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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 the Issuer's 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 THE ISSUER'S PERSPECTIVE

*William E. Decker**

INTRODUCTION

It's a pleasure to be here. It's a pleasure to see a program like this come together after so many months of planning. I am proud to be part of such a prestigious panel.

I spend a substantial portion of my time, and have done so over the past ten years, working with companies all around the world that are interested in accessing the U.S. capital markets in various ways. There is an awful lot of misinformation out there about what the process entails, what the various options are, and how much pain and suffering is involved in dealing with the process and the Securities and Exchange Commission ("SEC"). I think, as the interest in our markets has increased so dramatically for the reasons that Jim Silkenat mentioned,¹ it is becoming more and more important that the message be clearly explained. There is a process that has to be dealt with irrespective of the choice decided upon for entry into the U.S. markets.

Our markets are very attractive; the capital is here. A substantial number of large companies around the world are carefully considering what the process of entering the U.S. markets would mean to them so that they might at least position themselves for the potential access of our markets when and if the need arises. I think keeping those options open is the reason so

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1. See James R. Silkenat, *Overview of U.S. Securities Markets and Foreign Issuers*, 17 *FORDHAM INT'L L.J.* S4, S4-6 (1994) (noting increased interest by non-U.S. companies in U.S. capital markets).

many companies around the world are thinking about and acting toward this objective.

We are working with about twenty of these companies right now. As many as there are presently engaged in the process, there are dozens of others that I have spoken to that are doing their homework and considering a move over the next year or so.

What I am going to do — having the advantage of being one of the first speakers — is set the stage for you as to what the various alternatives are and what the overall implications of each approach are. Those panelists that follow me will give you more information in many of the areas that I will touch upon. But I would like to, as I said, just set the stage and share with you some of my overall observations on various aspects of the process.

I. ACCESS TO U.S. MARKETS

When a company considers entering the U.S. securities markets, it must consider three possible alternatives: a private placement; a public listing of shares — that is, listing shares without raising new funds; and a public offering itself, where a company goes to the U.S. public markets to raise funds.

Why do companies come into the U.S. markets? Jim Silkenat touched upon this,² and there are some other relevant points: the United States is the largest, most open market in the world; there is interest on the part of major institutional investors, such as pension funds, in diversifying — and they have only just begun to consider the attractiveness of non-U.S. securities; and the fact that U.S. investors are much more comfortable than ever before with trading in foreign securities. Joe Velli of The Bank of New York, I'm sure, has some excellent statistics to show you.³ The appetite for foreign securities has increased enormously. Over the last year, the most actively traded stock on the New York Stock Exchange, for the first time, was a foreign security — Glaxo. Telefonos de Mexico is usually on the top-ten list. By the way, I am proud to tell you that these are two companies

2. *See id.* at S5 (discussing increasing number of non-U.S. companies entering U.S. capital markets).

3. *See generally* 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).

Coopers & Lybrand helped bring into the U.S. markets in the first place.

Another issue that is certainly a new phenomenon, and Joe Velli had something to do with this in his innovative activities, is the use of the American Depositary Receipts ("ADRs") to acquire U.S. businesses.⁴ It used to be, five years ago or more, when a non-U.S. company acquired a U.S. company it was a cash deal. A few years ago I was involved in the acquisition of Rorer by Rhone-Poulenc, which was basically a paper transaction. This is a new use of ADRs and a new reason why non-U.S. companies are coming into the U.S. markets.

Other reasons include: enhancing share value; protection against hostile take-over bids; and the whole idea of increasing U.S. presence. When we helped bring Glaxo into the U.S. markets for the first time, they weren't interested in raising funds; they were just interested in increasing their name recognition and market following here in the United States. Believe it or not, at that time hardly anybody had ever heard of Glaxo in the United States, and now it's pretty much a household name.

