are results both of technological advances and of the removal of restrictions on foreign participation by many of the world's securities markets.8

Is it possible that so much ink has been spilled over a mere increase in the relative amount of distribution and trading activities that happen to take place across national borders? If so, then what distinguishes the current trend toward internationalization is apparently only the relative amount of such activity. Yet surely this is a rather misleading use of the term internationalization, a term that would seem to suggest a process whereby national markets are in some significant sense becoming an interrelated international securities market, not just a transnational one.

Whatever its significance, the pace of this increased internationalization appears to be creating new opportunities and new challenges. Whatever internationalization may be, it is still very much in process. It may well be that it is still too early to delimit the meaning of the term in any definitive fashion. One obvious model of an “internationalized securities market” would appear to be afforded by the secondary trading market in Eurobonds, now of long standing. Still, there remain many practical limitations on the emergence of an integrated, truly internationalized market even in that context. For example, the lack of international clearance and settlement links to facilitate cross-border settlements, and the wide variance in clearance and settlement systems within national markets are still major impediments to internationalization.

Nevertheless, even in its present state of development, notable features of an internationalized market may be identified. Among other things the internationalized market is, or will be, marked by increased direct competition among the participants in the world's national securities markets. In addition, the significant growth in transactions by investors outside their own countries would appear to give some definition to the emerging global character of the securities markets. Furthermore, in the international distribution market it appears that mechanisms that traditionally have been utilized in debt offerings are beginning to be mobilized for equity offerings as well. Transborder markets (and, presumably, eventually an internationalized market) are beginning to play a more significant role in international capital formation. In this regard “securitization,” a related and relatively recent development, has resulted in the increased use of the international securities markets as a means of capital formation, as opposed to reliance on international bank loans.

In addition, deregulation, at least as to ease of entry into other national markets, would seem to presage an increase in direct worldwide competition in equity markets. A corresponding development in the secondary markets, I think, is already upon us. With the increase in multinational stock listings and transborder trading of equity securities, there is heightened interest among professionals in the development of a 24-hour global stock market.

These, then, are some of the potential characteristics of the emerging trends toward internationalization. Among others, the question remains as to how the current regulatory systems will respond to this trend over time. For some answers, we shall turn now to our panelists.

REMARKS BY LINDA C. QUINN*

I'll be brief because I understand there are people who have a lot to say, and many people have heard me say what I have to say this morning a lot of times. To pick up

8SEC Internationalization Study, at I-1. Cf. id. at II-5.
*Director, Division of Corporation Finance, U.S. Securities and Exchange Commission. Ms. Quinn spoke in her individual capacity.
where Professor Malloy left off, I think there are a couple of factors that, perhaps, put the challenge that is presented to the SEC, and particularly the Division of Corporation Finance (Corp. Fin.) into context to an even greater degree. I'm going to focus particularly on what we're doing. Several factors have to be focused on as to why internationalization issues seem even greater today than they did earlier in the continuum of the development of the international market.

First, over the last decade the institutionalization of the market has become a given. It was studied in the early and mid-seventies and I think that both domestically and internationally, we basically view this as an institutional market. Yes, there are individual investors, but the internationalization of the market really is being driven by the professional investors, the institutions. And to the extent that those institutional investors now characterize the market, I think that's another reason driving the focus on internationalization. The people who are investing throughout this international market tend to be the broker-dealers, the corporations, the pension funds, and they are seeking diversified portfolios. That's generally done by the professionals and not by individuals.

Then, as Professor Malloy said, the established markets in London and Japan have opened up more to foreign participation, and have developed into deep, liquid markets that really offer an alternative to U.S. markets. This has caused, I think, the new focus principally on the international issues, simply because it is an alternative and there is real competition. Developments in the United States are going to have to take into account whether an action taken or not taken makes the U.S. market less attractive either to the investors, or to the persons who are trying to raise capital in those markets or to the intermediaries who are trying to make a living serving as the intermediaries in those markets. As we take action in every case now, we have to assess whether (because there are markets that really provide an alternative) in essence we're just forcing business offshore. I think that will be a constant theme when the SEC goes to regulate the markets or considers restrictions on capital-raising activities in the United States.

