Commentary on *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*

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**INTRODUCTION**

In the article by Ethiopis Tafara and Robert Peterson,¹ the authors propose a framework to apply to foreign financial services providers accessing the U.S. capital market (the “Blueprint”). Rather than requiring foreign stock exchanges and foreign broker-dealers to register with the Securities and Exchange Commission (“SEC”), as is currently the case, the Blueprint instead recommends “a system of substituted compliance with SEC regulations.”² I appreciate the invitation to provide a commentary on the Blueprint, which comes at such a critical juncture in time.³

In this commentary, I discuss the global factors and recent developments that are exerting, and will continue to exert, inevitable pressure on securities regulators to open up cross-border access in financial services. In commenting on the Blueprint, I suggest the need for a framework and associated criteria to aid in assessing such a framework. Alternative approaches are outlined and discussed, including a description of the Canada-U.S. Multijurisdictional Disclosure System (“MJDS”), the EU system, and a recent proposal by the Toronto Stock Exchange Group (“TSX Group”).⁴

**Globalization**

The Blueprint begins with the observation that capital markets are global. This observation is self-evident and support for it is omnipresent. Globalization is a fact. Innovative technologies are driving faster and more efficient trading, and they do not recognize national borders. Capital market participants

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² Id. at 32.

³ This commentary represents the views of the author and should not be taken to represent an official view of the OSC, the Commission members or staff.

are expanding their business activities into foreign markets. Investors are seeking international investment opportunities. The impact of these changes is profound and not yet fully realized.

Consider the recent flurry of media articles reporting on potential capital tie-ups, mutual listings, alliances, takeovers, and mergers between stock exchanges around the world. Recently, NASDAQ made a bid for the London Stock Exchange ("LSE") which, although rebuffed, resulted in NASDAQ acquiring a significant interest in the LSE. Shortly thereafter, the New York Stock Exchange ("NYSE") Group made an offer for Euronext N.V., the second-largest European stock exchange. The Paris-based Euronext signaled its support for a deal with the NYSE, maintaining that such an alliance would be "advantageous to Europe while leveraging transatlantic synergies." Contemporaneously, the Deutsche Boerse of Frankfurt apparently continues to pursue its plan to create a pan-European exchange, which would include Italy’s Borsa Italiana. Euronext and the NYSE Group have reportedly said that they remain willing to negotiate with Deutsche Boerse and Borsa Italiana with a view to combining their European cash equity businesses.

The Chicago Mercantile Exchange recently announced plans to buy the Chicago Board of Trade, which would create the world’s biggest market with a market value of U.S. $25 billion. In addition, the TSX Group has struck a deal with Brazil’s São Paulo Stock Exchange ("BOVESPA") that could lead to an interlisting of stocks, with some speculating that the move is designed to draw some of South America’s largest mining firms to Toronto indices.

Recent media reports have suggested that the “merger frenzy” among exchanges appears to be spreading to Asia. There is talk of an “alliance” between the NYSE Group and the Tokyo Stock Exchange, two of the world’s largest stock markets measured by total market value of stocks listed. It appears these discussions are “focus[ed] on cross-listing, technology sharing and, possibly, small investments by each exchange in the other.” In addition, NASDAQ is reportedly exploring co-operative agreements with both Japan’s Jasdaq Securities Exchange and the Korea Exchange, Inc. in areas that may be “in the interests of maintaining fair and orderly markets and in the best interests of listed companies” in both jurisdictions.

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11. Id.

12. Exchanges Explore Collaboration, WALL ST. J., Oct. 16, 2006; NASDAQ, Korea Exchange Agree to
This chess game of proposed exchange mergers, capital tie-ups, and alliances being played out on the global stage bears witness to the truism that capital markets are global. Proponents argue that cross-listings will benefit the following categories: (a) issuers by expanding their sources of capital, (b) investors by expanding their investment opportunities internationally, and (c) capital markets generally through the enhanced liquidity and potential analyst coverage that should naturally flow as a result of these events.

