

# *Fordham International Law Journal*

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*Volume 17, Issue 5*

1993

*Article 11*

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## The Role of SEC in Evaluating Foreign Issuers Coming to U.S. Markets

Richard Kosnik\*

\*Clifford Chance

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PANEL II

THE ROLE OF THE SEC IN EVALUATING  
FOREIGN ISSUERS COMING TO  
U.S. MARKETS

*Richard Kosnik\**

Before I begin, I am required to say that the views I express here today are mine alone and do not necessarily reflect those of the Securities and Exchange Commission ("SEC" or "Commission") or other members of the Commission's staff.

I have been asked to talk about the role of the SEC in evaluating foreign issuers coming to the U.S. markets. In looking through the materials, I thought one change I would make to that title would be to add a question mark at the end, because the question both in the U.S. markets and in foreign markets that I believe is extremely important in terms of the development of those markets is: What precisely is the role of a regulator?

We all know, for example, that the SEC is charged with the administration of the federal securities laws and that it has a mandate to ensure the integrity of the markets and the protection of investors.<sup>1</sup> The Commission, however, has a number of choices it can make in exercising that authority, all of which may satisfy that mandate but each of which can have a dramatically different impact on the competitiveness of the U.S. markets.

I personally feel, and I believe there is a great sense at both the Commission and staff levels, that it is extremely important to ensure that regulation does not become an unnecessary barrier to cross-border capital formation. It is crucial in these increasingly competitive times that the SEC find the correct balance in

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\* Partner, Clifford Chance, New York, N.Y.; B.A., 1977, Harvard College; J.D., 1982, Georgetown University Law Center. At the time of this Conference, Mr. Kosnik was Associate Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, Wash., D.C. While at the SEC, Mr. Kosnik oversaw the activities of the Office of International Corporate Finance, including the development and implementation of rule-making initiatives and interpretive policies of the Division of Corporation Finance, pertaining to offerings by foreign issuers in the United States.

1. See Securities Exchange Act of 1934, 15 U.S.C. § 78b (1988 & Supp. IV 1992) (citing need to regulate federal securities markets).

regulating the market; that the SEC appropriately weigh the benefits and the costs of regulation, so that we can both satisfy our mandate of protecting the markets and investors and also meet the needs of issuers and investors. It is essential in that process that the Commission continuously review its regulations and rules in light of the developments in the markets and in light of the needs of market participants. Also, it is very important for the Commission to consider new and different approaches to regulation in order to address problems faced by the market.

I believe what I have seen at the Commission in the last several years is a Commission with a dramatically different attitude toward regulating foreign issuers than the attitude that prevailed ten or fifteen years ago. On numerous occasions I have met with issuers and their advisors who were not aware of our attitude and approach toward dealing with foreign issuers, who, frankly, have been very positively surprised.<sup>2</sup>

Even in terms of the Commission's rule-making initiatives over the last few years, I believe you can see evidence of this approach. Over the last few years, the Commission adopted the following: Rule 144A,<sup>3</sup> which was discussed this morning;<sup>4</sup> Regulation S, a safe harbor that provides greater certainty with respect to the application of our registration requirements to offerings that take place outside of the United States;<sup>5</sup> and the multi-jurisdictional disclosure system with Canada, which allows Canadian firms to undertake public offerings in the United States using home country documentation.<sup>6</sup> These initiatives are

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2. See M. Shane Warbrick, *Practical Company Experience in Entering U.S. Markets: Significant Issues and Hurdles from the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S112 (1994) (discussing Fletcher Challenge Ltd.'s experience with SEC while undergoing U.S. registration process).

3. 17 C.F.R. § 230.144A (1993).

4. See William E. Decker, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S10, S14-15 (1994) (discussing increased attraction of non-U.S. companies to U.S. capital markets and options available for accessing those markets); Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From a Legal Perspective*, 17 FORDHAM INT'L L.J. S25, S35-37 (1994) (discussing alternative methods for non-U.S. companies to access U.S. capital markets); Joseph Velli, *American Depositary Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38, S53-56 (1994) (discussing Rule 144A transactions).

5. 17 C.F.R. §§ 230.901-904 (1993).

