THE REGULATION OF THE ISSUANCE AND TRADING OF SECURITIES IN THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY: A COMPARISON

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This article will compare the two major United States (U.S.) securities law statutes and European Economic Community (EEC) Directives and Recommendations that regulate issuance and trading of corporate securities and certain activities of corporate issuers. In particular, it will discuss the philosophy upon which each system of regulation is based.

1. An overview of the systems

1.1. United States securities laws

The starting point for a discussion of the securities laws of the United States is the Securities Act of 1933 (1933 Act) [1] which seeks to prevent the public offering and sale of securities unless adequate information about the securities has been made available to the public. The basic provisions designed to implement this goal are found in section 5 of the 1933 Act [2]. By its terms, section 5 makes it unlawful for any person to "make use of any means or instruments of transportation or communication in interstate commerce" to sell any security unless a registration statement is in effect as to the security or unless such sale or security is exempt from the registration requirement. Section 5 also prohibits any sale or offer to sell that is not accompanied or preceded by a prospectus in prescribed form [3]. This prospectus, called a statutory prospectus, must contain specified information about the issuer and the securities themselves [4]. In order to ensure the accuracy of information contained in the registration statement and prospectus, the 1933 Act also contains anti-fraud provisions [5].

Unlike the 1933 Act, which regulates the initial issuance of securities, the other major U.S. securities statute, the Securities Exchange Act of 1934 (1934 Act) [6], is primarily concerned with the trading in securities which are already issued and outstanding, and to this end, regulates issuers, institutions and professionals involved in the securities trading process. For example, section 12 [7] of the 1934 Act

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requires an issuer which wants to list securities on a U.S. stock exchange to file a registration statement in prescribed form with the Securities and Exchange Commission (SEC) [8]. Furthermore, pursuant to that same section, any issuer engaged in interstate commerce or whose securities are traded by any means or instrumentality of interstate commerce must register with the SEC, whether or not its securities are listed on a U.S. stock exchange, if its total assets exceed $1 million and if it has a class of equity securities held of record by at least 500 persons [9].

These registration provisions of the 1934 Act are complemented by anti-fraud and periodic reporting provisions. The primary anti-fraud provision of the 1934 Act, section 10(b) [10] and its rule 10b-5 [11], makes it unlawful for any person to misstate or omit to state a material fact in connection with the purchase or sale of a security [12]. With respect to periodic reports, corporations registered under the 1934 Act must file annual and, in some instances, more frequent reports with the SEC disclosing specified material information about the corporation [13]. In addition, the 1934 Act requires an undertaking in each registration statement filed pursuant to the 1933 Act which, in effect, renders corporations which have filed 1933 Act registration statements but are not yet registered with the SEC pursuant to the 1934 Act subject to the same 1934 Act periodic reporting requirements as registered 1934 Act corporations [14].

Both the 1933 and 1934 Acts, therefore, require the disclosure of material information at the time that securities are issued and so long as they are traded. This emphasis upon providing investors with accurate information on a continual basis reflects the philosophy of disclosure that underlies the U.S. securities laws. The disclosure philosophy results from the belief that investor protection and the orderly functioning of the securities markets can be more readily achieved by providing investors with information necessary for an informed investment decision, rather than by direct regulation of corporate behavior [15].

1.2. EEC rules

The EEC rules that affect the securities markets are also based upon an underlying preference for disclosure of material information rather than direct regulation of corporate activities. The Recommendation of July 25, 1977 (Recommendation) of the European Commission (Commission) of the EEC [16], which advocates a European code of conduct relating to transactions in transferable securities, states that its fundamental objective is the establishment of standards of behavior aimed at promoting the effective functioning of the securities markets and the safeguarding of the public interest [17]. Almost all of the general and supplementary principles in the Recommendation concern the availability of accurate information on a continual basis and the necessity for insiders and professionals to act fairly and to refrain from utilizing nonpublic information to their advantage. The Explanatory Memorandum contained in the Recommendation explains that a market may cease
to fulfill its role if information is not provided to the investing public or if the information provided is not correct [18].

This emphasis on disclosure is implemented essentially in five directives of the Council of Ministers (Council) of the EEC which either have already been adopted or have been proposed. First, the Council Directive of March 17, 1980 (Prospectus Directive or Sixth Directive) [19] contains requirements for “listing particulars”, that is, a prospectus which must be provided to investors when securities are admitted to official stock exchange listing within a Member State of the EEC (Member State). Second, the Council Directive of March 5, 1979 (Listing Directive) [20], coordinating the conditions for the admission of securities to official stock exchange listing, prescribes listing conditions with which issuers and their securities must comply and obligations of such issuers. Third, the amended proposed Council directive on information to be published on a regular basis (Information Directive) [21], submitted by the Commission to the Council on June 25, 1980, would require companies whose securities are admitted to official listing on a stock exchange within a Member State to publish a half-yearly report concerning their activities during the first six months of their financial year. Finally, the Fourth Council Directive of July 25, 1978 (Fourth Directive) [22], and the amended proposed Seventh Council Directive (Seventh Directive) [23], submitted by the Commission to the Council on December 14, 1978, are accounting directives which relate primarily to the preparation of financial statements.