Accepting that these developments are occurring is not a difficult stretch. An in-depth analysis of why they are occurring is beyond the scope of this brief commentary. The emergence of new technologies has resulted in enhanced capital mobility and access to foreign markets and investors. Some claim that the increased regulatory burden in the United States, combined with mounting concerns over exposure to U.S.-style class actions and more aggressive enforcement, may be driving companies to raise capital in foreign markets. The rise of the LSE in popularity and international appeal is also most likely a relevant factor, along with the ever-increasing depth and liquidity of the European and Asian capital markets. Another influential factor is the demutualization of exchanges and their conversion to “for-profit” entities. This has, in turn, unleashed pressure from shareholders to increase profits through expansion, investment in new technology, and cost cutting, forcing these for-profit entities to eschew nationalistic or protectionist tendencies in the bid for value maximization.

It is clear that these developments bring with them increasing pressure on regulators to develop models for better coordinating their regulatory oversight in an effort to ensure that domestic regulation does not unduly hamper the pursuit of business strategies and to ensure that domestic regulation is not indirectly exported to issuers and markets extraterritorially. Although the Blueprint is not directly related to or contingent upon these internationally focused developments at the exchange level, it is against this backdrop and historically significant context that the Blueprint has been developed.

I. Are There Lessons To Be Learned from Other Models?

Before turning to a discussion of the Blueprint, it is useful to consider whether there are any lessons to be learned from other approaches. Set out below is a brief description of three models, two of which are operational and the last of which is in the proposal stage. In focusing on these three models, I am not suggesting that they are the only models worthy of consideration. To the extent that there are other approaches, they, too, ought to be studied.


A. The Canada/U.S. Multijurisdictional Disclosure System

The MJDS is noteworthy for many reasons. Regulators are often accused of being too “reactionary.” Too often, we are in the position of having to adapt the regulatory environment in response to changing business models, industry trends, and international pressures. The MJDS therefore stands out as a rather unique example of regulators acting proactively, well ahead of the globalization curve.

The MJDS is a bilateral initiative that began with negotiations between the OSC, the CVMQ (now the Autorité des Marchés Financiers (“AMF”) in Quebec), and the SEC. These negotiations commenced following publication by the SEC of a Request for Comment in February 1985, entitled “Facilitation of Multinational Securities Offerings” (the “Release”). The Release sought comment on two conceptual approaches to facilitate multinational offerings in the United States, the United Kingdom, and Canada—the reciprocal approach and the common prospectus approach. The reciprocal approach would require a commitment that a prospectus prepared in accordance with the issuer’s home jurisdiction requirements and which meets certain pre-established standards would be accepted in the host jurisdiction. The common prospectus approach would involve the development of a standardized form of prospectus in the participating jurisdictions.

Following publication of the Release, the OSC submitted a comment letter to the SEC in which it expressed the view that the reciprocal approach was the preferred approach for multinational securities offerings in Canada and the United States as it could be implemented more expeditiously, at less cost, and with little or no reduction in the level or quality of disclosure. One might speculate that there were underlying concerns that the difficulties inherent in attempting to reach agreement with participating jurisdictions on a single standardized form of offering document, as contemplated under the common prospectus approach, would prove to be insurmountable. A majority of commentators favored the reciprocal approach, and discussions began in 1987 with a view to establishing a system of multijurisdictional disclosure based on this approach.

As the negotiations unfolded, the concepts of “reciprocal recognition” and “common prospectus approach” eventually evolved into the more generic descriptors “mutual recognition” and “harmonization,” respectively. In June 1991, the SEC and various jurisdictions comprising the Canadian Securities Ad-

15. Although the United Kingdom did not actively participate in the creation of the MJDS, the releases published at the time suggested that the MJDS could be extended to include the United Kingdom at a later date. In fact, this did not occur.
ministrators ("CSA") ultimately adopted the MJDS system. The adopted system was described as a hybrid of the mutual recognition and harmonization approaches. The following excerpt explains the conceptual underpinning for the MJDS:

As proposed, the multijurisdictional disclosure system is a hybrid of the two approaches. While it is based on the concept of mutual recognition, the participants will be those jurisdictions whose disclosure systems, while different in detail, in substance provide investors with information to make an informed investment decision and financial statements of relevance and reliability. The existence of a well-developed, sophisticated and reliable system for administering these requirements is also critical, as the Commission will rely primarily on foreign disclosure requirements, application of disclosure standards and day-to-day enforcement of those standards.\(^{18}\)

As adopted, the MJDS permits eligible issuers in Canada to effect offerings of securities in the United States based on disclosure documents prepared in accordance with Canadian requirements, and vice versa. It further permits issuers to use Canadian continuous disclosure documentation and file Canadian-style insider reports in satisfaction of U.S. requirements and, conversely, allows U.S. issuers to file their continuous disclosure and insider reports in satisfaction of the equivalent Canadian requirements.