But non-U.S. companies are coming in. As Jim Silkenat mentioned,⁵ the number is now more than 560 foreign registrants that have registered with the SEC, of which about half of them have registered over the past three years. The pace is frantic, and the amount of capital being raised is enormous.

I had some statistics recently given to me, indicating that over the past two years, in both the private and public marketplace in the United States, foreign companies have raised more than U.S.\$120 billion. If some of these major privatized companies that we know are out there come to the U.S. markets over the next year or two, such as the German telecom and maybe the Japanese telecom, the amount of money that they will be looking to raise is staggering.

I won't pretend, standing here in the presence of Joe Velli,

4. See Velli, *supra* note 3, at S38 (discussing ADRs as alternative for non-U.S. companies seeking to enter U.S. capital markets); 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).

5. See Silkenat, *supra* note 1, at S5 (noting increased interest by non-U.S. companies in U.S. capital markets).

to explain to you much about ADRs.⁶ He will do that far more eloquently than anyone I know. But suffice it to say that the vast majority of companies around the world come into the U.S. markets using the ADR mechanism. It is a mechanism that U.S. investors are very comfortable with. ADRs look, act, and smell like U.S. stock certificates.

Let me just make one other point in terms of the options for entering the U.S. markets. In addition to the three primary options, there is also a fourth one called the "Level I ADR," which is where a company can have its shares traded here on the pink sheet markets, over the counter, without any sort of registration with the SEC.⁷ There are many foreign companies currently trading in the United States using the ADR mechanism, without having gone through the SEC registration process.

To have your stock traded on the New York Stock Exchange ("NYSE"), on the American Stock Exchange, or on NASDAQ — the over-the-counter marketplace — it is required that a registration with the SEC take place. If a company merely wants to be pink sheet-traded — the "Level I ADR," as it has come to be known — there is no registration required.

Jim Cochrane of the NYSE will tell you why the NYSE is the only place to go to be publicly traded.⁸ From a prestige standpoint and a market following standpoint, that may be true. However, there are an awful lot of non-U.S. companies on NASDAQ as well — more than 250. Because of the less stringent criteria required (and also the lower costs involved), many foreign companies come into the United States on the NASDAQ system first and then change later on, as the criteria are met for listing on the NYSE.

II. *THREE MAJOR OPTIONS FOR ENTERING U.S. CAPITAL MARKETS*

Earlier I mentioned that there are three major options for a

6. See Velli, *supra* note 3, at S38 (discussing ADRs as alternative for non-U.S. companies seeking to enter U.S. capital markets); *cf.* Saunders, *supra* note 4, at 48 (discussing registration process of ADRs).

7. See Velli, *supra* note 3, at S43 (discussing Level I ADRs).

8. See 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).

company wishing to enter U.S. capital market. Let me briefly take you through these three alternatives.

A. *Private Placements*

Private placements have been around awhile, but Rule 144A of the Securities Act of 1933 ("Rule 144A" or "144A")⁹ was an innovation of the last few years. Rule 144A is intended to make the private placement alternative more attractive in the marketplace by making it easier for these shares to be traded within a two-year restricted period.

A Rule 144A offering involves Qualified Institutional Buyers ("QIBs").¹⁰ There are criteria for that designation,¹¹ which are met only by the very large institutions; this is a market intended only for those types of institutions. It is not appropriate, of course, in a private placement, that these shares be sold to the public. There is a two-year period involved, where these shares can only be effectively sold among the QIBs.¹²

The process of doing a private placement involves the preparation of an offering circular. It looks very much like a prospectus. It has information about the company and the securities to be issued. From the standpoint of the financial information contained in an offering circular, though, there is a fair amount of latitude. The financial requirements are basically negotiated between the investment banker and the offeror, in the sense that this document is not required to be registered with the SEC.¹³ Thus, the financial statements can be in accordance with the

9. 17 C.F.R. § 230.144A (1993); 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, S35 (1994) (commenting on SEC's implementation of Rule 144A).

