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London as Delaware?

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I. Introduction

Jurisdictional competition in corporate law has long been a staple of academic – and sometimes, political – debate in the United States. State corporate law, by long-standing tradition in the United States, determines most questions of internal corporate governance – the role of boards of directors, the allocation of authority between directors, managers and shareholders, etc. – while federal law governs questions of disclosure to shareholders – annual reports, proxy statements, and periodic filings. Despite substantial incursions by Congress, most recently in the Sarbanes-Oxley Act,¹ this dividing line between state and federal law persists, so state law arguably has the most immediate impact on corporate governance outcomes.

Companies have a good deal of discretion in choosing their state of incorporation. The allocation to the states of primary authority over corporate governance, when combined with the “internal affairs” doctrine, which holds that courts must apply the law of the state of incorporation to corporate law disputes, has created a regime of “issuer choice” in state corporate law.² Corporations are free to choose the law of the state that best suits the needs of their directors, managers and shareholders, without regard to where the corporation principally does business. States can compete to attract firms by offering the most attractive

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

² On the history of the internal affairs doctrine, see Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. Corp. L. 33 (2006).

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menu of corporate law rules. This competition for corporate charters is not just about state pride: States that attract incorporations are rewarded with tangible benefits in the form of charter fees. Of equal importance, incorporations are also likely to produce work for the state's lawyers, who may be an influential lobbying force.³

Critics of issuer choice argue that states compete by pandering to corporate managers. These critics charge that states are caught in a "race to the bottom," catering to management by providing rules which promote management entrenchment at the expense of shareholders.⁴ According to this view, states prevail in this competition by leaving shareholders vulnerable to overreaching by corporate managers. These critics point to state antitakeover laws as evidence for their position.⁵ On the other side, advocates for state control over corporate governance respond that competition between states for corporate charters generates a "race to the top." According to this camp, competition in the capital markets compels managers to offer shareholders corporate law rules that effectively constrain the agency costs inherent in the separation of ownership and control.⁶

Whether the race is to the top or the bottom, Delaware has clearly prevailed in the competition for corporate charters. That state draws a clear majority of the nation's largest public companies to incorporate under its corporate code, despite its relatively small population and share of the national economy.

Lately, the topic of jurisdictional competition has spread from corporate law to its close cousin, securities law. Historically, issuers listed their stock for trading on one of the exchanges

³ Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 Hofstra L. Rev. 1131 (2005).

⁴ William Cary, *Federalism and corporate law: reflections upon Delaware*. 83 Yale L.J. 663 (1974).

⁵ See, e.g., Lucian A. Bebchuk & Alan Ferrell, *A new approach to takeover law and regulatory competition*. 87 Va. L. Rev. 111 (2001).

⁶ Ralph K. Winter, *State law, shareholder protection, and the theory of the corporation*. 6 J. Leg. Stud. 251 (1977).

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in the country where they principally did business. Improvements in communication and related technologies, however, have made possible an *international* market for stock exchange listings that resembles in many respects the long-standing *federal* market for corporate charters in the United States. In an era when businesses are consolidating across national boundaries to create international conglomerates, the notion of a corporation having a “home” country seems increasingly archaic. Corporations, at least those of a certain size, are now citizens of the world, although they may have some identification with the jurisdiction where their headquarters are located. Today, corporations around the world realistically can choose the location, or locations, where they want to raise capital. Moreover, they can also choose where they want their common shares to trade. They are not limited to their “home” country in making these critical business decisions, and the capital raising decision need not be linked to the listing decision.

Academic commentators have offered their views on the normative desirability of issuer choice in world-wide market for listings for close to a decade now.⁷ More recently, groups more intimately involved in live policy disputes have entered the fray. The last few years – not coincidentally following closely the enactment of the Sarbanes-Oxley Act – have seen a flurry of reports bemoaning the decline of American competitiveness in the market for international listings.⁸

⁷ See, e.g., Roberta Romano, Empowering Investors, A Market Approach to Securities Regulation, 107 Yale L.J. 2359 (1998); Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. Cal. L. Rev. 903 (1998); Merritt B. Fox, Mandating Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment, 85 Va. L. Rev. 1335 (1999); James D. Cox, Regulatory Duopoly in U.S. Securities Markets, 99 Colum. L. Rev. 1200 (1999).

⁸ See, e.g., Committee on Capital Markets Regulation, Interim Report of the Committee on Capital Markets Regulation (2006); McKinsey & Co., Sustaining New York’s and the US’ Global Financial Services Leadership (2007); Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations (2007).

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As of today, the primary contenders in that listing market are New York and London. These cities have long dominated the competition for international listings, with New York the historic leader. Not coincidentally, those two markets have also long been the deepest and most liquid; liquidity attracts listings. The source of that liquidity is hotly contested, and the competition for listings between the U.S. and the U.K. raises important and interesting policy questions. In this essay, I want to put aside those normative topics. Instead, I want to focus on prediction— can we pick a winner in this market? Is London or New York likely to prevail in the battle for corporate listings?

This international question can be explored through the historical lens of our domestic competition for corporate charters. In this essay, my central claim is that Delaware has prevailed in that competition by being highly attuned to demands by directors who choose the site of incorporation. That responsiveness is driven, in part by its small population and relatively insignificant share of the U.S. economy. Delaware has very few public companies, which limits the number of managers and shareholders who might seek to influence the direction of its corporate law. Translating this insight to the market for exchange listings. London is the smaller, and therefore potentially more nimble, of the two primary international contenders. Should we expect the David of London to prevail over the Goliath of Gotham?

I proceed as follows. I begin in Part II by exploring how Delaware has managed to prevail in the domestic U.S. market for corporate charters. Part III then looks at the development of the international market for corporate listings and compares the strengths and weaknesses of London and New York in that competition. In Part IV, I assess whether London shares Delaware's advantages in jurisdictional competition. Is London likely to prevail in the

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market for listings? My answer, ultimately, is no. In the long term, New York is likely to lose in the market for listings, but so is London. I offer some concluding speculations about the effect of democracy on the market for listings in Part V.

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II. Jurisdictional Competition: The Delaware Advantage

A. Statutes

Does Delaware corporate law differ from that of other states in a way that is likely to appeal to directors choosing a state of incorporation?⁹ Recent work suggests that the competition for corporate charters is largely bilateral: States compete with Delaware in an effort to retain corporate charters.¹⁰ Notably, Delaware does not compete on price: Delaware incorporation fees are generally higher than those charged by other states, and incorporating in Delaware does not produce any particular tax advantages. If we look at the substance of the law, what is on offer in Delaware? The differences between the Delaware General Corporation Law and its main competitor, the Model Business Corporation Act (adopted in over forty states) are slight, so doctrinal analysis yields few obvious clues.¹¹ Notably, egregious forms of self-dealing, such as looting and tunneling, are proscribed by all of the states, although procedures for enforcing those proscriptions may vary from state to state. So nowhere in U.S. corporate

⁹ Different corporate laws may be better or worse for different corporate constituencies. In particular, restrictions on payouts to shareholders may appeal to creditors, potentially decreasing a firm's cost of debt. Wald and Long find that firms incorporated in states with tighter payout constraints, including California, Cal. Corp. Code § 500, and New York, N.Y. Bus. Corp. Law § 510, carry lower levels of debt than do firms incorporated in Delaware, which does not impose a fixed payout constraint. See Del. Gen. Corp. L. § 170. Wald, J. K., M. S. Long, The Effect of State Laws on Capital Structure, 83 *Journal of Financial Economics* 297 (2007). Mansi et al. find that firms from states that restrict payouts have better credit ratings and lower yield spreads. They also find antitakeover statutes reduce the cost of debt for investment-grade firms. Mansi, S.A., W.F. Maxwell, J.K. Wald, Do State Laws Matter for Bondholders? Working Paper, Virginia Tech (2006).

¹⁰ Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching, 150 *U. Pa. L. Rev.* 1795 (2002).

¹¹ Romano finds that firms are likely to reincorporate in Delaware before committing to a program of mergers and acquisitions. Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 *Journal of Law, Economics, and Organization* 225 (1985). Delaware, with its doctrine of "independent legal significance," gives corporations flexibility in structuring transactions and will not import procedures applicable to one type of transaction into another type. *Heilbrunn v. Sun Chemical Corporation*, 150 A.2d 755 (Del. 1959) (rejecting "de facto merger" claim). This doctrine takes on practical importance in allowing acquiring corporations to avoid shareholder votes and appraisal rights in most circumstances. Delaware corporations can set up a holding company structure without a shareholder vote, Del. G. Corp. L. § 251(g), which allows Delaware corporations to complete acquisitions through a triangular merger using a subsidiary without triggering a shareholder vote or appraisal.

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law will we find the tolerance for kleptocracy that discourages outside investment in many developing nations.