As indicated in the Explanatory Memorandum that accompanied the originally proposed Information Directive, these directives are designed to create a system of disclosure which will provide investors and potential investors with information about the issuer of securities during the entire period that such securities are traded on an exchange [24]. The disclosure process commences with the Prospectus Directive, which governs the type of information to be provided to investors when securities are admitted to official stock exchange listing. The Listing Directive continues the disclosure process by requiring the production of annual accounts and an annual report prepared in accordance with the accounting directives. The proposed Information Directive, in turn, is meant to supplement the Listing Directive by requiring listed companies to issue half-yearly reports.

1.3. General comparison of systems

The prospectus, listing and information directives, together with the accounting directives, create a continuous disclosure system similar, in general, to the one created by the 1934 Act. Domestic issuers subject to the 1934 Act must file annual, quarterly and, in some instances, monthly reports with the SEC and must promptly disclose to the public material information [25]. In addition, in certain situations in which proxies are being solicited from shareholders, the 1934 Act requires a corporation to send to its shareholders an annual report of specified content, which is distinct from the annual report required to be filed with the SEC [26]. Thus,
although the timing and specific content of the reports required by the various EEC directives and the 1934 Act may differ, each attempts to create a situation in which investors are provided on a timely basis with material information about an issuer and its securities.

The primary difference between the EEC disclosure requirements and those of the 1934 Act can be termed jurisdictional. The EEC disclosure requirements become applicable when securities of an issuer are admitted to stock exchange listing in a Member State. The 1934 Act disclosure requirements, by contrast, apply not only to issuers whose shares are listed on a U.S. exchange but also, in general, to issuers whose shares are traded over-the-counter [27]. The 1934 Act, therefore, focuses upon the fact that securities are being traded, even though the securities are not listed on an exchange.

The applicability of the EEC requirements also contrasts with the 1933 Act, which requires, subject to various exceptions, extensive disclosure whenever securities are initially issued [28]. By comparison, there are, at present, no general EEC disclosure requirements with respect to newly issued shares [29]. It should be pointed out, however, that this difference is not as significant as it might appear, since the trend in the development of the U.S. securities laws is to emphasize 1934 Act disclosure, which focuses upon the trading of securities and the issuers of those securities, rather than the 1933 Act disclosure requirements [30].

1.4. Integration of markets

Another comparable aspect of U.S. securities laws and EEC directives relating to securities trading is an effort to harmonize and integrate securities markets. The EEC directives make explicit references to this goal. For example, the Listing Directive states in its preamble that the rules it adopts will facilitate listing of a given security on a number of stock exchanges in the EEC, and that such multiple listing, in turn, will result in "greater interpenetration of national securities markets and therefore contribute to the prospect of establishing a European capital market" [31].

In the U.S., efforts to create a national market system and to coordinate individual U.S. stock exchanges have been underway for the last several years. In fact, since 1975 the 1934 Act itself has directed the SEC to facilitate the establishment of a national market system for securities [32]. Consistent with this legislative mandate, the SEC has issued a series of releases which attempts to implement these goals [33].

In addition to these attempts at domestic coordination of U.S. securities markets, the SEC has also made attempts at harmonization on the international level. For example, the SEC recently adopted form 20-F of the 1934 Act [34], which is the form governing (i) the registration of securities of foreign private issuers pursuant to section 12 of the 1934 Act, and (ii) annual reports of foreign private issuers filed with the SEC. The SEC release adopting form 20-F [35] states that, in for-
mulating the disclosure requirements of the form, the SEC was influenced by disclosure standards proposed or adopted by the EEC, among others, and that form 20-F is broadly consistent therewith [36].

2. The Prospectus Directive

The Prospectus or Sixth Directive is, at present, the foundation of the EEC disclosure scheme. This directive applies to "securities which are the subject of an application for admission to official listing on a stock exchange situated or operating within a Member State" [37]. In general, it requires the publication of an "information sheet" or a prospectus containing specified information about the issuer and its securities as a condition for the admission of securities to official listing [38].

2.1. Comparison with 1933 Act

Unlike the 1933 Act which, in general, applies to all newly issued securities, the Prospectus Directive has no general application to newly issued securities which are not officially listed. However, since, pursuant to the Listing Directive, newly issued securities of the same class as securities already officially listed must also be listed, disclosure pursuant to the Prospectus Directive with respect to such newly issued securities is similar to disclosure pursuant to the registration provisions of the 1933 Act [39]. Also, the Prospectus Directive can be viewed as encouraging disclosure in connection with the issuance of securities since it exempts securities that have been publicly issued within the preceding twelve months if a document containing information equivalent to the type of information which would appear in a listing prospectus was published in connection with such public issuance [40].

There are also parallels between the articles of the Prospectus Directive which govern the scrutiny and publication of the required prospectus and section 5 of the 1933 Act, which is the primary 1933 Act provision governing the manner in which offerings of newly issued securities are to be made [41]. For example, the Prospectus Directive states that no prospectus shall be published until it has been approved by the relevant "competent authorities" [42]. This approval involves a check that the prospectus is complete and that all information required by the directive appears in the prospectus. However, these authorities apparently do not verify the information which is provided, since they are not in a position to determine whether a prospectus is accurate and contains all relevant information [43].