6. Multijurisdictional Disclosure and Modification to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, Exchange Act Release No. 29,354, 56 Fed. Reg. 30,036-01 (July 1, 1991).

very important because of the practical effect they have had upon the market as well as what they demonstrate about the willingness of the Commission to adopt new conceptual approaches in regulating the market.

I believe that over the last few years the Commission has struck a correct balance in regulating the market and, at the same time, has been able to attract foreign issuers to U.S. markets. However, despite these successes, it is very important that we not sit back and let the market go forward without us as regulators being an important element of that market. I think that what you have seen over the last few years, and what you will continue to see under the new SEC Chairman, Arthur Levitt, is a continued focus on the international area and a willingness and desire to find solutions to problems to attract foreign issuers to our markets.

It might be useful to step back just for a moment to take a look at what has happened over the last few years in terms of foreign issuer participation in our markets. What we have seen at the SEC is that in both the private and the public U.S. markets foreign issuers have been coming in increasing numbers.

Rule 144A is a good example.<sup>7</sup> Over the last few years, we have seen more than 425 offerings involving more than U.S.\$55 billion of securities. Very importantly, the trend reflects a steep upward curve. In 1990, which is the year in which Rule 144A was adopted, there were only U.S.\$3.4 billion of securities offered in Rule 144A transactions. In 1993, more than U.S.\$24 billion has been raised through offerings of Rule 144A-eligible securities, an eight-fold increase from 1990 to 1993.

Foreign issuers have been an important part of the Rule 144A market. Foreign issuers have undertaken approximately forty-five percent of the Rule 144A-eligible securities placements. With respect to the equity component of the 144A market, foreign issuers have raised almost fifty percent of the total amount.

One trend that we have seen is very interesting. Use of the 144A market, generally, and foreign issuer participation in that market, has increased since the adoption of the Rule. The amount issued by foreign issuers in that market through the of-

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7. 17 C.F.R. § 230.144A (1993); see Decker, *supra* note 4, at S14 (discussing Rule 144A); Jensen, *supra* note 4, at S35-37 (discussing Rule 144A); Velli, *supra* note 4, at S53-56 (discussing Rule 144A transactions).

fering of debt securities also has increased. However, in the last year or two we have seen a decrease in the use of 144A for offerings of equity securities of foreign issuers. At first blush this may seem to indicate an adverse development in the market or a deficiency in Rule 144A. However, the reason for this development is, I believe, that many foreign issuers are bypassing the Rule 144A market for equity securities and going directly to the public markets.<sup>8</sup>

With respect to public offerings in the last three years, we have seen more than U.S.\$100 billion registered by foreign issuers. Again, in looking at the trends over that time period, we have gone from 1990 with U.S.\$7.7 billion in securities registered to more than U.S.\$26 billion to date in 1993, with still another month and a half left in this year.

As former Chairman Breeden mentioned in his Address, we have more than 550 reporting companies, which is up significantly from the end of 1990 when we had only 434.<sup>9</sup> In the last few years, we have had more than 250 new issuers from thirty-three countries that have entered the U.S. public market for the first time.

These trends certainly indicate an upward movement. But, as I have already mentioned, I do not believe it has resulted in a sense of complacency at the SEC. Over the last several years, given this enormous amount of activity, we have worked very closely with foreign issuers in solving problems to allow them to register and enter our public markets and to access the private markets through private placements of Rule 144A-eligible securities.<sup>10</sup>

We have learned much over the last few years, and we have identified several areas that present particular problems for foreign issuers, many of which were discussed earlier. Accounting, for example, is the highest on the list. We have seen in the con-

8. See Velli, *supra* note 4, at S54-55 (noting decrease in use of Rule 144A due to increase in full-blown public offerings)

9. See Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L.J. S77, S85 (1994) (discussing increase in non-U.S. companies registered with SEC); Jim Silkenat, *Overview of U.S. Securities Markets and Foreign Issuers*, 17 FORDHAM INT'L L.J. S4 (1994) (discussing increase in non-U.S. companies registered with SEC); Decker, *supra* note 4, at S11-12 (discussing increase in non-U.S. companies registered with SEC).

