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The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: Froma Legal Perspective

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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

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I am going to cover some of the same ground as Bill Decker,[1] but I'm going to cover it from a technical securities lawyer's perspective. I may take a slightly different position, though, regarding some of the difficulties of navigating through the securities laws, but that's only to be expected from a lawyer who gets paid to help find such difficulties and then to solve them.

I should note that talking about a body of law as comprehensive as the federal securities laws is always a bit of a challenge, so I found myself yesterday in my firm's library boning up on some technical points. One of the associates asked me what I was doing in the library because I'm not often found there. That reminded me of a story about a London solicitor who, too, was found in the library of his firm at the end of the day looking at a volume. One of the senior partners passed him on the way out and said, "What's the matter, Chomley Jones, losing your nerve?" But the securities laws are complicated and they are technical, and it is good from time to time to look them up.

I am also happy to be here today because, as every speaker has noted and as is undoubtedly the case, this is an exciting time in both the world and U.S. capital markets. As the world becomes smaller and more competitive, my view is that world capital markets are becoming more competitive.

If companies don't issue securities in the United States, they may well issue in other markets. We have seen in our practice,

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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 (1994) (discussing increased attraction of non-U.S. companies to U.S. capital markets and options available for accessing those markets).

for example, pension funds and institutional investors committing increasing amounts of capital to the developing markets, to stock markets in places like Singapore, Taiwan, and Hong Kong. Clearly, U.S. capital markets must in some respects remain competitive in order to bring transactions inside our borders. In fact, this is what is happening. The Securities and Exchange Commission ("SEC") is clearly interested in making the issuance of securities in the United States simpler and easier for foreign companies.

As Bill Decker pointed out,[2] just a week and a half ago, an extremely comprehensive set of five related SEC Releases (the "Releases")[3] was issued proposing a number of changes to the U.S. securities laws, which would make issuance of securities here easier for foreign companies.[4] I am going to touch on some of those specific points.

I thought it would probably make most sense and be most useful for me to focus primarily on the basic legal statutory and regulatory schemes that issuers, both domestic and foreign, have to comply with in order to sell securities in the United States. The framework for both domestic and foreign issuers is essentially the same; there are different rules that apply to foreign issuers, but there is one set of basic laws.

I. *RULES AND REGULATIONS UNDER THE SECURITIES ACT OF 1933*

The basic law is the Securities Act of 1933 (the "Securities Act").[5] The Securities Act, which is now sixty years old, was passed in the aftermath of the "Roaring '20s," after the crash, when Congress focused on the abuses that had sprung up during the 1920s, which dramatically harmed investors. After giving the matter a great deal of thought, Congress determined that the best method to regulate the sale of securities in the United States was by means of full disclosure. This is a key point that

2. *Id.* at S19 (discussing SEC releases).

3. *See* Simplification of Registration and Reporting Requirements 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).

4. Decker, *supra* note 1, at S19 (describing how access to U.S. markets has become easier for non-U.S. companies).

5. 15 U.S.C. §§ 77a-77aa (1988 & Supp. IV 1992).

those of you who are not familiar with the U.S. securities law should be aware of from the very start.

In the United States, we do not have, in general, a system of securities regulations that is based on the fairness or attractiveness of securities.[6] It is not, in general, a matter of concern to the SEC whether or not a particular stock is a good buy at U.S.$30 or U.S.$20, or whether a debt security is properly priced.[7] The focus of our securities laws is on full disclosure.[8] The theory is that if the business and prospects, management, and financial condition of a company are fully and properly disclosed in a registration statement and in the accompanying prospectus, then the investor can make up his own mind regarding the appropriateness of the price and the fairness of the transaction.[9]

Now, there are some countervailing forces in our system, primarily because we are part of a federal system. We do have state securities law regulations, and there are a few states — California, Massachusetts, others in the Midwest come to mind — where fairness is an issue, and issuers do occasionally run into trouble clearing registration statements for sale in certain states.[10] But the overriding feature of the federal securities laws is that full disclosure is the first cornerstone.