This system of approval, which is consistent with a philosophy of disclosure rather than direct regulation of corporate behavior, is similar to the procedures for registration of newly issued securities under the 1933 Act. The initial step in the issuance of securities under the 1933 Act is the filing of a registration statement
After a registration statement is filed with the SEC, a period of at least twenty days must elapse before the registration statement becomes effective and the securities being registered may be sold [46]. This "waiting period" is designed to provide investors with sufficient time to acquaint themselves with the facts of an offering [47]. Similarly, the Prospectus Directive requires the listing prospectus to be published a reasonable time prior to the date on which official listing becomes effective [48]. This requirement, apparently, is intended to permit a wide distribution of the prospectus and to allow the public time to study its contents.

The Prospectus Directive requires, in addition, that documents relevant to or publicizing the listing of securities must first be submitted to the competent authorities and must mention that a listing prospectus exists, and where it has been or will be published [49]. One probable purpose of this requirement is to ensure that information other than that appearing in the listing prospectus does not give the investing public a false impression about the issuer or the securities being listed. This requirement is similar to certain provisions of the 1933 Act which limit the communications other than a statutory prospectus that may be transmitted to a prospective purchaser of newly issued securities [50].

Finally, the Prospectus Directive requires the publication of a supplement to the listing prospectus if, prior to the effectiveness of the listing, a new factor arises which is capable of affecting the assessment of the securities [51]. Similarly, under the 1933 Act, amendments to 1933 Act registration statements must be filed to disclose any additional material information which, among other things, may have arisen in the period between the original filing of the registration statement and its effective date [52].

2.2. Comparison with 1934 Act

The disclosure requirements in the Prospectus Directive [53] can also be compared to disclosure requirements embodied in certain SEC forms promulgated under the 1934 Act. For example, since the directive is applicable when admission to listing is sought for securities, it is comparable to form 10 of the 1934 Act [54], the form which is used for admission to listing on a U.S. stock exchange and for mandatory registration with the SEC pursuant to section 12 of the 1934 Act [55]. The Prospectus Directive also contains disclosure requirements similar to those contained in form 10-K of the 1934 Act [56], the basic form for the annual report that must be filed with the SEC by corporations subject to the periodic reporting requirements of the 1934 Act [57]. Finally, since the directive represents an effort to coordinate disclosure requirements that may be applicable to a corporation attempting to list securities on the exchanges of more than one country [58], its requirements can be compared to those of form 20-F of the 1934 Act which, as mentioned in section 1.4 above, is the form governing the registration of securities.
of foreign private issuers and the filing of annual reports by such issuers under the 1934 Act [59]. The following comparison of the disclosure requirements of the Prospectus Directive and U.S. disclosure forms will focus upon forms 10 and 20-F, which are the forms most analogous to the Prospectus Directive since they are applicable to the listing of shares.

The information required to be disclosed pursuant to the Prospectus Directive relates, generally, to the business activities, financial condition and management of the company. Although these broad categories of disclosure are substantially similar to those required by SEC forms 10 and 20-F, some differences in specifics between EEC and U.S. requirements can be identified. Nonetheless, a comparison of these forms and the Prospectus Directive reflects the overall influence which each disclosure system has had upon the other and the fact that form 20-F specifically attempts to accommodate and minimize such differences in the case of foreign private issuers subject to the 1934 Act.

One area where specific differences may be found is the description of the business of the issuer. Form 10 requires a description of the business, which includes disclosure of revenue, operating profit and loss and identifiable assets by industry segments for the previous five fiscal years [60]. The Prospectus Directive, by contrast, requires only a breakdown of net turnover by category of activity for the previous three years [61]. Apparently in recognition of the fact that general SEC disclosure requirements in this area are more extensive than those of most foreign jurisdictions, form 20-F contains a reduced segment information requirement. Much like the Prospectus Directive requirements, form 20-F requires only disclosure of sales and revenue information by category of activity [62]. A narrative discussion is required, however, if the contribution to total operating profit or loss from a category of activity differs substantially from its contribution to total sales and revenue [63].

Another significant topic addressed by both EEC and SEC disclosure requirements is that of management remuneration and transactions. SEC form 10 requires separate disclosure of cash, cash-equivalent and contingent forms of remuneration [64]. Such information must be provided for each of the five most highly compensated executive officers or directors who earn in excess of $50,000, naming each such individual, and for all officers and directors as a group. In addition, detailed disclosure is required of financial transactions between the individuals named and the corporation.

The Prospectus Directive requires disclosure of remuneration paid and benefits in kind granted to members of the issuer's administrative, management and supervisory bodies [65]. The disclosure required, however, is the total amount paid in each of these categories. Also required is information concerning unusual transactions between the issuer and members of its administrative, management and supervisory bodies [66]. However, with respect to loans granted to such persons or guaranteed for their benefit by the issuer, only the disclosure of total amounts of the loans is required [67].
SEC form 20-F acknowledges that foreign jurisdictions typically require less disclosure of management remuneration than does the SEC. The form, therefore, requires only the disclosure of the aggregate amount of remuneration paid to all officers and directors as a group for services in all capacities [68]. However, information concerning remuneration of individual directors and officers and the interest of management in certain transactions must also be disclosed if such information is otherwise disclosed pursuant to foreign laws, regulations, or stock exchange requirements [69].

A third area of difference between SEC form 10 and the Prospectus Directive which is minimized for foreign private issuers by SEC form 20-F is disclosure relating to the business experience and background of management. Form 10 requires, among other things, disclosure of the names and ages of all directors of the issuer, all positions and offices with the issuer held by each such person, the nature of any family relationship between any director and executive officer, and the business experience of directors and certain other employees during the past five years [70]. With respect to business experience, information is required concerning principal occupations and employment and the name and principal business of any corporation or other organization for which such occupations and employment were conducted during the past five years [71]. Disclosure of information concerning other directorships and involvement in certain legal proceedings during the past five years, such as convictions in criminal proceedings, is also required [72].

