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## A Look at the Globalization of the Exchanges and Its Effects on the United States Market Through an Analysis of the NYSE and Euronext Merger

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# A LOOK AT THE GLOBALIZATION OF THE EXCHANGES AND ITS EFFECTS ON THE UNITED STATES MARKET THROUGH AN ANALYSIS OF THE NYSE AND EURONEXT MERGER

CHRISTOPHER OSBORNE

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## I. INTRODUCTION

The merger of the New York Stock Exchange Group and Euronext NV will create the first true global stock exchange entity spanning a network of five countries and twelve exchanges.<sup>1</sup> The NYSE Group has also been in communication about cooperation, and even possible integration, with Borsa Italiana, the National Stock Exchange of India, and the Tokyo Stock Exchange.<sup>2</sup> Many of the world's exchanges are eager to consolidate, but not as a subordinate since many exchanges are sources of national pride and fiercely independent.<sup>3</sup> Also, governments have historically taken an active interest in their exchanges, not just for national pride, but domestic regulatory security.<sup>4</sup> Thus, when exchanges consolidate there is more at stake than simple business interests like reducing trading costs. This paper will analyze the development the globalization of exchanges through a critical look at the NYSE and Euronext merger, highlighting the requirements, the fears, and the expectations of the consolidating exchange market. Sections II, III and IV will look at the history of the New York Stock Exchange and Euronext and the development of the merger between them.<sup>5</sup>

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<sup>1</sup> NYSE Euronext About Us, <http://www.nyse.com/about/1088808971270.html> (last visited Mar. 3,2008).

<sup>2</sup> See *infra* Section VIII.

<sup>3</sup> See *infra* note 84.

<sup>4</sup> See *infra* Section VIII.

<sup>5</sup> See *infra* Section II.

Section V will consider the history of the Securities Exchange Commission regulation of United States' exchanges and how the SEC has dealt with globalization as it affects the markets.<sup>6</sup> Section VI will provide an overview of the financial benefits of the NYSE and Euronext merger.<sup>7</sup> Section VII will contrast the evolution of the NYSE and Euronext merger to the situation of NASDAQ and the London Stock Exchange.<sup>8</sup> Then, Section VIII will look at the effects market exchange globalization will have on investors and how the respective domestic regulatory authorities hope to deal with international exchanges and conflicting regulatory schemes.<sup>9</sup> Finally, Section IX will conclude the analysis by offering a summary of the issues and thoughts of the future.<sup>10</sup>

## II. THE NYSE

The New York Stock Exchange ("NYSE") has roots back to 1792 when a group of twenty-four New York City stock brokers and merchants signed the Buttonwood Agreement.<sup>11</sup> They agreed "to trade securities on a commission basis."<sup>12</sup> As the market for securities grew they drafted their first constitution on March 8, 1817 outlining the rules of conduct and creating a formal organization known as the "New York Stock & Exchange Board."<sup>13</sup> The group evolved through the years, changing its name to the "New York Stock Exchange" in 1863, surviving the American Civil War and the crash of 1929.<sup>14</sup> It also had to adapt to new legislation and the creation of the Securities and Exchange Commission.<sup>15</sup> The most recent major development though was in March 2006 when it became a for-profit corporation.<sup>16</sup>

Traditionally, the NYSE was an independent cooperative managed by brokerage firms who paid for seats.<sup>17</sup> The seats awarded a right to directly trade shares on the exchange, which is currently capped at 1,366 seats.<sup>18</sup> Possessing the

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<sup>6</sup> See *infra* Section V.

<sup>7</sup> See *infra* Section VI.

<sup>8</sup> See *infra* Section VII.

<sup>9</sup> See *infra* Section VIII.

<sup>10</sup> See *infra* Section IX.

<sup>11</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_chronology\\_index.html](http://www.nyse.com/about/history/timeline_chronology_index.html) (last visited Mar. 3, 2008).

<sup>12</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_chronology\\_index.html](http://www.nyse.com/about/history/timeline_chronology_index.html) (last visited Mar. 3, 2008).

<sup>13</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_chronology\\_index.html](http://www.nyse.com/about/history/timeline_chronology_index.html) (last visited Mar. 3, 2008).

<sup>14</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1860\\_1899\\_index.html](http://www.nyse.com/about/history/timeline_1860_1899_index.html) (last visited Mar. 3, 2008); NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1920\\_1939\\_index.html](http://www.nyse.com/about/history/timeline_1920_1939_index.html) (last visited Mar. 3, 2008).

<sup>15</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1920\\_1939\\_index.html](http://www.nyse.com/about/history/timeline_1920_1939_index.html) (last visited Mar. 3, 2008).

<sup>16</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_2000\\_Today\\_index.html](http://www.nyse.com/about/history/timeline_2000_Today_index.html) (last visited Mar. 4, 2008).

<sup>17</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_chronology\\_index.html](http://www.nyse.com/about/history/timeline_chronology_index.html) (last visited Mar. 21, 2008).

<sup>18</sup> *Id.* After the merger with Archipelago, seat holders were given five hundred thousand dollars cash and seventy-seven thousand shares of the newly formed NYSE Group, Inc. Now, the NYSE sells

rights to a seat would allow the holder access to trade on the stock exchange floor and thus was a very valuable asset. In 1971 the exchange transitioned from a member run organization to a not-for-profit corporation and replaced the thirty-three member Board of Governors with a twenty-one member Board of Directors that included a full-time salaried chairman.<sup>19</sup> This was a significant step in changing the structure of the NYSE, a cooperative to a corporation, but it did not drastically affect its purpose as an organization, because it remained a not-for-profit corporation. Therefore, the Board of Directors would have mostly the same interest as the previous Board of Governors had; maintaining an efficient exchange for the members. Then in 2006, NYSE merged, through a reverse takeover,<sup>20</sup> with Archipelago Holdings, Inc., a completely online exchange known as ArcEx, creating the NYSE Group Inc.<sup>21</sup> The new NYSE Group became a for-profit, publicly owned company transforming the purpose and the direction of the NYSE.<sup>22</sup> The evolution of the exchange from its traditional form to for-profit corporation listed on its own exchange is so recent, one year versus two hundred fifteen years, that many of the effects of the transition are still being assimilated into the market.

The NYSE has always been at the forefront of technology and change compared to other stock exchanges, especially with non-U.S. investors and businesses. The NYSE has through the years taken the steps to welcome foreign entities access to the NYSE. Some notable moments include: in 1976 Bruno Des Forges became the first non-U.S. company to list on the exchange;<sup>23</sup> the subsequent year foreign broker/dealers were permitted to obtain membership on the floor;<sup>24</sup> in 1993 Daimler-Benz AG became the first German listed company;<sup>25</sup> in 1996 VimpelCom became the first Russian listed company<sup>26</sup> and in that year a record fifty-nine non-U.S. companies joined the NYSE bringing the total to 290.<sup>27</sup>

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one year licenses for the right to trade on the stock exchange floor, however about half of the trades on the NYSE are now done electronically.

<sup>19</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1960\\_1979\\_index.html](http://www.nyse.com/about/history/timeline_1960_1979_index.html) (last visited Mar. 31, 2008).

<sup>20</sup> Reverse Takeover – “A type of merger used by private companies to become publicly traded without resorting to an initial public offering. Initially, the private company buys enough shares to control a publicly traded company. The private company's shareholder then uses their shares in the private company to exchange for shares in the public company. At this point, the private company has effectively become a publicly traded one.” Investopedia – Reverse Takeover, <http://www.investopedia.com/terms/r/reversetakeover.asp> (last visited Feb. 22, 2008).

<sup>21</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_2000\\_Today\\_index.html](http://www.nyse.com/about/history/timeline_2000_Today_index.html) (last visited Mar. 31, 2008).

<sup>22</sup> *Id.*

<sup>23</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1960\\_1979\\_index.html](http://www.nyse.com/about/history/timeline_1960_1979_index.html) (last visited Mar. 31, 2008).

<sup>24</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1960\\_1979\\_index.html](http://www.nyse.com/about/history/timeline_1960_1979_index.html) (last visited Mar. 31, 2008).

<sup>25</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1980\\_1999\\_index.html](http://www.nyse.com/about/history/timeline_1980_1999_index.html) (last visited Mar. 31, 2008).

<sup>26</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1980\\_1999\\_index.html](http://www.nyse.com/about/history/timeline_1980_1999_index.html) (last visited Mar. 31, 2008).

<sup>27</sup> NYSE Euronext Timeline, [http://www.nyse.com/about/history/timeline\\_1980\\_1999\\_index.html](http://www.nyse.com/about/history/timeline_1980_1999_index.html) (last visited Mar. 31, 2008).

While the NYSE has been open to the revenues available from foreign investment and listings, the access to the U.S. exchange is largely dependent upon the regulations in place from the SEC. There are notable increases in either foreign company listings or foreign investors investing coinciding with certain legislation or interpretations laid down by the SEC.<sup>28</sup> The NYSE has also taken efforts to make listing on its exchange, or investing in it, even easier for the non-U.S. entities and as of 2006 there were over 450 non-U.S. companies listed on the NYSE.<sup>29</sup> This shows how the NYSE has always been an attractive place for foreign companies through the years, although recently there has been a steady decline in the amount of foreign companies looking to list on the NYSE exchange.<sup>30</sup> The number of foreign initial public offerings in 1996 was fifty-nine, while only ten years later there were only eighteen in 2006.<sup>31</sup> John Thain, the CEO of NYSE Group, has been very vocal that most of the decline of listings by non-U.S. companies is the result of the Sarbanes-Oxley Act of 2002.<sup>32</sup> The few things through the years that the NYSE has been able to do to make it easier on foreign companies to list, it has done, but this is difficult with the amount of regulation required by the Securities and Exchange Commission and the Sarbanes-Oxley Act of 2002.<sup>33</sup>

### III. EURONEXT NV

Euronext NV is a holding company for the exchanges incorporated under Dutch law operating as a pan-European exchange with a single platform for cash products and one for derivative products<sup>34</sup> and is the result of a merger in 2000 of the Paris Bourse, the Amsterdam Stock Exchange, and the Brussels Stock Exchange.<sup>35</sup> The three exchanges from France, the Netherlands, and Belgium, respectively, became subsidiaries under the merger with Euronext NV acting as the holding company.<sup>36</sup> Additionally, in 2002 Euronext expanded further by acquiring LIFFE<sup>37</sup> and merging with BVLP.<sup>38</sup> These additions brought Euronext's presence

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<sup>28</sup> See *infra* Section V.

<sup>29</sup> See *infra* Section V.

<sup>30</sup> See Michael R. Bloomberg & Charles E. Schumer, SUSTAINING NEW YORK'S AND US GLOBAL FINANCIAL SERVICES LEADERSHIP, (2007); see also Greg Ip et al., *Trade Winds: In Call to Deregulate Business, a Global Twist*, WALL ST. J., Jan 25, 2007 at A1.

<sup>31</sup> See David Vise et. al., *Something About AIM*, WALL ST. J., Mar. 10-11, 2007, at B14.

<sup>32</sup> See *id.* The Sarbanes-Oxley Act of 2002 and its affect on the NYSE and the rest of the financial market are discussed in more detail in Section V.

<sup>33</sup> See Bloomberg, *supra* note 30.

<sup>34</sup> See Euronext – History – Introduction, <http://www.euronext.com/editorial/wide/editorial-1994-EN.html> (last visited Mar. 31, 2008).

<sup>35</sup> See Euronext – History – Introduction, <http://www.euronext.com/editorial/wide/editorial-1994-EN.html> (last visited Mar. 31, 2008).

<sup>36</sup> See Euronext – History – Introduction, <http://www.euronext.com/editorial/wide/editorial-1994-EN.html> (last visited Mar. 31, 2008).

<sup>37</sup> LIFFE is the London International Financial Futures and Options Exchange, which was founded in 1982 in London, England and deals mainly with derivatives. Its combination with Euronext was to move all of the derivative products that are a part of Euronext to a single platform with a state-of-the-art trading platform. See Euronext – History – Liffe, <http://www.euronext.com/editorial/wide/editorial-1991-EN.html> (last visited Mar. 31, 2008).

across most of Europe by establishing subsidiaries in France, Belgium, the Netherlands, England, and Portugal. While the creation of Euronext itself is relatively recent, the exchanges that make it up are over 400 years old.<sup>39</sup>

Mergers are nothing new for Euronext; however, the merger with the NYSE Group will be the first trans-Atlantic exchange.<sup>40</sup> The development of a merger of this size creates many new problems and concerns that may have not been raised in previous exchange mergers. One of the most poignant issues with any exchange merger is the approval of the national regulators of all the exchanges involved.<sup>41</sup> Many issues had to be hammered out with French and Dutch authorities, whom operate in a similar capacity as the Securities and Exchanges Commission for the approval of the NYSE and Euronext merger.<sup>42</sup> This same regulatory approval is what took place when Euronext NV was formed in 2000.<sup>43</sup> The merger of the French, Belgian, and Dutch exchanges to create Euronext NV may seem to be a paradigm for the NYSE Group and Euronext merger, since it was a merger of several different national exchanges that required each country's national regulatory agency to help with the approval.<sup>44</sup> However, the overarching authority of the European Union had already created certain uniform regulation for the European countries involved in the creation of Euronext NV.<sup>45</sup> The regulations of the European Union are supreme and can come in the form of regulations that all the member nations are bound by or as a directive, which requires each member nation to enact domestic legislation to achieve the desired effect of the directive.<sup>46</sup> Therefore, at the time of the creation of Euronext, the countries involved were all members of the European Union and there was in certain aspects of the securities market and exchange regulation already homogenous law.<sup>47</sup> With the NYSE and Euronext merger, there is no similar body with authority over both Europe and the United States, thus it requires even more co-operation between the exchanges.<sup>48</sup> As a result, both sides of the deal have been very patient as they sought company, regulatory, and even political support along the way to help facilitate the merger.<sup>49</sup>

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<sup>38</sup> BVLP, a Portuguese exchange, stands for the Bolsa de Valores de Lisboa e Porto, which was also known as Porto Stock Exchange. After merging with Euronext NV its name became Euronext Lisbon. See Euronext – History – Euronext Lisbon, <http://www.euronext.com/editorial/wide/editorial-1992-EN.html> (last visited Mar. 31, 2008).