10. See Warbrick, *supra* note 2, at S117-18 (discussing experience of Fletcher Challenge Ltd. dealing with SEC while going through U.S. registration process).

text of reconciliation — not just with respect to primary financial statements but also select information, and financial statements of significant acquirees and investees — difficulties faced both by foreign issuers and by U.S. issuers who are acquiring, for example, foreign companies.

We also have seen particular difficulties with large foreign issuers who already have established markets outside the United States who, upon entering our markets for the first time, are unable to take advantage of certain rules and safe harbors that we have available to large U.S. issuers.

Also, and I think very importantly from a practical point of view, the trading rules — Rules 10b-6,<sup>11</sup> 10b-7,<sup>12</sup> and 10b-8<sup>13</sup> — have raised difficulties both in terms of the private markets with 144A placements, as well as the public markets, because of the restrictions that they place upon distribution participants and their affiliates in markets outside the United States.

In response to these issues, just a few weeks ago, the Commission adopted certain initiatives and also proposed certain new initiatives that could solve some of these problems that we have seen over the last few years.<sup>14</sup> I believe that many of these

11. 17 C.F.R. § 240.10b-6 (1993). Rule 10b-6 prohibits certain trading. Prohibitions against trading by persons interested in a distribution.

(a) It shall be unlawful for any person [specified by this rule] . . . to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution. . . .

*Id.*

12. 17 C.F.R. § 240.10b-7 (1993). Rule 10b-7 applies “to any person who . . . stabilizes the price of a security to facilitate an offering of any security.” *Id.* § 240.10b-7(a)

13. 17 C.F.R. § 240.10b-8 (1993). Rule 10b-8 prohibits certain manipulative and deceptive practices.

Distributions through rights.

(a) *Scope of section.* It shall constitute a “manipulative or deceptive device or contrivance” . . . for any person participating in a distribution of securities being offered through rights issued on a pro-rata basis to security holders . . . to do any act prohibited by this section prior to the expiration of the rights. . . .

*Id.*

14. See Exceptions to Rules 10b-6, 10b-7, and 10b-8 Under the Securities Exchange Act of 1934 for Distributions of Foreign Securities to Qualified Institutional Buyers, Securities Act Release No. 7028, Exchange Act Release No. 33,138, 55 SEC Docket 843 (Nov. 3, 1993) [hereinafter Exceptions to Trading Rules] (excepting 144A transactions from Exchange Act trading rules); Simplification of Registration and Reporting Re-

initiatives will have a significant practical impact by easing foreign issuers' ability to access the U.S. markets, and, in the longer run, will bring more foreign issuers to the U.S. markets. I thought what I might do is run through just briefly the changes that were adopted and proposed two weeks ago.

First, the Commission adopted certain changes to Rule 3-19 of Regulation S-X, which governs the age of financial statements of foreign issuers.<sup>15</sup> I am sure many of you are aware that the continuous reporting system in the United States as it applies to foreign issuers does not require quarterly reporting. Foreign issuers file annual reports on Form 20-F<sup>16</sup> and periodic reports as material developments occur during the year. However, in terms of accessing the capital markets, Rule 3-19 required that a foreign issuer's financial statements be not more than six months old at the time the issue goes to market.<sup>17</sup> The practical effect was that unless an issuer was producing quarterly reports, it could not have continuous, uninterrupted access to the public markets.

Two years ago, the Commission put out a proposal with respect to Rule 3-19, which would have allowed foreign issuers to use, in their registration statements, financial statements as old as twelve months, which would have allowed uninterrupted access to the public markets. On November 3, 1993, the Commission adopted that proposal in substantially the form that it was proposed, with one exception. In response to certain commentators, the maximum age of the financial statements was cut back from twelve months.

Under the current Rule, financial statements can be no more than ten months old.<sup>18</sup> The practical effect is that the blackout period, or the period during which the issuer would not have "current" financial statements has been dramatically reduced. Provided that foreign issuers produce their annual re-

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quirements for Foreign Companies; Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Research Reports, Securities Act Release No. 7029, Exchange Act Release No. 33,139, 58 Fed. Reg. 60,307-01 (Nov. 15, 1993) [hereinafter SEC Proposals] (proposing to streamline registration and reporting requirements for foreign companies).