The Prospectus Directive requirements in this area are much less extensive. For example, disclosure of the names, addresses and functions of the members of the company's administrative, management, or supervisory bodies and, in the case of companies established for less than five years, of the company's founders, is required [73]. Information concerning the principal activities performed by such persons outside the company is required only if such activities are significant with respect to the company [74]. No extensive background or legal information need be provided.

The form 20-F requirements concerning officers and directors once again reflect SEC awareness that disclosure requirements of foreign jurisdictions are characteristically more limited than the usual SEC requirements. To accommodate this situation, form 20-F requires, in essence, a list of all directors and executive officers, an indication of the positions held by each such person, a description of any arrangement pursuant to which such positions were obtained, and disclosure of any family relationships between such persons [75]. This is much less information than is required by form 10 and can even be viewed as less stringent than the requirements of the Prospectus Directive since no information concerning outside activities of these persons need be provided.

Another area of difference between SEC form 10 and the Prospectus Directive relates to the disclosure of ownership of securities of a corporation. Among other things, form 10 requires the disclosure of the name, address and amount of securities beneficially owned with respect to any person who owns more than 5% of any
class of the voting securities of the issuer [76]. In addition, disclosure is required of the amount of the issuer's securities that is owned by each director (naming them) and by all directors and officers as a group [77]. In contrast to these requirements, the Prospectus Directive requires disclosure of shareholders who, directly or indirectly, own a designated proportion of the capital of the issuer which the Member States may not fix at more than 20% [78]. Furthermore, information concerning the total number of shares of the issuer, including options therefor, held by the members of its administrative, managerial and supervisory bodies must be provided [79].

Similar to the other examples discussed above, SEC form 20-F requires disclosure of less information than SEC form 10 requires with respect to ownership of securities. Form 20-F requires disclosure of (i) the identity of any person who owns more than 10% of the voting securities of the issuer, and (ii) the total amount of any class of the voting securities of an issuer owned by the officers and directors as a group (without naming them) [80]. The disclosure requirement in form 20-F concerning ownership of securities by management is almost identical to the parallel requirement of the Prospectus Directive [81] and is another indication that the provisions of form 20-F were influenced by non-U.S. disclosure standards.

3. The Listing Directive

The Listing Directive embodies two sets of requirements. One set contains conditions relating to issuers and their shares or debt securities which must be satisfied before such securities may be listed on a stock exchange in a Member State. The other set of requirements prescribes obligations of issuers whose shares or debt securities have been admitted to official listing on such an exchange [82].

These latter obligations of issuers implement the EEC disclosure philosophy by contributing to a system of continuous disclosure similar to the continuous disclosure system with which companies subject to the periodic reporting requirements of the 1934 Act must comply [83]. Thus, for example, the Listing Directive requires a company to make available to the public, as soon as possible, its most recent annual accounts and its last annual report prepared in accordance with the accounting directives [84]. Similarly, issuers subject to the periodic reporting requirements of the 1934 Act must file with the SEC an annual report containing financial statements and certain other specified information [85]. The underlying concept is the same, i.e. that issuers have an obligation to shareholders and the trading markets to make a comprehensive annual disclosure.

The disclosure provisions of the Listing Directive are also relevant to the goals of integration of markets and harmonization of requirements for official stock exchange listing. The Listing Directive recognizes that not all companies which must comply with the requirements of the directive will prepare their annual accounts and annual reports in accordance with the provisions of the Fourth and proposed
Seventh Directives [86]. In such cases, more detailed or additional information must be provided only if necessary to present a true and fair view of the financial situation of the company [87].

These provisions of the Listing Directive are thus similar to SEC form 20-F which permits certain flexibility in financial statements of foreign private issuers. Generally, financial statements which must be filed with the SEC as part of the 1934 Act registration statements and reports must be prepared in conformity with SEC rules governing their form and content [88]. However, form 20-F recognizes that financial statements of foreign private issuers may not conform to the SEC rules. Thus, in those cases where there are discrepancies, form 20-F requires only that such discrepancies be disclosed and, if practicable, their effects described [89].

One interesting difference between the SEC annual report and the Listing Directive reporting requirements is the dissemination obligation with respect to each of them. The Listing Directive states that the information which issuers are required to provide (i) must be sent to the appropriate competent authorities, and (ii) must be published in a newspaper or made available to the public either in places indicated by announcements published in newspapers or by equivalent means [90]. By contrast, there is no requirement that the annual report filed with the SEC must, automatically, be widely disseminated, although the SEC has recently taken steps to encourage broader disclosure directly to shareholders [91].

The disclosure scheme of the Listing Directive is also implemented by requiring a subject issuer to inform the public as soon as possible “of any major new developments in its sphere of activity” which may affect the price of the shares of the issuer [92]. A similar requirement is imposed by the anti-fraud provisions of the U.S. securities laws [93], by certain reporting requirements of the 1934 Act [94], and by certain U.S. stock exchange rules [95].