<sup>39</sup> See Euronext – History – Euronext Amsterdam, <http://www.euronext.com/editorial/wide/editorial-1993-EN.html> (last visited Mar. 31, 2008). Euronext is now an entirely electronic trading system, which means that it has no “floor” like the NYSE.

<sup>40</sup> See Jenny Anderson & Heather Timmons, *NYSE Group Reaches Deal to Acquire Euronext*, N.Y. TIMES, Jun. 2, 2006, at C3.

<sup>41</sup> See Reuters, *Big Board Holders Back Euronext Deal*, N.Y. TIMES, Dec. 21, 2006, at C6.

<sup>42</sup> See *id.*

<sup>43</sup> See Euronext – History – Introduction, <http://www.euronext.com/editorial/wide/editorial-1994-EN.html> (last visited Mar. 31, 2008).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See D.G. Cracknell & Ian Brown, *EUROPEAN UNION LEGISLATION* (2006).

<sup>47</sup> See, e.g., Council Directive 2004/25, O.J. (L 142) (EC).

<sup>48</sup> See Anderson, *supra* note 40.

<sup>49</sup> See Jenny Anderson & Heather Timmons, *NYSE's Coup Stirs Political Opposition in Europe*, N.Y. TIMES, Jun. 15, 2006 at C1.

## IV. THE BEGINNINGS OF THE MERGER

The NYSE merger with Euronext began to take shape in 2004 when John Thain joined the NYSE.<sup>50</sup> Thain oversaw the NYSE merger with Archipelago, which turned the exchange into a for-profit ten billion dollar public company.<sup>51</sup> That deal revealed itself almost as a preparatory step for Thain's vision of global expansion for the company as it transformed it into an entity capable of expanding globally. The merger with ArcEx may have been the most significant development of the NYSE amongst the many changes through the years and the one most indicative of the more recent merger. The previous changes were adaptations of the organization to the changing market and society, so that it could continue to prosper, including adapting its rules to SEC regulation. The last development though, changed it from a not-for-profit cooperative, to a shareholder-owned for-profit corporation. Because the exchange is now part of a for-profit corporation, NYSE Group, it has the incentive to look to expand into other markets, like Europe. The corporation now has a duty to shareholders and faces pressure in the form of fiscal accountability to make a profit, which encourages it to look for new avenues of revenue.<sup>52</sup> This would likely explain its increase in fees, but more acutely explain its newfound interest in the overseas markets.<sup>53</sup> It is hard to determine what changes, like the fee increases, are the result of a new duty to shareholders versus the peripheral effects of rapid and monumental change through mergers and new technologies. The NYSE could justify the increase in certain fees to the displeased brokerage firms by increasing efficiency and reducing costs of creating a larger investor base, if they can properly integrate with Euronext and create an efficient international exchange.<sup>54</sup> Thain, at the company's first meeting of shareholders as a public company, NYSE Group, set the stage for the merger with Euronext by complaining of a shift away from foreign investment in the U.S. markets because of cumbersome regulation.<sup>55</sup> This attempt to garner support from stockholders of the company to favor the growth was the perfect prelude to announcing a deal for NYSE Group to buy Euronext NV.

The road to a trans-Atlantic exchange merger has been an arduous process for almost a year. The process for a Euronext merger formally began with a bid by Deutsche Börse, a German exchange, for Euronext on May 19, 2006 for approximately 6.6 billion Euros.<sup>56</sup> However, both the Deutsche Börse and the

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<sup>50</sup> See Anderson, *supra* note 40. John Thain joined the NYSE to restore its image after a pay scandal involving the former chairman, Richard A. Grasso. *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> See Aaron Lucchetti, *Meet the Big(ger) Board*, Wall St. J., Feb. 8, 2007, at C1.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> See Vise, *supra* note 31.

<sup>56</sup> Richard Milne et. al., *Deutsche Börse Hints At Sweeter Euronext Offer*, FIN. TIMES (London), May 25, 2006, at 25. While the formal bid first originated with Deutsche Börse, there had been significant pressure from hedge funds for Euronext to merge with either the Deutsche Börse or NYSE. Carol Matlack, *The Battle for the Bourses*, BUSINESSWEEK, May 22, 2006. Two hedge funds in particular that held enough clout to make such demands were Atticus Capital and TCI, which held about 9% and 10% of Euronext, respectively. *Id.* A week before the first offer from Deutsche Börse, they warned that if Euronext management did not seek a merger they would attempt to remove the

NYSE Group had been meeting with management of Euronext for some time,<sup>57</sup> and John Thain and Jean-Francois Theodore, the chief executive of Euronext, first discussed the possibility of a merger back in January of 2006.<sup>58</sup> Euronext held discussions with the NYSE Group, while concurrently holding similar discussions with the Deutsche Börse.<sup>59</sup> Four days after the Deutsche Börse's offer Euronext was having its annual shareholder meeting and one of the items on the agenda was the merger proposal by the Deutsche Börse.<sup>60</sup> However, on May 22, 2006 the night before the shareholder meeting, the NYSE Group offered a bid of 10.2 billion dollars in cash and shares for Euronext, or about eight billion euros.<sup>61</sup> This bid was submitted just in time for the Euronext boards to review it prior to the shareholder meeting.<sup>62</sup> The NYSE Group bid for Euronext was about 1.1 billion Euros higher than the Deutsche Börse's offer.<sup>63</sup> The Euronext management and supervisory boards then recommended that the shareholders reject the Deutsche Börse's offer.<sup>64</sup> Amidst speculation of whether a bidding war would result, the next day, May 23, 2006, Deutsche Börse offered a bid for 11 billion dollars for Euronext, 800 million dollars more than the NYSE Group's bid.<sup>65</sup> Although this deal stayed on the table for Euronext until mid-November and there was much political support for it, there is little evidence that Euronext ever seriously considered it again, having entered into a combination agreement with NYSE Group on June 1, 2006.<sup>66</sup> Euronext had chosen to further pursue the possible merger with the NYSE Group as the company found it the more attractive offer.<sup>67</sup>

The Deutsche Börse offer was mainly rejected because "[e]xchanges are interested in merging because that gives them access to more investors, which makes the exchanges more attractive to companies with stock to sell."<sup>68</sup> This is indicative of what the aim has been for the exchanges to begin with: access to a

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management to install ones more favorable for a takeover. *Id.* The offer is about 8.8 billion dollars under present currency rates.

<sup>57</sup> NYSE Group, Inc., PROXY STATEMENT OF NYSE GROUP, INC. – PROSPECTUS OF NYSE EURONEXT, INC. 69-72 (2006).

<sup>58</sup> *Id.* at 69.

<sup>59</sup> *Id.* at 69-71. During this time Euronext released a press release outlining the different factors they were most concerned about with a possible merger. *See id.*

<sup>60</sup> *Id.* at 71.

<sup>61</sup> James Kanter, *Germans Not Ready to Quit Pursuit of a Euronext Deal*, N.Y. TIMES, June 3, 2006 at C3. The deal was structured as an exchange offer where one Euronext share was worth 21.32 Euros and 0.98 of a share of NYSE Euronext. *See* NYSE Group, Inc., *supra* note 57, at 73. This was an exchange ratio of about 1.4 shares of Euronext for every share of NYSE Euronext with about 30% paid in cash. *See id.* Shareholders also would have the option to elect for more cash or shares depending upon availability. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Milne, *supra* note 56. This amount is about 1.46 billion dollars at current currency rates.

<sup>64</sup> *See* NYSE Group, Inc., *supra* note 57, at 73.

<sup>65</sup> Milne, *supra* note 56.

<sup>66</sup> Anuj Gangahar, *MARKETS: NYSE and Euronext recast an international dynamic*, FIN. TIMES, Dec. 12, 2006, at 1; *see also* NYSE Group, Inc. *supra* note 57, at 74-75.

<sup>67</sup> *See* NYSE Group, Inc., *supra* note 57, at 74.

<sup>68</sup> Mark A. Stein, *From Top of the Corporate World to Appeals Court*, N.Y. TIMES, May 27, 2006 at C1.



broader base of new investors, which for Euronext means outside of Europe.<sup>69</sup> In the prospectus for NYSE Euronext, Inc., Euronext lists as one of the reasons for strategic consideration for the combination as the

[E]xpectation that the combined company would be able to compete effectively for non-U.S. listings outside of the United States using the Euronext and NYSE brands, offering sizable liquidity within Europe as an attractive alternative for companies that do not want to be subject to the U.S. regulatory and legal regime.<sup>70</sup>

Euronext saw that while companies were losing interest in listing on U.S. exchanges because of regulation, the investor base was still there and drawn to the notoriety of the NYSE. Also, Deutsche Börse's offer was payable mainly in stock where NYSE offer was a combination of stock and cash.<sup>71</sup> Further, Euronext also cited potential anticompetitive restrictions from European regulation if they merged with the Deutsche Börse,<sup>72</sup> which might have expanded the whole company into a European monopoly and be forced to break up anyway.<sup>73</sup> These represent only several of the many reasons given by Euronext for their preference for the NYSE offer. Therefore, in summation, the German exchange's offer was rejected because of the NYSE offered more investors, alternative listing opportunities, a better payout, and possibly easier regulation. However, these business reasons for Euronext's acceptance of the NYSE's proposal hardly slowed down concern and debate over whether the merger would actually happen or whether it should.

Thain's attempt to garner support from shareholders was not helped by the political lobbying pursuant to the announcement by many prominent Europeans. Jacques Chirac, the president of France, expressed support for Euronext to merge with Deutsche Börse instead of the NYSE Group.<sup>74</sup> Then the president of the European Central Bank and the Italian prime minister added their support to a deal

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<sup>69</sup> See Anuj Gangahar, *COMPANIES INTERNATIONAL: NYSE vote approves Euronext deal*, FIN. TIMES, Dec. 21, 2006, at 22. Euronext does not have a presence in Germany and access to that would be more investors. However, the United States has over 298 million people with a GDP purchasing power of almost thirteen trillion dollars, while Germany has about 82 million people with 2.585 trillion dollars in GDP purchasing power. CIA, *The World Factbook - United States*, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Feb. 20, 2008).

<sup>70</sup> NYSE Group, Inc., *supra* note 57, at 81.

<sup>71</sup> NYSE Group, Inc., *supra* note 57, at 73; See also Kanter, *supra* note 61.

<sup>72</sup> See Aaron Lucchetti et al., *NYSE, Euronext Set Plan to Form A Markets Giant*, WALL ST. J., June 2, 2006, at A1. Europe has anti-competition restrictions that are to improve competition among the Member States of the European Union. The European Commission looks at market share to determine abuse of the market, which can be a violation from simply to dominant of share regardless of the actions of the company. See Treaty on European Union art. 82, Feb. 7, 1992, 2002 OJ (C 325) 65; see also Treaty on European Union, art. 81, Feb. 7, 1992, 2002 OJ (C 325) 64.

<sup>73</sup> See Treaty on European Union, art. 81, Feb. 7, 1992, 2002 OJ (C 325) 64.

<sup>74</sup> Anderson & Timmons, *supra* note 49. It appears that most of the support for a European merger was to help build and stabilize a European market. *Id.* Euronext already had markets in France, Belgium, Netherlands, England, and Portugal; thus, by combining with the German exchange it would create more of a true European exchange. See generally *id.* This would seem to help create the idea of European Union market, although it could have had competition regulation issues from the Treaty on European Union Articles 81 and 82. See *id.*

between the European exchanges.<sup>75</sup> These political leaders were mainly lobbying more for a unified European market to compliment the ever expanding European Community.<sup>76</sup> They also used European businesses' fears of U.S. regulation to garner support.<sup>77</sup> There was little reciprocal discussion though from the United States, with a few comments by U.S. Congressmen and by the SEC chairman offering assurances of no U.S. regulation on the foreign exchange.<sup>78</sup> This was a result of American investors' and businesses' lack of fear of European regulation, which is often considered less regulated, contrasted with the heightened fears among European investors and businesses of U.S. regulation, which will be discussed in more detail in Part IV.<sup>79</sup> To help counter some of the political noise about the merger and fears of SOX, Theodore, the CEO of Euronext, had to do some campaigning of his own, telling shareholders; "No Sarb-ox at all in Europe."<sup>80</sup> Further, there was more political and public fall out when Paris Europlace concluded that the merger "represented an American takeover rather than a merger of equals."<sup>81</sup> Thain had already had to deal with Euronext's need for control and was forced to work out a more satisfactory agreement that would erase the perception of inequality created by this study.<sup>82</sup>

Thain began his lobbying to NYSE Group shareholders at their first meeting as already noted, but then in an effort to win over Euronext shareholders Thain announced the news of the merger with Euronext at a news conference in Paris, instead of in New York at the NYSE Group's headquarters.<sup>83</sup> This was important because of the pride that the government and domestic shareholders have for their own national exchanges.<sup>84</sup> Euronext had been in negotiations with several different possible mergers, but did not want to lose control of the exchange.<sup>85</sup> This

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<sup>75</sup> *Id.* The Italian Prime Minister is Romano Prodi and the European Central Bank president is Jean-Claude Trichet. *Id.*

<sup>76</sup> See Christopher Brown-Humes, *WORLD EXCHANGES: Consolidation is Fevered but All Bets are Still on*, FIN. TIMES, Nov. 28, 2006, at 1.