15. Regulation S-X, 17 C.F.R. § 210.3-19 (1993).

16. 17 C.F.R. § 249.220f (1993).

17. Regulation S-X, 17 C.F.R. § 210.3-19(b) & (c) (1993).

18. Regulation S-X, Rule 3-19, *reprinted in* 6 Fed. Sec. L. Rep. (CCH) ¶ 69,160, at 61,032 (Dec. 8, 1993) (to be codified as amended at 17 C.F.R. § 210.3-19(b) & (c)).

ports within four months of the end of their fiscal year, or they provide unaudited financial statements for one interim period in addition to their semi-annual interim reports, they can have uninterrupted access to the U.S. markets. I believe, at least based upon the number of telephone calls I have had over the last two years, that this will be viewed very positively by the market.

On November 3, 1993, the Commission also proposed a number of initiatives that are directed at doing three things: first, streamlining the eligibility criteria for Form F-3,<sup>19</sup> the short form registration form, which would also expand the availability of the shelf registration system for foreign issuers; second, streamlining the reconciliation requirements that apply to foreign issuers; and, third, providing a new safe harbor and an extension of an existing safe harbor to deal with certain problems that over the last few years we have seen faced by foreign issuers and other issuers making use of both the Regulation S and Rule 144A markets.<sup>20</sup>

With respect to the eligibility criteria and the shelf registration process, the Commission's proposal would reduce the eligibility criteria such that the existing public float requirement of U.S.\$300 million would be reduced to U.S.\$75 million, and only twelve months, instead of thirty-six months, of reporting would be required.<sup>21</sup> These changes are very similar to those that were adopted for domestic issuers just last year. This proposal also reflects the results of a staff study regarding analyst following in the market for foreign issuers that demonstrated that these sorts of foreign issuers had the same or a similar sort of market following as domestic issuers of similar size. Therefore, expanded use of the form was justified. Our estimate is that with this change, we would expand the pool of F-3 eligible issuers by about one-third.

We also extended the unallocated shelf concept to foreign issuers.<sup>22</sup> The unallocated shelf system, which was put in place for domestic issuers recently, permits an issuer to register an amount of securities without designating a specific amount for

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19. 17 C.F.R. § 239.33 (1993).

20. SEC Proposals, *supra* note 14.

21. *Id.*

22. *Id.*

each class. The advantage of the unallocated shelf concept is that it eliminates overhang in the market with respect to equity put up on the shelf, thereby allowing issuers to take advantage of the shelf process to quickly access the markets for equity offerings.

The Commission also eliminated certain other requirements with respect to public float that were applicable to offerings of investment-grade securities and securities issued in connection with exercises of warrants, options, dividend reinvestment plans and so on.<sup>23</sup> This eliminated a distinction between debt and preferred securities that previously existed in our foreign issuer forms.

Historically, we treated investment grade preferred securities as different from investment grade debt, primarily because we looked at preferred securities as being equity and requiring a more difficult Item 18 reconciliation.<sup>24</sup> The Commission came to the position that investment-grade preferred securities should be treated like debt.

With respect to the reconciliation requirements, the Commission announced that it would propose to accept for foreign issuers cash flow statements prepared in accordance with International Accounting Standard No. 7 ("IAS No. 7").<sup>25</sup> That acceptance would be without any supplementation or reconciliation. I believe that conceptually it is a very important position for the Commission to have taken, and I believe it indicates the willingness of the Commission to look to International Accounting Standards provided that they insure the integrity of financial reporting.

Also, and I believe very importantly, the Commission proposed that with respect to first-time foreign registrants, we would require reconciliation for only two years, both in terms of the select information and the audited financial statements.<sup>26</sup> What we have seen with first-time foreign issuers is that it is very difficult for them to go back over historical periods to produce the information required to provide reconciled financial statements.

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23. *Id.*

24. Form 20-F, Item 18, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,764 (Nov. 18, 1993).

25. SEC Proposals, *supra* note 14.

26. *Id.*

As a result, we have on a case-by-case basis given waivers with respect to reconciliation for select information.