For example, one of the primary anti-fraud rules of the U.S. securities laws, rule 10b-5 of the 1934 Act, makes it unlawful, in connection with the purchase or sale of a security, “to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made ... not misleading” [96]. The U.S. Supreme Court has held that “an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important ...” [97]. This definition is an elaboration of the “market impact” test, which defines material information as information which, if disclosed, would have a substantial effect on the market price of the security in question [98]. The disclosure standard represented by the market impact test is comparable to the disclosure standard embodied in the Listing Directive [99].

In addition to the various annual and periodic disclosure requirements imposed by the Listing Directive upon issuers of shares listed on a stock exchange in a Member State, that directive also imposes an “equivalent information” requirement on such issuers. Specifically, the Listing Directive requires an issuer whose shares are listed on exchanges in different Member States to ensure that equivalent infor-
mation is made available to the market at each of these exchanges [100]. Additionally, an issuer whose shares are listed on exchange in a Member State and in a non-Member State is required to make available to the Member State market information equivalent to that which it makes available to the appropriate non-Member State markets, if the information is important in evaluating its shares [101].

The EEC requirements mentioned above which are applicable to issuers whose shares are listed on both Member State and non-Member State exchanges are similar to those imposed by the SEC upon foreign issuers subject to the reporting requirements of the 1934 Act. Such foreign issuers must furnish to the SEC a report on form 6-K [102], containing specified significant information which such issuer: (i) is required to disclose in the country of its residence or incorporation; (ii) has filed with a non-U.S. stock exchange on which its securities are traded and which was disclosed by that exchange; or (iii) has distributed to its security holders [103].

Although the equivalency requirements of the Listing Directive and SEC form 6-K are similar, form 6-K is more specific about the type of information which is subject to those requirements. Whereas the Listing Directive requires disclosure of any information which may be of importance in the evaluation of shares of an issuer [104], form 6-K requires disclosure of information which is significant with respect to a list of specified topics which are deemed to be material [105].

4. The proposed Information Directive

The third element in the EEC continuous disclosure scheme with respect to listed securities is the proposed Information Directive. The proposed directive is designed to complement the Prospectus and Listing Directives by requiring half-yearly reports to be published on a regular basis by most listed companies concerning their business during the first six months of each of their financial years [106].

The proposed directive can be analogized to form 10-Q of the 1934 Act [107]. Form 10-Q is the form for the quarterly report which must be filed with the SEC by issuers subject to the reporting requirements of the 1934 Act, excluding, among others, foreign private issuers [108].

The proposed Information Directive would require the disclosure of certain comparative income statement figures for the relevant six-month period and the corresponding period in the previous fiscal year [109]. SEC form 10-Q similarly requires a condensed income statement for the most recent fiscal quarter, for the period between the end of the last fiscal year and the end of the most recent fiscal quarter, and for the corresponding periods of the preceding fiscal year [110]. Form 10-Q, however, also requires the presentation of certain balance sheets and certain statements of the source and application of funds [111].

The proposed Information Directive would also require the income figures to be accompanied by an explanatory statement which would enable an investor to make
an informed appraisal of the business of the company [112]. The explanatory statement would be required to relate to the financial information disclosed and, if they are significant, to at least certain specified items, including appropriate supplemental financial information relating to the condition of the business [113].

This explanatory statement required by the proposed directive can be compared to the "management's analysis" required by form 10-Q [114]. The form requires a discussion of the liquidity, capital resources and results of operations of the registrant [115]. Presumably, the objective of both the proposed Information Directive and the management's analysis requirements of form 10-Q is to provide information necessary for informed financial evaluations. Thus, they should result in similar disclosure.

The proposed Information Directive would require the half-yearly report to be published in newspapers or to be made available to the public either at places indicated in published announcements or by other equivalent means [116]. This dissemination requirement is intended to make the report available to the greatest possible number of investors, whether they already are shareholders of the company or are prospective investors [117]. Thus, the half-yearly report is much more broadly disseminated compared to form 10-Q, which is, like the SEC annual report on form 10-K, only filed with the SEC and generally not otherwise required to be distributed [118].

In addition to its public dissemination requirements, the proposed Information Directive would also require a company to send a copy of the half-yearly report, not later than the time of its publication, to the competent authorities in each Member State in which the securities are admitted to stock exchange listing [119]. The Explanatory Memorandum to the originally proposed Information Directive states that this requirement does not imply that the competent authorities are responsible for checking the accuracy of the information provided [120]. This statement indicates that the authorities involved regulate formal compliance with the rules rather than verify the accuracy of the disclosures that are made [121]. This is consistent with a philosophy of disclosure and is similar to the SEC approach in equivalent circumstances.

The primary difference between the proposed Information Directive and SEC form 10-Q is that financial information and analysis comprise only part of the information required to be disclosed by form 10-Q, while such disclosures comprise primarily all of the information required to be disclosed by the half-yearly report. In addition to the financial information discussed, form 10-Q requires information concerning, among other things, legal proceedings and other materially important events [122]. Thus, the EEC disclosure requirements appear to emphasize primarily financial disclosure, while the SEC requires the disclosure of both nonfinancial information and financial information.
5. The accounting directives

The Fourth Directive regulates the contents of the annual accounts and annual reports of a company that must be disseminated in accordance with the requirements of the Listing Directive, while the proposed Seventh Directive prescribes principles of consolidation for financial statements. SEC rules governing the content of financial statements which must be filed in conjunction with various registration statements and annual reports appear mainly in regulation S-X [123], and the content of annual reports filed with the SEC is regulated primarily by form 10-K of the 1934 Act [124].