<sup>77</sup> Gangahar, *supra* note 55.

<sup>78</sup> Andersen, *supra* note 35.

<sup>79</sup> See David Blackwell & John Gapper, *NYSE Chief Says AIM Must Raise Standards*, FIN. TIMES, Jan. 27, 2007, at 8.

<sup>80</sup> Kanter, *supra* note 61.

<sup>81</sup> James Kanter, *NYSE Chief Now Willing To Reshape Merged Board*, N.Y. TIMES, Oct. 26, 2006, at C3. "Paris EUROPLACE is the organization which promotes Paris as a financial market. It represents the major players in the financial market, namely corporate issuers, investors, brokerage firms, banking institutions, market authorities, law, accounting and consulting firms, and professional associations. Its main characteristic is precisely to bring together the multiplicity of players in the financial industry." Paris Europlace, <http://www.paris-europlace.net/> (last visited Mar. 21, 2008).

<sup>82</sup> Kanter, *supra* note 81.

<sup>83</sup> See Anderson & Timmons, *supra* note 49.

<sup>84</sup> See Kanter, *supra* note 61. The exchange consolidation is more than just business mergers, but also a merger of the countries in a sense due to the "strong political and cultural character." David Lascelles, *Mergers are No Cure-All for Stock Exchanges*, FIN. TIMES, May 22, 2006, at 15.

<sup>85</sup> See Kanter, *supra* note 47. Some countries are even looking to impose legislation which would restrict ownership and control of the domestic exchange's ownership. Chris Hughes, *COMPANIES INTERNATIONAL: Concerns Grow for Rules as Global Deals Loom*, FIN. TIMES, Dec. 1, 2006, at 26. This is already in place in India and there is talk of England and Japan passing similar legislation in response to the consolidation of the exchanges and securities markets around the world. *Id.* The aim of this is two fold; one to maintain national independence, but also, to ensure protection from other

was a contentious issue with the Deutsche Börse proposal, which wanted to keep power and control of the merged company in Frankfurt and not in Paris, one of Euronext's current headquarter locations.<sup>86</sup> Also, as the larger company looking for a merger buyout Thain courted the smaller exchange's shareholders and did not alienated them. Euronext did not want to feel like the little brother of the NYSE; they wanted to be a valuable part – an equal.<sup>87</sup> The NYSE Euronext proxy statement says that one of Euronext's reasons for the combination is the "expectation that the combination would represent a true merger-of-equals, with a corporate and governance structure that represents the independence of all exchanges involved as well as the flexibility necessary to preserve Euronext's federal and horizontal business model."<sup>88</sup> The NYSE had to make several compromises, which will be discussed later, to get to the point where Euronext, and the politicians, felt it was a merger-of-equals.

In the end though, it was truly up to the shareholders to decide which merger they preferred and on December 20, 2006 Euronext shareholders approved the merger with NYSE.<sup>89</sup> The next day NYSE Group shareholders approved the merger, with over 99% of voters approving the merger.<sup>90</sup> Thus, the merger has been pushed along by business interests, notwithstanding politics,<sup>91</sup> although, even after shareholder approval the merger still has to be permitted by the regulators.

## V. THE SEC AND ITS INTERACTION WITH THE UNITED STATES AND BEYOND

The Securities and Exchange Commission ("SEC") is typically known as the regulator of the United States securities market. However, the SEC does not make the fundamental laws or rules for companies and exchanges; it interprets and enforces them.<sup>92</sup> The United States Congress makes the laws which govern the people and companies in America. It also gives authority to the SEC to interpret and enforce the laws that it creates, primarily through the Securities Exchange Act of 1934 ("34 Act").<sup>93</sup> The SEC is a federal agency created through the '34 Act to

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nations' regulatory creep. *Id.*

<sup>86</sup> See Reuters, *Deutsche Börse Makes Changes but Doesn't Add to Euronext Bid*, N.Y. TIMES, June 20, 2006, at C4.

<sup>87</sup> See Hughes, *supra* note 71.

<sup>88</sup> NYSE Group, Inc., *supra* note 57, at 81.

<sup>89</sup> See Aaron Lucchetti & Alistair MacDonald, *Moving the Market: Euronext Holders Approve Deal For Historic Merger With NYSE*, WALL ST. J., Dec. 20, 2006, at C3. The merger garnered 98% approval from Euronext NV shareholders, with almost two thirds of shareholders voting. *Id.* This, while seeming like an overwhelming majority, is in reality a much closer decision, since the other one third of votes that were not cast in the voting, must be counted against the merger. The abstaining voters may or may not have been in favor of the merger, thus in actuality the merger received less than two thirds support from shareholders, but overwhelming support of those that voted.

<sup>90</sup> Reuters, *Big Board Holders Back Euronext Deal*, N.Y. TIMES, Dec. 21, 2006, at C5.

<sup>91</sup> *COMPANIES AND MARKETS: The Short View*, FIN. TIMES, Dec. 21, 2006, at 17.

<sup>92</sup> See HERBERT B. MAYO, INVESTMENTS: AN INTRODUCTION 35 (8th ed. 2006).

<sup>93</sup> See Securities Exchange Act of 1934, 15 U.S.C. § 78c (2007). An exchange is: "[A]ny organization, association, or group of persons . . . which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange." *Id.*

replace the Federal Trade Commission which had the regulatory jurisdiction under the Securities Act of 1933 (“‘33 Act”).<sup>94</sup> From these humble beginnings the SEC has evolved into an organization with eleven offices across the United States, a permanent staff of 3,549 persons, and authorized funding of 88 million dollars.<sup>95</sup> The size of the agency shows how important a priority market regulation has been for the U.S government.

The ‘34 Act also enumerates most of the regulation for the security exchanges themselves, which is also enforced by the SEC.<sup>96</sup> The ‘34 Act requires all exchanges to be registered with the SEC<sup>97</sup> and that “their rules, regulations, system of governance, and operating procedures meet certain public interest standards.”<sup>98</sup> There have, however, been problems identifying an exchange under the definition given in the ‘34 Act with the development of electronic trading systems that operate as exchanges, but are different than the traditional understanding of an exchange which has specialists<sup>99</sup> and a floor to facilitate the trades.<sup>100</sup> Further, under the ‘34 Act the SEC is charged with regulating brokers and dealers although they have their own self regulatory agency, the National Association of Securities Dealers,<sup>101</sup> which almost all brokers and dealers must join.<sup>102</sup> Additionally, the ‘34 Act requires companies registered with the SEC to provide continuous disclosure while listed on an exchange.<sup>103</sup> Finally, the SEC, through the ‘33 and ‘34 Act, is given the authority to enforce the regulations and even bring criminal proceedings against violators of the laws.<sup>104</sup> However, the courts can check the interpretative powers of the SEC if the courts feel the SEC

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<sup>94</sup> See JOHN C. COFFEE, JR. & JOEL SELIGMAN, *SECURITIES REGULATION: CASES AND MATERIALS* 615 (9th ed. 2003).

<sup>95</sup> See U.S. SECURITIES AND EXCHANGE COMMISSION, *2006 PERFORMANCE AND ACCOUNTABILITY REPORT 7* (2006), <http://www.sec.gov/about/secpar/secpar2006.pdf#sec1>.

<sup>96</sup> MAYO, *supra* note 78, at 72.

<sup>97</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78 (2007).

<sup>98</sup> See COFFEE & SELIGMAN, *supra* note 94, at 615; see also Securities Exchange Act of 1934, 15 U.S.C. § 78 (2007).

<sup>99</sup> Specialists serve three main functions. COFFEE & SELIGMAN, *supra* note 94, at 661. First, they handle orders as brokers, generally in the form of limit orders. *Id.* Second, they “are charged with a legal obligation to buy or sell securities for their own account to the extent necessary to maintain a ‘fair and orderly market.’” *Id.* Third, they set the bid and ask price, along with the opening price for the security. *Id.*

<sup>100</sup> *Id.* at 615. “[T]echnological changes have posed significant challenges for the existing regulatory framework, which is ill-equipped to respond to innovations in U.S. and cross border trading.” *Id.* at 632 (quoting Exchange Act Release No. 38,672 (May 23, 1997)).

<sup>101</sup> “NASD licenses individuals and admits firms to the industry, writes rules to govern their behavior, examines them for regulatory compliance and disciplines those who fail to comply. [They] oversee and regulate trading in equities, corporate bonds, securities futures and options. And [they] provide education and qualification examinations to industry professionals while supporting securities firms in their compliance activities. [They] also operate the largest securities dispute resolution forum in the world, processing over 4,600 arbitrations and nearly 1,000 mediations a year. With a staff of nearly 2,500 and an annual budget of more than \$500 million. . . .” NASD – About NASD, <http://www.nasd.com/AboutNASD/index.htm>.

<sup>102</sup> See COFFEE & SELIGMAN, *supra* note 94, at 616.

<sup>103</sup> See COFFEE & SELIGMAN, *supra* note 94, at 617.

<sup>104</sup> See Securities Exchange Act of 1934, 15 U.S.C. § 78 (2007).

went too far in its interpretative powers and declare the requirements invalid.<sup>105</sup> One way the SEC tries to improve the communication it has with investors and companies is through the issuance of No-Action letters, which are issued by the staff of the SEC on whether or not the SEC would recommend enforcement by the SEC for a particular action. While not binding in court, No-Action letters are persuasive in giving companies and investors ideas of what the SEC considers an enforceable violation.<sup>106</sup>

The NYSE is one of the best examples of what a stock exchange is “generally understood”<sup>107</sup> to be under the ‘34 Act. Although, the NYSE was in existence when the ‘34 Act was enacted and was one of the exchanges considered as an exchange, the NYSE was not contemplated by the drafters of the ‘34 Act that it would ever be a shareholder-owned for-profit corporation.<sup>108</sup> This has not affected whether it is regulated, only the way that Congress and the SEC do regulate, especially now that most exchanges are privatized.<sup>109</sup> When the ‘34 Act was enacted, an “exchange” was thought of as a member club, not a for-profit corporation.<sup>110</sup> The SEC is still dealing with this issue and is particularly concerned with the possible conflicts of interest of an exchange, which is supposed to regulate itself, listed on its own exchange.<sup>111</sup>

Over decades, there has been little substantive change in how the exchanges themselves are regulated or what the SEC has required of them, but there has been much about how companies listed on those exchanges are regulated. Historically, there were great costs for foreign companies to list on an exchange, and this was normally only done by blue chip companies that needed the deep pool of capitalization available in the United States, making the registration process with the SEC worth the effort and costs.<sup>112</sup> The listing process for foreign companies on the American exchanges has been slow through the years, however, the SEC has tried to make it easier for foreign companies to issue in the United States. Originally, foreign companies were granted several leniencies by the SEC to entice

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<sup>105</sup> See generally *Goldstein v. SEC*, 451 F.3d 873, (D.C. Cir. 2006). In *Goldstein* the court overturned a rule by the SEC to change the how investors were defined for hedge funds. *Id.* The court said that the SEC went beyond its interpretive powers, where something was clearly and differently defined previously in the statute. *Id.* Therefore, all the hedge fund advisors that had been required to register under the SEC’s interpretation were no longer required to be registered because of the court’s ruling, restricting the SEC’s authority. *Id.*

<sup>106</sup> U.S. Securities and Exchange Commission – Staff Interpretations, <http://www.sec.gov/interp.shtml>.

<sup>107</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78c (2007).

<sup>108</sup> This refers to the privatization of the exchanges, also known as demutualization. COFFEY & SELIGMAN, *supra* note 94, at 623. Also, while there is debate about what an exchange is for some of the developments in technology and computerized platforms that perform some of the functions typically associated with traditional exchanges, there is none in regards to the primary exchanges, which includes the NYSE. See *id.*

<sup>109</sup> *Id.* at 623.

<sup>110</sup> *Id.* at 631.

<sup>111</sup> See Arthur Levitt, Jr., *SEC-CFTC*, WALL ST. J., Aug. 5, 2006, at A10.

