The Sixth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law

Dean William Michael Treanor Welcome*
Jill E. Fisch Opening Remarks†

Ben A. Indek Opening Remarks‡
Edward F. Greene Speaker**

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LECTURE

THE SIXTH ANNUAL A.A. SOMMER, JR. LECTURE ON CORPORATE, SECURITIES AND FINANCIAL LAW†

WELCOME

William Michael Treanor¹
Dean, Fordham University School of Law

OPENING REMARKS

Ben A. Indek²
Morgan, Lewis & Bockius LLP

Jill E. Fisch³
Fordham University School of Law

FEATURED LECTURER

Edward F. Greene⁴
Citigroup Corporate and Investment Banking

† Edward Greene delivered this address at Fordham University School of Law on November 17, 2005. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material in respect of certain statements by the speakers.

1. William Michael Treanor is the Dean of Fordham University School of Law.
2. Ben A. Indek is a partner in the securities litigation practice of Morgan, Lewis & Bockius LLP.
3. Jill E. Fisch is the Alpin J. Cameron Professor of Law at Fordham University School of Law and is the Director of the Fordham Center for Corporate, Securities and Financial Law.
4. Edward F. Greene is currently the General Counsel of Citigroup Corporate and Investment Banking.
DEAN TREANOR: Good evening, and welcome. I am Bill Treanor. I am the Dean of Fordham Law School. It is my pleasure to welcome you to the Sixth Annual A.A. Sommer, Jr. Lecture on Corporate Securities and Financial Law.

Fordham Law School, with the support of Morgan, Lewis & Bockius, inaugurated the Sommer Lecture in the fall of 2000. The lecture series began with the then Chair of the SEC, Arthur Levitt. Over the past five years, the Sommer Lecture has brought to the Law School the insights of Mary Shapiro, President of the NASD Regulation; SEC Commissioner Harvey Goldschmid; William McDonough of the Public Company Accounting Oversight Board; and the Chief Regulatory Officer of the New York Stock Exchange, and also a member of our Corporate Center’s Board of Advisers, Richard Ketchum.

It has been in every case really a gem. We are so pleased at the Law School to have the A.A. Sommer, Jr. Lecture because it’s such a tribute to A.A. Sommer, Jr. It is an absolute gem in our academic calendar, and we are so grateful.

The Law School Center for Corporate, Securities and Financial Law, which is directed by Professor Jill Fisch, with the assistance of Professor Caroline Gentile,\(^5\) has grown along with this lecture series. I would like to recognize Professor Fisch, Professor Gentile, and our Corporate Center fellow, Beth Young,\(^6\) for all their work in putting together this lecture. Thank you all.

I am now honored to introduce Ben Indek, a partner at Morgan, Lewis. At Morgan, Lewis, Mr. Indek has worked closely with senior counsel John Peloso. John is an alum and just one of the great friends and supporters of Fordham Law School. Mr. Sommer recruited him to Morgan, Lewis. John’s remarkable commitment to the vision of the Corporate Center is a large reason why the Corporate Center has started and flourished, and it is a large part of the reason that we are here tonight.

John has been instrumental in creating the lecture series, in creating and growing the Corporate Center. All of us in Fordham Law School,

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\(^6\) Beth Young is the former Fellow of the Fordham Center for Corporate, Securities and Financial Law.
all of us in the community, all in the University, are profoundly in his debt. I would like to thank you, John, for all that you have done.

We are grateful also to Ben for being with us here tonight. It is now my pleasure to turn matters over to you. Ben Indek.

**OPENING REMARKS**

MR. INDEK: Good evening, everybody. On behalf of Morgan, Lewis & Bockius, welcome to the Sixth Annual A.A. Sommer Lecture.

This lecture was established by Morgan, Lewis to honor our partner most identified with the securities industry. Al Sommer was a Morgan, Lewis partner from 1979 to 1994, when he became counsel to the firm and its clients. He was a skilled private practitioner for many years and a prolific author and commentator on a wide variety of securities law topics. Today, Al is probably best remembered by the securities bar for his service as an SEC Commissioner from 1973 to 1976 and as Chairman of the Public Oversight Board of the American Institute of CPAs.

In preparing for tonight’s lecture on international securities issues, I noted perhaps a few little-known but relevant facts about Al’s career. Not only was Al an expert in U.S. securities law, but he also had wide expertise and experience in international topics as well. For instance, I found that Al acted as a consultant to several foreign countries on the development of their securities laws and regulations, including the U.K., Jordan, Taiwan, and Egypt. He also consulted with the Asian Development Bank and the Inter-American Development Bank with respect to the securities laws of China, the Republic of Fiji, the Bahamas, and my personal favorite, Trinidad and Tobago, where he was actually the keynote speaker at that nation’s securities training session in 1999.

It is clear that Al would have enjoyed hearing what our keynote speaker has to say about the regulatory issues in the U.S. and Europe tonight. Indeed, Al was with us for the first two lectures to introduce our speakers, but, sadly, passed away in 2002 after a long illness. He is represented here tonight by his wife, Starr, and his son-in-law Jeff. We are honored that you have come to us tonight.

When Al joined our firm twenty-six years ago, he came to start a securities regulatory practice. Today we have more than 100 lawyers in the U.S. and in Europe dedicated to advising the securities industry in
the broker-dealer, investment adviser, investment company, enforcement defense, securities litigation, white-collar, public company accounting, and corporate governance areas. We like to think that our practice is one of the finest in the country.

We are proud of Al’s affiliation with Morgan, Lewis and delighted to sponsor this annual lecture in his honor.

That concludes my formal remarks, which have been vetted by Dean Treanor, by Professor Fisch, and by one of my mentors, John Peloso. Still, I would be remiss if I did not add one thought that would not have gotten by John’s editing pencil. John Peloso is a driving force behind the Fordham Center for Corporate, Securities and Financial Law and this lecture. He is also a pillar of Morgan, Lewis’s securities regulatory practice. At each of the previous five A.A. Sommer Lectures, the responsibility of offering the welcome remarks on behalf of Morgan, Lewis has been shouldered by John. This evening that high task fell to me.