The advantages of the MJDS extend to specific transactions such as cross-border rights offerings, takeover bids, issuer bids, and business combinations. Issuers using the MJDS system are subject to the same civil and criminal liability and applicable anti-fraud provisions as would be applicable to domestic issuers in that market.

A restrictive and important feature of the MJDS was the establishment of eligibility criteria to limit the universe of issuers that would be permitted access to the system and to restrict the types of transactions and offerings that could be effected under it. These restrictions were described as part of the "first phase of the system." It was noted that, by limiting the first phase of the system to a relatively limited number of eligible issuers and transactions, regulators would be better able to monitor use of the system and identify and address potential problems.\(^{19}\) There have been a number of amendments and revisions to the MJDS since its adoption over fifteen years ago, but the fundamental basis of the model and the features of the system remain largely intact.

The adoption of the MJDS was an innovative, and one might even say visionary, experiment between two jurisdictions that was only made possible as a result of two key ingredients: first, a threshold assessment of the compara-

\(^{18}\) Id. at 2,920.
\(^{19}\) Id. at 2,921.
tive similarities and differences between disclosure standards, underwriting
methods, and financial reporting between the participating jurisdictions;
and second, a determination that standards in these key areas were similar
enough to warrant reliance on what is, in effect, “substituted compliance”
with substantially comparable requirements. The comparability assessment
was a fundamental underpinning for the foundation of trust upon which the
MJDS was built.

The objective of the MJDS was to allow single-jurisdiction regulation of
certain cross-border securities transactions and continuous reporting obliga-
tions in order to simplify access to broader pools of capital more efficiently
and at a lower cost. Disclosure could essentially be prepared in accordance
with the requirements of the issuer’s home jurisdiction. Regulatory authori-
ties in the issuer’s home jurisdiction would be responsible on an ongoing
basis for establishing and monitoring compliance with the applicable disclosure
standards.

It is clear that certain aspects of the Blueprint have some similarities to the
MJDS system. There are, however, differences. These are discussed later in
this commentary.

B. The TSX Group Proposal

Recently, Richard Nesbitt, the Chief Executive Officer (CEO) of the TSX
Group, proposed a framework for achieving a Canada-U.S. free trade regime
for securities trading based on mutual recognition. The objectives sought to
be achieved, as outlined by Mr. Nesbitt in speeches to the U.S. National Press
Club and the U.S. Chamber of Commerce in April 2006, would be to increase
competition for cross-border listings, trading and data sales; to lower trans-
action costs for U.S. and Canadian investments; and to discourage regulatory
arbitrage as a by-product of the adoption of such a framework. He cites
numerous statistics in support of the framework including the following: when
the Canada-U.S. Free Trade Agreement was signed in 1988, trade in goods
and services between Canada and the United States was $152 billion. By the
end of 2005, it had reached $500 billion. The value of shares traded in 311
interlisted issuers surpassed that figure by a factor of three—totaling ap-
proximately U.S. $13 trillion.

The TSX Group proposal is premised on the concept of mutual recogni-
tion of each jurisdiction’s system of regulation and listing standards. The result
would be that the NYSE, NASDAQ, and other U.S. exchanges could com-

20. Seventy-two Canadian issuers used the MJDS during calendar years 2004 and 2005. In 2005, the
21. Nesbitt, supra note 4; see also Richard Nesbitt, CEO, TSX Group, Address to U.S. Chamber of
22. Nesbitt, supra note 4.
pete for Canadian business in Canada in compliance with U.S. laws and under U.S. regulatory supervision. Conversely, TSX Group exchanges could compete in the United States in compliance with Canadian laws and under Canadian regulatory oversight. As proposed, the arrangement calls for greater sharing of enforcement information to ensure that U.S. and Canadian enforcement resources can be applied as effectively as possible.