With the November 3, 1993 proposal, the Commission codified this staff position for select financial information and also expanded it to include the primary financial statements. As a result, a new foreign issuer would be required to reconcile only two years of select financial information and two years of the primary financial statements.<sup>27</sup> As these issuers ease their way into the reporting system, they would provide more reconciled financial information. For example, in its second year of reporting, a large issuer would include three years of income statements and a third year of select financial information.

Also very importantly, the Commission proposed to eliminate the requirement to reconcile financial statements of significant acquirees and investees if the significance level is under thirty percent.<sup>28</sup> What we have seen over the last few years for both domestic and foreign issuers is that in the event of a significant acquisition, for example, issuers would be required to include separate financial statements for the acquiree and, in addition, reconcile those separate financial statements. That was very difficult in some situations where the company did not have complete control of the acquiree or could not obtain the information in time to include it in the registration statement to go forward with the particular public offering.

Under the proposal, the primary audited financial statements would have to be included in the registration statement, but there would be no requirement to reconcile those financial statements if the significance level is below thirty percent.<sup>29</sup>

The Commission also eliminated the need for Item 18<sup>30</sup> reconciliation with respect to investment-grade preferred stock,<sup>31</sup> which I believe will make it much easier for foreign issuers to use the F-3 registration statement and other forms as well. Also eliminated were certain financial statement schedules previously required for foreign issuers.<sup>32</sup> As part of our regular process we

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27. *Id.*

28. *Id.*

29. *Id.*

30. Form 20-F, Item 18, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (Nov. 18, 1993).

31. SEC Proposals, *supra* note 14.

32. *Id.*

review our rules and regulations to determine if modifications are necessary. In reviewing the schedules that apply to foreign issuers, we came to the conclusion that, on balance, weighing the costs and benefits of the regulation, about five or six of those schedules were not necessary, so they were completely eliminated.

Finally, the Commission proposed a new safe harbor, Rule 135c,<sup>33</sup> dealing with announcements of unregistered offerings and expanded an existing safe harbor, Rule 139,<sup>34</sup> relating to broker-dealer research reports.

Proposed Rule 135c<sup>35</sup> tracks existing Rule 135, which provides a safe harbor for announcements in the context of contemplated registered offerings.<sup>36</sup> Rule 135c, as proposed, tracks exactly the text of Rule 135 with one exception, which is that we have added a requirement that the announcement cannot be made for the purpose of conditioning the U.S. market for the securities being offered.<sup>37</sup>

We recommended proposed Rule 135c to the Commission because in the context of the use of Rule 144A,<sup>38</sup> both in 144A-only offerings and in global offerings making use of Regulation S<sup>39</sup> and Rule 144A in combination, issuers were faced with a dilemma. For example, in cross-border offerings, issuers have conducted 144A offerings using a public-style distribution, which resulted in a fairly large pool of qualified institutional buyers being approached. At the same time, the issuer undertook a Regulation S offering offshore with the usual sort of road shows, disseminating a fair amount of information to a fairly broad group of potential investors.

Where convertible securities were being offered and the result was a significant overhang to the market for the issuer's equity securities in the United States, the foreign issuers and their counsel felt an obligation to disclose the Rule 144A and Regulation S offerings to the existing public trading market in the United States. The SEC's position was, and has been, that to the

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33. *Id.*

34. *Id.*

35. *Id.*

36. 17 C.F.R. § 230.135 (1993).

37. SEC Proposals, *supra* note 14.

38. 17 C.F.R. § 230.144A (1993).

39. 17 C.F.R. §§ 230.901-230.904 (1993)

extent there is material information and the issuer decides it is material, it must be disclosed to the market.

The dilemma for the issuer, however, was that in the context of the 144A offering, which usually is a private placement by the issuer under Section 4(2) of the Securities Act of 1933,<sup>40</sup> or using Regulation S, with subsequent Rule 144A resales, that they might have a "general solicitation" problem. Rule 135c is intended to deal with this problem. It is a fairly broad rule and we have asked a number of questions with respect to its applicability and whether or not it should be limited to cover only certain situations. I think it will be very interesting to see what sort of response we receive from the market.