Third, the competition includes not simply the established markets, like the International Stock Exchange or the Japanese Stock Exchange, but the unregulated Euromarket as well. The Euromarket has changed the complexion of how one regulates tremendously, whether you're talking about regulating in Japan, France, London, or the United States. All the regulators are concerned about this, both here, abroad and in a number of international organizations. The one that the SEC is involved in particularly actively is the International Organization of Securities Regulators (IOSR). We all get together at least once a year, and now there are technical committees with which we have an ongoing relationship. The basic conversation of all the regulators is based on the same concern—you can regulate only so much and then people say: "It is easier to go to the Euromarket." Thus, not only do you have the competition of established markets, but you have an overriding competition of this largely unregulated market, which to date has proved efficient, liquid and very useful as a valid alternative to the established markets.

I think that the biggest advantage that the Euromarket has is the ability, because of the lack of regulation, to allow participants to go to market instantly. In other words, you don't have to worry about regulatory delays. And in all the jurisdictions there can be questions of how fast you can proceed with financing from the time that it strikes your mind, "I need the capital," to getting the money in exchange for the securities.
In the United States, the development of the "Shelf Rule"1 was a response to that. I don't believe it was an intended response, but at the same time the development of the Euroequity market was in its seminal stages, you had the United States recognizing, at least for major issuers, that there needed to be the ability to go to market without worrying about timing concerns.

In Japan they are considering the same thing, because there's pressure in Japan concerning the length of the regulatory process going to the Ministry of Finance, queuing up to get reviewed by the Japanese authorities. It's not months and months any more, it's 30 or maybe 45 days, but when you compare that to the Euromarket where there is no limitation, in a time when money moves as fast as it does, when the volatility, not only of equities but of currency changes and of interest rate changes are so great, time has become the most tremendous pressure in the capital-raising area. That is the biggest advantage the Euromarket has. At times the Euromarket also has an advantage in rates, and since capital can be obtained there most cheaply, that market has certainly got that advantage.

So that's the environment in which the SEC is working. There's competition from the established markets, competition from the Euromarket, and on the books there are two statutes saying what has got to happen to raise capital in the United States, and what has to happen to regulate the markets once there is a trading market in those securities.

I don't think as a political matter that it is likely that the Congress is going to rescind either the Securities Act of 1933 (1933 Act) or the Securities Exchange Act of 1934. We will continue to view our jobs as trying to make the process more efficient and at the same time continuing to have a process by which shares are registered prior to offering and sale.

The impact of internationalization on the U.S. markets, as seen from our statutory mandates, seems to be twofold. One element is the impact on the integrity and efficiency of the U.S. capital markets. That's the external impact. How does it affect what's going on in the United States? That is a principal focus of the work of the SEC's Enforcement Division and the Memoranda of Understanding (MOUs) into which the SEC has been entering, and of the Division of Market Regulation in terms of how it impacts on the trading in the United States of IBM stock, for example, if you're trading in London in that stock, and you have questions of stabilization when you have an offering.

You have questions of marketmaking, so the market regulation rules basically have to be coordinated in some fashion with the other jurisdictions. In addition, they have to deal with the questions of broker-dealer registration. If a foreign broker-dealer is taking certain action that in essence gets it involved in selling securities in the United States, even though it is doing it offshore the question of registration in the United States has to be considered. With the telephone now, one can be in London and really be conducting business over here. So, there is a large initiative aimed at coordinating with the other jurisdictions to harmonize the surveillance and enforcement efforts and to provide assurances that each jurisdiction would be able to get information in the context of an investigation offshore with respect to activities that have had an impact in that jurisdiction, even though the participants may be offshore.

The SEC has been quite successful in entering into various MOUs that basically deal with the point at which the foreign jurisdiction will get the information or will help the SEC get the information that it might not be able to get under an administra-

tive subpoena because of problems of getting personal jurisdiction on the foreign person.

The second area where internationalization has an impact is the effect on competitiveness of the U.S. issuers, the U.S. markets, and intermediaries. That subject is more in Corporation Finance’s area. As you all know, the 1933 Act says that if one is going to offer securities to the public in the United States or to U.S. persons, those securities must be registered.