With explicit self-dealing plainly prohibited in all U.S. jurisdictions, some scholars have focused on managers' quest for self-preservation. Antitakeover provisions are thought to promote management entrenchment; perhaps these provisions drive the competition for charters?¹² Do antitakeover provisions explain Delaware's dominance in the competition for corporate charters? Although Delaware's anti-takeover statute is generally considered less protective of management than most other states, these differences in anti-takeover statutes may have little practical effect. Delaware courts have clearly validated the use of the poison pill to ward off takeovers, so managers of Delaware corporations are relatively immune to external threat. And firms at the IPO stage can make this defense effectively invulnerable by adopting a staggered board, even in relatively takeover friendly Delaware.¹³ Despite managers' ability to

¹² Although intuitively plausible, the evidence for this proposition turns out to be rather thin. See Murali Jaganathan & A.C. Pritchard, *Does Delaware Entrench Management?* (Working Paper, University of Michigan 2009) (finding that companies incorporated in states with stringent antitakeover protection do not have a lower rate of management turnover).

¹³ A substantial portion of the preference for anti-takeover provisions found by Subramanian, see *supra* note, may be explained by the exodus from California. California does not provide any explicit anti-takeover statutes, although its corporate code does make it very difficult to cash out minority shareholders, Cal. Corp. Code §1101(e), which may provide some secondary anti-takeover effect. Unlike most anti-takeover provisions, however, this provision is not subject to waiver by the target company's board. Avoiding this provision may push firms headquartered in California to incorporate in Delaware. California also stands out in that the validity of the poison pill has not yet been established there; the pill may run afoul of that state's provision precluding discrimination among shareholders. Cal. Corp. Code § 203. In Delaware, by contrast the validity of the pill is firmly established, although there are limits on the type of pill that can be adopted.

If the quest for anti-takeover protection were the primary motivation for fleeing California, however, Delaware seems an unlikely destination: the neighboring state of Nevada not only has a statutory language validating poison pills, Nev. Rev. Stat. § 78.195(5), 87.350(4), & 78.378(3), but also gives director greater discretion in redeeming pills than Delaware does. Nev. Rev. Stat. 78.139. Moreover, Nevada not only has a business combination statute, Nev. Rev. Stat. 78.438, with fewer exceptions than Delaware's, Del. G. Corp. L. § 203, but unlike Delaware, it has a control share statute. Nev. Rev. Stat. §78.379. In addition to Nevada's relatively stringent anti-takeover protections, it is also cheaper than Delaware, both in terms of franchise fees, and in terms of potential litigation costs. Taking all of these factors together, it seems unlikely that California firms choose Delaware incorporation for anti-takeover reasons.

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construct their own antitakeover defenses, Guhan Subramanian finds that firms are more likely to incorporate in the state where their headquarters are located if that state has adopted antitakeover statutes.¹⁴ Rob Daines, however, argues that Delaware's relatively mild antitakeover statute may minimize management entrenchment. He shows that takeover activity is not lower in Delaware.¹⁵ These findings suggest that firms may sort themselves based on their willingness to be taken over. Particularly for firms incorporated in states with stringent antitakeover protection, incorporating in Delaware may be akin to putting a "For Sale" sign on the door of the company's headquarters. This sorting hypothesis may be undermined, however, by Marcel Kahan, who, after controlling for other factors that might influence choice of incorporation, finds no evidence that firms are likely to incorporate in states with antitakeover statutes.¹⁶

In any event, these scholars may be looking under the wrong lamppost for the explanation of Delaware's advantage in the competition for charters. Delaware dominated the market for charters long before the advent of antitakeover provisions. Gordon Moodie shows that Delaware reincorporations surge after Delaware adopts liability protections for directors.¹⁷ To be sure, under the corporate law of virtually every state, the combination of the business judgment rule, stringent demand requirements, and broad statutory exculpation provisions

¹⁴ Subramanian, *supra* note. Lucian A. Bebchuk and Alma Cohen report a similar finding. *Firms' Decisions Where To Incorporate*. 46 *Journal of Law and Economics* 383 (2003).

¹⁵ Robert Daines, *Does Delaware law improve firm value?* 62 *Journal of Financial Economics* 525 (2001).

¹⁶ Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?* 22 *Journal of Law, Economics, and Organization* 340 (2006).

¹⁷ Gordon Moodie, *Forty Years of Charter Competition: A Race To Protect Directors from Liability?* Working Paper, Harvard University (2004). Heron and Lewellen find positive abnormal stock returns for firms reincorporating for the purpose of obtaining liability protections for directors, suggesting that shareholders are cognizant of the role of such protections in attracting quality outside directors. Randall A Heron and Wilbur G. Lewellen, *An Empirical Analysis of the Reincorporation Decision*, 23 *Journal of Financial and Quantitative Analysis* 549 (1998).

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means that directors face vanishingly small probabilities of being held personally liable for their acts as directors.¹⁸ Even if the probability of liability is low, however, directors may take a special interest in provisions protecting them from personal liability if the states' corporate law does not differ very much on other margins. Liability concerns are likely to be salient for outside directors, who have limited ability to control the firm's litigation exposure because they do not make day-to-day business decisions. Among outside directors, directors who serve multiple firms are most likely to be concerned about the potential for personal liability because each additional board membership increases the threat of liability.¹⁹ And directors, after all, make the decision where to incorporate. The lawyers who advise those directors are also likely to focus on liability concerns, and lawyers are the most common instigators of reincorporation decisions.²⁰ Consistent with this line of reasoning, Kahan finds that states that have not adopted a liability limitation are significantly less likely to retain firms headquartered in their states.²¹

B. Judges

¹⁸ Bernard Black, Brian Cheffins, & Michael Klausner, *Outside Director Liability*, 58 *Stanford Law Review* 1055 (2006). Delaware law does not differ significantly from the M.B.C.A. on the question of the standard of care or the protections of the business judgment rule. The M.B.C.A. also tracks Delaware law closely on the question of liability exculpation for breaches of the duty of care; if any thing the M.B.C.A. may be slightly more generous to directors. Compare M.B.C.A. § 2.02 with Del. Gen. Corp. L. § 102(b)(7).

¹⁹ Delaware law is particularly generous on indemnification. Delaware directors who prevail in a lawsuit against them have a statutory guarantee of indemnity from the corporation for the expense of their defense, (Del. Gen. Corp. L. §145(c)), which may be considerable. States following the Model Business Corporations Act also provide for guaranteed indemnification, but that provision requires complete exoneration (M.B.C.A. §8.52), whereas Delaware requires indemnification for partial success. See *Merrit-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. Sup. Ct. 1974). Delaware may also be more generous in allowing companies to provide permissive indemnification. Compare Del. Gen. Corp. L. §145(f) with M.B.C.A. §8.59. These differences are muted, however, by insurance policies, which are universal, and go beyond indemnification in the range of conduct that can be covered.

²⁰ Romano, *supra* note.

²¹ Kahan, *supra* note.

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Beyond differences in exculpation and indemnification, Delaware may promise directors more subtle advantages. Kahan finds that firms are more likely to incorporate in states with high quality judicial systems and flexible corporate law rules, two characteristics for which Delaware is well known.²² Commentators suggest Delaware's experienced and expert judges who sit on its Court of Chancery may play an important role in protecting shareholder interests.²³ That role is necessarily muted, however, by the very low probability that a director will be held personally liable. The low probability of liability suggests that experienced and expert judges are not important because they are likely to intervene to protect shareholder interests, thereby inducing Delaware board members to act as faithful monitors. Instead, an alternative causal story would suggest quality judges are important because they are likely to give directors comfort that they will *not* face liability because the judges produce litigation outcomes that predictably shield directors.²⁴

To be sure, Delaware law could afford directors total security by granting them complete immunity from litigation; Delaware has not gone down that path. Instead, it simply guarantees that when litigation is brought, the directors will not be held personally liable.²⁵ The predictability of Delaware law is further bolstered by the large stock of precedents to which its courts can look in deciding cases. Delaware's combination of expert judges and relatively comprehensive precedent provides a predictable body of law, at least on the salient point of the potential for director liability. Notwithstanding the slim chance that a director will be found liable, the experience and expertise of Delaware judges may allow them to play an important

²² Kahan, *supra* note ; see also Romano, *supra* note.

²³ Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 *University of Cincinnati Law Review* 1061 (2001).

²⁴ Romano, *supra* note.

²⁵ Macey, *supra* note.

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“shaming” role, publicly rebuking outside directors for inattention to their duties even while excusing them from liability.²⁶ The Delaware Supreme Court’s recent *Disney* decision is a prominent example of this style of decisionmaking.²⁷ Moreover, the impact of Delaware judges is likely to be amplified by the attention given to their decisions by the media and legal academics. Directors may be signaling their quality by pushing their firms to incorporate in Delaware, thereby announcing a willingness to have at least their reputation be held publicly accountable to shareholders through litigation.²⁸ That willingness is undoubtedly bolstered, however, by the knowledge that they will not personally bear the consequences of suit. The company’s D&O policy will cover the costs of suit, and that policy will pay any settlement. The directors will not be out of pocket. Their houses and retirement funds are safe.

The *Citigroup* decision is a timely exemplar of the predictability of the Delaware judiciary.²⁹ In that case, the plaintiff shareholders attempted to hold Citigroup directors liable in a derivative action for failure to monitor the bank’s risk taking in subprime mortgage market. Chancellor Chandler framed the theory of liability as a *Caremark* claim, i.e., a failure by the board to monitor management’s operation of the firm.³⁰ The court placed an “extremely high burden” on the plaintiff to show that the directors had acted in “bad faith,” which it defined as “particularized facts that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its risk or *consciously* disregarded the duty to

²⁶ Edward B. Rock, *Saints Sinners: How Does Delaware Corporate Law Work?* 44 *UCLA Law Review* 1009 (1997).