The second cornerstone of the federal securities laws is the concept of registration. Registration requires that in the United States, every offer and sale of a security via the jurisdictional means — primarily interstate commerce and telecommunica-

6. *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988 & Supp. IV 1992) (requiring disclosure of material information); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-77ll (1988 & Supp. IV 1992) (requiring disclosure of material information).

7. *See, e.g.*, 1 Louis Loss, Securities Regulation 130 (2d ed. 1961) (discussing how U.S. securities laws do not address fairness).

8. *Id.*

9. *See id.* In his treatise, Professor Loss describes the role of the Securities Act.

> [The Securities Act] is concerned by and large with the initial distribution of securities rather than subsequent trading. Securities which are offered to the public through the mails or the channels of interstate commerce must be registered with the SEC by the issuer. The registration statement must contain specified information about the security , the issuer and the underwriters. . . . The Commission has no authority to approve any security or to pass on its merits. Its sole function is to assure that the registration statement is accurate and complete.

Id.

10. *Id.* at 23-105 (detailing state Blue Sky laws).

tions — must be registered with the SEC unless exempt.[11] This means that all companies, all issuers, all broker-dealers, all investors who sell stock must register or avail themselves of a specific exemption from registration.

A frequent misconception of our law is that once registered, always registered. This is not the case. A company that sells a share of stock pursuant to a registration statement, buys it back, and then sells it a second time, must register the stock again.[12] Transactions must be registered unless exempt.[13] The Securities Act does not apply to the registration of securities as opposed to transactions. There is another form of registration under the Securities Exchange Act of 1934 (the "Exchange Act")[14] that covers classes of securities, but that doesn't govern in the case of a subsequent sale where there is no exemption available.

For example, not only must securities be registered in "garden variety" underwritten transactions involving, for example, common stock or investment-grade debt sold by underwriters into the investment community, but guarantees of securities have to be registered;[15] certain repurchases of securities are deemed to be securities and have to be registered;[16] and securities issued in business combination transactions are securities

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11. 15 U.S.C. § 77e(a) (1988). Section 77e(a) provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —
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> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
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> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Id.; *see* 15 U.S.C. § 77c (1988) (providing exemption for certain securities); 15 U.S.C. § 77d (1988) (providing exemption for certain transactions).

12. *See* 15 U.S.C. § 77e(a) (1988). Section 77e(a) clearly articulates "[u]nless a registration statement is in effect as to *a* security. . . ." *Id.* (emphasis added). Section 77f(a) further states, "[a] registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered." 15 U.S.C. § 77f(a) (1988 & Supp. IV 1992).

13. *See* 15 U.S.C. § 77c (1988) (providing exemptions for certain securities); 15 U.S.C. § 77d (1988) (providing exemptions for certain transactions).

14. 15 U.S.C. §§ 78a-78ll (1988 & Supp. IV 1992).

15. 15 U.S.C. § 77b(1) (1988) (including guarantees within definition of "security").

16. *Id.* (including certain repurchases of securities within definition of "security").

that have to be registered.[17]

The securities laws are enforced through an extensive scheme of civil and criminal penalties.[18] They cover provisions for rescission, for damages, and for criminal penalties that include the provision for jail sentences. Our securities laws historically have been, and still are, enforced zealously. I think it would be fair to say that foreign issuers coming into the U.S. markets should appreciate the fact that we take the enforcement of our securities laws very seriously. This is part of what, I think, creates the conditions of fairness and investor confidence that make our markets attractive.

II. *PRINCIPAL TYPES OF PRIMARY OFFERINGS*

If you start with the premise that the Securities Act governs the issuance of securities in the United States, then we can examine the three principal types of primary offerings that foreign issuers can use in the United States. These three are: public offerings, private placements, and Rule 144A offerings. I would like to walk you through the legal bases for these three types of offerings. I am not going to touch on American Depositary Receipts ("ADRs") specifically, although the public offering of ADRs is not different than the public offering of ordinary shares in many respects, from a legal point of view.[19]

A. *Public Offerings*

I'm going to start with the public offering. A public offering under our securities laws requires the filing of a registration statement, which includes the prospectus.[20] Sometimes there

17. 17 C.F.R. § 230.145 (1993) (including certain combination transactions within definition of "security").