It is appropriate tonight that we honor not only Al Sommer, but also John Peloso. Fordham and Morgan, Lewis owe him a large debt of gratitude. We can begin repaying that debt now, in some small way, by acknowledging John’s vision and leadership and by saying to John, thank you for your efforts, dedication, and friendship.

Professor Fisch?

PROF. FISCH: Good evening. I am Jill Fisch, and, as you heard from Bill, I am the Director of the Fordham Center for Corporate, Securities and Financial Law. On behalf of the Fordham Law School community, I am delighted to welcome you to the Sixth Annual A.A. Sommer, Jr. Lecture.

I would like to express — as well as everybody else has expressed it — our school’s deep gratitude to the firm of Morgan, Lewis & Bockius, to John Peloso, for their generosity in establishing and sponsoring the lecture and making this just a really wonderful tradition here. We also have the honor of being joined tonight by the SEC Historical Society, of which our speaker, Ed Greene, is a trustee.

I also want to welcome and express my gratitude to Al Sommer’s family. I am really glad you are here.

As you know, the Sommer Lecture is part of the Fordham Program

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7. For more information, visit the SEC Historical Society webpage, http://www.sechistorical.org (last visited Apr. 19, 2006).
in Corporate and Securities Law, a program that, with the formation of the Corporate Center, has continued to grow in quality and importance. We here at Fordham are able to take advantage of a distinguished business-law faculty, including some amazing adjunct professors, a remarkable alumni base, and, of course, our location at the heart of the financial world. Our programs and events include public lectures, policy-oriented roundtables, student-oriented lectures to introduce our students to developments and career options in business law, and more.

The business law program at Fordham includes the Securities Arbitration Clinic, in which our students represent small investors who lose money investing in the stock market. It also includes the school’s specialized business law journal, the *Fordham Journal of Corporate & Financial Law*. Many of you have noticed that the *Fordham Journal of Corporate & Financial Law* was cited by the United States Supreme Court last spring in its Arthur Andersen decision.

As with previous lectures, tonight’s lecture will be published in the journal, where, no doubt, the Supreme Court will read it in the future.

I, of course, want to thank Ed Greene for agreeing to deliver tonight’s lecture. It is a little-known fact that one of my first assignments as a junior associate was working with Ed Greene, when he was based in Cleary Gottlieb’s Tokyo office. I, of course, was based in New York. I think, for me, the biggest challenge of the assignment was trying to figure out what time to call him. I hadn’t adjusted, of course, to the global practice of law, a subject on which Ed is an expert.

One of the challenges of the global practice of law, particularly in the securities area, is regulatory conflicts. As our capital markets become more global, we face continued questions about which country and which entity is entitled to exercise regulatory authority over transactions that are essentially international in scope. Moreover, because different countries often have different underlying policy objectives, their regulations often conflict.

Few people are more experienced and more expert in responding to this challenge than Ed Greene. Mr. Greene is general counsel of Citigroup’s Global Corporate and Investment Bank, a position that he assumed in the spring of 2004. For Citigroup, which as a financial firm is subject to extensive regulation, the ability to deal with and resolve regulatory conflicts is essential.

Prior to joining Citigroup, Mr. Greene was a partner at Cleary Gottlieb Steen & Hamilton, which he joined in 1982. His practice there
included the counseling and representation of corporate issuers, investment banks, merchant banks, and commercial banks, primarily in connection with mergers and acquisitions, securitization of assets, distribution of securities, and enforcement proceedings before the U.S. Securities and Exchange Commission. He has been resident in Cleary’s London, Washington, and Tokyo offices.

Prior to joining Cleary Gottlieb, Mr. Greene was general counsel of the Securities and Exchange Commission from 1981 to 1982, and director of the Division of Corporation Finance from 1979 to 1981.

Mr. Greene received his law degree from Harvard Law School in 1966 and an undergraduate degree from Amherst College.

He is a true scholar, as well as a distinguished practitioner. He has published numerous articles in law reviews and other legal periodicals on federal securities law, banking law, and mergers and acquisitions. He is a co-author of *U.S. Regulation of International Securities and Derivatives Markets*. Most recently, he co-authored *The Sarbanes-Oxley Act: Analysis and Practice*.

The list of programs, advisory boards, and committees on which he has served is too long to recite, but among them, he was a member of the Financial Markets Law Committee of the Bank of England, Chairman of the Legal Advisory Board of the New York Stock Exchange, and a member of the SEC’s Advisory Committee on Capital Formation and Regulatory Processes. Most recently, the Association of Securities and Exchange Commission Alumni awarded Mr. Greene the William O. Douglas Award.

It gives me great pleasure to welcome Mr. Greene to Fordham and to introduce him to you now.

FEATURED LECTURER

MR. GREENE: Thank you very much for those kind remarks.

I was delighted to accept this invitation, because Al Sommer was a great mentor for me. I was the first outsider asked to head up the Division of Corporation Finance from when it was founded in 1933. As you can imagine, it was a somewhat contentious beginning. Al reached

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out to help me understand the history, the legacy, and the approach that one took at the Commission. He also helped me a great deal in connection with my first appearance at the San Diego Securities Law Institute, where he was one of the founding members.

Starr, it is very nice to see you again. Al really was the lion of the securities bar, and we miss him terribly.

I am delighted to see so many people here. I usually am asked to give the international segment of the PLI Annual Institute here in New York. It is always scheduled on Friday afternoon between 4:30 and 5:00. Usually we start at 4:40, and as I get to the podium, everyone starts streaming out of the auditorium, because they really don’t have much interest.