<sup>112</sup> Robert G. DeLaMater, *SPEECH: Recent Trends in SEC Regulation of Foreign Issuers: How the U.S. Regulatory Regime is Affecting the United States’ Historic Position as the World’s Principal Capital Market*, 39 CORNELL INT’L L.J. 109, 110 (2006).

them to issue in the U.S. markets.<sup>113</sup> The SEC was aware of differences in laws and business practices between the U.S. and other countries so it tried to ease the transition by allowing certain exemptions to the requirements of sections fourteen and sixteen of the '34 Act dealing primarily with insider transactions and short-swing trading.<sup>114</sup> The "[f]oreign issuers were entitled to use different registration forms which took some account of the differences between U.S. and foreign disclosure regimes and practices in the disclosure requirements," including disclosure of the compensation of the five highest executive officers.<sup>115</sup> Also, when foreign issuers needed to submit their annual reports they were given six months, the deadline for most U.S. issuers though was ninety days.<sup>116</sup> Part of this problem stemmed from the accounting differences of U.S. registration and the rest of the world.<sup>117</sup> Because the companies used an acceptable accounting standard to their domestic place of incorporation, but the standard was different from the U.S. Generally Accepted Accounting Principles,<sup>118</sup> they had to reconcile their statements to the U.S. accounting standard.<sup>119</sup> This was part of the reason they were given an extended period of time for their annual reports. These are several examples of how the SEC has taken steps to make it easier for foreign issuers to register and list on the U.S. market, which provides more business opportunities for foreign and domestic entities.

Although there was help by the SEC, only the largest foreign companies were able go through the steps necessary to register and issue in the United States until the 1990's, and it was difficult for them.<sup>120</sup> In 1990 the SEC adopted Rule 144A and Regulation S, which created safe harbors giving foreigners the confidence of knowing what to do.<sup>121</sup> The safe harbors of the two regulations

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<sup>113</sup> See *id* at 111.

<sup>114</sup> 17 C.F.R. 240.3a12-3 (2007). "Exemption from sections 14(a), 14(b), 14(c), 14(f) and 16 for securities of certain foreign issuers. (a) Securities for which the filing of registration statements on Form 18 [17 CFR 249.218] are authorized shall be exempt from the operation of sections 14 and 16 of the Act. (b) Securities registered by a foreign private issuer, as defined in Rule 3b-4 (§ 240.3b-4 of this chapter), shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Act." *Id.* See also DeLaMater, *supra* note 112, at 112.

<sup>115</sup> *Id.*

<sup>116</sup> 17 C.F.R. 249.220f (2007). "§ 249.220f Form 20-F, registration of securities of foreign private issuers pursuant to section 12(b) or (g), annual and transition reports pursuant to sections 13 and 15(d), and shell company reports required under Rule 13a-19 or 15d-19 (§ 240.13a-19 or § 240.15d-19 of this chapter). (a) Any foreign private issuer, other than an asset-backed issuer (as defined in § 229.1101 of this chapter), may use this form as a registration statement under section 12 (15 U.S.C. 781) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a *et. seq.* as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)), or as a shell company report required under Rule 13a-19 or Rule 15d-19 under the Exchange Act (§ 240.13a-19 or 240.15d-19 of this chapter). (b) An annual report on this form shall be filed within six months after the end of the fiscal year covered by such report. (c) A transition report on this form shall be filed in accordance with the requirements set forth in § 240.13a-10 or § 240.15d-10 applicable when the issuer changes its fiscal year end." *Id.* See also DeLaMater, *supra* note 112, at 112; U.S. issuers are required to fill out 10-K reports for their annual reports, while foreign issuers fill out a 20-F report.

<sup>117</sup> *Id.*

<sup>118</sup> This is also known as GAAP for short.

<sup>119</sup> *Id.*

<sup>120</sup> See *id.*

<sup>121</sup> *Id.*

finally gave foreign issuers the certainty of how to gain access to the U.S. investors without being subject to the restrictions of registration.<sup>122</sup> Rule 144A allows a safe harbor from registration requirements under the '33 Act for privately placed securities with qualified institutional investors.<sup>123</sup> The safe harbor gave clear and precise standards for what would qualify for registration and what would not, which was a relief because there had been uncertainty previously since each attempt was reviewed on a case by case assessment. The safe harbor, however, would allow foreign issuers to use the rule as a stepping stone into the U.S. market.<sup>124</sup> At the same time as the adoption of Rule 144A, the SEC approved the implementation of a trading system known as PORTAL, which created a form of liquidity to these issuances – that normally have holding requirements – by only allowing qualified institutional investors to trade the issuances on the system.<sup>125</sup> Thus, there was a minimal form of liquidity for these 144A listings, although not as much liquidity as a security listed on an exchange. However, once the issuers had gone through with the Rule 144A issuance, some of the issuers then moved on to fully listing on American exchanges like the NYSE.<sup>126</sup> Regulation S meanwhile, enacted the same year in 1990, allowed the sale of securities to U.S. nationals outside of the United States.<sup>127</sup> It then granted safe harbors for issuers regarding both distribution<sup>128</sup> and resales by investors.<sup>129</sup> This gave foreign companies access to the U.S. investor market without having to deal with all the registration requirements of the SEC to list on an American exchange. This was significant because U.S. securities regulation has historically been American investor protection, not just American issuance protection.<sup>130</sup> Now with Regulation S and the explosion of ADR<sup>131</sup> use, foreign issuers could take

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<sup>122</sup> *Id.*

<sup>123</sup> COFFEE & SEGILMAN, *supra* note 94, at 581-85.

<sup>124</sup> DeLaMater, *supra* note 112, at 111,113. “[R]oughly 30% of Rule 144A offerings are made by foreign issuers, and many of these later become ‘reporting companies’ and graduate to a listing on NASDAQ or the New York Stock Exchange.” COFFEE & SEGILMAN, *supra* note 94, at 584-85.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See 17 C.F.R. § 230.901 (2006).

For the purposes only of section 5 of the Act, the terms offer, offer to sell, sell, sale, and offer to buy shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

*Id.* (emphasis omitted); See also COFFEE & SEGILMAN, *supra* note 94, at 586-87.

<sup>128</sup> See 17 C.F.R. § 230.903 (2006); see also COFFEE & SEGILMAN, *supra* note 94, at 586-87.

<sup>129</sup> See 17 C.F.R. § 230.904 (2006); see also COFFEE & SEGILMAN, *supra* note 94, at 586-87.

<sup>130</sup> See Jeremy Grant, *US market regulator revises its foreign policy*, FIN. TIMES, Mar. 15, 2007, at 6.

<sup>131</sup> ADRs are American Depositary Receipts, or American Depositary Shares, which are “receipts issued for foreign securities held by a trustee.” MAYO, *supra* note 78, at 70-71. They are a way for American investors to invest in foreign firms. *Id.* There are sponsored ADRs in which a bank creates the ADRs and acts as the transfer agent. *Id.* Any ADRs listed on the NYSE or AMEX are sponsored ADRs. *Id.* There are also unsponsored ADRs where a brokerage firm determines there would be a market and takes the costs of converting the foreign security into ADR form for US investors. *Id.* ADRs are most beneficial because they help prevent fraud to U.S. investors by transferring the security into English for the investor, where buying security certificates in a language that an investor does not understand invites fraud. *Id.* They also make it more convenient by adjusting the currency to U.S. Dollars, however ADRs can best be tracked by foreign press like London’s Financial Times. See *id.*

advantage of U.S. investors without being subject to the U.S. registration requirements.

While Rule 144A and Regulation S allowed foreign companies access to the U.S. investors without formal registration requirements, many of them moved on to registering once having grown more comfortable with the U.S. investments. Concurrently, the SEC made even more attempts to work with foreign issuers, which encouraged direct listing, and registration, or the “stepping stone” approach.<sup>132</sup> One of the primary ways the SEC did this was individualized attention to foreign companies that wanted to list, and thereby register with the SEC.<sup>133</sup> As mentioned, a significant obstacle for companies was modifying their financials to U.S. accounting standards,<sup>134</sup> instead of their domestic accounting standards.<sup>135</sup> To help companies with this, the SEC allowed the companies to submit financial information privately to the SEC for review and incorporate comments or criticisms privately instead of suffer possible public embarrassment from the public disclosure or penalty from the SEC for an improper filing.<sup>136</sup> The opportunity for private review and correction helped eliminate one of the most significant obstacles to foreign issuers; fear of potential penalties from both the SEC and the public.<sup>137</sup> With the ease of the safe harbors from Rule 144A and Regulation S, and the individual attention by the SEC before formal filing, companies felt empowered to enter the heavily regulated U.S. market; thus there was a large increase in the amount of foreign investment in the U.S. markets both privately and publicly on the American exchanges in the 1990’s.<sup>138</sup> Then the Sarbanes-Oxley Act of 2002 was passed.

The Sarbanes-Oxley Act of 2002, which is also known as SOX, has created a storm of controversy over its unprecedented amount of increased costs and compliance requirements on companies listed on American exchanges.<sup>139</sup> SOX imposes more rules to comply with, stringent penalties for noncompliance, and unlike past legislation, little provisions for conflicts of domestic law for foreign issuers.<sup>140</sup> This has effectively reversed the trend of the ‘90s of a willingness of foreign issuers to enter the U.S. markets.<sup>141</sup> Because companies that wish to be listed on the American exchanges must be registered, a company is forced to meet

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<sup>132</sup> DeLaMater, *supra* note 112, at 111-13.

<sup>133</sup> *Id.* at 111-12.

<sup>134</sup> See *supra* note 118 and accompanying text.

<sup>135</sup> DeLaMater, *supra* note 112, at 112

<sup>136</sup> *Id.* The companies could also submit questions to the SEC about a proposed action by the company and get SEC staff interpretation of the how the SEC would respond to the proposed action. This allowed companies to relieve the concern over the speculation of how the SEC would interpret certain actions.

<sup>137</sup> *Id.* at 112.

<sup>138</sup> *Id.* at 113.

<sup>139</sup> Bloomberg & Schumer, *supra* note 30. SOX can also affect companies not listed on the exchange. *Id.* Companies are bound by SOX regulation if they are subject to regulation of the Securities Exchange Act of 1934, which includes any company bound under the Securities Act of 1933, also if a company has filed registration statements with SEC under the ‘34 Act but they are not yet effective. *Id.* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201(7) (2002).

<sup>140</sup> DeLaMater, *supra* note 112, at 115-16.

<sup>141</sup> *Id.*



the SOX requirements.<sup>142</sup> One of the requirements for SOX that is causing the most concern, especially among the foreign management, is the criminal penalties for the CEO and CFO for certifying false or misleading reports, under public disclosure laws.<sup>143</sup> Also, are the enormous compliance costs for independency, which include the requirement of independent auditing boards, and the maintenance of adequate internal controls and procedures for financial reporting.<sup>144</sup> These requirements are driving many European investors away from American markets and scared many Euronext shareholders and listed companies and the announcement of a possible merger.<sup>145</sup>

For many foreign companies SOX requirements conflicted with domestic law. This caused several companies that found the requirements more costly than the benefits of being on the exchange to delist – a significant process in itself.<sup>146</sup> Some of the law conflicts for foreign companies include French privacy laws versus the SOX disclosure requirements, and where German “labor union representatives, who are employees of the company, were required by local law to be members of the board but would not qualify as independent for Sarbanes-Oxley purposes.”<sup>147</sup> These conflicts coupled with the harsh punishments for chief executive officers and chief financial officers, who can face jail time for false or misleading reports, make SOX regulation not appealing for foreign companies’ shareholders and management.<sup>148</sup> Further worsening the situation was the difficulty many foreign companies had in delisting, or deregistering and exiting from the reporting requirements of being on an American exchange, once they decided compliance would be too costly.<sup>149</sup> This fostered even more concern among foreign companies and issuers that had not yet listed, or registered, but were considering it because entering the U.S. market appeared as a path of no return.<sup>150</sup>

These conflicts have yet to be completely resolved by the SEC, because their interpretative powers are limited, since much of SOX is so clearly and explicitly stated. Because of this, there has been much discussion about the decrease in the number of new foreign companies willing to list on an American exchange.<sup>151</sup> The

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<sup>142</sup> See Bloomberg & Schumer, *supra* note 30.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 101. Section 404 is one of the most attacked areas of SOX. *Id.* It deals primarily with the accounting standards and is seen as unbeneficial and overly burdensome in terms of compliance costs on most smaller companies. *Id.* It has received some of the most vocal opposition and support for reform. *Id.*

<sup>145</sup> See Heather Timmons, *Stock Market in London Fights Nasdaq With Buyback*, N.Y. TIMES, Jan. 19, 2007 at C4. Regulatory creep is a common term used to describe the concern of U.S. regulation affecting foreign companies that were previously unaffected by some aspect of U.S. regulation, which is seen by many Europeans as too large.

<sup>146</sup> See DeLaMater, *supra* note 112, at 118.

<sup>147</sup> *Id.* at 114-15.

<sup>148</sup> Also, in European and other foreign nations, CEOs and CFOs have historically been compensated less than their American counterparts, which is a further disincentive to take on additional regulation.

<sup>149</sup> See *id.* at 118.

<sup>150</sup> See Grant, *supra* note 130.

<sup>151</sup> See Anderson & Timmons, *supra* note 40.

financial and structural hardships of conforming to SOX are costly and time consuming for companies, especially foreign companies which have different regulatory structures for their formation.<sup>152</sup> Many foreign companies, since the implementation of SOX, have decided that these costs outweigh the benefits to list on a U.S. exchange when they can just as easily list on an exchange like England's London Stock Exchange ("LSE"), which imposes far fewer regulations on listing companies.<sup>153</sup> In 2006, there were 123 foreign initial public offerings on the LSE, and twenty-three on NASDAQ, and only eighteen on the NYSE.<sup>154</sup> Both chairs of NYSE and NASDAQ blame much of the decrease in listings on the American exchanges versus foreign exchanges, in particularly the LSE, on Sarbanes-Oxley.<sup>155</sup> Also, foreign companies are still utilizing the safe harbor of Rule 144A to invest in the U.S. market, but no longer use it as a stepping stone, because the benefits of becoming fully listed, and having to register, do not outweigh the costs of becoming subject to the SOX costs and requirements.<sup>156</sup>

The SEC has taken steps in the past to give foreign companies that wish to list, or are listed, on an American exchange certain breaks to help facilitate the process and are trying to ease some of these conflicts under SOX.<sup>157</sup> However, the

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<sup>152</sup> French privacy laws contrast with SOX disclosure requirements. See DeLaMater, *supra* note 112.