As was the case with the other directives discussed above, there are specific differences between the EEC and SEC requirements in these areas, but the overall intent of the requirements is similar. Thus, the Fourth Directive states that the annual accounts shall give a "true and fair view" of the financial position of the company [125]. Similarly, SEC regulation S-X requires that financial statements be truthful and filed in a form and order that will best indicate their significance [126]. More specifically, the Fourth Directive primarily prescribes the contents of the balance sheet, the profit and loss account, or income statement, and the notes on the accounts, all of which comprise the annual accounts [127]. In a similar fashion, SEC regulation S-X contains provisions regulating the composition of the balance sheet, the income statement and the notes to the financial statements [128].

The balance sheet requirements illustrate that, while the purposes of the accounting rules are similar, different methods may be used to achieve those purposes. On the one hand, for example, the Fourth Directive requires assets and liabilities to be classified as to current and noncurrent [129], and regulation S-X requires similar treatment of assets and liabilities [130]. On the other hand, the Fourth Directive distinguishes fixed assets from current assets by defining fixed assets as those "intended for use on a continuing basis" [131]. Regulation S-X, by contrast, states the distinction in terms of current assets, and the assumption that such assets are reasonably expected to be realized in cash or sold or consumed in one year underlies the rule concerning current assets [132]. Similarly, the income statement captions of the Fourth Directive [133] are not comparable in all respects to the captions specified in regulation S-X [134], but each seeks a fair presentation of revenue and expense.

As previously noted, the SEC emphasizes nonfinancial disclosure to a greater extent than does the EEC [135]. This is illustrated again by the different rules concerning the contents of annual reports. The Fourth Directive requires, in essence, that the annual report review the development of the business of the company, its present position and likely future developments [136]. By contrast, SEC form 10-K, which is the basic SEC annual report form [137], requires, in addition to inclusion in the annual report of financial statements prepared in accordance with regulation S-X, extensive narrative disclosure, including a description of the business of the issuer [138].
One area in which the Fourth Directive annual report requires more information than the form 10-K annual report concerns the future developments of the company. The directive requires the EEC annual report to discuss future developments [139], while the SEC has traditionally been skeptical of forward-looking information. The SEC has only recently adopted rules that will allow issuers to provide such information at their discretion [140].

The proposed Seventh Directive, according to the Explanatory Memorandum which accompanied the original proposal [141], is designed to unify EEC policy on consolidated accounts. Its objective is to ensure that consolidated accounts provide information necessary to protect shareholders, employees and third parties in Member States, while dealing, at the same time, with the economic realities of groups of companies that function as an economic unit. The Explanatory Memorandum states that the proposal is a necessary extension of the Fourth Directive and, in fact, incorporates the rules of the Fourth Directive relating to, among other things, the composition of the balance sheet and income statement [142].

The proposed Seventh Directive would require, assuming certain other conditions are met, a "dominant undertaking of a group" which has its registered office within the EEC to prepare group accounts and a group annual report [143]. The proposed directive further requires, absent certain exemptions, the preparation of subgroup consolidated accounts [144]. For purposes of the directive, a group is defined as a "dominant undertaking and one or more undertakings dependent on it" if all such undertakings are managed on a unified basis by the dominant undertaking [145]. A "dependent undertaking means an undertaking over which another undertaking, referred to as the dominant undertaking, is able, directly or indirectly, to exercise a dominant influence" [146]. An undertaking is presumed to be dependent upon another undertaking if the latter undertaking, directly or indirectly:

(1) holds the major part of the undertaking's subscribed capital;
(2) controls the majority of the voting power of its shares; or
(3) can appoint more than half of its administrative, managerial or supervisory body [147].

These definitions of dominant and dependent undertakings can be contrasted with corresponding provisions of SEC regulation S-X [148]. Regulation S-X provides that a corporation shall not consolidate any subsidiary which is not majority owned [149]. This provision, similar to those of the proposed Seventh Directive, seeks to premise consolidation on the concept of control. The EEC definition of control is, however, broader than the SEC definition [150].

Notwithstanding this definitional difference concerning companies to be consolidated, the principles of consolidation in both regulatory schemes are similar. The proposed Seventh Directive contains general principles of consolidation and provides that, in preparing consolidated accounts, (i) debts and claims between group undertakings and (ii) profits, income, and expenditures relating to transactions between group undertakings, shall be eliminated [151]. Similarly, regulation S-X requires the elimination of intercompany items and transactions in the preparation of consolidated accounts [152].
6. Conclusion

Both the U.S. and the EEC attempt to regulate securities transactions by requiring the timely disclosure of material information rather than by regulating corporate issuers directly. The EEC directives focus on securities listed on stock exchanges, while U.S. laws and rules focus on the initial issuance of securities and the trading of securities both on and off exchanges. The U.S. system also requires the disclosure of more nonfinancial information more frequently. The EEC directives, however, require a broader public dissemination of information which must be disclosed. Nonetheless, in general, the similarity of disclosure philosophy of the two systems overshadows their specific differences.
Notes

[3] Id. §77e(b) (1) and (2).
[8] Id. §781(b).
[9] Id. §781(g).
[12] Id. The provisions of section 10(b) and rule 10b-5 are similar to the 1933 Act anti-fraud provisions. See note 5 supra. For a comprehensive discussion of rule 10b-5, see Jacobs, The Impact of Rule 10b-5 in Securities Law Series, Volumes 5, 5A and 5B (revised 1980).
[17] Id. at 41.
[18] Id. at 38.
[26] The 1934 Act requirements concerning annual reports to shareholders are contained in rule 14a-3, 17 C.F.R. §240.14a-3 (1980). With respect to the annual report filed with the SEC, see note 13 supra and text accompanying notes 137 and 138 infra.
[27] See text accompanying notes 8 and 9 supra.