10. See 17 C.F.R. § 230.144A(a)(1) (1993) (defining qualified institutional buyer).

11. See *id.* Qualified Institutional Buyers under Rule 144A include: insurance companies (as defined in § 2(13) of the Securities Act of 1933, 15 U.S.C. § 77b(13) (1988)); investment companies (registered under the Investment Company Act, 15 U.S.C. § 80a (1988)); business development companies (as defined in § 2(a)(48) of the Investment Company Act, 15 U.S.C. § 80a-2(48) (1988), or § 202(a)(22) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(22) (1988)); and several other entities and individuals. 17 C.F.R. § 230.144A (1993).

12. 17 C.F.R. § 230.144A (1993); see Jensen, *supra* note 9, at S36 (discussing registration exemption for Rule 144A transactions).

13. See 15 U.S.C. § 77d(2) (1988). Section 77d of the Securities Act provides that "[t]he provisions of section 77e [requiring registration with the SEC] of this title shall not apply to . . . transactions by an issuer not involving any public offering." *Id.*

home country's accounting principles, and they typically are. But they have evolved to a point — and I have been involved in quite a few of these, especially Rule 144A offerings involving equity deals — where they will almost invariably include a narrative description of the differences between the home country accounting principles and generally accepted accounting principles (“GAAP”) in the United States, outlining what those differences are.

The offering circular will often include a set of financial statements that, while prepared in accordance with home country GAAP, are “Americanized” in terms of style and presentation. It will include a full-blown SEC-style Management's Discussion & Analysis (“MD&A”),¹⁴ in many cases virtually the same kind of presentation that you would see in a prospectus. In many cases, I also find that the investment bankers want to know what the numbers are in terms of the GAAP differences between the home country and U.S. GAAP, even though they typically don't go into the document.

I would just mention that, while the private placement alternative is clearly the right move in many cases, especially if the company is unable to provide the financial information needed for a registration or a listing in any realistic period of time, it may be a task in terms of the effort involved on the prospectus preparation side that's not dramatically different from a full public offering. I think that this process is still evolving. In some cases it's extremely easy; in other cases the investment bankers require a fair amount of detail on the financial side, so we're finding that Rule 144A transactions are sometimes not that much different from a public offering when you get to the end of the line in terms of effort. What you save, of course, is not having to go through the SEC registration process and to get those financial statements “cleared” by the SEC.

B. *Public Listing*

The public listing alternative involves a company that wants to register and have its existing shares listed on one of our exchanges for any one of a number of reasons — such as to

14. Cf. Regulation S-K, 17 C.F.R. § 229.303 (1993) (outlining Management's Discussion & Analysis of registrants financial condition and results of registrants operation).

broaden the trading market, or as a first step toward a full public offering.

A listing requires a registration with the SEC on a Form 20-F.¹⁵ I will briefly talk about some of the key requirements for a filing on 20-F, which are not all that different from the rules covering a prospectus on Form F-1,¹⁶ which would be used for a public offering. The listing alternative is an option that many of non-U.S. companies ignore when contemplating entry into the U.S. markets.¹⁷ The big advantage I see in the listing approach is that it enables a company that doesn't need the funds today to develop a presence in the U.S. marketplace and to prepare a document that goes through the whole SEC registration process; passes the test, if you will, of the SEC, where the company receives comments from the SEC, addresses those issues, and ends up with a set of financial statements that have been accepted by the SEC.¹⁸

If the company then decides to go to the public markets, it is well positioned to do so very easily.¹⁹ In fact, there are short-form registration statements available once a company has been listed for a designated period of time that merely incorporate by reference the financial information that is included in the annual accounts required to be furnished by these companies.²⁰ That makes accessing the markets an easy process once the listing has taken place.

A listing is an option that a lot of non-U.S. companies ignore. Many companies do not consider the U.S. markets until they have to raise funds. Then they ask, "Well, should we go private or public?" A public listing may be an in-between step for a company that does not need the funds today.

15. 17 C.F.R. § 249.220f (1993).