²⁷ *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (2006).

²⁸ Edward M. Iacobucci, *Toward a Signaling Explanation of the Private Choice of Corporate Law*, 6 *American Law and Economics Review* 319 (2006).

²⁹ *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).

³⁰ *Id.* at 121-122 (citing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)).

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monitor and oversee the business.”³¹ The rationale for this daunting standard was a familiar one: the need to preserve the board’s ability to exercise its discretion.

Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future. To impose liability on directors for making a “wrong” business decision would cripple their ability to earn returns for investors by taking business risks. Indeed, this kind of judicial second guessing is what the business judgment rule was designed to prevent, and even if a complaint is framed under a *Caremark* theory, this Court will not abandon such bedrock principles of Delaware fiduciary duty law.³²

The “bedrock principle” in a nutshell: Delaware courts will not second guess directors.³³ And so that principle was applied in this case as well, with the Chancellor rejecting the plaintiffs’ claims.

C. The Legislature

The Delaware legislature does its part to reassure outside directors as well. Delaware’s constitution requires a two-thirds vote of the legislature to amend the corporate law.³⁴ Moreover, the legislature further enhances predictability with virtually complete reliance on the corporate bar to screen any amendments proposed for the corporate code.³⁵ The combination of these structural features means that Delaware’s politicians have largely tied their hands when it comes to the corporate code. Partisan politics does not get entangled in the process of corporate lawmaking.³⁶ Consequently, interest groups and corporate

³¹ Id. at 125.

³² Id. at 126.

³³ Id. (“It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the “right” business decision.”).

³⁴ Del. Const. art. IX, § 1. Indeed, the custom is for changes to be approved unanimously. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1753 (2006).

³⁵ See Hamermesh, *supra* note , at 1754-1757 (describing the operation of the Council of Corporation Law Section of the Delaware State Bar Association that is responsible for proposing amendments to the Delaware corporate law).

³⁶ Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del. J. Corp. L. 885, 898 (1990).

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“reformers” – who have their own agenda – face substantial barriers when seeking changes in Delaware’s corporate law.

More importantly, the state has bonded a good deal of its tax revenue stream as a guarantee that it will not do anything reckless in the field of corporate governance. Some scholars suggest Delaware’s competitive advantage is tied, in part, to its small population, which ensures that franchise tax revenues will be a significant portion of its overall budget.³⁷ That budget contribution amounted to 15% of revenues in 2007.³⁸ The crisis du jour will inevitably be met with calls for populist retribution – see, e.g., Congress’s incursion into corporate governance with the Sarbanes-Oxley Act³⁹ – but the constituents of Delaware legislators are unlikely to be leading the call. Consequently, Delaware legislators are relatively insulated from the populist backlash that inevitably accompanies economic downturns. Insulating corporate lawmaking from the vagaries of democracy may be Delaware’s most important comparative advantage.

Not only does Delaware’s legislature protect directors from the tides of democracy, it also protects them from the unlikely event of judicial overreaching. Delaware’s reliance on charter fee revenues is a powerful incentive for legislative attentiveness to the topic of corporate law. Consequently, should Delaware’s judges slip and do the unpredictable, directors of Delaware firms can be confident that the Delaware legislature will step in to correct the problem. When the Delaware Supreme Court did the unthinkable in *Smith v. Van Gorkom*⁴⁰ – holding the directors of Trans Union personally liable for the careless sale of their company –

³⁷ Romano, *supra* note .

³⁸ State of Delaware, Comprehensive Annual Financial Report (2007), available at <http://www.state.de.us/account/cafr.shtml>.

³⁹ See text at *infra* notes .

⁴⁰ 485 A.2d 858 (Del. Sup. Ct. 1985).

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the Delaware legislature quickly restored equilibrium by allowing corporations to amend their charters to eliminate money damages for duty of care violations.⁴¹ The Delaware legislature's swift overturning of *Smith v. Van Gorkom* actually had the effect of accelerating Delaware reincorporations.⁴² Delaware created a shock to the system, and then benefitted from the ensuing uncertainty in the directors' and officers' insurance market by fixing the problem more swiftly than its peer states.

D. Summing Up Delaware's Comparative Advantage

The theme that unites these points is predictability for directors.⁴³ Delaware provides a relatively certain body of law that gives confidence to lawyers who are called upon to give advice to their clients. Delaware's predictability gives comfort to outside directors, who can sleep well at night if they serve on the board of Delaware corporations, regardless of the diligence of their monitoring. Corporate governance failures will inevitably be met with calls for draconian reform, and most worrisomely, the imposition of liability on the directors who were supposed to be minding the store. Directors of Delaware firms can be confident that those calls will be ignored. As *Citigroup* demonstrates, even amidst one of the worst financial crises of the century, Delaware directors can rest easy knowing that they are not going to be held personally liable for the fallout.

⁴¹ Del. Gen. Corp. L. § 102(b)(7).

⁴² Moodie, *supra* note.

⁴³ Hamermesh, *supra* note, at 1774 ("In predicting the trajectory of future struggle between federal and state governments over the establishment of corporate governance rules, count on Delaware to look for ways to make changes, if at all, that most nearly preserve intact the substance and balance reflected in the existing law.").

III. London and New York

London was the preeminent center of finance in the nineteenth century, leveraging its longtime status as a trading center.⁴⁴ That historical advantage provided by international contacts was bolstered by the new wealth created in Great Britain by the early rise of the Industrial Revolution there. The combinations of these factors meant that London enjoyed global ties and a deep source of capital, which it used to finance development around the world. Most conspicuously, the expansion of the U.S. industrial economy in that century was largely funded by the London capital markets. Despite this head start, London's lead was wiped away by the cumulative impact of two world wars and the burden imposed by the rapidly disintegrating British Empire. By the end of the second of those two wars, New York emerged as the world's preeminent financial center.⁴⁵

A. New York's Ascendance

It was not until the 1990s, however, that the world became small enough to allow New York to translate its status as a financial center into the ability to draw stock exchange listings from outside the U.S. During that decade, the New York Stock Exchange and the Nasdaq established themselves as trading venues not only for U.S. companies, but foreign companies as well.⁴⁶ Drawn by the unmatched depth and liquidity of the U.S. markets, foreign companies came to the U.S. to add to the investment pool available in their home jurisdiction. The U.S. exchanges of course had every incentive to be accommodating; more listings meant more fees for the exchanges and more commissions for their broker-dealers.

⁴⁴ Charles R. Geisst, *Wall Street: A History* 88 (1997).

⁴⁵ Mark Roe, *Legal Origins, Politics and Modern Stock Markets*, 120 *Harv. L. Rev.* 460 (2006).

⁴⁶ Luigi Zingales, *Is the U.S. Capital Market Losing Its Competitive Edge?* ECGI Working Paper Series in Finance, Working Paper No. 192/2007 (2007).

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New York's status as the world's leading financial center made it the preferred destination for companies choosing to cross-list on a stock exchange away from their home jurisdiction. New York led this competition through the 1990s, attracting 861 listings by foreign companies during that decade.⁴⁷ London trailed badly, garnering only 156 foreign listings during the same time period.⁴⁸ In 2000, 9 of the ten largest IPOs in the world took place in the U.S.; nearly half of the money raised by non-U.S. companies in IPOs came from listing on a U.S. exchange.⁴⁹ New York was riding high.

What did New York have to offer that London (and other jurisdictions) lacked? Listing in New York offered a certain prestige, making clear that a company was now "world class." More tangibly, New York offered liquidity – New York boasted a deeper pool of investment capital than London could provide at that time. Listing in the U.S. also provided valuable acquisition currency: common stock that could be freely traded in the U.S. For growing companies with international aspirations looking to acquire publicly-held U.S. companies, having stock that could be used as merger consideration offered considerable appeal. The alternative was using cash – an international currency that travels everywhere – but this would have required taking on more debt or offering stock in their home jurisdiction.

A more controversial claim for the New York advantage is that New York provided bonding; foreign companies could signal their integrity by exposing themselves to the rigors of

⁴⁷ Craig Doidge, G. Andrew Karolyi, Rene M. Stulz, Has New York become less competitive than London in global markets? Evaluating foreign listing choices over time, 91 J. Fin. Econ. 253, 259, Table 2. (2009).

⁴⁸ Id.

⁴⁹ Eric Pan, Why the World No Longer Puts Its Stock in Us, Cardozo School of Law, Working Paper No. 176, at 2-3 (2006).