[28] See text accompanying notes 1-5 supra.

[29] Item 1 of schedule C of the Listing Directive, supra note 20, at 30, however, does require the listing of newly issued shares of the same class as those already officially listed. This requirement, therefore, results in disclosure pursuant to the Prospectus Directive, supra note 19, for such newly issued shares and approximates the requirements of the 1933 Act.


[34] 17 C.F.R. §249.220f (1980).


[36] Id. at 6, 10.


[38] Prospectus Directive, art. 3, supra note 19, at 2.


[40] Prospectus Directive, art. 6, supra note 19, at 3-4.

[41] See text accompanying notes 1-5 supra.


[43] Cf. notes 120 and 121 infra and accompanying text.

[44] The requirement to file a registration statement is contained in section 5 of the 1933 Act. See text accompanying notes 1-5 supra. For a comprehensive discussion of the 1933 Act registration process, see Loss, Securities Regulation (1961, 1969 Supp.).


[50] Section 5 of the 1933 Act prohibits communications other than a statutory prospectus prior to the effective date of a registration statement and requires that a statutory prospectus precede or accompany communications after the effective date of a registration statement. Certain rules, such as rules 134 and 135 of the 1933 Act, 17 C.F.R. §§ 230.134 and 230.135 (1980), create exceptions to the section 5 provisions and permit other limited and specified communications. For a general discussion of section 5 of the 1933 Act and permissible communications during the registration process, see Pierce, Current and Recurrent Section 5 Gun-Jumping Problems, 26 Case W. Res. L. Rev. 370 (1976).


[52] Amendments to 1933 Act registration statements are necessitated by section 11 of the 1933 Act, 15 U.S.C. §77k (1976), which requires a registration statement to be true and complete as of the date of its effectiveness. Consequently, amendments to a registration statement may be required both prior to or after its effective date.

[53] The schedules to the Prospectus Directive, supra note 19, at 11-26, contain the
specific types of information required to be disclosed. Schedule A sets forth the information required with respect to the admission of shares to official stock exchange listing, whereas schedules B and C set forth corresponding disclosure requirements with respect to the admission of, respectively, debt securities and certificates representing shares. The discussion in this article will focus upon the requirements of schedule A.

[55] See text accompanying notes 7–9 supra.
[57] See note 13 supra. Form 10-K is the annual report form used by U.S. issuers when no other form is prescribed. See 17 C.F.R. §249.310 (1980).
[59] See text accompanying notes 34–36 supra.
[60] Item 1 of SEC form 10, 17 C.F.R. §249.210 (1980), requires a description of the business of the registrant which must conform to the disclosure requirements of item 1 of SEC regulation S–K, 17 C.F.R. §229.20 (1980). Regulation S–K represents an effort by the SEC over the last few years to standardize certain disclosure requirements which are applicable to a variety of 1933 Act and 1934 Act forms.

[63] Id.
[64] Item 7 of SEC form 10, 17 C.F.R. §249.210 (1980), which contains the requirements of that form concerning management remuneration disclosure, incorporates the requirements of item 4 of SEC regulation S–K, 17 C.F.R. §229.20 (1980).
[69] SEC form 20-F, items 6(c) and 17, 17 C.F.R. §249.220f (1980).


In Securities Act Release No. 33–6276 (December 23, 1980), the SEC has proposed amendments to its rules which would, among other things, reorganize regulation S–K and the guides. Present Guide 63 is proposed to be relocated in regulation S–K as item 21.

[70] Item 6 of SEC form 10, 17 C.F.R. §249.210 (1980), which contains the requirements of that form with respect to disclosure concerning management, incorporates the requirements of item 3 of SEC regulation S–K, 17 C.F.R. §229.20 (1980).
[72] Id.
[74] Id.
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[82] These requirements are set forth in the following four schedules to the Listing Directive, supra note 20, at 26–32: schedule A — Conditions for the Admission of Shares to Official Listing on a Stock Exchange; schedule B — Conditions for the Admission of Debt Securities to Official Listing on a Stock Exchange; schedule C — Obligations of Companies Whose Shares are Admitted to Official Listing on a Stock Exchange; schedule D — Obligations of Issuers Whose Debt Securities are Admitted to Official Listing on a Stock Exchange. The discussion in this article will focus upon the requirements of schedule C.
[83] See text accompanying notes 25 and 26 supra.
[85] See note 13 supra.
[87] Id.
[91] Rule 14a–3(b) (9) of the 1934 Act, 17 C.F.R. § 240.14a–3(b) (9) (1980), requires, in general, that an issuer state either in its proxy statement or in its annual report to shareholders, that it will provide shareholders, upon request, with a copy of the annual report on form 10–K filed with the SEC.