16. 17 C.F.R. § 239.31 (1993).

17. 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, S115 (1994) (discussing how Fletcher Challenge Ltd. listed before offering securities in U.S. markets).

18. *Id.* (describing listing experience of Fletcher Challenge Ltd.).

19. *Id.* at S112 (describing offering of Fletcher Challenge Ltd. securities in U.S. markets after first listing shares).

20. Form F-2, 17 C.F.R. § 239.32 (1993) (applying to certain foreign registrants that already have registered class of securities); Form F-3, 17 C.F.R. § 239.33 (1993) (applying to certain foreign registrants that already have registered class of securities); see Saunders, *supra* note 4, at 68-69 (discussing requirements for filing by foreign registrants on Forms F-2 or F-3).

C. Public Offering

1. Registration Process

A public offering occurs when a company wants to come to the U.S. public markets to raise funds. An offering requires a registration with the SEC, usually on a Form F-1; the heart and soul of that F-1 is a prospectus.²¹

One of the most significant areas of information included in the prospectus, certainly from a time and effort standpoint, is the discussion of the business, which includes a discussion of legal actions and a concise discussion of risk factors.²² But the requirement that most companies worry about, and where the principal obstacles lie, in my experience, is in the development of the required financial statements and related financial information.²³ This is what scares non-U.S. companies considering public offerings in the United States. This is what they worry about from a burden of disclosure standpoint and from a sensitivity of disclosure standpoint.

A registration statement filed — and this would be true of a listing on Form 20-F²⁴ or a public offering on Form F-1²⁵ — basically requires the following: two years of audited balance sheets²⁶ along with statements of income, cash flow,²⁷ and

21. Form F-1, 2 Fed. Sec. L. Rep. (CCH) ¶ 6952, at 6062 (Apr. 7, 1993).

22. *See id.* (listing information required in prospectus by reference to Regulation S-K and Form 20-F).

23. *See* Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993). Rule 4-01(a)(2) of Regulation S-X requires foreign private issuers that do not apply U.S. GAAP to reconcile their accounting principles with U.S. standards.

In all filings of foreign private issuers . . . except as stated otherwise in the applicable form, the financial statements may be prepared according to a comprehensive body of accounting principles other than those generally accepted in the United States if a reconciliation to United States generally accepted accounting principles and the provisions of Regulation S-X of the type specified in Item 18 of Form 20-F . . . is also filed as part of the financial statements. Alternatively, the financial statements may be prepared according to United States generally accepted accounting principles.

Id.

24. 17 C.F.R. § 249.220f (1993).

25. 17 C.F.R. § 239.31 (1993).

26. Regulation S-X, 17 C.F.R. § 210.3-19(a)(1) (1993) (setting out special instructions and requirements for financial statements of foreign private issuers).

27. *Id.* § 210.3-19(a)(2) (1993). Rule 3-19(a)(2) requires “[a]udited statements of income and cash flows for each of the three fiscal years preceding the date of the most recent audited balance being filed.” *Id.*

changes in shareholders' equity for those years.²⁸

When one considers the obstacles that need to be overcome, I think it is important to view them in two ways. One is the availability of information — how difficult is it going to be to come up with the information that is required to satisfy the SEC? And second, how sensitive is that information? Availability and sensitivity are two distinct issues that a company must consider prior to beginning the registration process.

I find in practice that sensitivity is far more of an issue than availability. Companies that decide to commit to entering the U.S. markets and put forth the effort to generate the required information can come up with whatever disclosures are needed to satisfy the SEC. It might be a bit painful the first time around, but it really is not that big of an issue if there is a good business reason for the offering or listing. What prospective registrants often become concerned with is the sensitivity of the required information.

