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PANEL I

OVERVIEW OF U.S. SECURITIES MARKETS AND FOREIGN ISSUERS

*James R. Silkenat**

My job this morning is to focus your attention on the topic at hand, U.S. securities markets and access for foreign companies. Our excellent panel today will detail the specific questions foreign companies face concerning U.S. markets and foreign issuers. After giving you a little background on what the state of play currently is in the United States, I am simply going to leave you with a few questions that I hope you will pose to our panelists during the course of the program.

Foreign companies are coming to U.S. capital markets for two reasons. The first reason is the easy "Willie Sutton" answer to the question of why you rob banks: "This is where the money is." There is more money available, at less cost, in the United States than in almost any of the home countries of the foreign companies that are coming here.[1]

The second reason is really a negative reason — or the avoidance of a negative in this case — and that is, our legal and regulatory system is no longer scaring foreign companies away from U.S. markets.[2]

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1. *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, S11 (1994) (noting that United States is world's largest, most open market).

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 practical experience of Fletcher Challenge Ltd. entering U.S. markets); Richard Kosnik, *The Role of the SEC in Evaluating Foreign Issuers Coming to U.S. Markets*, 17 FORDHAM INT'L L.J. (1994) S97, S98 (discussing flexibility of SEC in evaluating and accommodating non-U.S. companies entering U.S. capital markets); M. Elizabeth Rader, *Accounting Issues in Cross-Border Securities Offerings*, 17 FORDHAM INT'L L.J. S129 (1994) (noting flexibility of SEC in assisting non-U.S. companies with accounting and disclosure issues).

Taking these two factors into account, there has been a dramatic increase in the number of foreign companies that have entered the U.S. capital markets in recent months.[3] In the last year and a half, more than 140 foreign issuers from twenty-seven countries have entered the U.S. public market for the first time—companies like Daimler-Benz, Shanghai Petrochemical, Enterprise Oil, and Alcatel Alsthom are just a few of the major companies that have recently entered the U.S. market. Today, more than 550 foreign companies are reporting, for one reason or another, to the Securities and Exchange Commission ("SEC") in Washington about their on-going activities.

This is a major change in international finance, and the size of this change in foreign companies coming to the U.S. markets would not have been possible if the U.S. markets and its regulators had not found a means to help foreign companies in a number of different ways.

First, the regulatory costs that are involved in coming to U.S. markets are lower than before. High costs are one of the obstacles that has traditionally scared away foreign companies from coming to the United States. The costs of investment bankers, lawyers, accountants, filing fees, etc., had been too expensive for foreign companies to come to the United States.

The second way that regulators and the U.S. market itself have changed in order to help foreign companies is by facilitating the transition of those companies into the U.S. disclosure system.[4] By focusing on the differences between U.S. and non-U.S. companies and finding a way to take account of those differences in the disclosure requirements of the United States, there has been a significant change, which has opened up U.S. capital

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3. *See* Decker, *supra* note 1, at S12 (noting "frantic pace" at which non-U.S. companies are presently entering U.S. capital markets); Joseph Velli, *American Depositary Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38 (1994) (discussing increased use of ADRs as alternative for non-U.S. companies entering U.S. capital markets).

4. *See* 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, S29 (1994) (discussing alternative methods for non-U.S. companies to access U.S. capital markets); Velli, *supra* note 3, at S38 (discussing use of ADRs as alternative method for non-U.S. company U.S. capital markets); Kosnik, *supra* note 2, at S97 (discussing flexibility of SEC in evaluating and assisting non-U.S. companies entering U.S. capital markets). *See generally* James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58 (1994) (discussing goal of attracting non-U.S. companies to U.S. capital markets and further steps that should be taken to encourage non-U.S. companies to enter U.S. markets).

markets to foreign issuers.[5]

The third way that the U.S. market is responding to these companies is by maintaining U.S. confidence in the market and by continuing to insist on the principles of full disclosure and investor protection, as required by U.S. securities laws.[6]

Unfortunately, these three changes somewhat conflict with each other. I think, however, that it is the "balance" that has continued to be important and that has led to the dramatic rise in foreign companies coming to the U.S. markets.

But one of the main reasons that capital is available in such such quantities in the U.S. markets is basically that the investor trusts the U.S. markets to be fair. Fairness is a major issue. Even though it sounds simplistic, it is a critical factor and one that is absent, really to a surprising degree, in many of the sophisticated foreign markets.

For example, although there have been a number of recent efforts to curb insider trading on European exchanges and European markets, such efforts have had little practical effect to date either on the insiders themselves or on the typical investor's perception of how insiders act.[7] The common belief in Europe that certain investors have access to confidential information and regularly profit from that information may be the major reason why comparatively few Europeans actually own stock. In the United States, nearly thirty-five percent of adults own shares directly. In Germany, that number is seven percent; fourteen percent in France; and twenty percent in England. Those are siza-

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5. *See* Warbrick, *supra* note 2, at S114-19 (discussing differences between New Zealand and U.S. methods of business); Kosnik, *supra* note 2, at S97-98 (discussing flexibility of SEC in evaluating and accommodating non-U.S. companies entering U.S. capital markets).

6. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988 & Supp. IV 1992); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-77ll (1988 & Supp. IV 1992); *see* Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L.J. S77 (1994) (discussing need to maintain fundamental principles of U.S. securities laws); 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, S122 (1994) (discussing disclosure system in United States and how it promotes efficiency and liquidity in U.S. capital markets); Matthew M. McKenna, *Tax Issues in Cross-Border Securities Offerings*, 17 FORDHAM INT'L L.J. S140, S144 (1994) (noting tax issues as disclosure obligation for non-U.S. companies).