The proposal sets out various options in terms of its intended scope which could include: investors having access (retail and institutional) to purchase and sell securities freely in the participating jurisdictions; members of self-regulatory organizations (investment dealers in Canada) being able to do business in each country without having to comply with—and incur the fixed costs of—residency requirements; and exchanges being free to conduct business in each jurisdiction.

The TSX Group proposal articulates four elements, which would be essential to implement a workable framework:

1. an explicit political commitment from the relevant governments and regulatory agencies in each jurisdiction;
2. a mutual recognition of equivalent regulatory standards, objectives, surveillance, and enforcement on both sides of the border;
3. a clear commitment to the highest standards of investor protection; and
4. a cross-border technical working group to resolve specific issues as they arise.

As is the case under the Blueprint, the TSX Group framework focuses on enhancing cross-border access for exchanges, dealers, and investors. MJDS, by contrast, focuses on facilitating cross-border access for issuers. All of these models share an explicit commitment to liberalizing cross-border securities-related activities.

As noted in the TSX Group proposal, cross-border trading is very significant between the United States and Canada and the untapped potential is even greater. With a total of over 10,000 public companies currently listed on major exchanges in Canada and the United States, it is clear that there is more potential to be tapped. Among the benefits that the TSX Group proposal identifies and that could be expected to flow from greater liberalization of cross-border securities trading are the following: improved liquidity, higher volumes, reduced trading costs, more choice in terms of listing venues, and greater opportunities for diversification.

C. The European Union (EU) Model

In the EU, a new system of securities regulation was adopted as a result of the findings of the Financial Services Action Plan (February 2001). The main goal of the system was to integrate the EU's financial markets into a single European financial market. The new system envisions four steps in the creation of securities legislation: (a) identification of key principles, (b) implementation measures, (c) regulatory cooperation to improve implementation, and (d) enforcement of measures among member states.

Several key directives have been adopted to further this goal since 2001, including: the Market Abuse Directive,24 the Prospectus Directive,25 and the Markets in Financial Instruments Directive.26 The level of required legislative harmonization varies across directives. One example of a more harmonized directive is the revised Prospectus Directive (the "Directive"), which creates a "common market prospectus" across EU member states. With a few exceptions, the Directive does not permit member states to impose additional requirements for a prospectus beyond those specified within it. Prospectus approval is granted only if specified, common EU standards of disclosure have been met. Each member state maintains its own national liability rules for prospectuses, and the "home member state" is responsible for approving the prospectus. The prospectus is then valid for use in any other EU member state. This process is often referred to as "passporting."

What should be evident from the above is that, notwithstanding some differences, there are many similarities in terms of the objectives, limitations and conditions that are features of the MJDS, the Blueprint, and the EU model. It is significant to note that these models have, by and large, gravitated towards a mutual recognition approach that combines certain minimum standards with a degree of flexibility and tolerance for somewhat divergent requirements. It is noteworthy that none of the subject alternative models has embraced absolute harmonization as a prerequisite to successful adoption and implementation, presumably because the prospect of achieving absolute harmonization between sovereign jurisdictions is so fraught with impediments as to be practically unachievable.

II. The Challenges and Advantages of Convergence

As the Blueprint points out, complete regulatory convergence has proven to be difficult (if not impossible) to achieve. Furthermore, as the authors note, it may not be desirable "if eliminating . . . philosophical differences results in less regulatory experimentation and a rigid one-size-fits-all approach to market oversight." 27 The Blueprint goes on to state that although "conforming the laws and regulations of different countries around a single standard has tangible benefits for the cross-border flow of capital . . . markets also benefit from regulatory competition as much as they do from other types of competition." 28 These statements are, in principle, compelling. The challenge, however, is to strike the right balance between a healthy degree of regulatory competition and the proverbial "race to the bottom." To what extent can we tolerate different, but fundamentally compatible, standards and still claim victory in the battle for global "convergence"? These are difficult challenges for regulators, but challenges that we are forced to tackle if we are prepared to entertain the idea of liberalizing cross-border access based on compliance with requirements that are not identical to those that we apply domestically.