International securities regulation is a narrow field for some. But as General Counsel of the Corporate and Investment Bank of Citigroup, it is an issue that I spend a great deal of time with. We provide products and services throughout the globe, including in nineteen of the twenty-five member states of the European Union. Our multinational clients want to offer securities in as large and liquid a market as possible, but regulatory conflicts often frustrate this goal.

The E.U. has made substantial progress in implementing the Financial Services Action Plan (which I will refer to hereafter as FSAP), its broad legislative agenda to create an integrated European market to be competitive with the U.S. market. This progress has given financial intermediaries and issuers a significant interest in expanding convergence in securities regulation between the E.U. and the U.S., with my ultimate goal being reciprocity or mutual recognition, whichever term you prefer.

The potential gains from convergence and market integration are significant. The combined U.S.-E.U. market is large and growing. If we put aside mutual-fund holdings, from 1995 to 2004, the total holdings of U.S. equity securities by non-U.S. investors increased from $550 billion to $2.1 trillion.10 The total holdings of non-U.S. equity securities, including ADRs, by U.S. investors increased from $790 billion to $2.5 trillion.11 If the U.S. and E.U. securities markets were fully integrated,

11. Id.
substantial expenditures, such as the cost of accounting reconciliations, production of multiple prospectuses, and periodic disclosure documents, would be reduced or eliminated, reducing the overall cost of raising capital.

Moreover, it has been estimated that by combining the greater automation found in European trading systems with the greater efficiency of U.S. intermediaries, it may be possible to decrease the cost of trading, in a fully unified transatlantic securities market, by 60 percent, which could decrease the overall cost of capital by up to 9 percent.12

From my perspective as a regulator, a lawyer, and now a general counsel, my ideal outcome — perhaps unrealistic — is a fully integrated, seamless U.S. and E.U. market. In this scenario, when two different national regulatory authorities have a claim to jurisdiction over the same activity, they would not unnecessarily partition markets by imposing different and mutually incompatible standards.

How close are we to achieving this goal of a fully integrated market? Is it even realistic? Before I try to answer that question, some background might be helpful.

As you know, in the United States, the model is national treatment. All issuers, domestic or foreign, are treated the same. The SEC has granted limited concessions to foreign private issuers.13 These companies have an exemption from the proxy rules, the requirement to file quarterly reports, Section 16 requirements, and the requirement to disclose individual compensation of executive officers and directors. Also, they can report in the U.S. using local GAAP financial statements. But this concession is of limited value, because local GAAP financial statements must be audited under U.S. auditing standards, reconciled to U.S. GAAP, and the auditors must satisfy U.S. independence standards.

The general approach of the SEC remains the same today as it was when cross-border trading was much less extensive. That is, to protect U.S. investors, we need a uniform standard that should apply to any involvement in the U.S. markets. Sarbanes-Oxley was a classic example of national treatment, even though the SEC did eventually grant some minor concessions to foreign private issuers, who vigorously protested

13. See SOX: ANALYSIS AND PRACTICE, supra note 9, at 6.
being made subject to the act.\textsuperscript{14}

What is interesting is that the E.U. is now adopting a similar approach. While the E.U. is integrating its international securities market through FSAP, using the concept of the common passport, non-E.U. issuers will generally now be subject to the same rules as E.U. companies.\textsuperscript{15}

But there is a fundamental difference. The E.U. has, in some cases, adopted the concept of equivalency, which is a finding by one regulator that there has been a level of convergence such that another regulator's standards and how they are enforced have the same practical effect as its own. For example, the E.U. will now allow non-E.U. issuers to use their own disclosure and accounting standards if the European Commission or an individual member state determines that the issuer's home country standards are equivalent to those mandated by the E.U.\textsuperscript{16} Essentially, this is "national treatment lite" for non-E.U. issuers. This flexibility is key to the prospects of future transatlantic convergence, as I will discuss. The United States should also focus on equivalence, seeking substantial convergence and mutual recognition between home and host country regulators, instead of harmonization.

The prospects for mutual determinations of equivalence vary in different areas of securities regulation. I will touch on some relevant considerations in the areas in which I think these findings can be made quite soon: disclosure, accounting and auditing, regulation of public offers, and secondary market transactions. Other areas — cross-border access to exchanges and trading platforms, regulation of rating agencies, and hedge funds — will take more time.

In the transatlantic securities markets today, we are closest to being able to determine equivalence with respect to disclosure. Both the European Union and the U.S. have adopted the disclosure standards promulgated by the International Organization of Securities Commissions, IOSCO, which set out ten core disclosure areas for

\textsuperscript{14} See id. at 60 (discussing concessions regarding audit committee requirements).


prospectuses. The SEC conformed the disclosure required in Form 20-F, for prospectuses and annual reports used by foreign private issuers, to the IOSCO standards in 1999. The requirements for annual reports for U.S. companies, in Form 10-K, are virtually identical.

In Europe, the Prospectus Directive, a widely acclaimed part of the Financial Services Action Plan, implements the IOSCO standards for European prospectuses and initiates a common passport system for public offerings throughout the European economic area. Only an issuer's home-country member state will review its prospectus, the body of which can be prepared — and this was a great source of tension for the French — in any language "customary in the sphere of international finance." Many of us don't think the French language qualifies, but there is a different view, perhaps, in Paris.

The host state cannot add additional disclosure requirements above those set forth in the Prospectus Directive and the related E.C. Rules, although it can require that the summary portion of the prospectus be translated. As an E.U. internal matter, then, European Union-wide retail public offerings, problematic before the effective date of the Prospectus Directive because of the need to translate the offering document into many local languages, should now be possible.

When I participated in one of the privatizations of Deutsche Telekom, there were prospectuses in fifteen different languages, in fifteen different countries, and a contentious aspect of the underwriting agreement was who would assume responsibility if the prospectus had been mistranslated. That issue, I think, will drop away as we go forward.