A non-U.S. company coming into the United States can prepare its primary financial statements on the basis of U.S. GAAP²⁹ — which, believe it or not, a number of companies do — such as, Rhone-Poulenc in France and Chile Telecom; they don't reconcile from home country accounting principles to U.S. GAAP. However, the vast majority of foreign companies entering U.S. markets provide their home country financial statements and then present an audited reconciliation to U.S. GAAP, outlining each of the differences as it affects net income and shareholders' equity.³⁰ The sensitive issues that are borne out in that reconciliation are often what really concern these non-U.S. companies.

When we talk and hear about "burden of disclosure," what people are most often talking about is that they don't like the information that needs to be included in that reconciliation. It may be a case where there has been an aggressive revenue recognition approach followed in the home country that would have to be reconciled with U.S. GAAP and thus highlighted; it may be

28. *Id.* § 210.3-04 (1993)

29. *See supra* note 23 (citing accounting requirements of Rule 4-01(a)(2) of Regulation S-X); *see also* Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993) (offering U.S. GAAP as disclosure option for foreign private issuer).

30. *See supra* note 23 (citing accounting requirements and alternatives of Rule 4-01(a)(2) of Regulation S-X); *see also* Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993) (offering reconciliation with U.S. GAAP as disclosure option for foreign private issuer).

the hidden reserves, or secret reserves in countries like Switzerland and Germany; it may be the pension information in cases where a company may have a massive under-funded pension plan, and the pension information under U.S. GAAP would show a huge reconciling item of increased pension expense and/or a large pension liability. It's these sorts of disclosure that non-U.S. companies are very cautious about.

There are other required pieces of financial information.³¹ I do not want to dwell on them because those are going to be covered by others. But suffice it to say that the SEC is trying to do whatever it can to make the registration process as painless as possible for non-U.S. companies and, just within the last two weeks, has come forth with some rule changes and proposals for other rule changes that I think will significantly reduce the registration burden for non-U.S. companies.³²

For example, if a company has made an acquisition of certain significance, or has an investee company of certain significance, the rules now say that you have to provide separate financial statements for that entity, for the target or for the investee, reconciled to U.S. GAAP. This presents a significant burden for many companies.³³ The current proposals would modify those rules, and I think this would be a very positive step towards relieving the disclosure burden, except in the largest types of acquisitions or investee situations. Another significant proposed rule change would reduce the reconciliation requirements to the most recent two years.³⁴

To the home country financial statements and the footnotes therein need to be added the information required under U.S. GAAP and SEC disclosure requirements.³⁵ This information is

31. See 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,745 (Nov. 18, 1992) (setting out disclosure requirements in public listing by foreign issuer on Form 20-F); 2 Fed. Sec. L. Rep. (CCH) ¶ 6952 at 6061 (Apr. 7, 1993) (setting out disclosure requirements in public offering by foreign issuer on Form F-1).

32. 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) [hereinafter SEC Proposals].

33. Regulation S-K, 17 C.F.R. 229.601(b)(2) (1993).

34. SEC Proposals, *supra* note 32.

35. See Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993) (requiring reconciliation with U.S. GAAP and SEC disclosure requirements).

typically built into the home country footnotes when an offering or listing is done.

There again, I think it is merely a question of assembling the required information. Occasionally there is something that is sensitive, but I think here it is basically a process that needs to be endured the first time until a system is developed to generate the required information. Then there's typically no more discussion about the disclosure burden involved.

There are a couple of exceptions for things that may be sensitive, like segment information, and maybe some of the related party transaction disclosures that the SEC considers very important. But again, these exceptions usually involve sensitivity issues rather than availability issues.

I would point out that there is the possibility, if a company is doing a listing rather than an offering, to delete from the 20-F footnotes any information that it cannot generate, or would prefer not to disclose. The GAAP reconciliation is required in any case, but from the standpoint of the other footnote disclosures, if a company has something like segments that may be sensitive, or geographic information that it prefers not to provide, it can file under Item 17 of Rule 20-F³⁶ and leave that information out of the listing document, whereas it's required for a public offering. I just mention this option because some of this data that can be sensitive from a disclosure standpoint can be dealt with in a number of different ways.