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the U.S. disclosure and enforcement regime.⁵⁰ That regime offered foreign companies the opportunity to credibly precommit to limit self-dealing transactions. The mechanism for precommitment was not a ban on such transaction, but rather, disclosure requirements under exacting U.S. standards, backed by the threat of SEC scrutiny. The computerized surveillance systems of the U.S. exchanges also promised real teeth for enforcing insider trading rules and other prohibitions against market manipulation. Other countries have followed the U.S. lead in prohibiting insider trading, but enforcement of those prohibitions is either spotty or non-existent. Of equal significance for companies listing in the U.S., misstatements about a company's fortunes would be subject to the sting of SEC enforcement, generally regarded as step above that pursued in other jurisdictions, both in probability that violations would be sanctioned, as well as the size of sanctions.⁵¹

In response to lobbying by the exchanges, the SEC did its part to encourage foreign companies to list in the United States by relaxing a number of potentially expensive requirements for listing in the U.S. Most notably, the agency: (1) allowed foreign issuers to reconcile their accounts with U.S. GAAP, rather than requiring a new set of financial statements prepared in accordance with U.S. standards;⁵² (2) relaxed certain reporting requirements;⁵³ and (3) exempted foreign companies from the short-swing insider trading rule of § 16 and the proxy

⁵⁰ John C. Coffee, Jr. *Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 *Colum. L. Rev.* 1757 (2002).

⁵¹ John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 *U. Pa. L. Rev.* 229, n. 17 (summarizing LSE's treatment of foreign issuers). The probability of SEC enforcement against foreign issuers cross-listing in the U.S. was probably overstated. See Jordan Siegel, *Can foreign firms bond themselves effectively by renting U.S. securities laws?* 75 *J. Fin. Econ.* 319, 342 (2005) (finding that the SEC averaged two enforcement actions per year against cross-listed firms).

⁵² See Securities Act Form F-1.

⁵³ Exchange Act Rule 13a-13(b)(2) (exempting foreign issuers from quarterly reporting requirements); Exchange Act Regulation FD § 103 (exempting foreign issuers from Regulation FD's equal access to disclosure requirements).

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requirements.⁵⁴ Conspicuously, however, the SEC did not go so far as to allow foreign companies to merely comply with the disclosure requirements of their home jurisdictions (a “mutual recognition” regime). From the SEC’s perspective, U.S. standards were superior; they could be tinkered with around the edges, but wholesale waiver was not an option. Although the SEC was anxious to bring foreign companies to U.S. exchanges, it had to bear in mind that it bears “a significant political risk” from financial scandals involving foreign firms if American retail investors incur substantial losses.⁵⁵ Stock market losses due to financial scandal make the SEC unpopular; losses from fraud by foreigners are completely unacceptable.

Perhaps this explains why the SEC did not exempt foreign companies from the anti-fraud rules. Those anti-fraud rules carried with them the potential for SEC enforcement. More unpredictably, selling securities in the U.S. also exposed foreign issuers to §§ 11 and 12 of the Securities Act,⁵⁶ which carry liability for misstatements made in connection with public offerings, and Rule 10b-5 of the Exchange Act, which makes companies potentially liable for misstatements even when they have not been selling securities.⁵⁷ That liability risk, so frequently bemoaned by U.S. companies as increasing their cost of capital raising, made many foreign companies wary of dipping their toes into the U.S. waters. Indeed, the risk of private litigation – unheard of in other jurisdictions until very recently – was frequently cited by the executives of foreign companies as the most compelling reason for *not* listing in the U.S.⁵⁸

⁵⁴ Exchange Act Rule 3a12-3.

⁵⁵ Ethiopis Tafara & Robert J. Peterson, A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework, 48 Harv. Int. L.J. 31, 49 (2007).

⁵⁶ 15 U.S.C. §§77k & 77l.

⁵⁷ Exchange Act Rule 10b-5.

⁵⁸ McKinsey & Co., Sustaining New York’s and the US’ Global Financial Services Leadership, at 16 (2007).

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Those companies willing to face this risk by listing in the U.S. were sending a strong signal of their honesty and integrity (or more cynically, expected lack of volatility in their stock returns).

The twin burdens of SEC disclosure requirements and exposure to securities class actions made listing in the U.S. a costly proposition for foreign companies, notwithstanding the SEC's efforts at accommodation. The fact that a significant number of companies were willing to pay this price allowed the SEC to tell a happy story of a race to the top in the competition for international listings. The best companies sought to list in the U.S. because it had the best regulation, the story went. Left unsaid was the inference that companies that chose not to list in the U.S. had something to hide. Evidence of a listing premium for companies selling shares in the U.S. strongly supported the account.⁵⁹

B. The (British) Empire Strikes Back

This happy equilibrium for U.S. competitiveness did not last. London has overtaken – and by some measures surpassed – New York. The switch can be traced to 2001-2002, a period marked by two signal developments for the U.S. financial markets. First, the tech bubble collapsed, with the overheated Nasdaq market taking a precipitous dive. The U.S.'s thirst for “the next Microsoft” had seemingly abated overnight, perhaps quenched by the collapse of Enron and WorldCom. Second, and more tangibly, Congress reacted to the accounting scandals at those companies by enacting a host of new regulatory requirements in the Sarbanes-Oxley Act.⁶⁰ Collecting a hodge-podge of reforms, Congress: (1) federalized a portion of corporate governance;⁶¹ (2) took over the regulation of accounting firms from the private sector;⁶² (3)

⁵⁹ Craig Dodge et al. *Why are Foreign Firms Listed in the U.S. Worth More?*, 71 *J. Fin. Econ.* 205 (2004).

⁶⁰ Pub. L. No. 107-204 (2002).

⁶¹ Securities Exchange Act § 10A(m), 15 U.S.C. § 78j-1(m).

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imposed expensive internal controls and certification requirements;⁶³ and (4) adopted an array of new sanctions.⁶⁴ Most expensive of these requirements were standards relating to internal accounting controls, requiring both review and certifications of those controls by the CEO and CFO.⁶⁵ Foreign company executives proved less than enthusiastic about the spotlight afforded by those certifications. More importantly for the bottom line, especially of smaller (i.e., growth) companies, Sarbanes-Oxley required not only certification of those internal controls, but also auditor attestation as to their adequacy.⁶⁶ Auditors proved unwilling to sign off on internal controls that they had not reviewed – thoroughly – and audit costs skyrocketed.⁶⁷ Public companies were in no position to object to the demands of their auditors; terminating an auditor had become tantamount to an admission of fraud, so auditors now held the whip hand in their relations with their client companies. And the language of Sarbanes-Oxley offered no suggestion that the SEC was empowered to exempt foreign issuers from its reach.⁶⁸

The flow of foreign companies stopped, and more worryingly, reversed. After the SEC relaxed standards for foreign companies wanting to delist,⁶⁹ a flood of companies headed for the doors.⁷⁰ London seized the opportunity; fourteen of the top twenty IPOs listed on the LSE

⁶² Sarbanes-Oxley Act §§ 101-109, 15 U.S.C. §§ 7211-7219.

⁶³ Sarbanes-Oxley Act § 302, 15 U.S.C. § 7241.

⁶⁴ E.g., Sarbanes-Oxley Act, § 906, 18 U.S.C. § 1350.

⁶⁵ Sarbanes-Oxley Act § 404(a), 15 U.S.C. § 7262(a).

⁶⁶ Sarbanes-Oxley Act § 404(b), 15 U.S.C. § 7262(b).

⁶⁷ Cyrus Afshar and Paul Rose, Capital Markets Competitiveness: A Survey of Recent Reports, 2 *Entrepreneurial Bus. L.J.* 439, 449-451 (2007) (surveying studies of Sarbanes-Oxley costs).

⁶⁸ See generally Kenji Taneda, Sarbanes-Oxley, Foreign Issuers and the United States Securities Regulation, 2003 *Colum. Bus. L. Rev.* 715.

⁶⁹ Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15 (d) of the Securities Exchange Act of 1934, Exchange Act Release No. 34-55540 (Mar. 27, 2007).

⁷⁰ Committee on Capital Markets Regulation, Summary of Competitiveness Measures (2008) (noting that 15% of foreign firms listed on the NYSE delisted in 2007). See also Craig Doidge, G. Andrew Karolyi, & Rene M. Stulz, *Why*

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came from outside the U.K. in 2005 to 2008. By contrast, only four of the top twenty IPOs in New York came from outside the U.S.⁷¹ At the same time, London's pool of liquidity was growing deeper, as it developed its own community of hedge funds and private equity.

Still more ominously for New York, for the first time a small number of U.S. companies chose to list their shares in London, instead of New York.⁷² To be sure, most of the companies were not eligible for listing on the Nasdaq, much less the NYSE. A quarter of the U.S. firms, however, could have signed on to the Nasdaq, but instead opted for the London AIM market.⁷³ London, long known for its "light touch" regulation, based on principles, took the next step with the AIM market. The AIM market stood out for its minimal listing standards, essentially requiring only a sponsoring institution – a NOMAD – to vouch for the company.⁷⁴ Even listing on London Stock Exchange was less burdensome than New York; the LSE only required foreign issuers to comply with the disclosure requirements of their home jurisdiction.⁷⁵ London was providing an unencumbered source of liquidity, instead of the bonding opportunity provided in New York. London was winning the race, but the contest suddenly looked like a race to the bottom.

Do Foreign Firms Leave U.S. Equity Markets? Dice Center Working Paper 2009-3, Ohio State (March 2009) (finding that departing firms had lower growth prospects and capital requirements).