Given the progress that has been made through the Prospectus Directive, it does not seem to me too optimistic to expect that issuers will, in the not-too-distant future, be able to use prospectuses satisfying the requirements of either the E.U. or the U.S. to satisfy the requirements of the other market, which is similar to what has been the case between the United States and Canada since 1991, under the multi-jurisdictional disclosure system.

Also, noteworthy progress toward equivalence has been made in accounting standards under U.S. GAAP and International Financial Reporting Standards, which I will refer to hereafter by this wonderful acronym, “IFRS.” Equivalence is likely to be achieved first with respect to accounting standards. However, equivalence in auditing standards, auditor independence, and auditor qualification and registration requirements is also key if IFRS are to be acceptable to the SEC in lieu of reconciliation.

The extent to which U.S. and E.U. accounting standards were approaching equivalence was indicated in a speech last April by Don Nicolaisen, the former chief accountant of the SEC. He set out a possible roadmap for the acceptance by the SEC of financial statements prepared under IFRS without reconciliation to U.S. GAAP, by 2009 or sooner. The E.U. has its eye on this roadmap and, to encourage implementation, is starting to offer a quid pro quo. This is important, because what is now happening is that bargaining is taking place to achieve the goals that I hope we can achieve. The Committee of European Securities Regulators — with this marvelous acronym, “CESR” — was established as part of the Financial Services Action Plan in 2001, and it is charged with making recommendations of equivalence to the European Commission. It has found U.S. GAAP to be equivalent to IFRS — now listen to this — subject to inclusion of certain remedies (read “reconciliation”), which may or may not be less onerous than the U.S. requirement to reconcile local GAAP to U.S. GAAP. But the E.U. commissioner for internal markets, Charlie McCreevy, has taken the position that perhaps remedies with respect to U.S. GAAP would not be necessary, depending on how the roadmap comes out.

This flexibility — the “national lite” treatment I mentioned earlier — has implications that many non-U.S. issuers, including U.S.


companies, have not yet fully appreciated. Currently there are no proposed remedies for financial statements that are prepared on the basis of accounting principles, other than those of Japan, Canada, and the United States.

Moreover, equivalence would depend on the rules of the issuer’s home country, not the rules it follows in other countries, such as the United States, where its securities may be listed. As a result, Asian, Latin American, and other non-E.U. issuers may be able to meet the requirements for either the E.U. or the U.S., without meeting the requirements for both. For example, in the case of a Korean issuer that prepares its financial statements under Korean GAAP and reconciles to U.S. GAAP because it is registered in the U.S., the E.U. currently would not accept Korean GAAP, even if reconciled to U.S. GAAP, as equivalent to IFRS and would require financial statements prepared under IFRS for a public offering or listing in the E.U. of that company’s securities. The result is a market partition, because, unless a third-company issuer was willing to prepare three sets of financial statements, it will have to choose between either the U.S. or the E.U. for its foreign listing.

To me, it will be very interesting to see which market will be more attractive to third-party countries and the extent to which the E.U. or the U.S. will permit the development of alternative exchanges that would not subject an issuer to the disclosure and accounting standards required for listing on regulated E.U. or U.S. exchanges.

It is interesting, in our competitive world today, that both London and Luxembourg are developing such exchanges, such that listing on those exchanges would not subject an issuer to the requirement to report periodically under IFRS.

For U.S. companies, unless remedies are dropped, many of these remedies will be effective and equivalent to reconciliation, which will discourage U.S. companies from listing or doing public offerings in the E.U.

In the E.U., IFRS must be approved by the European Parliament. Imagine saying that U.S. GAAP would have to be approved by the U.S. Congress. That poses the risk of politicizing accounting standards, a risk we have also seen in the United States with respect to the issue of expensing options.

Thus, the main unknown in predicting convergence of accounting standards is the European Parliament’s response to controversial
standards, such as IAS 39, the standard on the recognition and management of financial instruments, which attempted, so far unsuccessfully, to introduce certain hedge accounting principles in Europe. Consequently, there is a schism between the standards adopted by the International Accounting Standards Board and those accepted by the E.U. at this point. The United States has only recognized the IASB standard.

But despite the convergence of accounting standards, continuing attention will be necessary to how equivalent accounting standards are applied in practice. There is an interesting aspect to the approaches in the E.U. and the U.S. While it is not absolutely free from doubt, the implication of CESR's recommendation of the equivalence of U.S. GAAP and IFRS seems to be that the appropriate E.U. regulator would review the adequacy of the remedy disclosure, but not the actual application of U.S. GAAP itself. E.U. regulators would rely on the SEC for that. But the U.S. is not likely to follow suit. It will, I believe, retain the right to review and comment on the appropriate application of IFRS, unless and until Europe establishes a single securities regulator or otherwise ensures unitary oversight.

Thus, there is a risk of a U.S. version of IFRS developing that may differ from that accepted by the European Union regulators, even after issues like IAS 39 have been resolved. To avoid this result, the E.U. must develop effective mechanisms to make application and interpretation of IFRS consistent and to assure that reporting under IFRS is comparable to and subject to the same level of rigorous review as U.S. GAAP. If that were to occur, the U.S. might change its position.

But one of the E.U.'s handicaps with respect to having the U.S. find equivalence is its diffuse framework of legislative and administrative authority, which makes it exceedingly difficult to achieve uniform interpretation and application. Unlike the United States, which relies on federal regulations that often preempt state law, the E.U. depends generally on implementation and oversight by member states of directives adopted by the European-wide bodies.

I will describe briefly some of the steps the E.U. has taken to encourage uniform interpretation. However, even my highly truncated account will illustrate why the SEC will be reluctant, at least initially, to

defer to European regulation in this area.

The first step in the Financial Services Action Plan was the acceptance of the four-level approach set out in the Lamfalussy Report, otherwise referred to as the "Wise Men Report," intended to expedite the adoption of measures to implement the Financial Services Action Plan by standardizing interactions between the different E.U. legislative bodies.\textsuperscript{23} There are four levels to this process.