18. *See* 15 U.S.C. §§ 77k & 77l (1988) (providing for civil liability); 15 U.S.C. § 77q(a) (1988) (providing for criminal liability); 17 C.F.R. § 201.2(e) (1993) (providing for SEC's disciplinary authority over professionals practicing under federal securities laws). "Civil and criminal liabilities are imposed for material misstatements or omissions in the registration statement or prospectus." Loss, *supra* note 7, at 130.

19. *See* 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); *see also* Mark 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).

20. *See* 15 U.S.C. § 77e (1988) (requiring filing of registration statement); 15 U.S.C. § 77j(b) (1988) ("A prospectus permitted under this subsection shall . . . be filed as part of the registration statement . . . ."); *see also* Form F-1, 2 Fed. Sec. L. Rep. (CCH)

may be some confusion over what is a registration statement and what is a prospectus.

A prospectus is Part I of the registration statement[21] and is the portion of the registration statement that is delivered to the investor, to the offeree or purchaser, in compliance with the securities laws' requirements for prospectus delivery.

The registration statement is not delivered to the investor, but is filed with the SEC.[22] The registration statement has to be reviewed, cleared and declared effective by the SEC before sales can be confirmed. The form of registration statement most frequently availed of by foreign issuers is the so-called Form F-1, which is a full-disclosure, long-form registration statement, analogous to the domestic Form S-1, which does not permit incorporation by reference, and therefore is the lengthiest, most detailed, and most expensive form of registration statement to prepare.[23]

Form F-1 requires three years' income and cash flow statements, two years' balance sheets, five years of selected financial information, and, in addition, requires the accounting reconcili-

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¶ 6952, at 6061 (Apr. 7, 1993) (enumerating registration requirements for public offering by non-U.S. issuer).

21. *See* Regulation C, 17 C.F.R. § 230.404 (1993). Item 404 of Regulation C provides that "[a] registration statement shall consist of . . . a prospectus containing the information called for by Part I . . . ." *Id.*

22. 15 U.S.C. § 77f(a) (1988 & Supp. IV 1992). Section 77f(a) provides for registration with the SEC.

> (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer, its comptroller or principal accounting officer, and the majority of its board of directors or person performing similar functions . . . and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States. . . . A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.
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> . . . .
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> (c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof. . . .

Id.

23. *See* 2 Fed. Sec. L. Rep. (CCH) ¶ 6952, at 6061 (Apr. 7, 1993) (setting out registration requirements of Form F-1 for foreign issuer); *see also* 2 Fed. Sec. L. Rep. (CCH) ¶ 7121, at 6235 (setting forth registration requirements of Form S-1 for domestic issuer).

ations that Bill Decker mentioned.[24] I'm going to skip over a lengthy discussion of the financial statements and reconciliations and focus more on the non-financial statement disclosure required in the registration statement.

In my experience, there are a number of areas that have caused and continue to cause concern for foreign issuers. Our registration disclosure requirements require lengthy and extensive disclosure of executive compensation[25] — sometimes a sensitive matter — and of transactions with officers, directors, and shareholders.[26] The threshold for disclosure of transactions with such interested parties is U.S.$60,000, a relatively small amount.[27]

Another area where there is frequent concern is business segment disclosure. Our securities laws require separate businesses to be described separately.[28] This is frequently a matter of great concern. If you were a company running two or three businesses and you've never disclosed the profitability of one of your business segments in your home market or to your competitors, segment disclosure, if required, would provide for such disclosure.

Another area we frequently have a problem with is the disclosure of material contracts.[29] If your company is dependent upon one or two suppliers, and that dependency is subject to or part of a contractual relationship, the SEC will require full disclosure of the terms of the contract. Now, there are provisions for confidentiality,[30] and it is possible to obtain confidential

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24. *See id.*; *see also* Decker, *supra* note 1, at S17 (discussing registration process involved in public offering).

25. *See* Regulation S-K, 17 C.F.R. § 229.402 (1993).