The Blueprint outlines a number of initiatives that the SEC has undertaken over the past two decades to afford certain accommodations to foreign issuers seeking to access the U.S. capital markets (e.g., permitting foreign issuers to use high quality foreign accounting standards provided there is a reconciliation to U.S. Generally Accepted Accounting Principles ("GAAP")). In the Blueprint, it is noted that the SEC has historically advocated for the "convergence" of national regulatory standards on the basis that the costs associated with having to comply with different regulatory requirements in multiple jurisdictions would be substantially reduced if one set of high quality standards was embraced by regulators globally. Recognizing that this goal, while theoretically desirable, has in practice proven to be elusive, the Blueprint opens the door to a new and potentially more flexible approach.

The Blueprint is positive in signaling a willingness to consider new paradigms to achieve objectives which many regulators around the world share: increasing investor access to foreign opportunities, lowering transaction costs to investors engaging in trades of foreign securities, eliminating overlapping and duplicative requirements imposed by multiple regulators, and discouraging regulatory arbitrage.

Some might argue that the concept of "bilateral substituted compliance" poses a threat to high standards of investor protection and market integrity and will potentially set back the goal of global regulatory convergence by opening the door to disparate standards. However, if implemented sensibly and with careful deliberation, this need not be the case. Striking the right bal-

27. Tafara & Peterson, supra note 1, at 50.
28. Id. at 52.
ance between prescribed and transparent minimum standards and ongoing equivalent oversight, as necessary pre-conditions to bilateral arrangements will be key to preventing a “race to the bottom.”

Ironically, implementation of the MJDS, based on mutual recognition of different but substantially similar standards, has provided very powerful incentives to maintain high standards of regulatory convergence between the two jurisdictions involved. As U.S. regulatory standards have evolved since the adoption of the MJDS, there has been considerable pressure on Canadian regulators to keep Canadian regulatory standards broadly in line with U.S. regulation to address perceived gaps and generally to minimize relevant differences so as not to jeopardize the continued availability of the MJDS to eligible Canadian issuers. In the wake of the passage of the Sarbanes-Oxley Act (“SOX”) in the United States, Canada, through the CSA, indicated its intention early on to carefully study the SOX legislation. Ultimately, the CSA did adopt certain aspects of SOX, modified as appropriate, which had the effect of ensuring that our securities regulatory environment remains closely aligned in principle with that in the United States.29

III. ASSESSMENT CRITERIA

A critical analysis of the Blueprint or any other proposal that might be developed to achieve similar objectives should proceed from the identification and adoption of appropriate criteria to guide such an assessment. In this section of the commentary, I suggest a number of criteria that might, with necessary refinement, form the basis for such an exercise.

A. Congruence in Statutory Mandate

The Blueprint provides a detailed description of the SEC’s approach to regulating the U.S. capital markets and sets out with particularity its legislative mandate and governing principles. The paper emphasizes the need for a new degree of “openness” at the SEC in terms of dealing with foreign market participants and foreign regulators. At the same time, the paper also


Broadly speaking: (a) NI 52-108 requires reporting issuers to use audit firms which are members of the Canadian Public Accountability Board; (b) MI 52-109 requires CEO/CFO certification of disclosure in issuers’ annual interim filings; and (c) MI 52-110 requires reporting issuers to have audit committees composed of directors who are independent and financially literate. On June 30, 2005, the Canadian Securities Administrators’ corporate governance policy and disclosure rules were adopted as National Policy 58-201: Corporate Governance Guidelines, 28 O.S.C.B. 5,383 (2005) (Can.); and National Instrument 58-101: Disclosure of Corporate Governance Practices, 28 O.S.C.B. 5,377 (2005) (Can.).
reaffirms the need for the SEC not to stray from its fundamental mandate which, piecing together various provisions in the Securities Exchange Act of 1934 ("Exchange Act"), the National Securities Markets Improvement Act and the SEC’s own "Mission Statement," may be fairly cast as follows: to protect investors and promote efficient, fair, and competitive capital markets in the national public interest.

It would therefore appear that an essential first step along the road to adopting a system of bilateral substituted compliance with a foreign regulator would be to ensure a basic level of congruence in statutory mandate. The Securities Act (Ontario), for example, sets out our mandate as follows: "to provide protection to investors from unfair, improper or fraudulent practices” and “to foster fair and efficient capital markets and confidence in capital markets." To the extent that regulators share a fundamentally congruent mandate, this establishes an important foundational platform for any model that incorporates elements of mutual recognition and/or reliance.