<sup>153</sup> See Lucchetti, *supra* note 72.; See also Anuj Gangahar, *MARKETS: NYSE and Euronext Recast an International Dynamic*, FIN. TIMES, Dec. 23, 2006 at 31.

<sup>154</sup> See Vise, *supra* note 31. Seventy-seven of the LSE's listings were on AIM, which has very few listing requirements in contrast to companies that look to list on an American exchange due to SOX. *Id.* AIM has come under attack specifically by Thain as being an unregulated free for all and that as much as 30% of the companies on AIM fail. See Blackwell & Gapper, *supra* note 79. While the regulations may be less than many exchanges, only 3% of companies fail, not the 30% that Thain suggested. See Vise, *supra* note 31.

<sup>155</sup> *Id.* New York City Mayor Michael Bloomberg and New York Senator Charles E. Schumer released a report warning of the decline of New York as the world's financial capital. It names several reasons, in addition to SOX, for the decline in growth of New York financial services. One other reason for the decline the report says is the increase in litigation over securities issues in the United States that drive up business costs. Steps the report recommends include adopting a convergence on international accounting standards with U.S. GAAP. It also recommends adopting Basel II, to bring uniformity to international capital standards. See Bloomberg & Schumer, *supra* note 30. *But see* Ip, *supra* note 30. While SOX is receiving much of the blame for the decrease in foreign investments and IPO listings in the United States, it is not the only possible cause. *Id.* Some contend that foreign investment is dwindling because all the foreign markets that used to be considered more risky and volatile are gaining stability. There was a decrease in foreign listings on the LSE's main exchange, the Deutsche Borse, and the Tokyo Stock Exchange, so it is not just an American epidemic, but companies are gaining confidence in their own countries. *Id.* While section 404 of SOX is being condemned for being too restrictive, other places like Hong Kong, Canada, U.K., and Germany are tightening auditing requirements. *Id.* Furthermore, the regulatory schemes in place in most countries are increasing, meaning there is less need to go to a U.S. market to gain recognition since their own domestic market is becoming similar to the U.S. Lastly, the ease of access to foreign markets, through such things as globalization and consolidation, means that U.S. investors have access to shares listed exclusively on other exchanges reducing the importance of a U.S. listing to have access to U.S. investors. *Id.*

<sup>156</sup> See Georges Uguex, *COMMENT: Exchange Battles Mask Europe's Silence*, FIN. TIMES, Jan. 3, 2007, at 13; See also DeLaMater, *supra* note 112, at 117-18.

<sup>157</sup> See Blackwell & Gapper, *supra* note 79. Another way the SEC has historically done this is through their exemption power, which they can extend to companies. This allows the companies to be exempt from certain regulatory provisions. The Bloomberg and Schumer report suggests that they should utilize this now for foreign companies in regards to securities related litigation to help reduce the decline of the U.S. financial markets. See Bloomberg & Schumer, *supra* note 30.

perception of the value of listing in the U.S. market has changed and that can be a hard thing to overcome, which is shown by long it took the U.S. market to become accommodating to foreign issuers. Thus, the SEC has been working diligently to restore interest in the U.S. markets, through what would many would call a change in policy – cooperation.<sup>158</sup> The SEC has been actively speaking and meeting with foreign regulators from the European Union to China.<sup>159</sup> SEC Chairman, Christopher Cox, has spoken of the importance of cooperation with national regulators, even saying, “We . . . have no choice. After all, there’s no global regulator who can do the job for us.”<sup>160</sup> Further, the SEC is trying to address the concerns of the foreign companies by making it easier for them to deregister in the face of SOX compliance requirements.<sup>161</sup> The new proposed rule, which the SEC floated in December of 2006, would allow companies to deregister if they reduce their trading shares to 5% or less, in contrast to the current requirements of three hundred U.S. resident shareholders or fewer to deregister.<sup>162</sup> The SEC has been cooperating with foreign regulators and foreign issuers to remove obstacles that may block U.S participation in the globalization of the financial markets, and it can be seen more acutely through the SEC’s actions surrounding the NYSE Group and Euronext merger.

The SEC has said that Euronext and the companies listed on any of its subsidiary exchanges do not need any special legislation or exemptions, because under the current merger structure they will not be subject to US regulation.<sup>163</sup> The SEC has been actively involved in the merger negotiations with both NYSE Group and Euronext. SEC chairman Christopher Cox, within weeks of the bid by the NYSE Group for Euronext in May 2006, was quoted as saying that the SEC was working with Euronext authorities to allow an exchange merger to go through.<sup>164</sup> A few weeks later, the SEC released a fact sheet on potential cross border exchange mergers, which set out several guidelines about potential mergers between U.S. and non-U.S. exchanges. It stated that “[j]oint ownership of a U.S. exchange and a non-U.S. exchange would not result in automatic application of U.S. securities regulation to the listing or trading activities of the non-U.S.

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<sup>158</sup> Grant, *supra* note 130.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* See also Christopher Cox, Chairman, U.S. Securities and Exchange Commission, Address at the Harvard Business School Global Leadership Forum (June 22, 2006).

<sup>161</sup> Grant, *supra* note 130.

<sup>162</sup> Robert Bruce, *BUSINESS LIFE: Easier to check out – but a US listing is still a trap*, FIN. TIMES, Dec. 28, 2006, at 8.

<sup>163</sup> See NYSE Group, Inc., *supra* note 57, at 82.

<sup>164</sup> See Anderson, *supra* note 40. Chairman Cox said, “We are working with our counterparts in Paris and Amsterdam to establish a cooperative approach to the type of combination being proposed. We have every expectation that a transaction can take place that will benefit investors in all of the affected countries.” Christopher Cox, Chairman, U.S. Securities and Exchange Commission, Address at the Harvard Business School Global Leadership Forum (June 22, 2006). Also, during the time the NYSE was negotiating with the SEC to work out a merger with Euronext, NASDAQ was in the middle of purchasing shares of the London Stock Exchange, in an attempted takeover. Thus, the SEC in many of their releases and statements spoke of a general understanding of how to work out a merger, as the two U.S. exchanges were looking at mergers with non-U.S. exchanges through two very different avenues.

exchange.”<sup>165</sup> Also, it noted that each structure requires a careful analysis and the SE-C would not equate affiliation with the U.S. exchange to operation in the United States.<sup>166</sup> This did little to give clear standards or safe harbors for the companies looking to merge to ensure they would not be faced with regulatory creep,<sup>167</sup> but it showed that exchanges did have opportunities to work out a successful merger – the SEC just was not sure what they exactly were yet. This at least let investors breathe easier and gave credibility to Thain and Theodore’s insistence on there being no U.S. regulation on Euronext. Part of the reason the SEC lacked specificity in the release was that both NASDAQ and the NYSE were involved in potential exchange mergers with European exchanges, but the mergers were unraveling in completely different forms. Chairman Cox knew that a cross border exchange merger was going to occur, it was simply a matter of when, and therefore the SEC was going to be willing to work with the exchanges and alternative regulators to help facilitate the mergers.<sup>168</sup> Globalization was going to happen with or without the United States.<sup>169</sup>

Consequently, the SEC has been working closely with the NYSE, Euronext, and European regulators during the negotiation process. The NYSE Group submitted various styles of proposals to the SEC for approval of the merger and its structural framework. It has also offered enough statements of intent to alleviate the fears of at least the Euronext shareholders, which approved the merger in December, 2006. In the proxy statement given to the shareholders Euronext lists as a strategic consideration of the Euronext boards to recommend the merger was their expectation, which was substantially confirmed by the SEC in public statements, that the combination with NYSE Group would not by itself require registration of Euronext’s listed companies with the SEC or mandatory compliance with U.S. federal securities laws, including the Sarbanes-Oxley Act, merely because of Euronext’s affiliation with a U.S. securities exchange.<sup>170</sup> Actual SEC approval of the merger structure itself came in February of 2007.<sup>171</sup>

The necessity for cooperation by the SEC with foreign regulators becomes clear when one considers all the parts actually involved in the NYSE Group and Euronext merger. The amount of regulatory approvals for a merger to go through is formidable. Regulatory approval prior to completion of the merger for the

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<sup>165</sup> Fact Sheet on Potential Cross-Border Exchange Mergers, SEC Office of International Affairs and Divisions of Market Regulation and Corporation Finance, Fed. Sec. L. Rep. (CCH) (June 16, 2006).

<sup>166</sup> *See id.*

<sup>167</sup> *See supra* note 145.

<sup>168</sup> *See Cox, supra* note 160.

<sup>169</sup> *See id.* Parts of Chairman Cox’s speech include: “The question is not whether . . . these exchanges will merge, but rather only when, and how. Governments should welcome these cross-border affiliations, because they hold great potential. Already, we’ve seen the benefits to investors from lower barriers to cross-border securities trading across Europe.” *Id.* “Inevitably, our parochial national market system will give way to the reality of a global market, because the only true closed economy is the world economy.” *Id.* “National regulation will still be important . . . . But equally important will be cooperation among national regulators. If national regulators don’t cooperate with one another, and update their own rules and practices, the combination of global exchanges could serve as a robust new means for the unscrupulous to circumvent laws and regulations . . . .” *Id.*

<sup>170</sup> *See NYSE Group, Inc., supra* note 57, at 82.

<sup>171</sup> *See NYSE Merger Draws Closer on SEC Ruling*, WALL ST. J., Feb. 15, 2007, at C14.

companies includes: “the SEC, the Dutch Minister of Finance, the committee chairmen of the College of Regulators, which is composed of the AMF, the Netherlands Authority for the Financial Markets, the Belgian Banking, Finance, and Insurance Commission, the Portuguese Securities Commission, and the U.K. Financial Services Authority.”<sup>172</sup> Also, the parties involved have to seek approval that the merger does not violate anti-competition measures, or in the United States it is sometimes known as anti-trust.<sup>173</sup> The U.S. does not require anti-trust approval, but before, during, or after the combination, the government could take action if it deemed the merger violated the public interest as an antitrust violation, so it is best to seek some form of prior approval. However, anti-competition approval is required from competition authorities in the United Kingdom and Portugal.<sup>174</sup> Lastly, the merger still must abide by all the national laws and regulations of the European Union and each country involved, which include the United States, Belgium, the Netherlands, the United Kingdom, France, and Portugal.<sup>175</sup> These rules can vary as widely from simple terminology to complex stock ownership limits throughout the different countries.<sup>176</sup> Cooperation among regulators would appear inevitable.

Although the SEC has broad enforcement powers and some limited exemptions powers, if Congress changes the law and redefines what it means to operate in the United States, Euronext and its listed companies may experience U.S. regulation. This could occur regardless of the current SEC approval of the merger and its reassurances that the current merger structure is free of regulatory creep. One U.S. Senator, Charles E. Schumer a Democrat from New York, was quoted, back in June of 2006 shortly after the announcement of the proposed tie-up, as saying “Europe will be regulated by Europe, period. It will hurt the merger and the market if the U.S. imposes its standards on Europe.”<sup>177</sup> This is most likely reassuring to foreign investors and issuers, but if another crisis scandal similar to the ones with Enron and WorldCom, among others, that initiated SOX occurred on a world scale it might cause such drastic action. In the end, all the SEC can do is offer guidance on their interpretation of the current legislation and how they plan to enforce it. Thus, the real power lies in what assurances Congress is willing to give to European investors and companies, and how long those will last.

## VI. BENEFITS OF THE MERGER

The NYSE and Euronext have taken many precautionary steps, from the political lobbying to the complex regulatory approval, along the way to ensure that the merger can be successful and, at the least, be approved.<sup>178</sup> What has driven the

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<sup>172</sup> See NYSE Group, Inc., *supra* note 57, at 156. AMF stands for the Autorité des Marchés Financiers, which is a French securities regulator.

<sup>173</sup> See *id.* at 139-40.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 196-204.

<sup>176</sup> See *id.*

<sup>177</sup> See Anderson & Timmons, *supra* note 49.

<sup>178</sup> See NYSE Group, Inc., *supra* note 57.

companies to plow through is what drives all for-profit corporations: money. NYSE Euronext has claimed to be able to reduce costs by more than two hundred-fifty million dollars over the next three years.<sup>179</sup> Such a vast amount of savings is what has been the incentive for both the NYSE Group and Euronext NV to work through the lengthy regulatory and surrounding issues.

NYSE Euronext is hoping that through the merger the integration of technologies and vision will help facilitate the cost reductions.<sup>180</sup> First, it hopes to be able to cut initial costs to make international investing easier through the combination of the two companies.<sup>181</sup> This, it hopes, will increase the efficiency “in post-trade processing services, including clearing and settlement.”<sup>182</sup> One of the ways it hopes to achieve that is through the reduction of their cash trading systems and derivative systems which are both currently at three to one each.<sup>183</sup> Not only are the platforms going to be consolidated, but also the data centers and networks. The data centers are expected to be reduced from ten to four, and the networks from four to one.<sup>184</sup> If the efficiency of investing internationally can be increased it will create more business for both NYSE and Euronext as it will enable investors in both Europe and the United States easier access to their respective foreign market.