26. *Id.* § 229.404.

27. *Id.* § 229.404(a). Item 404 provides

> (a) *Transactions with management and others.* Describe briefly any transaction, or series of similar transactions, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, or series of similar transactions, to which the registrant or any of its subsidiaries was or is to be a party, in which the amount exceeds $60,000 and in which any of the following persons had, or will have, a direct or indirect material interest . . . .

Id.

28. *Id.* § 229.101(b).

29. *Id.* § 229.601(b)(10).

30. *See* Regulation C, 17 C.F.R. § 230.406(a) (1993). Item 406(a) of Regulation C provides for confidential treatment of certain information:

> Any person submitting any information in a document required to be filed

treatment for certain information, which on balance while perhaps of some interest to investors, would be extremely damaging to the company, and we have had success in specific cases obtaining confidential treatment of material information that would otherwise have to be disclosed. Similarly, other areas of concern include competition.[31] It is sometimes difficult for an issuer to bring itself to acknowledge who the competition is and what the competitive balance is in the industry.

Also of concern is the writing of Management's Discussion & Analysis ("MD&A").[32] The SEC has focused increasingly on the MD&A as a means of providing a window for investors into management's views of the future and the prospects for the company and industry. There are also SEC requirements relating to the disclosure of negative trends, and information that investors might use to determine whether or not there are negative trends.[33] This disclosure is usually carefully written by both the

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> under the [Securities] Act may make written objection to its public disclosure by following the procedure in paragraph (b) of this section, which shall be the exclusive means of requesting confidential treatment of information included in any document (hereinafter referred to as the *material filed*) required to be filed under the [Securities] Act . . . .

Id.

31. Regulation S-K, 17 C.F.R. § 229.101(c)(x) (1993).

32. Regulation S-K, 17 C.F.R. § 229.303 (1993). Item 303 of Regulation S-K requires certain disclosures in "Management's Discussion and Analysis of Financial Condition and Results of Operations."

> (a) *Full fiscal years.* Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a)(1), (2) and (3) with respect to liquidity, capital resources and results of operations and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. . . .
>
> . . . .
>
> (b) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S-X (17 C.F.R. § 210), a management's discussion and analysis of the financial condition and results of operations shall be provided so as to enable the reader to assess material charges in financial condition and results of operations between the periods specified in paragraphs (b)(1) and (2) of this Item. The discussion and analysis shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.

Id.

33. Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii) (1993).

company and its counsel, and the underwriters and their counsel, but it still leads to anxiety in specific cases.

Another area that I would like to mention, which makes our system a little hard to understand for first-time issuers, both domestic and foreign, is the fact that a prospectus under our laws is not only a selling document, as company management would like it to be in order to have a successful sale of securities in the United States, but also what we call an "insurance policy." It's an insurance policy because it is important to fully disclose all material facts, not omit any facts, in order that the prospectus not be challenged subsequently by investors on the grounds that it failed to fully disclose the company, it's prospects and its business. Your counsel will advise you that it's more important for the prospectus to be an insurance policy in some respects than it is to be a selling document, or at least a comfortable balance has to be struck, so that the company doesn't have liabilities under the securities laws after the sale.

This need to include bad news as well as good news frequently comes to a head in the section known as "risk factors," where the company is asked to disclose in fact why an investor making this investment might not succeed, what the risks are in making the investment, and why the investor may lose money.[34] This is not an area, I think, that in the final analysis should prevent a foreign issuer from coming to our markets because it is an accepted part of our markets, and once the issuer gets over the hurdle of understanding that its U.S. prospectus will include information that would not necessarily be required in Germany or France, I think people get used to the concept.

I would like to also touch on the fact that preparing a regis-

34. Regulation S-K, 17 C.F.R. § 229.503(c) (1993). Item 503(c) of Regulation S-K requires disclosure of certain risk factors:

> (c) *Risk factors.* Registrants, where appropriate, shall set forth on the page immediately following the cover page of the prospectus (or following the summary, if included) under an appropriate caption, a discussion of the principal factors that make the offering speculative or one of high risk; these factors may be due, among other things, to such matters as an absence of an operating history of the registrant, an absence of profitable operations in recent periods, the financial position of the registrant, the nature of the business in which the registrant is engaged or proposes to engage, or, if common equity or securities convertible into or exercisable for common equity are being offered, the absence of a previous market for the registrant's common equity.