7. *See* Steven R. Salbu, *Regulation of Insider Trading in a Global Marketplace: An Uniform Statutory Approach*, 66 TUL. L. REV. 837 (1992); Dr. Gerhad Wegen, Address, *Colloquium: Congratulations from Your Continental Cousins, 10b-5: Securities Fraud Regulation from the European Perspective*, 61 FORDHAM L. REV. S57 (1993).

ble differences, and partially explain why the U.S. markets are so active and why so much money is available for those companies that seek to enter the U.S. markets.

On the regulatory side, which in the past has been cited as the reason at least some foreign companies have stayed out of the U.S. market, the use of insider trading statutes has resulted in convictions in only two of fourteen major countries in Western Europe. The enforcement capacity of these counties is minimal even when the laws are focused properly.

At the same time that the appetite for U.S. capital has increased abroad, the U.S. appetite for foreign companies in which to invest has blossomed. U.S. investors, when they look abroad for places to invest their money, no longer see the "great unknown" with the typical American parochialism that we used to find. Instead, U.S. investors now see returns on capital that are much greater than they would be on purely domestic investments.

Of course, foreign companies have been tapping U.S. investors for capital for a number of years by selling "Yankee Bonds" and by selling stock in the form of American Depositary Receipts ("ADRs"), which Joe Velli from The Bank of New York will be talking to you about at greater length later this morning.[8] I do not think Mr. Velli really can be seen as the "father of ADRs" — he is not old enough — but I think he is seen as the closest living relative of ADRs, and really is one of the key innovators in this field.

The pace of both listed and private financing has been increasing in the United States, holding steady for ADRs, but surging dramatically for bonds and debt securities. In the first half of 1993, sixty-three new foreign stock issues, valued at U.S.$5.5 billion, were sold in the United States, which is about the same as 1992. On the bond side, however, the numbers have been dramatically larger and have almost doubled over the last year, close to U.S.$50 billion.

One major factor in this growth of foreign financing in the

8. *See* Velli, *supra* note 3, at S38 (discussing increased use of ADRs as alternative for non-U.S. companies entering U.S. capital markets); *see also* Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48 (1993) (discussing use of ADRs by foreign private issuers raising capital in United States); Kerry Hannon, *Live here, invest abroad*, U.S. NEWS & WORLD REP., Apr. 4, 1994, at 65 (discussing growth of ADR market).

United States is the wave of privatizations that has been taking place in a number of markets around the world. Thus far, foreign markets have been unable to handle both the capital needs created by these privatizations and their traditional corporate financing needs. As a result, several of those companies have been driven to the U.S. markets in search of the capital they need to expand.

Another factor in the current success of the U.S. capital markets in attracting foreign companies is a bit more subtle: that is, the work of multilateral financial institutions, like the International Finance Corporation ("IFC"),[9] in helping good companies in developing countries prepare to enter the U.S. market. It is no longer unusual for companies from countries that our parents never heard of to come to the U.S. markets and raise hundreds of millions of dollars in offerings. A major reason for this change is due to the pioneering work of institutions like IFC.[10]

Finally, I think it is accurate to say that foreign companies that have already listed stock on the U.S. exchanges and have issued bonds in the United States have basically been pleased with their reception. It has not been as hard as they thought it would be, the costs have not been as high, the continuing regulation has not been as bad on the disclosure side, and, after going through the disclosure hoops, the regulatory hoops, and the accounting hoops, the experience has resulted in much greater liquidity for the shareholders that have invested in these companies.[11]

The SEC has also recently announced several new steps that will be taken to respond to the particular needs of foreign companies in meeting the regulatory standards of the United States. Richard Kosnik, from the SEC, will be talking about some of those changes this afternoon in more detail.[12]

In closing, I want to focus on the fine line, the delicate bal-

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9. *See* Alain Soulard, *The Role of Multilateral Financial Institutions in Bringing Developing Companies to U.S. Markets*, 17 FORDHAM INT'L L.J. S145 (1994) (outlining IFC's role in assisting capital market activities of companies from emerging market countries).

10. *Id.*

11. *See* Warbrick, *supra* note 2, at S114-19 (discussing favorable experience of Fletcher Challenge Ltd. in entering U.S. markets).

12. *See* Kosnik, *supra* note 2, at S101 (discussing regulatory changes by SEC that have encouraged registration of foreign securities).

ance, in the different arguments that exist on the issues we are going to be talking about here — the delicate balance between, on one side, over-regulation that scares foreign companies away and, on the other side, relaxing the rules too much, which would scare away U.S. investors; between making New York the financial capital of the world, on the one side, or making the fund-raising activities flow to the lowest common denominator in terms of regulation; and finally, the balance between what regulators think is right and what bankers and advisors need for their corporate customers.[13]

It may be that these problems are now being addressed in a fair way and that we are in some sense dealing with the best of all possible worlds. It certainly seems that way when you read the newspaper and see the number of companies that are coming to the United States. My guess, however, is that these issues will always be with us because the issues themselves are indeed difficult ones, as you will see from some of the discussions we are going to have today, and because the results are so important, not just for the companies and firms we work for but for us as citizens as well. Besides, if there were no arguments about this, what would lawyers do to occupy their time?

13. *Compare* Cochrane, *supra* note 4, at S61 (stressing difficulty of requiring U.S. GAAP for non-U.S. issuers) *with* Breeden, *supra* note 6, at S88 (arguing that U.S. GAAP is most practical and efficient accounting method for foreign issuers). *See generally* Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993) (requiring non-U.S. issuers to reconcile their accounting standards with U.S. GAAP).