Level 1 is broad-scoped framework legislation, enacted by joint decision of the Parliament and the Council of the European Union.\textsuperscript{24} This legislation sets out broadly the terms of the Financial Services Action Plan.\textsuperscript{25} Legislation can take three forms: regulation, which has the force of law throughout Europe when it is adopted; or one of two kinds of directives which direct the member states to enact conforming legislation:

- Maximum harmonization. These directives preclude a member state from imposing regulations not contemplated by the directive, thus ensuring intra-European harmonization.

- Minimum harmonization. These require states to enact minimum regulations, but allow them to impose additional super-equivalent requirements, a practice known as gold-plating, that raises the possibility of decreased convergence.

In Level 2 in the process, the E.C., in consultation with the European Securities Commission and with advice from CESR, issues detailed legislation implementing the Level 1 broad legislation.\textsuperscript{26} This level of streamlined decision making by the European Commission was a significant innovation of the Lamfalussy process.

In Level 3, the member states cooperate in implementing the Level 1 and 2 measures, and interact with CESR in order to obtain uniform rules.\textsuperscript{27}

Level 4 of the process is enforcement of member states that do not


\textsuperscript{24} Id. at 24.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id.
properly implement the legislation.\textsuperscript{28}

That is complex and in stark contrast to what we have in the United States. Despite this process, despite this flexibility, there is still some inflexibility in the regime in Europe that may jeopardize the finding of equivalence. Take a simple example. The annex to the Prospectus Regulation, a Level 2 regulation adopted to implement the Prospectus Directive, set out detailed requirements for historical financial statements. CESR considered making Level 3 recommendations that national authorities require supplemental information for entities that have undergone corporate transactions that make their historical financial statements unrepresentative. We would call that requiring pro-forma financial statements to recognize a merger, for example. But because the Prospectus Directive is a maximum-harmonization measure, it was not clear that the national authorities had the authority to promulgate those requirements. Accordingly, this seemingly minor change required legislative action in the form of an amendment by the European Commission to the Prospectus Regulation.

But notwithstanding this convoluted process, the E.U. has taken certain steps to try to find a way to achieve uniform application of IFRS. In July 2002, the International Accounting Standards regulation established an aggressive timetable for the adoption of IFRS by issuers with securities listed on a regulated market in the E.U.. They must prepare financial statements in accordance with IFRS for fiscal years beginning on or after January 1, 2005.\textsuperscript{29} Last month, IOSCO announced, by the end of 2006 it will establish a database containing the decisions by E.U. regulators concerning the application of IFRS that will be accessible to each regulator on a confidential basis.\textsuperscript{30} CESR has announced its support for IOSCO's initiative and has also released two standards on financial information to coordinate the uniform development of IFRS standards in Europe.\textsuperscript{31} But it is far from certain that the uniformity which characterizes U.S. GAAP because of SEC

\textsuperscript{28} Id.


\textsuperscript{31} See Price Waterhouse Coopers, CESR Takes Up the Challenge on Enforcement of IFSR, WORLD WATCH I, at 3 (2004).
oversight will develop.

Concerning auditor qualifications, auditor registration issues, and the scope of the audit:

In October, the E.U. enhanced the uniformity of its own rules and moved toward convergence with the U.S. when the 8th Company Law Directive became effective. The object of this is to reinforce and harmonize European auditing by setting out principles for public supervision of audits in all member states, requiring external quality assurance and clarifying duties of statutory auditors, and defining principles with respect to auditor independence. The directive also provides for the registration and oversight of non-E.U. audit firms that audit financial statements of issuers with securities listed in Europe—a direct response to what the PCAOB and Sarbanes-Oxley did with respect to non-U.S. audit firms which audit financials filed in the U.S. with the SEC. But the competent European authorities will be able to waive the requirements applicable to a non-E.U. audit firm if they determine that it is subject to equivalent requirements in its home country and there is reciprocity.

The critical factor for success here will be the outcome of the discussions that are currently underway between the E.U., the SEC, and the PCAOB on mutual recognition—that is, whether each side will recognize the other as imposing requirements on audit firms that are equivalent to its own, and therefore abandon dual registration.

If we make progress in that area, think about the implications for licensing of, for example, stock brokers, and financial institutions, among others.

In sum, there is reason to hope that in the relatively near future, issuers will be able to use the disclosure documents they prepared to meet disclosure requirements in the U.S. and the E.U. to meet the requirements in the reciprocal jurisdiction without reconciliation or remedies, and that accounting firms will not be subject to multiple regulators.

With respect to the regulation of offers to the public, there has been a widening rather than a narrowing between the approach of the E.U.

33. Id.
A.A. SOMMER LECTURE: GREENE

To put it differently, the Prospectus Directive moved toward a model in the E.U. which, for at least well-known seasoned issuers, the U.S. has changed significantly in the securities offering reforms that take place at the beginning of next month. The Prospectus Directive requires regulatory approval for all public offerings and implements only a very limited version of shelf registration, even for large companies. In the United States, the SEC has determined that well-known seasoned issuers should have instant market access, without prior review or approval of the offering documents by the SEC. Rather, the SEC will focus its attention on an issuer’s regular communications to the market, such as its annual and periodic reports.

The SEC was able to implement this system because, at the time shelf registration was implemented in the late 1970s, it made the disclosure in annual and quarterly reports equivalent to that contained in a prospectus. But the Transparency Directive in Europe, unfortunately, backed away from achieving that equivalence, which perhaps explains why there remains the focus on distributions in Europe rather than continuous reporting to the market.