Id.

tration statement is going to require a great deal of management time — you can imagine that it will require a lot, and then double it.[35] There will be management attention required to preparation of the registration statement and to the "road show"[36] marketing process.

The registration process also is not cheap. It perhaps has become cheaper because over the years we have amended the laws and regulations to provide for shorter form registration statements, for incorporation by reference, and foreign issuers benefit from some of these improvements.[37] But for a first-time issuer, the U.S. registration process is still an expensive undertaking.

B. *Private Placements and Rule 144A Offerings*

1. Private Placements

Historically, the alternative to a public offering was a private placement. A private placement under our laws is an offering of securities that is exempt from registration because it meets very specific private placement requirements.[38] These requirements are primarily the absence of any public advertising or solicitation, the fact that the offering is made to a limited number of offerees who must be sophisticated investors, the provision of sufficient information even though no registration statement is filed, investor representations regarding investment intent because in a private placement an investor cannot take with a view towards a further distribution, and restrictions on resales.

For fifty years after the passage of the Securities Act, the only way to sell securities without registering them — except for

35. *See* Decker, *supra* note 1, at S21 (discussing time requirements for preparing registration statement); 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 experience of Fletcher Challenge Ltd. entering U.S. capital markets).

36. *See* RICHARD JENNINGS ET AL., SECURITIES REGULATION 177 (7th ed. 1992). During the "road show," management and the lead underwriter tour the country making presentations to educate prospective institutional investors regarding the prospects of the issuer and the merits of the particular offering. *Id.*

37. *See, e.g.,* Form F-2, 17 C.F.R. § 239.32 (1993); Form F-3, 17 C.F.R. § 239.33 (1993).

38. *See* 15 U.S.C. § 77d(2) (1988). Section 77d(2) exempts private placements from the registration requirement: "The provisions of section 77e [requiring registration] of this title shall not apply to . . . transactions by an issuer not involving any public offering." *Id.*

certain other specific exemptions for government securities, bank securities and that kind of thing — was through the private placement exemption. The problem with the private placement exemption, though, was that the lack of liquidity and the paperwork involved in secondary transactions made the market less attractive than foreign alternatives. For example, in the Euro-bond market in London, we found in the 1970s and 1980s an increasing number of U.S. issuers going abroad and foreign issuers not coming to the United States because, on the one hand, the public offering alternative was too onerous and expensive, and on the other hand, the private placement alternative was too cumbersome, and while cheaper, because it doesn't involve registration, involved higher issuance costs, higher coupons, lower prices for equity, and was generally unsatisfactory.

2. Rule 144A Offerings

It took the SEC a long time to respond accordingly to the high cost of registration and the limitations of a traditional private placement. The problem was known for years, through the 1970s and 1980s, as companies increasingly raised capital outside U.S. markets. The SEC finally acted in 1990, in the form of Rule 144A of the Securities Act ("Rule 144A" or "144A").[39]

Rule 144A fits neatly into our statutory framework. It is best understood as a quasi-public offering, quasi-private placement that is exempt from registration because the SEC has deemed that a 144A offering does not involve a distribution, and thus is not a public offering.[40] So even though securities can be issued pursuant to Rule 144A to an unlimited number of investors, pro-

39. 17 C.F.R. § 230.144A (1993).

40. *Id.* The preliminary notes to Rule 144A describe the parameters of the Rule's application.

> 1. This section relates solely to the application of section 5 of the [Securities] Act and not to antifraud or other provisions of the federal securities laws.
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> 2. Attempted compliance with this section does not act an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the [Securities] Act.
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> 3. In view of the objective of this section and the policies underlying the [Securities] Act, this section is not available with respect to any transaction or series of transactions that, although in technical compliance with this section, is part of a plan or scheme to evade the registration provisions of the [Securities] Act. In such cases, registration under the [Securities] Act is required.
>
> 4. Nothing in this section obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration

vided that all of those investors are Qualified Institutional Buyers ("QIBs"), in the SEC's view, in their vocabulary, such a transaction does not involve a distribution.[41] Since it doesn't involve a distribution, it's not a public offering, therefore it must be a private placement, and it is exempt from registration.