⁷¹ Review of the Competitiveness of London's Financial Centre, London: Winning in a Changing World, p. 13, Exhibit 3 (2008). See also Joseph D. Piotroski & Suraj Srivivasn, Regulation & Bodning: The Sarbanes-Oxley Act and the Flow of International Listings (2008), available at <http://ssrn.com/abstract=956987> (finding a shift in smaller firm listings post-Sarbanes-Oxley); Ashfar and Rose, *supra* note , at 457 (collecting data on decline of foreign companies listing in the U.S.).

⁷² Committee on Capital Markets Regulation, Summary of Competitiveness Measures (2008) (noting that 21% of U.S. IPOs were listed abroad in the first three quarters of 2008).

⁷³ Craig Doidge, G. Andrew Karolyi, Rene M. Stulz, Has New York become less competitive than London in global markets? Evaluating foreign listing choices over time, 91 J. Fin. Econ. 253, 263(2009) (finding that approximately 25% of the U.S. firms listing on AIM would qualify for Nasdaq.).

⁷⁴ London Stock Exchange, AIM Rules for Companies.

⁷⁵ Kathryn Cearns & Eilís Ferran, Non-Enforcement Led Public Oversight of Financial and Corporate Governances Disclosures and of Auditors, ECGI Law Working Paper No. 101/2008, at 34-35 (discussing regulation of European issuers in the UK).

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These developments suggested that in the competition for international listings, the U.S. may have repeated New Jersey's misstep in the competition for corporate listings. Delaware did not start out with the lead in the market for corporate charters. That honor belonged to New Jersey, which was the first state to attract corporate charters from companies located out of state in any significant numbers. New Jersey stole a march on New York, the more obvious location for incorporation in the late nineteenth century, by adopting an "enabling" model of corporate law, one that emphasized contractual freedom in corporate law.⁷⁶ New Jersey's reputation as a haven for incorporation was eviscerated overnight, however, by new laws pushed by Governor Woodrow Wilson in an effort to crack down on business trusts.⁷⁷ Corporations quickly fled south to Delaware, which had copied New Jersey's enabling approach, but did not follow when New Jersey took a more restrictive turn.⁷⁸ Delaware grabbed the lead and never looked back. In the market for corporate listings, the U.S. yielded its lead with enactment of the Sarbanes-Oxley Act. Can the U.K. dominate the listing market the way Delaware has dominated the charter market?

⁷⁶ Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 *J. Corp. L.* 323 (2007).

⁷⁷ *Id.* at 356-357.

⁷⁸ Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 *Del. J. Corp. L.* 249 (1976).

IV. Is London Delaware?

Can London sustain its new momentum? The U.K. has a number of characteristics that seem to mirror the factors responsible for Delaware's comparative advantage. Certainly the financial services industry is critical to the U.K., growing from 5.3% of the economy in 2001 to 9.4% in 2006,⁷⁹ and employing half a million people in London alone.⁸⁰ From a regulatory perspective, the U.K.'s credible and responsive Financial Services Authority might be viewed as the securities law analogue to the Delaware Chancery Court's role in corporate adjudication. The FSA's "light touch" approach to regulation gives London a predictability edge over New York, which is subject to the much more intrusive (and expensive) scrutiny of the SEC.⁸¹ London's unitary financial services regulator also reduces compliance costs in the U.K. relative to those imposed by the splintered regulatory structure found in the U.S., with its alphabet soup of federal and state agencies, regulating broker-dealers, banks and insurers.⁸²

Key to Delaware's ability to maintain and extend its lead in corporate charters has been the restraint of the Delaware legislature. That body was conspicuous in failing to succumb to the quest for populist retribution in the wake of Enron and WorldCom. (To be sure, the demand for revenge may have been mitigated by the fact that neither company was incorporated in Delaware.) Less restraint was shown at the federal level in the U.S. With the

⁷⁹ Review of the Competitiveness of London's Financial Centre, London: Winning in a Changing World, p. 13, Exhibit 4 (2008).

⁸⁰ Review of the Competitiveness of London's Financial Centre, London: Winning in a Changing World, p. 14, Exhibit 5 (2008).

⁸¹ McKinsey & Co., Sustaining New York's and the US' Global Financial Services Leadership, at 77 (2007) (reporting survey results of senior executives indicating greater perceived predictability of legal regime in the U.K.). The U.K.'s "light touch" approach should not be confused with a "laissez faire" attitude. See Eilís Ferran, Capital Market Competitiveness and Enforcement, Working Paper, University of Cambridge, at 6 (April 2008) (discussing recent enforcement actions brought by the FSA).

⁸² McKinsey & Co., Sustaining New York's and the US' Global Financial Services Leadership, at 81 (2007). On the U.K.'s transition to a unitary financial services regulator, see Eilís Ferran, Examining the UK's Experience in Adopting the Single Financial Regulator Model, Working Paper, University of Cambridge (2002).

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adoption of the Sarbanes-Oxley Act, the U.S. Congress demonstrated that it could not be trusted (at least in the eyes of foreign executives and directors). As noted above, the flow of foreign companies to New York largely dried up. By contrast, the British Parliament largely stayed on the sidelines at that time. For its part, the FSA pushed a set of “best practices” for corporate governance, backed only by a disclosure requirement for firms that chose not to follow the best practices directive.⁸³ That episode suggested that London would follow the Delaware example, affording it a comparative advantage over New York on the predictability front.

More recent events, however, suggest that the regulatory forces in London cannot be so reliably constrained. Consequently, its recently gained allure for listings may be more tenuous. Unlike Delaware, which has a small population and very few public companies headquartered in the state, the U.K., while benefitting from the financial services industry,⁸⁴ cannot completely insulate that industry from the political pressures (pathologies?) typical of modern democracies. Britain has many public companies headquartered there, and of greater current relevance, a substantial representation among the world’s largest banks. The response to the near failure of a number of those banks in the wake of recent credit crisis revealed that the British democratic process was not immune to the inevitable quest for a scapegoat.

⁸³ See Kathryn Cearn & Eilís Ferran, Non-Enforcement Led Public Oversight of Financial and Corporate Governances Disclosures and of Auditors, ECGI Law Working Paper No. 101/2008, at 55-60 (discussing UK Combined Code on Corporate Governance); Ashfar and Rose, *supra* note , at 461-463 (discussing “comply or explain” approach of the U.K. and listing countries adopting that approach).

⁸⁴ Alistair MacDonald & Cassell Bryan-Low, Turmoil Batters London’s Status as Financial Center, *Wall St. J.* A10 (Oct. 22, 2008) (citing government statistics that one in five jobs in the U.K. were in financial services).

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The British real estate market was infected by a bubble that paralleled the one that fueled the U.S. economy from 2002-2007, and the bubbles popped simultaneously.⁸⁵ Unlike 2002, when the British response to the collapse of Enron and WorldCom was quite restrained, the British response to the financial meltdown was conspicuously un-Delaware like. Indeed, the U.K.'s actions closely paralleled the populist backlash against the moneyed classes that emanated from Washington.⁸⁶

The initial British response was just as muddled as it was in the U.S. As the markets declined in 2008, the FSA responded by banning short selling for a long list of financial institutions.⁸⁷ This strategy of killing the canary in the coal mine, lest it die from the poisonous gases, was also pursued by the SEC, which introduced its own limits on short selling in an effort to keep the markets propped up.⁸⁸ The message for hedge funds and other liquidity providers was clear: Regulators and politicians in both Washington and London believed in the free play of market forces . . . until it became politically inexpedient. When the markets started to go south, policy makers on both sides retreated to the old time faith in government control, whether or not it was likely to be effective.⁸⁹ (For the record, it was not; the markets continued to plunge.)

⁸⁵ Alistair MacDonald & Cassell Bryan-Low, Turmoil Batters London's Status as Financial Center, *Wall St. J.* A10 (Oct. 22, 2008).

⁸⁶ Adam Nagourney, Bracing for a Bailout Backlash, *N.Y. Times* (March 16, 2009).

⁸⁷ Alistair MacDonald, U.K. Plans To End Ban on Shorting, *Wall St. J.* C3 (Jan. 6, 2009).

⁸⁸ Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934, Taking Temporary Action to Respond to Market Developments, *Sec. Exch. Act. Rel. NO. 58166* (July 15, 2008); SEC Press Release, SEC Halts Short Selling of Financial Stocks to Protect Investors and Markets, (Sept. 19, 2008); Joe Nocera, 36 Hours of Alarm and Action as Crisis Spiraled, *NY Times* (October 2, 2008). See also Jonathan Macey, The Government Is Contributing to the Panic, *Wall St. J.* A13 (Oct. 11-12, 2008) (criticizing SEC's restrictions on short sales).

⁸⁹ On the role of short sellers in price discovery, see Jonathan M. Karpoff & Xiaoxia Lou, Do Short Sellers Detect Overpriced Firms? Evidence from SEC Enforcement Actions, <http://ssrn.com/abstract=1102853> (showing that short sellers anticipate SEC enforcement actions); Ekkehart Boehmer, Charles, M. Jones, Xiaoyan Zhang, Which Shorts Are Informed? *Journal of Finance* (forthcoming) (showing that heavy short sellers outperform the market).