The E.U. also adopted a sweeping overhaul of the rules governing securities markets, trading systems, and investment firms, in the Markets and Financial Instruments Directive, called affectionately by many of us “MFID.” As I noted earlier, improvements in the efficiency of secondary trading markets could significantly decrease the cost of capital, and the MFID may, in fact, enhance competition between different types of trading platforms — exchanges, multilateral trading facilities, and investment firms — given that all equity trades will need to be reported. As a member of the industry, however, I can’t help but observe that the MFID, which imposes extensive new obligations on our firm, among others, including new transaction reporting and conflict-of-interest requirements that will require significant new infrastructure, was adopted without a cost/benefit analysis, a cost/benefit analysis being one

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of the key contentious issues affecting regulators in the United States.\textsuperscript{36}

In September, a very interesting report was issued. A group of industry associations, with the support of the Corporation of London, published a major study calling for regulatory convergence of the transatlantic markets, focusing primarily on the institutional, or what we sometimes call the wholesale, market in equities and equity derivatives.\textsuperscript{37} The report, which I strongly recommend to you, and which is available in the press section of the Futures Industry Association Web site, among others, argues persuasively for:

- The formulation of a common set of customer definitions for the purposes of classification, solicitation, and documentation;
- A common approach to core investor protection objectives, such as "know your customer";
- The development of a common set of examination and registration requirements;
- A consensual regulatory approach to firms’ outsourcing arrangements;
- The simplification of regulation in other critical areas, such as the obligation to deliver best execution, trade-allocation procedures, and the distribution of research, among others.

The adoption of these proposals in the course of implementing the MFID would be a positive step in developing an efficient, integrated transatlantic wholesale market for equities.

With respect to market-manipulation issues, there seems to be not only a commitment to national treatment in both markets, but also extraterritorial application to conduct which affects financial instruments in the home country. Certain parts of the Market Abuse Directive,\textsuperscript{38} affectionately called MAD by some of us, with respect to financial


instruments traded on an E.U.-regulated exchange would regulate non-E.U. conduct, an approach similar to that taken in Regulation M adopted by the SEC.  

The MAD also implements rules on insider trading and continuous disclosure in Europe that are substantially different and more rigorous than the regime in the United States. It defines “information” broadly, to include information that relates directly or indirectly to a financial instrument or issuer and that could affect price, and then makes it illegal for anyone to trade if he or she knows or should have known that the information is inside information — no need to show breach of fiduciary duty, no need to show misappropriation. Did you know it was non-public material information? If so, you can’t use it.

In addition, think of a continuous-disclosure obligation. Any time the market is a false market because you know of developments that have not been disclosed, you are obligated to inform the market continuously, as opposed to the U.S. approach, where you do it periodically or when 8-K otherwise requires you to do so.

In the area of market-abuse regulation, national treatment will continue and harmonization is unlikely, notwithstanding the convergence. But the challenge, in my mind, will be regulatory cooperation when cross-border conduct violates the Market Abuse Directive, as well as similar provisions under U.S. law. Here, the lack of a single European regulator with full authority to administer these rules is regrettable.

What compounds the problem is that the roles of regulators differ. Some European regulators have no power to settle cases, a power that the FSA in the U.K. and the SEC have and use extensively. Thus, for example — and we went through this with a controversial trade in the U.K. — if there is an allegation of impropriety relating to a security listed in multiple jurisdictions in the U.S. and the E.U., each regulator will look to apply the Market Abuse Directive and its implementing legislation separately on its own behalf. But the French and German regulators, for example, must bring a case before an independent

39. In 1996, the SEC adopted Regulation M to replace Rules 10b-6, 10b-6A, 10b-7, 10b-8 and 10b-21 under the Securities Exchange Act of 1934.

tribunal. They have no power to settle. Thus, notwithstanding any language included in the settlement with the regulator that does have the power to settle, settlement in one jurisdiction with such an authority can only compound the problem in those jurisdictions where the regulator must decide whether to bring the matter before an independent tribunal.

While the E.U. is aware of these issues and considering possible ways of addressing them, my preferred path would be a memorandum of understanding between the SEC and the European Commission that would provide that if there is a cross-border investigation involving the U.S. and more than one European Union market, the SEC and the European Commission would agree which European regulator would take the lead and act with the SEC on behalf of all European regulators, with fines being allocated pursuant to an agreed formula, similar to that which was done in the investigation of Shell by the U.S. and the FSA together. A similar system could be implemented within the E.U. itself with respect to conduct occurring in more than one member state.

Convergence and mutual recognition in these areas are gaining importance from the U.S. perspective. Formerly, European companies were willing to subject themselves to the U.S. rules, but the game has changed. European companies want to withdraw from the U.S. markets and are reducing their listings. The European Union has made it clear to the U.S. that findings of equivalence of U.S. standards are not a foregone conclusion. In fact, Europe has forced the SEC to begin bargaining, initially with respect to the issue of consolidated supervision, which is imposed on all groups providing financial services in Europe under the directive on financial conglomerates.41 That directive led the SEC to adopt rules permitting holding companies of U.S. broker-dealers to register with the SEC as consolidated supervised entities, so that they will, in turn, be recognized by the E.U. as being subject to regulation equivalent to that imposed on the European Union financial holding companies. Goldman Sachs, Lehman, Bear Stearns, Morgan Stanley, all have gone through that process, to avoid having multiple regulators.

The next substantial area of transatlantic negotiation is whether U.S. GAAP by itself should be equivalent to IFRS, as Commissioner McCreevy has indicated, or is equivalent only with remedies (read "reconciliation") as CESR recommended. Adherence to the spirit of the

roadmap by both sides should result in the former, on the assumption that soon IFRS will be accepted in the United States without reconciliation.

Other issues, perhaps, will be:

- What rules should be followed with respect to stabilization, over-allotments and the size of the naked short in cross-border offerings?
- How should funds be regulated?
- What access should be permitted to trading platforms on a cross-border basis?

Now that the E.U. has made significant progress on the Financial Services Action Plan, more attention should be paid to approaching E.U.-U.S. convergence in a more programmatic fashion, rather than on a case-by-case, issue-by-issue ad-hoc basis. Why not set an agenda with certain goals, similar to the Financial Services Action Plan?