The key to understanding 144A from a legal point of view is that all sales must be made to QIBs.[42] If you look at Rule 144A, there are thirteen separate categories of QIBs.[43] But, in general, QIBs are institutional investors with an excess of U.S.$100 million in assets under management, not including government securities.[44]

> requirements of the Securities Exchange Act of 1934 . . . whenever such requirements are applicable.
>
> 5. Nothing in this section obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.
>
> 6. Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be restricted securities within the meaning of Rule 144(a)(3) of this chapter.
>
> 7. The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(2) of the [Securities] Act, or Regulation D under the [Securities] Act, from the registration requirements of the [Securities] Act.

Id.

41. *Id.* Rule 144A(b) & (c) determines that certain transactions do not involve distributions, and thus are exempt from registration.

> (b) *Sales by persons other than issuers or dealers.* Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) [necessary requirements to qualify as a QIB] of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(11) and 4(1) of the [Securities] Act.
>
> (c) *Sales by Dealers.* Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) [necessary requirements to qualify as a QIB] of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(3)(C) of the [Securities] Act and not to be an underwriter of such securities within the meaning of section 2(11) of the [Securities] Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the [Securities] Act.

Id.

42. *Id.* § 230.144A(a). Rule 144A sets forth the qualifications for the 144A exemption: "To qualify for exemption under [Rule 144A], an offer or sale must meet the following conditions . . . . The Securities are offered or sold only to a qualified institutional buyer. . . ." *Id.* § 230.144A(d). Rule 144A further enumerates thirteen entities that satisfy the requirements of a qualified institutional buyer. *Id.* § 230.144A(a).

43. *Id.* § 230.144A(a).

44. *Id.*

The benefit of Rule 144A is that the procedures for transfer are greatly simplified. Under the old private placement procedure, in order to transfer a security, in virtually every case an opinion of counsel had to be delivered. This was a huge impediment to the liquidity of the private placement market. In fact, privately placed securities tended to be held indefinitely.

Under Rule 144A, so long as information regarding the issuer is in the marketplace, and so long as the seller has reason to believe or reasonably believes that the buyer is a QIB, the transfer can be made without further paperwork. The SEC also anticipated that the NASD-sponsored PORTAL system[45] would be available as a kind of a box within which 144A-qualified securities could trade at the lowest possible cost.[46]

The above synopsis essentially covers the legal framework for the issuance of securities in the United States — the public offering, the private placement, and the private placement modified by Rule 144A.

CONCLUSION

In an attempt to make the public sale of securities in the United States as attractive as possible, as I mentioned, the SEC has, within the past two weeks, promulgated a series of Releases.[47] These are not rules that have been adopted; rather, these are rules that are being proposed for comment. These rules would in a number of areas simplify the issuance of securities by foreign companies in the United States, not only by reducing the reconciliation requirements that Bill Decker mentioned[48] — for example, cash flow statements can be included based on the international standard, not the U.S. standard — but also by recognizing differences in the foreign markets and accommodating in a number of cases foreign practices that would be deemed acceptable under the SEC rules.

45. *See* Operation of the PORTAL Market, Exchange Act Release No. 27,956, 55 Fed. Reg. 18,781 (Apr. 27, 1990). The PORTAL (Private Offerings, Resales and Trading through Automated Linkages) system, established by the NASD and approved by the SEC, is a screen-based marketplace for secondary trading of unregistered securities, which are exempt from the registration requirements of the Securities Act pursuant to Rule 144A. *Id.*

46. 17 C.F.R. § 230.144A (1993).

47. *See supra* note 3 and accompanying text (discussing recent SEC Releases).

48. *See* Decker, *supra* note 1, at S19 (discussing reconciliation requirements of non-U.S. companies registering securities in United States).