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As the credit crisis deepened, London, like was Washington, was also forced to step in and bail out a number of leading financial institutions.⁹⁰ The messy insolvency of Northern Rock pressured the government into adopting new legislation to ensure the orderly resolution of failing banks.⁹¹ And like Washington, London quickly followed up government control with populist retribution.⁹² Constituents were angry, and limits on executive pay were imposed on executives of financial institutions receiving bailouts on both sides of the Atlantic.⁹³ To be sure, no British politician sunk to the level of Senator Charles Grassley, who recommended ritual suicide for AIG derivatives traders who received performance bonuses after the government bailed out the insurance company.⁹⁴ (Never mind that the traders receiving the bonuses were not the ones responsible for the losses.⁹⁵) But British bankers did come in for vandalism of their

⁹⁰ Carrick Mollenkamp, Dan Ciulla, and Alistair MacDonald, U.K. Sheds Its Reputation for Bumbling, *Wall St. J.* A3 (Oct. 14, 2008); Carrick Mollenkamp, Sara Schaefer Muñoz, and Alistair MacDonald, U.K. Boosts Its Bailout As Bank Losses Rise, *Wall St. J.* A1 (January 20, 2009); Mark Landler, U.S. Investing \$250 Billion in Banks, *NY Times* (Oct. 14, 2008).

⁹¹ Banking (Special Provisions) Act 2008.

⁹² See Sara Schaefer Muñoz, Public Flaying for U.K. Bank Titans, *Wall St. J.* C1 (Feb. 11, 2009); Letter from Andrew M. Cuomo, New York Atty. Gen'l to Honorable Barney Frank, Chairman, House Committee on Financial Services (February 10, 2009) (describing Cuomo's investigation into payment of bonuses at Merrill Lynch after government sponsored merger with Bank of America).

⁹³ Alistair MacDonald and Sara Schaefer Muñoz, In U.K., Getting Tough With Nationalized Banks, *Wall St. J.* (Feb. 9, 2009) (describing reduced bonuses imposed by U.K. Treasury); Edmund L. Andrews and Eric Dash, Stimulus Plan Places New Limits on Wall St. Bonuses, *NY Times* (Feb. 14, 2009).

⁹⁴ Senate committee to explore taxing AIG bonuses, CNN.com (March 17, 2009), http://www.cnn.com/2009/POLITICS/03/17/aig.bonuses/index.html?erf=rss_topstories. The political witch hunt went hand-in-hand with harassment in executives' private lives as well. Many felt compelled to hire private security. See Jame Barron and Russ Buettner, Scorn Trails A.I.G. Executives, Even in Their Driveways, *NY Times* (March 20, 2009). The pressure for punitive taxation subsided after New York Attorney General Andrew Cuomo bullied most of the recipients into paying back their bonuses. DealBook, A.I.G. Memo Hints at Pressure From Cuomo, *New York Times* (March 24, 2009).

⁹⁵ Letter from Jake DeSantis, Executive Vice President, AIG to Edward M. Liddy, CEO, AIG, *New York Times* (March 25, 2009). Shockingly, the political backlash pushed a number of the AIG managers out the door, increasing the cost of unwinding the losing positions. Liam Plevin & Randall Smith, Action on AIG Unit May Cost Taxpayers, *Wall St. J.* C1 (April 13, 2009).

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homes and cars, not to mention bullying of their children at school.⁹⁶ To its credit, the British government stood placidly by while the U.S. Congress proposed a 90% tax rate on bonuses at financial institutions receiving government assistance. But the bureaucrats now in charge of the British banks cracked down in myriad irksome ways, such as limiting the use of car services and requiring employees to pay for their own meals on business trips.⁹⁷ Trivial matters perhaps, but for productive employees with alternative options, another factor pushing them out the door.

The message on both sides of the Atlantic was clear. Regulators told the public that their top priority was to free up lending markets. They sent a very different message to the bankers making the decisions about whether to make loans – if you make risky loans and they turn out badly, we are going to slash your pay. And if you accept bailout money to ameliorate the consequences of your risky lending, we may change the rules of the game retroactively.⁹⁸ Not surprisingly, bankers who were subject to the restrictions responded that they would repay the governments' bailout funds ASAP.⁹⁹ Banks that had not accepted money from the

⁹⁶ Sara Schaefer Muñoz and Leila Abboud, In Europe, Rage Over Crisis Hits Executives, *Wall St. J.* A7 (March 26, 2009); Julia Werdigies and Matthew Saltmarsh, *New York Times* (March 26, 2009) (reporting attacks on the property of the former CEO of the Royal Bank of Scotland).

⁹⁷ Landon Thomas, Jr., *British Bank Adapts to Life on a Leash*, *NY Times* (Feb. 6, 2009).

⁹⁸ David M. Herszenhorn, *To Chagrin of Republicans, Compensation Bill Passes*, *NY Times* (April 2, 2009) (describing bill that would allow Treasury Secretary to set compensation at firms receiving bailout money); Carl Hulse and David M. Herszenhorn, *House Approves 90% Tax on Bonuses After Bailouts*, *NY Times* (March 20, 2009); Jonathan Weisman, *Dodd's Amendment At Crux of Bonus Issue*, *Wall St. J.* A4 (March 19, 2009) (retroactive limits on bonuses eliminated from stimulus bill because of constitutional doubts); Deborah Solomon and Mark Maremont, *Bankers Face Strict New Pay Cap*, *Wall St. J.* A1 (Feb. 14-15, 2009).

⁹⁹ DealBook, *4 Banks Become First to Repay TARP Money*, *NY Times* (March 31, 2009); Andrew Ross Sorkin, *If Goldman Returns Aid, Will Others*, *NY Times* (March 24, 2009); Stephen Labaton, *Some Banks, Feeling Chained, Want to Return Bailout Money*, *NY Times* (March 11, 2009); Kate Kelly and Robin Sidel, *Aid Recipients Want to Give It Back Soon*, *Wall St. J.* A10 (Feb. 5, 2009).

Notably, a number of institutions in the U.S. had to be bullied into taking the bailout money in the first place. Mark Landler and Eric Dash, *Drama Behind a \$250 Billion Banking Deal*, *NY Times* (Oct. 15, 2008) (“It was a take it or take it offer.”)

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government loudly proclaimed that they would not be lining up at the trough,¹⁰⁰ and that they would be selling even strategically important assets to avoid that fate.¹⁰¹ Credit markets tightened in response, despite government efforts to jump start them.¹⁰²

The governments' message to the small group of bankers that were actually generating profits for the bailed out banks was that they should start looking for greener pastures at the healthier banks, or at unregulated entities.¹⁰³ In a situation where the U.K. might have distinguished itself by parting ways with the U.S., it succumbed to the populist backlash.¹⁰⁴ The CEO of the FSA warned that the bankers to blame for the crisis should be "very frightened" of the FSA; more ominously, he declared that "a principles-based approach does not work with individuals who have no principles."¹⁰⁵

The contours of that frightening regulation came into sharper focus with the publication of *The Turner Review* by the FSA.¹⁰⁶ The Chancellor of the Exchequer commissioned Lord Adair Turner, Chairman of the FSA, to review the events that led to the financial crisis and to

¹⁰⁰ Simon Nixon, Barclays Stresses Its Independence, Wall St. J. B10 (March 28-29, 2009); Sara Schaefer Muñoz, Barclays Stays Firm: No Capital From U.K., Wall St. J. C3 (Feb. 10, 2009).

¹⁰¹ Simon Nixon, For Barclays, Family Silver On the Block, Wall St. J. C10 (March 17, 2009) (discussing Barclays' plan to sell its iShares unit). See also Dan Cimilluca and Sara Schaefer Muñoz, Barclays Will Fund iShares Sale, Wall St. J. B1 (March 21-22, 2009).

¹⁰² David Enrich, Michael Crittenden, & Maurice Tamman, Bank Lending Keeps Dropping, Wall St. J. A1 (April 20, 2009) (reporting reduced lending by banks receiving bailout funds); Liz Rappaport and Jon Milsenrath, Consumer-Loan Plan Is Off to Slow Start, Wall St. J. A2 (March 19, 2009) ("Some investors are concerned that they too could be exposed a political storm should they make too much money from taxpayer-funded program.").

¹⁰³ Matthew Karnitschnig and Heidi Moore, Bankers Rush To the Exits, Wall St. J. C1 (Mar. 11, 2009) (chronicling departures in both London and New York). See also Citigroup Eyes New Ways to Pay Employees, NY Times (May 4, 2009) (detailing threat of employee defections from Citi's profitable energy trading business in response to limits on pay).

¹⁰⁴ See, e.g., Sara Schaefer Muñoz, Under Fire, a Top U.K. Watchdog Quits Post, Wall St. J. C3 (Feb. 12, 2009) (quoting John McCall, chairman of Parliamentary committee examining the banking crisis, asking bank executives: "Why do you think you are hated so much by the public?").

¹⁰⁵ Peter Tahl Larsen and Jennifer Hughes, FSA to 'frighten' with tough stance, Financial Times (March 12, 2009). See also Donald C. Langevoort, The SEC, Retail Investors, and the Institutionalization of the Securities Markets, 95 Va. L. Rev. at 12-13 (forthcoming, 2009) (predicting that FSA enforcement will become more stringent as more retail investors enter the market).

¹⁰⁶ FSA, *The Turner Review* (March 2009).