Registration currently is the “boogie man” for foreign issuers. They are not keen to come into the United States and subject themselves to SEC jurisdiction. I don’t know whether it’s because they haven’t met us and don’t know how charming and reasonable we are, but there is a great reluctance to subject themselves to the SEC’s jurisdiction.

There is also a substantial concern with having to comply with SEC disclosure requirements. There have been a number of efforts to accommodate foreign concerns. One notable area has been disclosure of the remuneration of officers and directors. By tradition, I guess, in other jurisdictions investors and the public generally don’t have that much information about management remuneration. It’s a difference in culture. In the United States, I think the public believes it should know every cent that the directors or the management are getting. There have been accommodations made for foreign issuers in this regard.

The area in which there has been the least accommodation made is in accounting and auditing. It is important to understand the problem with which the Commission is faced, because this is really the major impediment to a harmonization or development of a reciprocal approach to disclosure.

Auditing goes to the heart of the integrity of the financial statement. So, as an investor protection concept, it is very difficult to say why IBM should be required to have a physical check of the inventory, but Rolls Royce would be allowed to come in without such a check. Auditing is also probably the most cost-intensive area of compliance. It really translates into dollars and cents for the issuer. If we in the United States were to say that IBM has to incur—I don’t know why I keep using IBM; it could be any U.S. company—if IBM were to have to incur the cost of a physical inventory, and it cost $10 million over two years, or whatever, but Rolls Royce could come in and didn’t have to have a physical check, Rolls could eliminate that $10-million cost. It’s the same security being sold to the same person, and for some reason that is undefinable the foreign person doesn’t have to do that, even though it’s a major burden on the domestic issuer.

So here, I would say, is the major obstacle to the integration of disclosure efforts. We nevertheless have been working on a reciprocal disclosure approach. The SEC issued a concept release in 1985\(^2\) in which it talked about the coming together of various jurisdictions and proposing two alternative approaches. One was that we should develop a common disclosure document. The federal government and the 50 states haven’t been able to develop a common disclosure document for the last 50 years, and I don’t know why we think it would be any easier to do it with France or Germany or Great Britain. I think most commentators on the concept said just that: “Love the idea—it certainly would make life easy, but it won’t be in our lifetimes.” The other idea was the reciprocal approach, that is, allowing use of a company’s home-state document to meet the disclosure obligations for the United States. That is the concept that the SEC is attempting to develop and implement. The big problem,
of course, is that we have to find jurisdictions in which the accounting and auditing standards are so similar to the United States that accepting the differences that do exist will not impair the protection intended for investors and will not create a tremendous disparity between compliance costs for domestic and foreign issuers.

Right now we are dealing with Ontario and Quebec, and Great Britain. Whether we extend reciprocity to other jurisdictions depends on further analysis of how close the auditing and accounting standards are. Even with Canada and Great Britain there are differences. Undisclosed reserves continue to be permitted in Great Britain, which is particularly difficult for us to deal with in financial institutions. So there continue, even in those jurisdictions that one would think would be broadly acceptable to us in their practices and usages, to be significant differences. Thus, I'm not quite certain how quickly this reciprocal approach is going to be implemented.

Another concern in internationalization for the United States is that U.S. investors want to have the full gamut of investment opportunities. As you look at the institutional market, at the institutional investors who now predominate, they basically come to the SEC and say: "Thank you very much for your protection, but forget it: I would rather have the opportunity to invest in this security that you, by your regulation, are deterring from being offered to me!"

The way that deterrence works is either the foreign issuer won't come to the United States, or, even if the U.S. investor chooses to go offshore, the foreign issuer will not sell to him because there continue to be concerns under section 5 of the 1933 Act as to whether registration is required. The foreign issuer, or the U.S. issuer who is offering offshore, will not allow U.S. investors to participate in the offering. So the U.S. investor who goes offshore has to buy in the secondary market rather than in the primary offering, which may prove costly. The more sophisticated investors have become, the more likely that they will see the regulatory burden as being a burden on them, rather than simply a cost of compliance to the issuer. So we have U.S. investors coming to the SEC and saying: "Could you please clarify the law?" "Clarify" frequently means to define it more narrowly, so that they are provided greater investment opportunities.