This leads us to the next main source of financial benefit of the merger – increased revenues. NYSE Euronext hopes to use the consolidation of the platforms and the companies to produce additional revenues through the synergies of the different branches.<sup>185</sup> This would likely be a very profitable endeavor as many investors are looking to diversify their portfolios through investing in global markets. Making it easier for those investors would likely increase their willingness to further invest, and open it up to investors who previously found it too onerous to attempt overseas investments. NYSE Euronext can do this by pushing and assisting U.S. companies listed on the NYSE to also list on Euronext making access to U.S. companies easier for European investors.<sup>186</sup> This would help U.S. companies by increasing their capital asset pool of investors and it will help Euronext, by increasing the listings on their exchange. It also hopes that there

<sup>179</sup> See Lucchetti & MacDonald, *supra* note 98.

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*; see also NYSE Group, Inc., *supra* note 57, at 76, 87.

<sup>182</sup> Lucchetti & MacDonald, *supra* note 98. Clearing is “[t]he procedure by which an organization acts as an intermediary and assumes the role of a buyer and seller for transactions in order to reconcile orders between transacting parties.” Investopedia – Clearing, <http://www.investopedia.com/terms/c/clearing.asp> (last visited Apr. 7, 2008). Settlement generally occurs a few days after a trade is where the settlement agents reconcile or settle the trades made by the traders. See Investopedia – Settlement Agent, <http://www.investopedia.com/terms/s/settlementagent.asp> (last visited Apr. 7, 2008).

<sup>183</sup> See Anderson, *supra* note 40.

<sup>184</sup> See Anderson, *supra* note 40. The four data centers will be dispersed so there are two in the United States and two in Europe.

<sup>185</sup> See NYSE Group, Inc., *supra* note 57, at 88

<sup>186</sup> See Lucchetti & MacDonald, *supra* note 98. It is possible that it will not work as well in the reverse direction where Euronext would list companies on the NYSE, because of the United States’ heightened regulation standards. There would be significant costs and efforts to conform to the U.S. regulation for U.S. listed companies as mentioned throughout the paper. While conversely, there is less additional compliance for U.S. companies to list on the European markets.

will be an increase in listings on the American and European exchanges as its brand image improves, being known as the largest global stock exchange and the exchange with the deepest liquidity pool compared to any other current exchanges.<sup>187</sup> Finally, it hopes to use their breadth to expand into the growing derivatives market, which in the United States has traditionally been done on the Chicago Mercantile Exchange.<sup>188</sup> The derivatives market is just one of the examples of both NYSE and Euronext taking advantage of technologies and businesses that one is stronger in than the other to maximize the whole's ability to grow. The merger hopes that by cutting costs through technology integration, increasing savings through efficiency from redundancy reductions, and increasing profits through expanding in other arenas that the work and effort of the merger will be a benefit for both of the companies and their shareholders.<sup>189</sup>

If NYSE Euronext can achieve those results, it expects that the financial benefits will break down as follows.<sup>190</sup> First is the savings in cost reduction, which is divided between technology and non-IT sources.<sup>191</sup> NYSE Euronext projects that the consolidation of the three cash trading systems on to one global cash trading platform, and the reduction of three derivatives platforms to one, will save them 30 million dollars in 2007, 100 million dollars in 2008 and 250 million dollars in 2009.<sup>192</sup> This would also include the reduction of the data centers mentioned previously from ten to four globally connected ones.<sup>193</sup> The non-technology cost savings include the integration and streamlining of support functions, marketing, and corporate costs, which will result in a savings of 25 million dollars in years 2007, 2008, and 2009.<sup>194</sup> However, the restructuring costs of merging two enormous companies are not cheap. NYSE Euronext estimates that it will cost 70 million dollars in 2007 and 2008, and 40 million dollars in

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<sup>187</sup> NYSE Group, Inc., *supra* note 57, at 88.

<sup>188</sup> See Lucchetti, *supra* note 72. A derivative is "a security whose price is dependent upon or derived from one or more underlying assets. The derivative itself is merely a contract between two or more parties. Its value is determined by fluctuations in the underlying asset. The most common underlying assets include stocks, bonds, commodities, currencies, interest rates and market indexes. Most derivatives are characterized by high leverage.

Futures contracts, forward contracts, options and swaps are the most common types of derivatives. Because derivatives are just contracts, just about anything can be used as an underlying asset. There are even derivatives based on weather data, such as the amount of rain or the number of sunny days in a particular region.

Derivatives are generally used to hedge risk, but can also be used for speculative purposes. For example, a European investor purchasing shares of an American company off of an American exchange (using American dollars to do so) would be exposed to exchange-rate risk while holding that stock. To hedge this risk, the investor could purchase currency futures to lock in a specified exchange rate for the future stock sale and currency conversion back into euros." Investopedia – Derivative, <http://www.investopedia.com/terms/d/derivative.asp> (last visited Apr. 7, 2008).

<sup>189</sup> See *supra* and *infra* Section VI.

<sup>190</sup> This is based on several assumptions including the reorganization and closing by the end of 2006, which did not happen, certain tax rates, and an exchange rate of roughly one euro equal to one dollar and twenty-eight cents. NYSE Group, Inc., *supra* note 57.

<sup>191</sup> *Id.* at 87.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

2009.<sup>195</sup> Under these figures, the costs versus savings of the merger in 2007 would actually cost the companies money, roughly 15 million dollars for that year.<sup>196</sup> However, over the next two years there would be gains of 55 million and 275 million dollars in 2008 and 2009 respectively as a result of the merger.<sup>197</sup> With projected gains such as these, it is easy to see why such a complex process merits all the effort.

The second projected financial benefit of the merger is the revenue synergies that will develop as a result of the combination. First, NYSE Euronext hopes to gain 45 million dollars in revenue synergies from derivatives.<sup>198</sup> This projection includes such expectations as cross selling the customer bases, extending Euronext's derivative service into the United States, and launching new products.<sup>199</sup> Second, it projects a revenue increase of 35 million dollars from cash trading.<sup>200</sup> It is believed this can be achieved by extending trading hours over the time zones<sup>201</sup> and cross-fertilizing product developments in the products they will offer.<sup>202</sup> Finally, it anticipates an increase in revenue of twenty million dollars from listings.<sup>203</sup> This would result from such things as the "pre-eminent brand," the largest liquidity pool, recruiting other overseas listings, having Alternext gain in the micro-cap listings against AIM, and developing GDRs that are Euro denominated.<sup>204</sup> These revenue synergies would total 100 million dollars, and are expected to be realized in the next three years. These increased revenues will possibly generate a further boon to the enormous cost savings already project by completing the merger.<sup>205</sup>

## VII. CONCLUDING THE MERGER

Getting to the point where the NYSE and Euronext could realize these financial benefits has been a long process of compromises. The original structure of the NYSE Euronext, Inc. under the merger agreement called for John A. Thain, the current chief executive of NYSE Group, to be the chief executive and Jean-Francois Theodore, the current head of Euronext NV, to be the deputy chief executive.<sup>206</sup> The board of directors would consist of eleven NYSE executives and nine Euronext executives,<sup>207</sup> and possibly if Borsa Italiana joins the merged

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<sup>195</sup> *Id.*

<sup>196</sup> NYSE Group, Inc., *supra* note 57.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> After the merger, NYSE Euronext will extend from the Pacific Time Zone, which includes California, to the Central European time zone which includes France, representing a nine hour span. *Id.*

<sup>202</sup> NYSE Group, Inc., *supra* note 57, at 88.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* AIM is the alternative investment market of the LSE. It seeks to attract smaller companies, but has less regulatory requirements.

<sup>205</sup> *See id.*

<sup>206</sup> *See* Anderson, *supra* note 40.

<sup>207</sup> *See id.*



company in the future, one of the NYSE's seats would go to Borsa Italiana, creating an even board of U.S. and European members.<sup>208</sup> However, even if Borsa Italiana does not join and the board would remain in the NYSE's favor, the company's bylaws require two-thirds support for "certain key strategic decisions."<sup>209</sup> Thus, the European members could block proposals even with the NYSE members possessing a majority.

This was the structure of the board when the combination agreement was signed in June of 2006, a few weeks after the initial bid. But when it was finally being approved by shareholders in December, there were eleven members on the board for both NYSE Group and Euronext NV – an even split.<sup>210</sup> Thain remains the head and Théodörë the deputy, but the chairman of the board will be European and the deputy chairman will be American.<sup>211</sup> All the political bantering and Euronext shareholder reservations about whether it was an American takeover or a merger of equals compelled the NYSE Group to rebalance the board to make the merger more appealing to the Euronext shareholders.<sup>212</sup> The fact that the European contingent of NYSE Euronext's Board of Directors could block material board decisions was not enough. Thain was left to concede the extra board seats to appease the desires of control and independence from the Europeans. This is just the first example of compromises they made.

Both NYSE Group and Euronext are aware of the possible reach of U.S. and European law and how future legislation could make the merger not as advantageous as it is now. Therefore, part of the structure of the merger agreement includes a protection for this very undesirable scenario.<sup>213</sup> The agreement creates two standby structures to the deal: a Delaware trust and a Dutch foundation.<sup>214</sup> These will each have three directors.<sup>215</sup> The Dutch foundation is authorized to take action if a situation arises when U.S. law has extraterritorial impact on "non-U.S. issuers listed on Euronext markets, non-U.S. financial services firms that are members of Euronext markets or holders of exchange licenses with respect to the Euronext markets."<sup>216</sup> The Delaware trust is authorized to take action for the same situation, but when a European law has extraterritorial impact on the same groups but of non-Europeans.<sup>217</sup> The setup of the trust and the foundation are similar and only mainly differ in some standard structural differences between a Delaware trust and the Dutch foundation.<sup>218</sup> For instance, how a voting trust is restricted to

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<sup>208</sup> See Lucchetti, *supra* note 72.

<sup>209</sup> *Id.*

<sup>210</sup> NYSE Group, Inc., *supra* note 57, at 77-78, 83; see also Gangahar, *supra* note 55.

<sup>211</sup> NYSE Group, Inc., *supra* note 57, at 77, 83.

<sup>212</sup> See Gangahar, *supra* note 55.

<sup>213</sup> See Notice of Filing of Proposed Rule Change Regarding Proposed Combination Between NYSE Group, Inc. and Euronext N.V., Exchange Act Release No. 34,55026, [SR-NYSE-2006-120] ¶ Exhibit 5M (Dec. 29, 2006).

<sup>214</sup> NYSE Group, Inc., *supra* note 57, at 121-28.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 121.

<sup>217</sup> *Id.* at 121-28.

<sup>218</sup> *Id.*

ten years in length, where a Dutch foundation does not have such rules.<sup>219</sup> Therefore, the paper will only spend the time to analyze the Delaware trust, but, as a whole, the checks and contingencies are the same, but for U.S. regulations.

The Delaware trust's provisions are not initiated until there is "a Material Adverse Change of European Law [that] could disrupt this regulatory balance and be detrimental to the NYSE Group Securities Exchanges."<sup>220</sup> If there is a Material Adverse Change of European Law, the trust agreement calls for several remedies to deal with the change and the effects it may have on NYSE Group or its subsidiaries.<sup>221</sup> The Delaware trust's board then must choose between several specified remedies of action.<sup>222</sup> The most notable and powerful remedy provided for in the agreement is that if the "European Law" will be in effect for more than six months, the trust can "assume management responsibilities of NYSE Group or the Affected Subsidiary solely with respect to some or all of the Assumed Matters; and exercise the call option over Priority Shares."<sup>223</sup> Thus, the Delaware trust's board can exercise a call over the effective subsidiary, thereby assuming control of it and out of the control of NYSE Euronext.<sup>224</sup> The trust is still bound to act in the interests of NYSE Euronext Inc., but it can place the interests of the affected subsidiary first, in effect severing itself to protect it from the reach of European legislation.<sup>225</sup> The affected subsidiary could just be a single exchange or it could be all of what was formerly the NYSE Group, depending on how far the reach of the European law extends and which subsidiaries the law is detrimental to.<sup>226</sup> However, if the extraterritorial law ceases, the actions and effects of the trust shall immediately be unwound, thereby returning the corporation to its structure before the disadvantageous law went into effect.<sup>227</sup> Furthermore, the bylaws affecting the trust and foundation are very difficult to amend or terminate, even requiring regulator approval before it can be done.<sup>228</sup>

The presence of the trust agreement in the combination agreements shows that the fears that have been voiced in dissent of aspects of the merger have not been forgotten. Its existence is present to calm both political and business fears, more likely from the Europeans than the Americans. However, the European Union's scope is broadening and Sarbanes-Oxley should not be the only concern of

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<sup>219</sup> *Id.*

<sup>220</sup> Notice of Filing of Proposed Rule Change Regarding Proposed Combination Between NYSE Group, Inc. and Euronext N.V., *supra* note 213.

<sup>221</sup> *Id.* at 292-93. There are formal provisions for the process and requirements of the trust in its creation and operation. *See id.* It would be a Delaware Trust, with its own board of trustees, to act in the interests of the affected subsidiary. *Id.*

<sup>222</sup> *See* NYSE Group, Inc., *supra* note 57, at 121-28.