2. Key Players

The key players to a listing or a registration are in many cases the same players who are important to a private placement. I would like to stress that the most frequently under-estimated factor in one of these transactions is the role that management needs to play in the process.³⁷ Management needs to retain control, devote someone to run and drive the process, to keep control of it, and to make sure it doesn't develop a life of its own. It

36. Form 20-F, Item 17, 5 Fed. Sec. L. Rep. (CCH) ¶ 29,701, at 21,763 (Nov. 18, 1992); see M. Elizabeth Rader, *Accounting Issues in Cross-Border Securities Offerings*, 17 *FORDHAM INT'L L.J.* S129, S131 (1994) (outlining Item 17 disclosure requirements for Form 20-F).

37. See Jensen *supra* note 9, at S33 (highlighting role of management in registration process); Warbrick, *supra* note 17, at S112 (citing management's experience in registering Fletcher Challenge Ltd.).

requires a significant time commitment and the process doesn't happen by itself.

Investment bankers, of course, play a critical role in a public offering or private placement in terms of marketing and pricing the issue. Additionally, without a competent securities counsel, the whole process will become a nightmare. The lawyers play a key coordinating role in terms of the development of the whole document and in terms of the coordination with the SEC's legal staff.

As independent accountants, we certainly help in all aspects of the identification and preparation of the financial disclosures required to go into the filing document; we attest to the financial statements; assist management in the development of the MD&A, along with the attorneys — very much a joint effort; help coordinate with the SEC staff on the accounting side, including organizing and conducting any pre-filing meetings with the SEC that typically are required when a non-U.S. registrant is involved.

Joe Velli will explain to you what the ADR Depositary Bank does,³⁸ the selection of which is a decision usually made very early in the process of entry into the U.S. markets.

Finally, do not under-estimate the role of an experienced financial printer throughout all this. They don't come cheap, but they are critical to the process, and any short-cuts taken in this area are usually regretted.

3. Time Requirements

A question I am typically asked is, "How long does all of this take? Suppose we decide to come into the U.S. markets. How long is it going to take us to do it?"³⁹ The answer is that it is impossible to generalize as to how long the process takes. It depends on so many things, particularly how complicated the company is, whether the company has had audited financial statements for the last couple of years, and how complicated the differences are to generate and calculate.

But, if there's any such thing as a "typical" time table, if a company is really serious about the process, and has audited fi-

38. See Velli, *supra* note 3, at S38 (discussing increased use of ADRs by non-U.S. companies entering U.S. capital markets).

39. See Warbrick, *supra* note 17, at S112 (describing registration experience of Fletcher Challenge Ltd.).

nancial statements available in the local country, the whole process generally can be accomplished in six months if everybody really puts their minds to it and the effort is properly planned, with the proper advisors involved.⁴⁰

That would mean that the filing with the SEC would have to take place at the beginning of the fifth month of the process because the initial SEC review process generally takes thirty days. And then, addressing the SEC's comments, preparing the final documents, and completing all the necessary tasks in preparation for the closing typically adds another whole month.

A typical scenario involves a concentrated four-month period where everybody involved has to be totally channeled. And it can be done. I have had some that have taken more than two years, but I have had others that were a matter of several months — for example, a Norwegian company, that came to New York and said they wanted to prepare a public offering document in one month. I told them that it was impossible. They managed to do it in about three months — it was incredible — from nothing to a full public offering in three months. Thus, it can be done with the right dedication of resources and the right team in place.

III. *CURRENT CLIMATE*

I would mention here that, as far as the climate at the SEC goes, there has never been a better time for non-U.S. companies to register with the SEC. This was not always the case. Five years ago and beyond, there was a very different kind of environment at the SEC that essentially warned, "if you want to play in our ball park, you play by our rules; if it's difficult, that's too bad." That is over-stating it, but not by much.