Here is my suggestion: First, let's initially focus on capital raising. I suggest that companies of a certain size should be able to access either the U.S. or the E.U. market using the disclosure and accounting standards, as well as the prospectus format, mandated by their home country. While they would be subject to the liability and market-abuse regimes of the host country, they would not be subject to ongoing requirements in the host country, such as Sarbanes-Oxley or periodic reporting requirements, as a result of having made an offer.

Under my proposal, eligible U.S. companies would be WKSIs. As you know, these are defined as companies that are required to file reports under the 1934 act, are current in their reporting, and have for the preceding twelve months been timely in filing these reports, are eligible to use Forms S-3 or F-3, have $700 million in equity or $1 billion in debt outstanding, and are not otherwise ineligible.

In my proposal, eligible European Union companies would be companies that have at least $1 billion of voting and non-voting equity, held by non-affiliates, and that would otherwise be eligible to use Form F-3 if they were to register the offering.

There can be no doubt that there is equivalence of disclosure, in part driven by the market for these well-followed companies. Reliance should be on the home regulator as to whether any review of the offer document is necessary wherever the offering takes place. The E.U. should accept the SEC's decision to examine only the periodic disclosure of well-known seasoned issuers and not their offering documents. Similarly, E.U. home regulators could review prospectuses
of eligible E.U. companies or adopt the U.S. approach.

My proposal will also permit E.U. eligible issuers to de-register in the United States, which many want to do, because they are subject to host country ongoing requirements which, in some cases, are inconsistent with the home country’s.

I would start with a three-year trial, at the end of which one could decide whether to expand or contract eligibility.

Liability for failure to meet disclosure standards will continue to be determined by the host country. I see no way of changing that. Unfortunately, there has been no convergence in this area. Absent change, even under my proposal, E.U. companies may be reluctant to finance broadly in the United States market because of litigation risk. Witness the recent class-action lawsuit filed against the Republic of Italy with respect to some of its offerings.

Second, I would suggest that the E.U. and the U.S. reach agreement that the home country’s rules on stabilization, exercise of the Greenshoe, size of the underwriters’ permitted naked short positions govern in cross-border offerings. There is currently a conflict between the U.S. and the E.U. in this matter.

Third, I would see if we could achieve common treatment of wholesale equities and equity derivatives customers of market intermediaries and other conduct of business issues addressed in the September joint industry association report, with a view to having an almost seamless wholesale market where regulation could be much, much lighter because it is a predominantly institutional market.

Finally, I would create a coordination mechanism for enforcement. While a spectrum of proposals have been put forth in Europe, I believe that the mechanism should provide the maximum possible authority for streamlined decision making, preferably through a single decision making body.

This, to me, is a start. It is predicated on a more active dialogue between the E.U. and the U.S. These goals are a long shot, but given the potential gains, we should try.

With that, I would like to acknowledge the assistance of Brian Yeager in preparing this presentation with me. I will now be happy to take any questions.

QUESTION: Ed, you mentioned that consolidated supervision was an issue. I actually was in the SEC’s Division of Market Regulation a while ago, and that was a big concern — the capital requirements for
financial institutions in the U.S. versus those companies doing business in Europe — there was always tension between the European regulators and the U.S. regulators. In fact, there was tension between the banking regulators and the securities regulators.

Did this consolidated supervision of the capital requirements solve some of those problems, or do we still have some of that tension?

MR. GREENE: It did solve them. The interesting aspect of the consolidated supervision rule proposal — the SEC needed to make it attractive to the firms, such as Goldman Sachs, who really needed it, because they don't have regulation at the holding company level, and without this proposal, they would have been subject to a European Union regulator. The SEC made it very attractive, because it gave alternative capital treatment to those companies that filed as consolidated supervised entities, so that they can use their own internal evaluation methods and will save significant regulatory capital.42

That will also bring the capital computation closer to how bank regulators do it, both in Europe and the U.S.

It is interesting that no universal bank, which doesn't have to do this, because they are subject to the Fed — and the Fed is recognized by the E.U. as a comparable regulator — has filed. But my guess is that we will find some of the universal banks filing under this so they can get better capital treatment with respect to the U.S. broker-dealer. That is something that Citigroup is actively considering.

QUESTION: I am Professor Goebel, and my field is European Union law.

I want to congratulate you on a really impressive and thorough description of what has been going on under the implementation of the Financial Services Action Plan.

I have a comment and an unrelated question.

The comment: You referred several times to a desire to have an SEC-type European Union structure. I think that, for the first time, the trial balloons on a Union-wide securities commission and a Union-wide banking commission are going to receive serious debate. But one must understand that that would mean that this independent agency, of whatever sort, has to be composed of representatives from throughout

Europe. I wonder whether you will be happier with the situation if you get a securities commission.

At the present time, the principal interlocutor, by reason of power, is the U.K. Financial Services Authority, because of the London market's preeminence in Europe. You cited specifically the example of how they have the power to have settlements, whereas in France and Germany you have to have court review. That theory of appellate court review of administrative agencies is very strong on the Continent, and I think one would suspect that any securities commission would not have the power to do precisely what you think is very nice to do in the United Kingdom.

So my comment and related question to that is, do you really want such a securities commission? Wouldn't you be happier with the situation now?

The other, totally unrelated question: I think you are absolutely right that, particularly since Sarbanes-Oxley, many large European companies have decided they do not want to raise capital in the United States, and some would very much like to get out of our regime. You suggested that it would be desirable if we had some mode of facilitating that. Do you think there is any practical possibility of it? Quite apart from the chauvinism of American regulators, the fear of popular outcry by investors in the United States if their belief in their protection is removed, by allowing these companies to get out — do you think there is any real possibility?

MR. GREENE: I will answer the second and come back to the first, because I have had a lot of experience in both.