B. Congruence in Governing Principles

Just as congruence of statutory mandate or mission is a useful threshold consideration, it should be equally instructive to compare the governing principles that guide the administration, implementation and enforcement of securities legislation in each jurisdiction. Although some disparities are inevitable, a basic level of congruence and compatibility of governing principles should further aid in establishing that there is a fundamental basis for reliance, to an extent, on another regulator’s supervision and oversight of issuers, intermediaries, or exchanges.

The Blueprint notes that the concepts embedded in the Exchange Act are surprisingly adaptable to an international context. In particular, these concepts are identified as follows: U.S. securities regulation must remain nationality-neutral; U.S. securities regulation must be flexible; and regulatory competition should not be confused with regulatory arbitrage.

It is interesting to compare the fundamental principles set out in the Securities Act (Ontario) with the above-noted “embedded” concepts. The OSC is directed by its governing legislation to have regard to, and balance, these principles in administering the Securities Act (Ontario). Although the

34. Section 2.1 of the Securities Act, R.S.O., c. S.5 (1990) (Can.), states as follows:
   In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
   1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
terminology may differ somewhat and the list of principles articulated in the Securities Act (Ontario) is more comprehensive as compared to those identified in the Blueprint, there appears to be a fundamental level of compatibility or congruence in the animating principles.

C. Cost-Benefit Analysis

The Blueprint contemplates a four-step process for both foreign trading screens (which are described as extensions of foreign stock exchanges) and foreign broker-dealers. While acknowledging that the regulation of exchanges and broker-dealers is different, the concept of “substituted compliance” would be applied in a similar manner to allow both types of entities to access the U.S. capital market. The Blueprint is comprised of two parts: an outline of the exemption requirements for the exchanges and broker-dealers and a set of regulatory pre-conditions that would need to be present in the home jurisdiction of the exchange or broker-dealer. The latter pre-conditions would entail an evaluation of the entity’s home country regulatory regime and “would be hardwired through a bilateral arrangement with the SEC, possibly legally supported by a treaty between the United States and the foreign government.”35

The four-step process involves the following:

(i) a petition from the foreign entity to the SEC seeking an exemption from registration;
(ii) discussions between the SEC and the home jurisdiction regulator with primary oversight responsibility for the petitioner;36
(iii) dialogue between the SEC and the petitioning entity; and
(iv) public notice of the petition and request for comment.

While there is undoubtedly some conceptual appeal in applying the same framework to foreign stock exchanges and broker-dealers, one might fairly ask whether the same four-step approach for both types of entities strikes the right balance from a cost-benefit perspective. Inviting exchanges to seek specific exemptions from the SEC on an ad hoc basis and exposing such applications

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2. The primary means for achieving the purposes of this Act are,
   i. requirements for timely, accurate and efficient disclosure of information,
   ii. restrictions on fraudulent and unfair market practices and procedures, and
   iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.
4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.
6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.

35. Tafara & Peterson, supra note 1, at 54.
36. This second step contemplates the bilateral comparability assessment and negotiation of supporting agreements and memoranda of understanding.
to a public comment process may be appropriate and feasible given the relative volume of requests that might be expected and the significance of extending access to foreign exchanges in terms of broader capital market impact.

The cost-benefit equation may be different in terms of assessing the impact of the model from a broker-dealer perspective. In addition, if the framework is transparent and well established, one might fairly ask whether requiring ad hoc requests for exemptive relief is optimal or necessary. The same question should be addressed in connection with the proposal that individual broker-dealer petitions be published for public comment. If the framework itself and the requirements it imposes are exposed for comment and fully debated prior to adoption, it may be unnecessary to also require ad hoc requests for exemption to be published for comment.37

D. Transparency, Clarity, and Effectiveness

The framework should be transparent and exposed for public comment and debate prior to adoption. It must be clear to petitioners what conditions they must meet to seek access to the model. The relevant criteria should be applied, and be seen to be applied, in an even-handed and impartial fashion.