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recommend reforms.¹⁰⁷ Most of the proposed reforms, such as increased capital requirements, in particular for trading books, were predictable.¹⁰⁸ More importantly, major banks are in no position to resist, given their dependence on the promise of a government backstop. The focus on the need for capital requirements to be counter-cyclical will be more difficult to implement simply as a technical matter.¹⁰⁹ More controversial will be the proposal to limit pay structures thought to create undue risk.¹¹⁰ As a political matter, the proposal to expand regulation to cover entities deemed to be part of the shadow banking system will face the challenge of those entities fleeing offshore.¹¹¹ Underlying all of these proposals is a newfound skepticism of the efficiency of capital markets generally, and a distrust of the process of securitization specifically.¹¹² Although understandable in light of the dire circumstances that called for the review, does this new skepticism augur a considerably more interventionist attitude going forward? At a minimum, the report suggests that the U.K. will now be more sympathetic to attempts to suppress regulatory competition if it promises to limit risk taking.¹¹³

If the U.S. and U.K. both responded in a heavy-handed way the credit crisis, does this make it a wash from the perspective of regulatory competition? Perhaps, in the short term, but the response does not bode well for London's long term future. This crackdown on financial institutions creates the potential for bifurcating the financial sector into two spheres. The first,

¹⁰⁷ FSA, Press Release, The FSA publishes "The Turner Review": a wide-ranging review of global banking regulation (18 March 2009).

¹⁰⁸ Turner Review, *supra* note, at 53-60.

¹⁰⁹ Turner Review, *supra* note, at 61-67.

¹¹⁰ Turner Review, *supra* note, at 79-81.

¹¹¹ Turner Review, *supra* note, at 74 ("Tighter effective controls in offshore centers will, however, become more important over time as regulation is improved in the major onshore locations and as the incentives for regulatory arbitrage through movement offshore therefore increase.").

¹¹² Turner Review, *supra* note, at 39-42.

¹¹³ Mark Whitehouse, 'Big Bang' Pioneers Rethink Banking Overhaul, *Wall St. J. A11* (March 31, 2009).

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populated by the type of institutions that have populated the headlines during the ongoing credit crisis, consists of financial institutions that have been discovered by the government to be “too big to fail” because their insolvency would threaten the functioning of the financial system. Going forward, these institutions are likely to require the backing of a lender of last resort in order to have credibility with counterparties. If counterparties lose confidence in the ability of these financial institutions to perform, these massive entities can evaporate virtually overnight, as we witnessed with the demise of Lehman Brothers.¹¹⁴ The registration of Goldman Sachs and Morgan Stanley as commercial banks reflected their recognition of that market reality.¹¹⁵ As the *Turner Review* suggests, these large institutions are likely to face an array of regulation, including considerably more stringent capital requirements.¹¹⁶

The flip side of capital requirements, however, is the lower profits implied by constraints on leverage. The proprietary trading that drove bank profits during the boom years was fueled by leverage.¹¹⁷ Smaller bets will mean smaller paychecks.¹¹⁸ Not satisfied with limiting leverage, regulators may seek to limit pay directly for regulated institutions.¹¹⁹ Financial institutions are likely to tolerate this only if their business model requires the backstop of a very deep pocket. And London’s pocket is unlikely to be deeper than New York’s. Consequently,

¹¹⁴ Jon Hilsenrath, Deborah Solomon and Damian Paletta, Paulson, Bernanke Strained for Consensus in Bailout, *Wall St. J.* A1 (Nov. 10, 2008) (chronicling the government’s decision not to intervene to save Lehman Brothers).

¹¹⁵ Ben Prots, ‘Flawed’ SEC Program Failed to Rein in Investment Banks, *ProPublica* (Oct. 1, 2008).

¹¹⁶ Simon Nixon, U.K.’s Liquidity Rules May Drain Lending, *Wall St. J.* B10 (Dec. 6-7, 2008); Hugo Dixon, Separation Rule Is Not the Answer, *NY Times* (March 9, 2009) (“Tighter regulation ... should be quid pro quo for being allowed to take deposits the public or for being too big to fail.”).

More regulation is likely the best case scenario for these large institutions. The alternative is to simply break them up. Maya Jackson Randall, Economists Seek Breakup Of Big Banks, *Wall St. J.* A2 (April 22, 2009) (quoting Joseph Stiglitz: “We have little to lose, and much to gain, by breaking up these behemoths, which are not just too big to fail, but also too big to save and too big to manage.”)

¹¹⁷ Joe Nocera, It’s Not the Bonus Money. It’s the Principle, *NY Times* (January 31, 2009)

¹¹⁸ Robert Lenzner, Dimon, Munger, Rohatyn: No More Vegas, *Forbes.com* (Oct. 13, 2008).

¹¹⁹ Landon Thomas, Jr., Regulators Worldwide Scrutinize Bakers’ Pay, *NY Times* (Mar. 20, 2009) (discussing plan for regulators to control pay at financial institutions to limit risk taking).

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London's policies are unlikely to be more lax than those emanating from Washington – indeed, they may well be dictated by Washington.¹²⁰ If anything, London's regulatory crackdown may be more draconian than the U.S.'s, driven by new directives from the European Union.¹²¹

How do these developments in the financial services industry affect the competition for listings? Strong banks – commercial and investment – are one source of liquidity, but they do not dominate trading in the financial markets as they once did. Moreover, as capital requirements are ramped up for such entities, they will become even less important as sources of liquidity because they will need to rein in their proprietary trading. Traders have headed for the door rather than have their pay restricted.¹²² Where have they gone? To institutions that have not yet felt the backlash of political retribution. Institutional investors, such as pension funds, mutual funds, and increasingly, hedge funds, have become the predominant sources of investment capital and trading orders. London has become a leading center for such entities, rivaling New York.¹²³ But is the status of those two finance capitals as centers for institutional investors secure?

Tightened limits on leverage for institutions deemed “too big to fail” create opportunities for smaller institutions, whose business models do not require the backing of a lender of last resort. These entities will be harder to regulate. Governments are keen to do so in the wake of the financial crisis; politicians on both sides of the Atlantic put forward proposals

¹²⁰ Joe Nocera, *New York and London: Twins in Finance and Folly*, NY Times (May 9, 2009) (arguing that “Britain can’t regulate unilaterally anymore – it is simply too dependent on American institutions. Its regulatory response will be to mimic whatever the Obama administration decides to do.”)

¹²¹ Review of the Competitiveness of London's Financial Centre, *London: Winning in a Changing World*, p. 17.

¹²² Caroline Salas and Pierre Paulden, *Eat-What-You-Kill Bond Traders Rise From Wreckage*, Bloomberg.com (March 24, 2009) (discussing exodus of traders from large banks to boutique firms).

¹²³ McKinsey & Co., *Sustaining New York's and the US' Global Financial Services Leadership*, at 72 (noting 63% growth rate of hedge fund assets in the U.K. from 2003-2005 (2007)).

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to crack down on hedge funds and other sources of capital that have mushroomed in the last decade.¹²⁴ Among the more draconian ideas, the FSA has proposed requiring the disclosure of short positions.¹²⁵ The FSA already requires the disclosure of positions greater than 3%, in whatever form ownership takes.¹²⁶ The SEC responded with a proposal to restore its largely ineffective “up-tick” rule.¹²⁷ The Turner Review suggests more intrusive measures will be forthcoming, and the EU is likely to push strongly in that direction.¹²⁸

That impulse to regulate hedge funds and private equity, however, comes squarely up against the ever-increasing mobility of such institutions. These institutions can do business in Greenwich or London, but Bermuda, the Cayman Islands, Dubai, Ireland, Luxembourg, and Singapore, just to name a few, are also potential venues.¹²⁹ Smaller countries, like Delaware in the U.S. charter competition, are better able to precommit to predictable regulatory structures

¹²⁴ Edmund L. Andrews, *Battles Over Reform Plan Lie Ahead*, NY Times (March 27, 2009) (describing Obama administration proposal to regulate hedge funds); Jenny Strasburg, *Legislators Seek Hedge-Fund Disclosure*, Wall St. J. C2 (Feb. 2, 2009) (discussing proposed Hedge Fund Transparency Act); Peter Lattman, *Bill Aims for Disclosure by Private Equity*, Wall St. J. C3 (Feb. 4, 2009) (discussing application of proposed Hedge Fund Transparency Act to private equity); David Cho, *A Conversion in ‘This Storm,’* Washington Post A1 (Nov. 18, 2008); Cassell Bryan-Low, *A Blame Game For Bank Crisis*, Wall St. J. C3 (Jan. 27, 2009) (discussing Parliamentary inquiry into hedge fund practices).

¹²⁵ Cassell Bryan-Low, *U.K. Plans for Bears: Disclose All Bets*, Wall St. J. C2 (Feb. 9, 2009) (discussing proposal to disclose all short positions of more than 0.5% of a company’s shares).

¹²⁶ Financial Services Authority, *Disclosure of Contracts for Difference*, Policy Statement 09/3 (March 2009).

¹²⁷ Reuters, *SEC Looks At More Short-Selling Measures*, NY Times (March 11, 2009). Newly appointed SEC Chairman Mary Shapiro suggested that her agency needed more authority to regulate hedge fund activities, including disclosure of short-sale positions, restricting leverage and investments. Jesse Westbrook, *SEC Chief Schapiro Wants Authority to Make Hedge-Fund Rules*, Bloomberg.com (May 2, 2009).