The second safe harbor, Rule 139,<sup>41</sup> deals with broker-dealer research reports. Under existing Rule 139, broker-dealers that participate in distributions and that disseminate information about issuers that are F-3 eligible can do so fairly easily, relying on the "easier" provisions of the present Rule 139.<sup>42</sup> The difficulty we saw occurred when large foreign issuers with established trading markets offshore came into the United States and, obviously, much of the research information was being done in the issuer's home market. The participants in the distribution were not able to disseminate that information in reliance on the "easier" part of the safe harbor because although the issuer met all of the requirements in terms of size, it did not have a reporting history in the United States because it was coming in for the first time. The proposal with respect to Rule 139 is that, if an issuer meets all of the requirements except for the reporting history, and provided that the issue is traded in an offshore market for at least twelve months, broker-dealers participating in the distribution would be able to rely on Rule 139 for distribution of reports with respect to that issue.<sup>43</sup>

The other very important action undertaken by the Commission two weeks ago related to the trading rules. As I stated before, there has been a very significant impact of the trading rules in the context of cross-border offerings that involve a U.S. tranche, whether in the private markets with private placements

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40. 15 U.S.C. § 77d(2) (1988).

41. 17 C.F.R. § 230.139 (1993).

42. *Id.*

43. SEC Proposals, *supra* note 14.

of 144A-eligible securities or in the public markets. Recognizing the impact of the trading rules, the Commission undertook several actions.

First, with respect to offerings of 144A-eligible securities, they gave a pass from the trading rules.<sup>44</sup> The arguments that had been made to the staff and to the Commission since the adoption of 144A were that the difficulties presented by the trading rules were impeding the development of the market and it was not necessary to apply the trading rules given that the nature of the Qualified Institutional Buyers' ("QIBs")<sup>45</sup> market consisted of large sophisticated institutional investors. The Commission agreed with these arguments, so now in the context of 144A offerings only to QIBs, Rules 10b-6, 10b-7, and 10b-8 no longer apply.<sup>46</sup>

Second, and very importantly, the Commission issued a statement of policy with respect to class exemptions from the trading rules for securities of foreign issuers.<sup>47</sup> This statement of policy grew out of action that was taken about two months ago by the Commission in the context of a letter by the staff that related to offerings of securities by German issuers (the "German Letter").<sup>48</sup> That letter was issued shortly after the Daimler-Benz listing, after we were approached by certain market participants who explained to us that in the event that German issuers wish to come to the U.S. markets to publicly offer securities, there would be difficulties relating to the application of the trading rules to the German market, which might prevent them from entering U.S. markets.

With respect to the application of the trading rules, the Division of Market Regulation of the SEC has been fairly flexible in attempting to find solutions to problems caused by the application of those prophylactic rules. For example, with respect to the London market, there is a separate series of letters with respect to public offerings and rights offerings that gives relief

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44. Exceptions to Trading Rules, *supra* note 14.

45. 17 C.F.R. § 230.144A(a) (1993) (defining QIB for purposes of Rule 144A).

46. Exceptions to Trading Rules, *supra* note 14.

47. Application of Rules 10b-6, 10b-7, and 10b-8 During Distributions of Securities of Certain Foreign Issuers, Securities Act Release No. 7027, Exchange Act Release No. 33,137, 55 SEC Docket 839 (Nov. 3, 1993).

48. Exemptions from Rules 10b-6, 10b-7, and 10b-8 During Distributions of Certain German Securities, Securities Act Release No. 7021, Exchange Act Release No. 33,022, 55 SEC Docket 314 (Oct. 6, 1993).

from the application of the rules, relying to a great extent on the flow of information or delivery of information in that context to the London exchange which would make it available to the SEC, if necessary. With respect to the German market, given the nature of the market and the way securities are traded and held, those traditional sorts of relief would not be adequate to solve the problem. As a result, the Division of Market Regulation worked with various participants in the market to come up with the German Letter, which essentially said that with respect to very large German companies that are part of the German Stock Index, the Deutscher Aktienindex (the "DAX"), whose securities are very liquid, a modified exemption from the application of the trading rules would be available,<sup>49</sup> again relying very heavily on the ability of the SEC at some later point to get information with respect to trading in the market. It should be recognized that the German Letter, and the statement of policy that allows securities issuers from other countries to come in and ask for relief similar to that given in the German Letter, reflect a willingness of the Commission to extend relief for other jurisdictions to solve problems, where it is warranted.