The SEC has, apparently, realized the incongruity of requiring extensive disclosure to which investors do not have easy access. Form 10–K was recently amended, effective for fiscal years ending after December 15, 1980, to permit compliance with many of the disclosure requirements of that form by means of incorporating by reference such required information from the annual report to shareholders. See SEC Securities Act Release No. 33–6231 (September 2, 1980). These amendments were intended to encourage issuers to expand the disclosure in the annual report to shareholders.

[93] See text accompanying notes 10–12 supra.

Form 8–K of the 1934 Act, 17 C.F.R. § 249.308 (1980), is the form used for current reports filed with the SEC pursuant to that statute by issuers other than foreign private issuers. Form 8–K reports must be filed to report: (i) changes in control of an issuer; (ii) acquisition or disposition of assets; (iii) bankruptcy or receivership; (iv) changes in an issuer’s certifying accountant; (v) resignations by the issuer’s directors; and (vi) other materially important events. A form 8–K report must be filed upon the occurrence of any of the first five of these events within fifteen days of the event. However, reports pursuant to the sixth category may be filed within ten days after the close of the month during which the event occurred. Although the disclosure required pursuant to form 8–K is not as immediate as the disclosure required by item 5 of schedule C of the Listing Directive or by rule 10b–5 of the 1934 Act (see text accompanying notes 96–99 infra), the purpose of the form is similar to those requirements.

[95] Certain U.S. stock exchange rules require the immediate disclosure of material information. For example, the New York Stock Exchange Company Manual states (at A–18):
A corporation whose securities are listed on the New York Stock Exchange Inc. is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for those securities. This is one of the most important and fundamental purposes of the listing agreement which each corporation enters into with the Exchange.

[97] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). The quoted statement was made in the proxy context, but is thought to be the test also applicable to rule 10b–5 “materiality”.

U.S. anti-fraud rules, which attempt to provide investors with material information, also attempt to prohibit corporate insiders from using nonpublic information to their advantage. See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F. 2d 833 (2d Cir. 1968) (en banc), cert. denied sub nom. Coates v. SEC, 394 U.S. 976 (1969). The Listing Directive, apparently, also serves this purpose.

[100] Listing Directive, schedule C, item 6(a), supra note 20, at 31.
[101] Listing Directive, schedule C, item 6(b), supra note 20, at 31.
[103] Id. general instruction B. See note 105 infra.
[104] Listing Directive, schedule C, item 6(b), supra note 20, at 31.
[105] SEC form 6-K, general instruction B, 17 C.F.R. § 249.306 (1980). These topics include changes in management or control, acquisitions or dispositions of assets, bankruptcy or receivership, the financial condition and results of operations, material legal proceedings, material increases or decreases in the outstanding amount of securities or indebtedness, and any other information material to security holders.

[106] See Memorandum, supra note 24. These reports would be required to be published within three months of the end of the relevant six-month period. See Information Directive, art. 4, supra note 21, at 9.
[108] Such quarterly report must be filed within forty-five days after the end of each of the first three fiscal quarters of each fiscal year. No report is required for the fourth quarter since the annual report filed with the SEC must be filed within ninety days after the end of the fiscal year of the corporation. Id.
[111] Id. Balance sheets must be presented as of the end of the most recent fiscal quarter and for the end of the corresponding period of the preceding fiscal year. Statements of the source and application of funds must be presented for the period between the end of the last fiscal year and the end of the most recent fiscal quarter and for the corresponding period of the preceding fiscal year.
[113] Those specified items are:
(i) the number of persons employed;
(ii) investments carried out and firm commitments as to future investments;
(iii) the state of the order book;
(iv) the general situation regarding stocks of finished products;
(v) the degree of capacity utilization;
(vi) any new products or activities which have had a significant effect on revenues; and
(vii) prospects for the current financial year.
[114] SEC form 10-Q, part I, item 2, 17 C.F.R. § 249.308a (1980), which refers to item 11(b) of regulation S–K.
[116] Information Directive, art. 9, supra note 21, at 11–12.
[118] See text accompanying notes 90 and 91 supra.
[119] Information Directive, art. 9, supra note 21, at 11–12. This requirement is similar to the one contained in article 17 of the Listing Directive, supra note 20, at 24, with respect to the reports required by the Listing Directive.
[120] See Memorandum, supra note 24.
[121] See text accompanying notes 44 and 45 supra.
[125] Fourth Directive, art. 2.3, supra note 22, at 12.
[135] See text accompanying note 122 supra.
[137] See notes 57 and 85 supra.
[139] See Fourth Directive, art. 46, supra note 20, at 27. This requirement is similar to the requirement contained in the Information Directive that the explanatory statement of management discuss the prospects of the company for the current financial year. See note 113 supra. For a discussion of the disclosure of forward-looking information in SEC filings, see Mann and Schneider, Disclosure of “Soft Information”, in PLI Tenth Annual Institute on Securities Regulation 169 (Fleischer, Lipton & Stevenson, eds. 1979).
[142] Id.
[144] Seventh Directive, art. 6a, supra note 23, at 8.
[147] Id. art. 2(2).
[150] It should be noted that the proposed EEC definitions of "dominant undertaking" and "group" in the proposed Seventh Directive have been the subject of considerable debate, as has the issue of subgroup consolidated accounts. See Comm. Mkt. Rep. (CCH), Euromarket News, Issue No. 567 (November 28, 1979) and Issue No. 594 (June 3, 1980).

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