Lastly, it should be evident that the framework is sufficiently robust, and yet practical, to enable participants to realize its intended benefits. In this regard, it would be a useful discipline to analyze and compare the requirements that would apply to an entity seeking access to the U.S. markets in the normal course as compared with the requirements that would apply under the Blueprint. Such an exercise would not only help to expose the benefits of the Blueprint, but would also shed light on the effectiveness of the framework in achieving the stated goals in a cost-effective manner.

E. Ongoing Evaluation

The Blueprint specifically contemplates a detailed five-year review and reassessment process. This process is designed to overcome the limitations inherent in mutual recognition arrangements, which are premised on an initial determination that systems are sufficiently converged, without any mechanism to ensure that this continues to be the case.

As regulatory regimes will inevitably shift and diverge over time in response to different political, legislative, judicial, and administrative imperatives, it is critical, as the Blueprint points out, that any mutual recognition model attempt to address the "snapshot in time" hazard that typically accompanies cross-border mutual recognition and convergence arrangements.38

37. In this regard, it is notable that eligible issuers that rely on the MJDS system are not required to make individual petitions and obtain exemptive relief as a pre-condition to such reliance.
38. Tafara & Peterson, supra note 1, at 56.
IV. KEY COMPARABILITY ASSESSMENT CRITERIA

The Blueprint identifies the “key comparability assessment criteria” that would need to exist in order for the SEC to determine that an entity’s home jurisdiction regulatory system satisfies the objectives of U.S. federal securities laws. Presumably, a bilateral assessment process is contemplated. A favorable comparability assessment ensures that an SEC exemption to a foreign financial services provider (e.g., broker-dealer) is predicated upon substituted compliance with substantially equivalent requirements.39

The key comparability assessment criteria identified in the paper are: exchange oversight, broker-dealer comparability, reciprocity, and bilateral regulatory co-operation agreements covering supervisory and enforcement activities. These criteria are described more fully in the Blueprint and appear to be both pragmatic and supportable.

It might also be worthwhile to consider and adapt the criteria that would apply if an exchange or broker-dealer were applying for recognition or registration. In other words, an exchange (whether domestic or foreign-based) applying for recognition to carry on business in Ontario would have to address, at a minimum, the following criteria: corporate governance, transparent and fair fee structure, fair access, information sharing capability, fitness criteria for officers and directors of listed companies, financial viability, robust systems and technology capability, and a rule-making framework to conduct compliance reviews and perform surveillance and enforcement activities.

Currently, when a foreign-based stock exchange applies for exemption from recognition in Ontario, it will be expected to establish that it meets essentially the same criteria, set out above, that a domestic exchange seeking recognition under the Securities Act (Ontario) would be required to meet. However, some flexibility is applied in assessing whether the criteria have, in substance, been satisfied through the laws and oversight of the home regulator. If so, subject to an appropriate regulatory oversight regime in the home jurisdiction, the foreign-based exchange will be exempted from ongoing requirements that would apply to domestic exchanges (e.g., approval of rules, policies and similar instruments, and regular examinations). In addition, exemptions may be subject to terms and conditions designed to ensure access to information on the operations of the foreign exchange and the trading activity of Ontario residents.40

Conclusion

Regulators around the world will be increasingly challenged to develop sound and effective models for regulating entities that operate internationally. As George Osborne, the Shadow Chancellor of the Exchequer in the United

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39. MJDS, by contrast, does not expressly incorporate such a reassessment mechanism.

Kingdom, so ably articulated, unilateral action is an imperfect, partial solution. Improving domestic regulation and taking steps to protect against “regulatory” creep fails to address regulatory overlap for those who wish to operate in several jurisdictions. Similarly, Mr. Osborne points out the difficulties inherent in attempting to establish a “supra-national institution,” such as the EU, to regulate at a regional or even global level. He therefore concludes that the best approach is for national bodies to work together and promote mutual recognition of principles-based standards as opposed to overlaying divergent, inconsistent regimes on market participants seeking to access foreign markets.

In conclusion, I concur with Mr. Osborne’s pithy assessment as to the best of the available alternatives. Both governments and regulators should collaborate to build a framework that facilitates international access and rejects protectionist tendencies but, at the same time, protects investors and market integrity. It is a tall order. The Blueprint opens the door to an important discussion. I hope that Canada will be an active participant in these negotiations.