<sup>223</sup> Notice of Filing of Proposed Rule Change Regarding Proposed Combination Between NYSE Group, Inc. and Euronext N.V., *supra* note 213, at 300.

<sup>224</sup> NYSE Group, Inc., *supra* note 57, at 121-28.

<sup>225</sup> Notice of Filing of Proposed Rule Change Regarding Proposed Combination Between NYSE Group, Inc. and Euronext N.V., *supra* note 213, at 301.

<sup>226</sup> NYSE Group, Inc., *supra* note 57, at 121-28.

<sup>227</sup> *Id.* at 126.

<sup>228</sup> *See id.*

investors and shareholders in a merger of this size.<sup>229</sup> Nonetheless, the provisions are there, and no matter how technical and limited they are, they illuminate what every exchange, proud in their independence, fears the most: non-domestic regulation. A comparison of the events between the NYSE and Euronext merger versus the events of the failed NASDAQ takeover of the LSE, highlights these divisive issues.

Many of the reasons for the NYSE Group and Euronext NV merger were the same reasons that other exchanges have pursued mergers in an attempt to maintain the pace of globalization, which is “[e]xchanges are interested in merging because that gives them access to more investors, which makes the exchanges more attractive to companies with stock to sell.”<sup>230</sup> One merger in particular that began before the NYSE Group offered its first proposal to Euronext NV was NASDAQ’s interest in acquiring the LSE. NASDAQ proposed to purchase the LSE back in March of 2006, around the same time the Deutsche Borse was expressing interest in Euronext.<sup>231</sup> The NYSE Group realizing they needed to catch up with the other major exchanges in the merger fervor expressed interest in also purchasing the LSE. NASDAQ in an attempt to make sure that a NYSE and LSE merger<sup>232</sup> would not come to fruition began purchasing LSE stock in an attempt to secure a strong enough position to block any other potential bidders.<sup>233</sup> Over the next year, NASDAQ acquired a 28.75 % ownership stake in the LSE.<sup>234</sup> This ownership stake has been used as leverage to attempt to force the LSE to agree to a takeover bid.<sup>235</sup> However, the LSE rejected all offers from NASDAQ in 2006 and 2007, with the last being a hostile takeover bid for twelve pounds and forty-three pence a share.<sup>236</sup> As of January 27, 2007, the ability of NASDAQ to raise its last offer

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<sup>229</sup> See *id.* at 129. One of the most prominent EU regulations that will affect the exchanges and securities market is the directive on markets in financial instruments, or MiFID. See Kyle Wingfield, *Big Deal*, WALL ST. J., Nov. 22, 2006, at A14. MiFID is “intended to enhance the Continent’s single market in securities trading” and impose “stricter price-publishing requirements on trading firms both before and after trades.” *Id.* MiFID will take effect in November of 2007 and as a result of the higher costs caused by its implementation, seven of the leading investment banks have announced the possibility of creating their own platform to process trades. *Id.* It is tentatively known as the Turquoise project and would involve Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, Merrill Lynch, Morgan Stanley, and UBS. *Id.* Four of these banks are American and they represent half of the equities trading volume in Europe, so if it comes to fruition, it would seriously reduce amount of trades processed by the exchanges, thereby drastically reducing revenues. *Id.* However, the platform maybe restricted by EU competition laws from the sheer size of the possible cooperation. *Id.*

<sup>230</sup> Stein, *supra* note 68.

<sup>231</sup> See Mark A. Stein, *That Other Madness This Month: Mergers*, N.Y. TIMES, Mar. 18, 2006, at C2.

<sup>232</sup> There had been many different attempts by exchanges and banks to gain control of the LSE. NYSE is however, NASDAQ’s largest competitor domestically and therefore, greatest competition to have a U.S. and a non-U.S. exchange merger.

<sup>233</sup> See Aaron Lucchetti & Alistair MacDonald, *NASDAQ, Chief Weigh Choices After LSE Snub*, WALL ST. J., Feb. 12, 2007, at C1.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> *Id.* See also Brown-Humes, *supra* note 76; the twelve pound and forty-three pence offer equates roughly to twenty-four dollars a share based on current exchange rates. Clara Furse, head of LSE, was quoted as saying that NASDAQ’s offer was “not even approaching [its] fair value.” Norma Cohen, *LSE Set to See Off Bid from NASDAQ*, FIN. TIMES, Feb. 10, 2007, at 1.

expired and it must now wait for one year, under English takeover rules, until it can increase its bid or bid again.<sup>237</sup>

The failed NASDAQ and LSE merger can be used to contrast and highlight the importance of several of the aspects of the NYSE Euronext merger. First, the procedure taken by the acquiring company: the NYSE began its formal attempt of a merger with an offer above a competitor's bid, while NASDAQ began with a stock acquisition to block any competitors from being able to bid.<sup>238</sup> These two advances were likewise met with two very different reactions from the respective European exchanges. Euronext reviewed and considered the option and price as Thain, the NYSE Group CEO, flew to Europe to meet with Euronext executives.<sup>239</sup> Euronext ultimately accepted the NYSE Group's offer even though it had a higher bid from Deutsche Borse, because it believed the NYSE offer was a better business opportunity.<sup>240</sup> NASDAQ's gradual increase of LSE ownership, in effect, put the LSE on the defensive. While exchanges are now looking to merge all across the globe, they have historically been independent and able to control their own destiny and business plans.<sup>241</sup> NASDAQ's aggressive moves to gain ownership and control came across as a threat to the LSE's control of its own direction and independence, not as a beneficial business move for the LSE. Clara Furse, the CEO of the LSE, has expressed repeatedly that she wishes to keep the LSE independent, but is not against cooperation with other exchanges as opportunities to consolidate.<sup>242</sup> The independence and pride of that independence is a delicate thing for exchanges that are often seen as national symbols for their respective countries.<sup>243</sup> These two very different approaches to exchange consolidation show how procedure will affect behavior of these independent companies and the importance of cooperation for both sides to make a combination work.

Second, the importance of shareholder and business perceptions: as already noted, there has been much fear of U.S. regulation among non-U.S. companies and exchanges, most notably of SOX.<sup>244</sup> The NYSE Group was able to dispel these fears through proactive approaches to the concerns and even implementing the trust and foundation clause into the agreement.<sup>245</sup> NYSE Euronext also sought reassurance from the SEC to give the Euronext shareholders a legitimate belief of freedom from U.S. regulation. Also, Euronext was explaining to shareholders there would not be regulation from the United States. Conversely, one of the ways that the LSE was able to drive a wedge into NASDAQ's plans of acquisition,

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<sup>237</sup> See Lucchetti & MacDonald, *supra* note 233; See generally Companies Act of 2006, Ch. 46, Impediments to Takeovers.

<sup>238</sup> See Lucchetti & MacDonald, *supra* note 233.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See Lucchetti & MacDonald, *supra* note 233. Many of the firms that run the exchanges or are the exchanges are "fiercely independent firms fighting to stay in control of their own destinies." *Id.*

<sup>242</sup> Timmons, *supra* note 145.

<sup>243</sup> Lucchetti & MacDonald, *supra* note 233.

<sup>244</sup> See Timmons, *supra* note 145.

<sup>245</sup> See Lucchetti, *supra* note 72; Thain said it had been constant questioning during the week following the proposal about whether Sarbanes Oxley would reach Euronext if there was a merger. See *id.*

possibly through a takeover, was by fueling the fear of U.S. regulation, in particular Sarbanes-Oxley.<sup>246</sup> The LSE has even gone as far as to advertise itself as SOX free, in an effort to lure leery non-U.S. businesses, whose leaders fear the harsh consequences for business chiefs.<sup>247</sup> The LSE has been able to transform itself into the leading exchanges for initial listings of non-U.S. companies since the imposition of SOX.<sup>248</sup> The LSE knew that many of the companies listed on the exchange were there to avoid SOX regulation and that fueling this fear would make shareholders think that U.S. affiliation was bad for the companies on the LSE and, therefore, bad for LSE. The lengths that NYSE Group was willing to go, even conceding board seats, to quell fears of Sarbanes Oxley regulation, coupled with the LSE's strategy of emphasizing those fears to block NASDAQ's takeover attempt, show how real these concerns were amongst not just European investors, but all non-U.S. investors.<sup>249</sup> The two scenarios show that while there may have been aspects of fear with Euronext shareholders and LSE shareholders, it was how the companies handled the perception of SOX regulation that determined the final outcome.

Cooperation and communication for mergers to work is essential, especially when each exchange is bound by so much differing regulation. NASDAQ is now in the precarious position of owning one billion sixty-five million dollars worth of stock of an exchange that does not want to work with them.<sup>250</sup> There is much uncertainty as to what is going to happen next, especially when hedge fund investors hold an estimated 30% of the LSE's stock.<sup>251</sup> Under current British

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<sup>246</sup> See Timmons, *supra* note 145.

<sup>247</sup> See Lucchetti, *supra* note 72; there is much confusion and misunderstanding amongst non-U.S. companies about how far Sarbanes Oxley goes to affect companies, but enough of the concerns are legitimate that the apprehension of falling under SOX regulation has materialized into a overblown fear. As a result of this NASDAQ has hired former U.S. Congressman Michael Oxley, who was one of the co-authors of the Sarbanes-Oxley Act. Alistair MacDonald, *Oxley Gets Position at NASDAQ*, WALL ST. J., Mar. 16, 2007, at B6. His job as a vice president at NASDAQ is to work on public policy issues with Washington and "correcting misconceptions about Sarbanes-Oxley among companies at home and abroad." *Id.*

<sup>248</sup> See Timmons, *supra* note 145; "London has become the favoured destination for companies seeking a foreign listing. There were 367 initial public offerings in London last year. . . ." Ivar Simensen, *COMMENT AND ANALYSIS: Frankfurt Finance is in Fear of a Drift from 'Mainhattan' to Marginalisation*, FIN. TIMES, Feb. 8, 2007, at 15.

<sup>249</sup> Not only has Sarbanes Oxley been a source of fear to keep non-U.S. companies listing on U.S. exchanges, but it has caused an increase in smaller U.S. companies listing outside of the United States in markets like AIM, in London, which is the alternative investment market, a smaller exchange of the LSE. See Vise, *supra* note 31. AIM alone had thirty American companies list with them last year, which traditionally would have listed on U.S. exchanges, but the cost of following Sarbanes Oxley regulation to be a listed company is too much for these smaller companies. See *id.* AIM currently has sixty U.S. companies listed on it. See *id.* But see Ip, *supra* note 30 (arguing that most of the companies that list on AIM are smaller companies with little financial history and would not receive the requisite interest from underwriters and investors and would not meet the NYSE listing standard anyway, which means the NYSE does not even lose them as a listing because they never would have qualified in the first place).

<sup>250</sup> See Brown-Humes, *supra* note 76.

<sup>251</sup> See Timmons, *supra* note 145.; This is significant because hedge fund investors are notorious for looking for the quick return as short term holders. See James MacKintosh, *COMPANIES UK: Hedge funds split over NASDAQ's LSE bid*, FIN. TIMES, Jan. 24, 2007, at 19. Therefore, if they felt that NASDAQ's offer was fair or the LSE was losing value they may be inclined to sell to NASDAQ possibly giving it over a 50% share ownership. See *id.* Many of the hedge funds had acquired their

takeover rules NASDAQ has to wait for a year to bid again, unless there is a rival bid or the LSE's management changes their mind.<sup>252</sup> The LSE has considered buying back shares to protect itself from future aggressive maneuvers by rival exchanges.<sup>253</sup> NASDAQ, which took on about one billion dollars in debt to acquire the shares, has to decide what to do with its shares of the LSE now that the bid failed.<sup>254</sup> NASDAQ has not announced any formal plans as to what to do with the shares, and there is much speculation over what is the best option.<sup>255</sup> Most say that holding is a risky move, but the other side is saying that whichever way the stock goes is a win/win situation for NASDAQ.<sup>256</sup> The current LSE stock price was above the last bid, and that stock price is almost a dollar higher than what NASDAQ paid for about 15% of the company last year.<sup>257</sup> Therefore, if the stock price remains high or goes up, NASDAQ could sell and realize a substantial gain just on the "investment" in LSE stock; or, if the stock goes down it will make the bid price all the more attractive and could put pressure on LSE management to accept the bid, which is what NASDAQ had been trying to do all along.<sup>258</sup> However, there are many moves going on with many of the exchanges around the world as they position themselves for global alliances and it will be hard for NASDAQ to make too many moves when it has so much leverage in the LSE.<sup>259</sup>

#### VIII. THE FUTURE GLOBALIZATION OF EXCHANGES

The wave of globalization, though, is not stalled like the NASDAQ takeover. Euronext capitalization is almost 10 billion euros<sup>260</sup> and upon completion of the merger with the NYSE Group, NYSE Euronext will have a combined

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interest in the LSE upon NASDAQ's initial offer. *See id.* They then played a waiting game to see when the best price for the stock would be, knowing that a potential bid would cause the stock price to rise. *See* Lucchetti & MacDonald, *supra* note 233. Most of these hedge funds were unsure of what was going to happen to the stock right up to the rejection of the bid by the shareholders, some hoping NASDAQ would increase their bid, some hoping for a rival bid, and others listening to Clara Furse, who was saying that the bid price undervalued the company. *See id.* However, NASDAQ attempted to scare many of the hedge funds into accepting the bid price, claiming that the price would fall drastically if NASDAQ sold off their interest. *See id.* The stock ended up falling from a high of over thirteen pounds and forty pence before the offer closed to less than twelve pounds and twenty-five pence in mid-March. Therefore, perhaps NASDAQ was right, the bidding war had inflated the value of the LSE's shares. NASDAQ also tried to argue that the introduction of new European Union legislation, which may increase competition among financial institutions, known as MiFID, would devalue the company and slow the huge profits and growth the LSE has seen recently, which according to NASDAQ makes it overvalued. *See id.*

<sup>252</sup> *See id.* *See also* MacKintosh, *supra* note 227.