¹²⁸ Cassell Bryan-Low & Alistair MacDonald, *EU Poised To Tighten Regulation*, Wall St. J. C2 (April 29, 2009); Reuters, *Hedge Funds Attack EU Draft*, NY Times (April 23, 2009).

¹²⁹ See Antony Currie & John Foley, *Breakingviews.Com*, *Asian Funds Rise*, NY Times (May 7, 2009) (“Greenwich and Mayfair, the hedge fund capitals of the United States and Britain, may be shrinking. But a new hedge fund center is sprouting in Hong Kong. More funds opened than closed in the territory last year, according to the Alternative Investment Management Association.”). See also *Review of the Competitiveness of London’s Financial Centre*, London: Winning in a Changing World, p. 21 (2008) (identifying jurisdictions that pose particular threats to London).

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because their economies tend to be underdiversified.¹³⁰ It is a safe bet that a number of these jurisdictions will be happy to commit to a “principles-based” regulatory approach now that the U.K. has announced a turn toward a “frightening” regulatory approach.¹³¹

Regulators are in the business of regulating; naturally they want to regulate as wide a domain as possible. The bifurcation between financial institutions that are too big to fail, and therefore require a government backstop, and those whose business models’ afford them greater mobility, poses new challenges to regulators’ domains. The end result may well be that regulators in the U.S. and U.K. wield overarching authority over financial institutions that are dependent upon government bailouts (or may need such bailouts in the future). These regulators wield such authority, however, at the risk of shrinking the sector to be regulated. The banks (and similar institutions) that are too big to fail will be closely monitored; smaller financial institutions are likely to flee to more permissive jurisdictions. Of course, the regulator’s impulse will be to try and suppress regulatory competition through international agreement on regulatory standards.¹³² That goal, however, faces immense collective action problems, with many countries not inclined to follow the lead of the U.S. and U.K.¹³³

The flight of liquidity providers is one very real threat to London’s new found ascendance in the market for listings. The other threat is improvement in trading technology; stock exchanges around the world now offer similar speed in executing orders. Increasingly,

¹³⁰ See generally Andrew Morriss, *The Role of Offshore Financial Centers in Regulatory Competition*, Illinois Law and Economics Research Papers Series, Res. Paper No. LE07-032, at 46-48.

¹³¹ Alistair MacDonald, *U.K. Watchdog Adds More Bark, Bite*, Wall St. J. C2 (January 5, 2009) (describing greater scrutiny of financial institutions and bigger fines for violations).

¹³² Adam Bradbery & Alistair MacDonald, *U.K. Puts Spotlight On Regulatory Gaps*, Wall St. J. C6 (May 8, 2009); Carrick Mollenkamp, Jelen Perry, and Alessandra Galloni, *Signs of the Future of Banking Emerge at Davos*, Wall St. J. A7 (Jan. 31-Feb. 1, 2009); *EU to Push Global Oversight of Top Financial Firms*, Wall St. J. A5 (Oct. 16, 2008).

¹³³ See David E. Sanger & Mark Landler, *In Europe, Obama Faces Calls for Rules on Finances*, NY Times (April 2, 2009); Alistair MacDonald and Joellen Perry, *ECB, U.K. Spar on Bank Rules*, Wall St. J. C8 (Feb. 13, 2009).

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securities trading has been reduced to the status of commodity. The best trading systems are no longer the monopoly of the exchanges, which are hemorrhaging market share to proprietary trading systems and dark pools.¹³⁴ That same commodification of trading technology – along with greater access to information about companies in other jurisdictions – has greatly reduced the liquidity advantages formerly enjoyed by the LSE and NYSE, which have had to cut fees in response.¹³⁵ The value of the exchanges has plummeted.¹³⁶

Of equal importance to the question of liquidity, companies no longer need to bring their shares in physical proximity to investors. Institutional investors, at least, can access virtually any market in the world.¹³⁷ As results, ADRs have fallen out of favor, as investors are simply investing directly abroad.¹³⁸ Moreover, Rule 144A allows issuers to access capital in the U.S. without a U.S. listing.¹³⁹ Why should a company pay for an expensive listing in London or New York if a listing in their home country allows them easy access to capital from around the

¹³⁴ See, e.g., Associated Press, *NYSE Euronext Posts Big Loss on Write Down*, NY Times (Feb. 9, 2009); David Bogoslaw, *Big Traders Dive Into Dark Pools*, Bus. Week, (Oct. 3, 2007). See generally Jerry W. Markham and Daniel J. Harty, *For whom the bell tolls: the demise of exchange trading floors and the growth of ECNs*, 33 J. of Corp. L. 865 (2008).

¹³⁵ Jacob Bunge, *NYSE Adjusts Charges In Bid to Draw Traders*, Wall St. J. C5 (Feb. 4, 2009) (“Incumbent stock exchanges are grappling with lower year-on-year trading volumes and tougher competition from newer entrants like BATS Exchange and Direct Edge in the U.S., and a host of trading platforms in Europe.”).

¹³⁶ Associated Press, *NYSE Euronext Posts Big Loss on Write Down*, NY Times (Feb. 9, 2009) (“(NYSE’s matched volume of NYSE-listed stocks fell to 43 percent during the fourth quarter, from 54.3 percent during the year-ago period.”).

¹³⁷ Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. Chi. L. Rev. 1435, 1459-1466 (2009).

¹³⁸ Eric Pan, *Why the World No Longer Puts Its Stock in Us*, Cardozo School of Law, Working Paper No. 176, at 8-11 (2006).

¹³⁹ Securities Act Rule 144A. On the importance of Rule 144A in undermining the incentive of foreign issuers to list in the U.S., see Eric Pan, *Why the World No Longer Puts Its Stock in Us*, Cardozo School of Law, Working Paper No. 176, at 7 (2006). See also William Sjostrom, *The Birth of Rule 144A Equity Offerings*, 58 UCLA L. Rev. (2008).

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world?¹⁴⁰ For regulators, this means that listing requirements are likely to offer little leverage as a regulatory tool.¹⁴¹

In sum, my argument here is that the international market for listings has a parallel structure to the domestic market for corporate charters, but Delaware's sustained ability to dominate that domestic market is not likely to be replicated in the market for listings. Companies face a largely bilateral choice between their home jurisdiction and the market leader. In corporate law, Delaware has been that market leader since it surpassed New Jersey; in listings, New York has been that market leader, but its dominance was undermined when Congress and the SEC had their "New Jersey moment" with the Sarbanes-Oxley Act. New York's status is now challenged, and perhaps surpassed, by London. But neither New York nor London is likely to provide any important listing advantage over a company's home jurisdiction in the long run. Both jurisdictions, by their actions during the credit crisis, have shown that they are willing to impose regulatory burdens in the face of political pressure. In their home jurisdiction, companies can at least bring political pressure to bear as a counter to political retribution.¹⁴² In the U.S. and the U.K., foreign companies are essentially powerless in political circles. London has not succumbed to the "burn the witches" mentality seen in Washington of late, but it nonetheless lacks the credibility to insulate companies from political influences in the way that Delaware does.

¹⁴⁰ Alistair MacDonald & Cassell Bryan-Low, *Turmoil Batters London's Status as Financial Center*, *Wall St. J.* A10 (Oct. 22, 2008) ("The London Stock Exchange has seen international listings fall by more than 70% in terms of capitalization year to date ... more emerging-market companies are listing at home as these markets develop financial centers capable of handling larger listings.").

¹⁴¹ See Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, at 12 (Georgetown Law Working Paper, (2008) ("I suspect that if global fragmentation becomes the norm, the concept of stock exchange 'listings' as a basis for jurisdiction and regulation of issuers will weaken, and eventually disappear.").

¹⁴² John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 *Va. J. Int'l L.* 531 (2001).

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V. Conclusion

Delaware has long enjoyed an overwhelming lead in the domestic market for corporate charters, which invites the question of whether a similar leader might emerge in the market for corporate listings. Applying the insights derived from the market for corporate charters to the market for listings, this article has assessed the prospects of the two leading contenders in the latter market, New York and London.

For London to dominate in the market for listings as Delaware has done in the market for charters, it needs to offer a product that companies' home jurisdictions cannot easily duplicate. The notion that the world has become smaller is a cliché, of course, but it nonetheless holds an important insight for the market for corporate listings. The world of investment capital shrinks every day, as institutional investors become more and more willing to look beyond their home jurisdictions in search of profitable investment opportunities. The lure of New York and London, and the pools of liquidity that they offer, have diminished greatly in the last decade, as trading has increasingly become a commodity. London must look elsewhere to find a comparative advantage.

London bears at least superficial resemblance to Delaware – the smaller, less populous competitor, heavily dependent on the financial services industry – but its recent track record shows that it is susceptible to political retribution in the same way that New York is. Democracy has its virtues, but it also has its costs. Delaware's primary product is predictability, which it has promoted by insulating its corporate law from the ebb and flow of politics. London may dominate New York with respect to predictability, but it does not appear to offer

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substantially more certainty than companies can get in their home jurisdiction. The answer to the cryptic question of my title, “London as Delaware?” is “No.”