It is very important to understand that these positions do not mean that the anti-fraud provisions do not apply with respect to activities in foreign markets. Those of you who are very familiar with Rule 10b-6 understand that it is a prophylactic rule, unlike our registration requirements.<sup>50</sup> It is not the end in and of itself. It is an attempt to provide a means by which we can ensure that there are not violations of Section 10(b) of the Securities Exchange Act of 1934.<sup>51</sup> If there is another method of getting to that same position, which we have done on a case-by-case

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49. *Id.*

50. Compare 17 C.F.R. § 240.10b-6 (1993) with 15 U.S.C. § 77f (1988 & Supp. IV 1992).

51. 15 U.S.C. § 78j(b) (1988). Section 78j(b) states

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange —

.....

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

*Id.*

basis, but also now in a more generic way with the German Letter and the statement of policy, the staff and the Commission are willing to consider it. But it is important to understand that the anti-fraud rules still apply.

There are two more thoughts I would like to leave with you before I finish. They relate to SEC activities both at the Commission and staff levels, which I believe are very important and not only have had but will have an impact on the markets going forward.

The first thought relates to the activity of the Commission with respect to the International Organization of Securities Commissions ("IOSCO"), as well as the International Accounting Standards Committee ("IASC").<sup>52</sup> I sense at the Commission a strong belief that it is important to become very involved with the work of IOSCO and the IASC in establishing standards. We have contributed, and we expect to continue to contribute, substantial resources to the activities of our groups dealing with the IASC and IOSCO. I think the acceptance of IAS No. 7 is an indication of the Commission's willingness to move toward those standards where those standards, in their view, are adequate. I do believe it is an important way of the future, because it would solve many of the very important problems that foreign issuers attempting to access the U.S. public markets are presented with today.

The second thought relates to the willingness of the Commission, and in particular my office of International Corporate Finance, to work with foreign issuers, on a practical day-to-day level, to solve problems that foreign issuers face in the context of particular offerings.<sup>53</sup> We are willing to work with issuers not only to react to proposed solutions to problems, but to the extent we can, to provide our own creative solutions to those problems. We are willing to review, on a confidential basis, documentation relating to cross-border offerings. In offerings being made in multiple markets, it oftentimes is important that information with respect to the offerings not be made public until it

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52. See Pat McConnell, *Practical Company Experience in Entering U.S. Markets: Significant Issues and Hurdles from the Advisor's Perspective*, 17 *FORDHAM INT'L L.J.* S120, S127-28 (1994) (outlining activities of IASC and IOSCO).

53. See Warbrick, *supra* note 2, at S117-18 (discussing Fletcher Challenge Ltd.'s experience with SEC while undergoing U.S. registration process).

is appropriate to do so in the foreign jurisdiction. We will work with issuers to do that.

In addition, in terms of timing of transactions, the length of review with respect to registration statements will be determined by the timing of the transaction, not by the SEC based upon its ordinary review process. The point is that we understand the way the market works, we understand the need for swift response, and we understand that in the competitive markets today, particularly in cross-border offerings, that timing is extremely important. We will work with foreign issuers to meet whatever timing requirements they have for getting the registration statement out of the SEC.

In conclusion, if I can leave with you one final thought, it is that the SEC is very sensitive to the problems of foreign issuers. We deal with the problems that issuers bring to us, but we also go out and solicit issuers to find out what difficulties they are having with the system so that we can find ways to resolve those difficulties. While we have been very successful in attracting issuers to our market, I believe that, we, as a regulator, have an important obligation to continue to monitor the market, to evaluate our regulations in light of developments in the market and the needs of market participants, and also to provide prompt solutions to problems that are faced by market participants as market needs change. I believe this is necessary not only to ensure protection of investors, but also to ensure the competitiveness of the U.S. markets.