<sup>253</sup> *See* Timmons, *supra* note 145.

<sup>254</sup> *See* Lucchetti & MacDonald, *supra* note 233.

<sup>255</sup> *See* Richard Beales & Norma Cohen, *LSE to reveal strong start to the year*, FIN. TIMES, Feb. 12, 2007, at Companies UK at 23.

<sup>256</sup> *See id.*

<sup>257</sup> *See id.*

<sup>258</sup> *See id.* The stock price did go down after the bid failed, and at one point in March fell below NASDAQ's bid price. *See supra* note 227.

<sup>259</sup> *See id.*

<sup>260</sup> Cohen, *supra* note 236. Ten billion euros is roughly thirteen billion three hundred forty-one million dollars at current exchange rates.

capitalization of 27 billion dollars.<sup>261</sup> This will make it by far the largest exchange in terms of capitalization. While Euronext is the largest of the exchanges that NYSE Group has targeted in their global growth plan, it is certainly not the only one. NYSE has been pursuing several other exchanges that are all around the world.

On January 31, 2007 the NYSE Group and the Tokyo Stock Exchange announced a formal alliance and in a symbolic gesture of the alliance the two exchange chief executives rang the Wall Street bell together that same day.<sup>262</sup> The alliance will allow the two exchanges to “work together on areas such as trading systems and technology, cross listings, regulatory issues, corporate governance and exchange-traded funds.”<sup>263</sup> This could serve as the first step for a possible capital alliance or merger, as the current alliance is little more than an agreement to work together. There was talk that NASDAQ may partner with the Tokyo Stock Exchange as well and the LSE has signed a similar agreement as NYSE Group with the Tokyo Stock Exchange.<sup>264</sup> The Tokyo Stock Exchange is not expected to go public until 2009, which means that these strategic alliances may pose as both an opportunity for Tokyo to reestablish itself in the market and to see which courting exchange they would prefer to formally work with through a merger.<sup>265</sup> The Tokyo Stock Exchange has been struggling to win back investors’ faith after several computer problems paralyzed trading on several different days in 2005 and 2006.<sup>266</sup> The Tokyo Stock Exchange is currently Asia’s largest market and is number two globally behind the NYSE.<sup>267</sup> The hope is that these alliances will restore the image of the Tokyo Stock Exchange to investors as it makes them look competitive again.<sup>268</sup> The NYSE Group clearly has its eyes on growing globally and may try to take a stake when it goes public; but it is worth noting that regardless of how many strategic alliances the Tokyo Stock Exchange signs with the rest of the exchanges, the NYSE Group was the first.<sup>269</sup>

The NYSE Group also purchased a 5% stake in the National Stock Exchange in January of 2007.<sup>270</sup> The National Stock Exchange is an Indian stock exchange that was created in 1994 by Indian financial institutions, which is now larger than India’s oldest exchange the Bombay Stock Exchange.<sup>271</sup> According to Indian

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<sup>261</sup> See The Short View, *supra* note 91.

<sup>262</sup> Jenny Anderson & Martin Fackler, *NYSE Makes Alliance With Tokyo Exchange*, N.Y. TIMES, Feb. 1, 2007 at C1. See also Paul Betts & Stephen Pettitt, *COMPANIES INTERNATIONAL: Home alone*, FIN. TIMES, Feb. 1, 2007, at 23. The head of the Tokyo Stock Exchange is Taizo Nishimuro, who replaced Takuo Tsurushima, after a trading mistake on the exchange costing hundreds of million dollars to Mizuho Securities. See Anderson & Fackler, *supra*.

<sup>263</sup> Betts & Pettitt, *supra* note 262.

<sup>264</sup> See Anuj Gangahar, *COMPANIES INTERNATIONAL: Unclear course for Greifield post-LSE bid*, FIN. TIMES, Feb. 14, 2007, at 23.

<sup>265</sup> See Betts & Pettitt, *supra* note 238.

<sup>266</sup> Anderson & Fackler, *supra* note 262.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.*

<sup>269</sup> See *id.*

<sup>270</sup> John Authers & Joe Leahy, *COMPANIES AND MARKETS: NYSE buys into Indian bourse*, FIN. TIMES (Asia Edition), Jan. 11, 2007, at 13.

<sup>271</sup> *Id.*

regulator's rules, a foreign investor is only allowed up to a 5% ownership and combined foreign ownership can only be up to 49% of an Indian exchange.<sup>272</sup> Goldman Sachs, General Atlantic, and Softbank Asian Infrastructure Fund each bought a 5% stake at the same time as the NYSE, in a sort of combined purchase of the exchange with NYSE under the Indian guidelines.<sup>273</sup> The National Stock Exchange has almost tripled its level of capitalization from three years ago, as many investors believe it going to continue to rise as India, which has over one billion people, continues its economic development.<sup>274</sup> It is still unclear what type of partnership the two exchanges will take as a result of the stock purchase, but it will entail cooperation on similar issues as the alliance with the Tokyo Stock Exchange.

The NYSE Group had expressed a continued interest in the European market, even while it was in the middle of its merger with Euronext, which supported the moves.<sup>275</sup> It has made several mentions of the Borsa Italiana, trying to woo them into the Euronext group.<sup>276</sup> The NYSE Group has also mentioned several times that they are likely to look to China for a deal, though not necessarily an acquisition.<sup>277</sup> Many consider China to have high market growth potential, being the largest country in the world in terms of population, which could make alliances with its exchanges now, very profitable later, if the market does take off.<sup>278</sup> Nonetheless, the dealings with both the Tokyo Stock Exchange and the National Stock Exchange show how serious the NYSE Group, or NYSE Euronext, is about establishing a presence in Asia and gives all the more credence to plans to move into the Chinese market as well.

The NYSE Group is not the only exchange though that is actively pursuing merger and alliances with others. After the Deutsche Borse's failed attempt with

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<sup>272</sup> *Id.*

<sup>273</sup> *See id.* "Goldman Sachs is a leading global investment banking, securities and investment management firm that provides a wide range of services worldwide to a substantial and diversified client base that includes corporations, financial institutions, governments and high-net-worth individuals." Goldman Sachs - Business Overview, [http://www2.goldmansachs.com/our\\_firm/corporate\\_information/business\\_overview/index.html](http://www2.goldmansachs.com/our_firm/corporate_information/business_overview/index.html) (last visited Apr. 7, 2008). Their investment banking provides both financial advisory and underwriting services. They deal with fixed income, currency, and commodities along with equities, while also providing asset management and securities services. *Id.* **General Atlantic** is a leading global private equity firm providing capital for growth companies driven by information technology or intellectual property. Founded in 1980, General Atlantic manages approximately \$12 billion, investing in growth, recapitalization and buyout opportunities worldwide. General Atlantic - <http://www.generalatlantic.com> (last visited Apr. 7, 2008); "SAIF Partners is a leading private equity firm that provides growth capital to companies in Asia. Our primary areas of focus include Business Services, Financial Services, Communications, Consumer Services, Education Services, Healthcare, & Manufacturing. SAIF Partners was founded in 2001 and currently manages over \$2 billion across three funds . . . SAIF is a long-term investor with local teams in Hong Kong, China, India, and South Korea." SAIF Partners, <http://www.sbaif.com/> (last visited Apr. 7, 2008).

<sup>274</sup> Authers & Leahy, *supra* note 246.

<sup>275</sup> *See* Reuters, *supra* note 90; *see also* Authers & Leahy, *supra* note 246.

<sup>276</sup> *See* Gaston F. Ceron, *Moving the Market: NYSE Group's Shareholders Approve Takeover of Euronext*, WALL ST. J., Dec. 21, 2006, at C3.

<sup>277</sup> Anuj Gangahar, *COMPANIES INTERNATIONAL: Archipelago deal lifts NYSE profit*, FIN. TIMES, Feb. 3, 2007, at 19. *See also* Reuters, *supra* note 90.

<sup>278</sup> *See* Gangahar, *supra* note 277.



Euronext and as of December 2006 it was the only major U.S. or European exchange that was not involved in globalization.<sup>279</sup> This caused several questions as to the importance of exchange globalization as the Deutsche Borse at that time closed at a record high on January 15, 2007 prior to any formal tie-ups; there were not even talks of more tie-ups when it hit its record high.<sup>280</sup> In the end, Deutsche Borse could not stay out of the frenzy and they acquired a 5% stake in the Bombay Stock Exchange in February of 2007.<sup>281</sup> Deutsche Borse also signed a memorandum of understanding with the Korean Exchange.<sup>282</sup> The LSE has entered into a partnership with MICEX stock exchange in Russia and has “a formal tie-up with the Tel Aviv Stock Exchange in Israel.”<sup>283</sup> Additionally, LSE has also entered into a similar arrangement as the NYSE with the Tokyo Stock Exchange.<sup>284</sup> NASDAQ has talked about tie-ups with the Toronto Stock Exchange and the Tokyo Stock Exchange too.<sup>285</sup>

#### IX. CONCLUSION

The evolution of the NYSE may be entering its final stages as it goes from a national member organization into an international for-profit corporation. The road there has been a long journey though that has sped up significantly under the leadership of John Thain in the last three years. Euronext has gone through a similar transformation and now the two have arrived at the same place as a merged international exchange.

The SEC has always tried to be responsive to the needs of the investment community, whether it is offering No-Action letters or creating exemptions for foreign companies, although, the accommodating nature of the SEC could not stop the flood of negativity that resulted from SOX. The perception of overregulation and fear derived from it scared both U.S. and non-U.S. investors. This made the merger although the more difficult for the NYSE Group and Euronext. Now, not only did the companies have to work around the delicate issue of national independence, but they had to ensure that European fears could be relieved. The fears were relieved enough to approve the merger, but not erased as evidenced by the Delaware trust and the Dutch foundation provisions in the agreement.

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<sup>279</sup> See Norma Cohen & Ivar Simensen, *COMPANIES EUROPE: D Borse rally belies M&A exclusion*, FIN. TIMES (London), Jan. 16, 2007, at 22.

<sup>280</sup> See *id.*

<sup>281</sup> See Heather Timmons, *Stock Exchanges in a Rush to Forge Links With One Another*, N.Y. TIMES, Feb. 23, 2007, at C5.; NYSE had purchased the same stake in the National Stock Exchange, which is the rival stock exchange of the Bombay Stock Exchange in India.

<sup>282</sup> See Bett & Pettitt, *supra* note 262.

<sup>283</sup> See Joanna Chung & David Turner, *COMPANIES UK: London and Tokyo combine*, FIN. TIMES (London), Feb. 23, 2007, at 20.

<sup>284</sup> See *id.*

<sup>285</sup> See Gangahar, *supra* note 264. The Tokyo Stock Exchange has been eager to form alliances to be part of the globalization of mergers as it looks to go public in 2009. They have or are considering alliances with the NYSE Group, which now includes Euronext, the LSE, NASDAQ, Deutsche Borse, and the Chicago Mercantile Exchange. See Chung & Turner, *supra* note 283. The alliances are supposed to be preparation for it to join a formal merger when it goes public. See Anderson & Fackler, *supra* note 262.

The pace of globalization is only getting faster in the worlds of business and politics. These two worlds are crashing together right now as a result of the exchange consolidations happening all across the globe. There is little information or examples available to see what will result of these events due to their unprecedented. Less than ten years ago most exchanges were non-profit member organized national symbols. Now they are nearly all demutualized into for-profit corporations struggling for identity independent of their own regulators, but fearful of falling under the reaches of foreign regulators. The NYSE Euronext merger is the first of the major global exchanges as a single entity that will have control of exchanges that cross an ocean. As business drives the consolidation it is likely that before long one will cross all oceans and trading will go all day all around the world. The politicians and governments will be forced to work with foreign governments as they will not allow their national symbols, their national exchanges, to be bound by other countries easily, so they will be forced to cooperate and compromise. There will always be domestic exchanges for the smaller companies in the country, but is likely they will all be owned by a few consolidated entities shortly. However, there is little evidence of its sustainability and it really comes down to one simple question. Will it work? John Thain seems thinks to so.<sup>286</sup>

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<sup>286</sup> This article was completed in April of 2007 and as such there have been several developments that may affect the accuracy of the article at the time of publication. Following are some of the noteworthy developments. John Thain left his post at NYSE Euronext in November 2007 to become the CEO of Merrill Lynch & Co. Randall Smith & Aaron Lucchetti, *Merrill Taps NYSE's Thain as CEO*, WALL ST. J., (Nov. 15, 2007). Also of note is that in July of 2007 the NASD consolidated with a branch of the NYSE to create the Financial Industry Regulatory Authority ("FINRA"). <http://www.finra.org/AboutFINRA/index.htm> (last visited April 2, 2008). Therefore the NASD no longer exists, but much of the same functions are now performed by the FINRA.

