E.g.,* John Coffee, Jr., *What Caused Enron? A Capsule of Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2003); COMMONWEALTH OF AUSTRALIA, HIH ROYAL COMMISSION, THE FAILURE OF HIH INSURANCE 72-73 (2003); DAVID EINHORN, FOOLING SOME OF THE PEOPLE ALL OF THE TIME: A LONG SHORT STORY (JOHN WILEY & SONS, 2008); Robert Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORPS. L. 363, 365 (2009).

247. *See* U.S. FIN. CRISIS INQUIRY COMM'N REPORT, *supra* note 244. The Report notes at [xxii] that the "integrity of our financial markets and the public's trust in those markets are essential to the economic well-being of . . . [a] nation." *Id.*