With respect to the second, the SEC has realized that you can't have a system which is like a briar patch: You can get in, but you can't get out. It is inherently unfair to say that, as a result of listing or doing a public offering, you can be stuck in the market, subject to new legislation that is enacted, and no way to pull back, unless you achieve the remote goal of having fewer than 300 resident U.S. holders in a multinational corporation. In fact, I am confident that the SEC will put out a proposal giving multiple tests that would permit withdrawal.\footnote{The SEC has, in fact, recently proposed a new rule 12h-6 that would permit a foreign private issuer to terminate its Exchange Act registration and reporting obligations in less restrictive circumstances. Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(G) and Duty To File Reports Under Section 15(D) of the Securities Exchange Act of 1934, Exchange Act Release}
will be predicated on percentage of capitalization held in the U.S., number of shareholders, and perhaps trading volume.

No other market makes it that difficult to withdraw if you decide that you no longer have investor interest in that country.

With respect to the first, that is a challenge. It is clear that most of the continental regulators have no love for the FSA. The FSA clearly views itself as first among the European regulators. But I don’t think it is going to be possible to achieve uniformity within twenty-five countries. Having been through a trade which took place in London, it basically involved investigations in Portugal, Spain, France, Germany, Italy, and the U.K. There was no mechanism to coordinate, no mechanism to resolve it. Regulators refused to cooperate.

I don’t think that is going to make for an efficient market, notwithstanding what Europe says. How do we assure that home countries will apply the same standards?

So it may be some combination of maintaining the local regulators, but having some bodies that might, for example, oversee application of accounting standards, some bodies that might oversee with respect to disclosure, but leave local authorities to pursue investigations and enforcement proceedings.

It is a debate that has to go on. But after the trade that I mentioned, there were comments in the press suggesting, “Isn’t it now time to have one regulator that can coordinate going forward?”

There is a proposal by CESR that they would be permitted to designate one European regulator to act for all. But the problem is that many of these regulators don’t have the power to settle.

This came up for me in a discussion I had with Michel Prada, who is the head of AMF, the French securities regulator. He asked me and several others whether AMF should have the power to settle, much like the FSA does. He thought it should and proposed it, and it became extremely controversial in France — one of the most controversial proposals he made — because in France, the argument is, if you give power to a regulator to settle, it will take marginal cases, put pressure on defendants to settle, and in the course of those settlements, articulate their view of the law, which may not be what courts would uphold. The idea is that you need to go to an independent body — he didn’t mention

the SEC, but he didn’t have to — as opposed to going to a regulator, where you have to argue your case before an independent tribunal.

That is something that is embedded, as you say, in the Continent, whereas in the U.K. it is much more like the U.S.

So it is a battle and a debate going back and forth. Lamfalussy recognized that, politically, he could not recommend a single European regulator. That was a nonstarter. The U.K. would never accept that, because it wouldn’t be located in the U.K. It would probably be in Brussels, maybe in Frankfurt, conceivably in Paris. That being the case, it was not going to happen.

QUESTIONER: I would simply agree with you. I don’t think it will happen. But if it did happen, I am not sure you would be happy with it, because that continental tradition of judicial supervision of administrative acts is very strong, and the Court of Justice, in other contexts, has said that it is part of the rule of law which has to be protected. So it would be very unlikely, I think, for legislation to achieve this by the Council and the Parliament, to have anything other than a possibility of judicial review of some sort.

MR. GREENE: You could be right.

QUESTION: To what extent, if any, do the corporate scandals in the E.U. and the United States impede the development of one country accepting the standards or the offerings of another country and vice versa? If this is a problem, what kinds of reforms are necessary in this area?

MR. GREENE: I think it is interesting. The scandals have probably driven convergence in accounting standards, which helps, especially with respect to off-balance-sheet arrangements.

I think the real challenge is going to be that the E.U. is now twenty-five countries, and the issue is, do you rely entirely on the home country to review the disclosures or should the host country be able to step in, to review both application and disclosure?

I don’t think the SEC will accept home country review in Europe absent a single regulator, and therefore will insist that they see how the disclosure standards are applied, even though they are the same between the U.S. and Europe. That will, I think, continue to be the case for the foreseeable future.

If you are right that we are not going to get a European central regulator, I think we are going to have a situation where we will have the same standards, but as a result of a much more rigorous SEC
oversight, we will have U.S. versions of E.U. standards and E.U. versions.

The interesting thing is that many of the regulators in Europe don’t review the application of accounting standards. In the E.U., it was just a very small body that would review the application upon recommendation of a third party, as opposed to having any filing made with respect to an offering reviewed by a regulatory agency. That will change, I think, going forward, and to the extent we have agencies like the FSA reviewing, on an active basis, the application of IFRS, we might have more deference. But until that happens, we will have convergence because of the scandals, we will have better disclosure, but we will have the U.S. insisting that it have the right to review the disclosure of any one financing. That is why my proposal is limited to these well-known companies, because the SEC has taken the view that they have sufficient confidence in those companies that they will review just the annual disclosures to the market.

The weakness in my proposal is that the SEC is not, probably, prepared, in the short term, to rely upon review of periodic reporting by the home country. They would insist that if you are going to raise money in the U.S., they also see how the market is kept informed.

But the hope is that there will be continued dialogue, and if the standards converge and we have strong regulators — the challenge here also is that the SEC can’t pick out and say Germany is better than France or the U.K. is better than Hungary. If you could, that would be easy. But since you can’t really do that, you are going to have to make a judgment about the E.U. as a whole, home country versus host. In that regard, I think it is going to be a long time before the SEC will defer.

This came up in other areas. Can you really single out one country and say, “Their standards are pretty good?” It happened, for example, with Regulation M, where we said, “If you follow the U.K. rules with respect to market intervention, you will be okay,” but no other rules are singled out. That is very rare for the SEC to do. They are uncomfortable saying, “We like the U.K., not the French or the Germans.”

Thank you all very much.

PROF. FISCH: Thank you. Please join us at the reception.