Thus, the SEC has undertaken, in addition to the reciprocal disclosure approach, to redefine the scope of the registration obligation. That process is being done on a territorial approach. Historically there has been a perception that the registration obligation applies to all offerings and sales to U.S. persons wherever they are located. So like the Roman citizen the U.S. investor carries U.S. laws around on his back; even if he's lived in France for the last 30 years, he's got the 1933 Act right there to protect him if someone sells him securities and uses the means of U.S. interstate commerce.

The SEC is developing a proposal for a new approach that essentially will say that the SEC now reads section 5 as being intended to protect investors in offers for sale within the territorial limits of the United States, in other words, in the U.S. capital markets. Under this rule, an offshore transaction will be beyond the reach of section 5. Thus, for example, even if it involves a sale to U.S. investors.

Finally, the third effort that we are engaged in is not a purely international effort—it is designed to help domestic issuers as well, but we think its international implications are considerable. It is the development of a rule called "Rule 144A." In a sense, it is accepted now that there is such a thing. It's a parallel, for those of you who are practicing lawyers, to Rule 144, a safe harbor rule for public resales of restricted securities. Well, we now have the 144A safe harbor for institutional resales, i.e., qualifying "resales to institutional buyers" would not involve a "public distribution." As a result, under such a rule on investor buying in a private placement, and reselling to a qualified institution, would not raise section 5 concerns. What, again, this attempts to
do is to recognize that the 1933 Act was intended to protect the public, but not necessarily the sophisticated professional investor. If institutions are permitted to trade among themselves, the foreign issuers have another route into the U.S. capital markets. They will not have to become subject to the SEC's jurisdiction through the registration process. They can come and have a private placement here and notwithstanding the fact that the securities are restricted securities they could be traded freely in an institutional market. The discount that normally would be taken on restricted securities either would be eliminated or at least greatly reduced, which would make it more attractive to resort to the private placement market.

Investor protection is our basic mandate; and the same time the SEC must take into account the competition of other markets, and the fact that investors feel at present that regulation is hurting them more than it is helping them. This gives an overview of the issues presented to the division by the internationalization of corporate finance.

Remarks by Roger J. Goebel*

My topic is "Recent Developments in European Economic Community (EEC) Securities Law Harmonization." I think I should start by raising a question that many students and quite a few practitioners often raise, which is why is the EEC concerned with securities regulation at all? There is a general awareness that the EEC is a customs and trade union, a very major player in international trade affairs, concerned also with active antitrust enforcement. But what does the EEC have to do with securities? The answer is that the EEC is far more than what many Americans, and even some sophisticated American lawyers, realize it is.

Among the fundamental purposes listed in article 3 of the Treaty of Rome are free movement of goods and free movement of capital. There is also article 54, which guarantees rights of freedom of establishment among the member states, and even a specific reference in article 54(g) on the coordination of safeguards for shareholders. Thus, in the drafting of the treaty itself, the drafters foresaw to some extent the current securities law activity of the EEC.

Among the most important aspects of the treaty, particularly today, is the EEC's ability to legislate to achieve harmonization of specific fields of law. The American Society of International Law is concerned principally with public international law, all too often referred to as only "soft" law, but I have the pleasure this morning of talking exclusively about a form of "hard" law. The EEC's harmonization of securities law constitutes legislation, even though it takes the juridical form of a "directive," or instructions to member states to pass laws or regulations to achieve a particular legislative goal.

Harmonization of member state laws is undertaken under article 100. Until the treaty amendments of the Single European Act in 1987,1 article 100 required unanimity, but today harmonizing directives can be passed by a "qualified" majority vote of the Council of Ministers. This new ability to act by majority vote should increase the speed of harmonization of laws, including securities law harmonization.

As early as 1968, the EEC began passing directives in the field of company law harmonization and indeed ongoing efforts toward harmonization continue to this day. Some of you may have heard of the famous—perhaps infamous—draft Fifth Directive on company law harmonization, which has never been adopted because of the diffic-

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1Reprinted at 25 ILM 503 (1986).