Now it's a whole different game.⁴¹ The SEC wants the process to work. They do not want foreign companies avoiding the U.S. markets because the regulatory process is too complicated

40. *Id.* at S115 (discussing time considerations of registration process of Fletcher Challenge Ltd.).

41. See Richard Kosnik, *The Role of the SEC in Evaluating Foreign Issuers Coming to U.S. Markets*, 17 *FORDHAM INT'L L.J.* S97 (1994) (discussing flexibility of SEC in evaluating and accommodating non-U.S. companies entering U.S. capital markets); 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 (1994) (discussing U.S. disclosure system, and how it promotes efficiency and liquidity in U.S. capital markets).

and burdensome to deal with. They will work with you.⁴² They are cooperative and trying to do everything they can to make the process as painless as possible.

As I said, I typically take our non-U.S. clients down to meet with the SEC in advance of filing, to talk over the issues, and to talk over what's unusual about the company.⁴³ If there are accounting transactions that are unique to a particular environment, the SEC is always willing to talk about them, to assess whether the U.S. model really fits or whether this is a transaction that warrants some special approach.⁴⁴ If there are disclosure problems, and alternative information can be provided, the SEC is willing to talk about those situations. Frankly, they are willing to give concessions in many cases that they might not be willing to give to domestic companies. In summary, the SEC staff will work cooperatively with non-U.S. companies seeking to access the U.S. markets for the first time.

There is a framework, though, that the SEC believes in. We have a disclosure framework in the United States that works well, and the SEC understandably is reluctant to overhaul that framework. This is a very controversial point that you probably will be hearing more about throughout the day.

IV. *RECONCILIATION OF FINANCIAL STATEMENTS*

In terms of the measurement of the financials — that is, showing investors in the United States what a non-U.S. company looks like in comparison with a U.S. company — the reconciliation of net income and shareholders' equity from home country to U.S. GAAP is something the SEC considers very important.⁴⁵ From the standpoint of that measurement framework, the SEC

42. See Kosnik, *supra* note 41, at S97 (discussing flexibility of SEC in evaluating and accommodating non-U.S. companies entering U.S. capital markets); McConnell, *supra* note 41, at S120 (discussing flexibility of SEC in evaluating and accommodating non-U.S. companies entering U.S. capital markets); Warbrick, *supra* note 17, at S112 (discussing Fletcher Challenge Ltd.'s experience dealing with SEC in preparation for entering U.S. capital markets).

43. Warbrick, *supra* note 17, at S117 (describing preliminary discussions with SEC).

44. *Id.* at S115 (detailing differences between New Zealand accounting methods with U.S. methods, which necessitated discussions with SEC).

45. See Regulation S-X, 17 C.F.R. § 210.4-01(a)(2) (1993) (requiring reconciliation with U.S. GAAP); *supra* note 23 (enunciating accounting requirements of Regulation S-X).

believes a level playing field is important and should be retained. But within that framework there is room for discussion and compromise. I can attest to that because that's what I spend a lot of my time doing, working with the SEC staff to try to meet the rules, not compromise the framework, and yet not present an overwhelming burden for any particular foreign company that's interested in coming into the U.S. markets from the standpoint of a particular disclosure or transaction.

CONCLUSION

A few final observations before I close. First, non-U.S. companies should not be afraid of the U.S. regulatory process. Companies are managing it, going through it every week. Most find it far less painful than they expected.

Second, the business decision is the key. Does a company want to keep its options open as far as accessing the U.S. markets? The cost of raising capital right now is very reasonable in the United States. It may not always be so, but it is likely to continue to be so for the foreseeable future. The availability of capital is here. There is a worldwide shortage of capital and there's plenty here in the United States. So companies would be well advised to carefully consider keeping their options open.

Third, non-U.S. companies should consider the listing option that I referred to earlier, as opposed to going for a full offering, if there is no pressing need for funds.

Finally, remember that the process of entering the U.S. markets can be managed. With the right planning and the right advisors working with you, it's not a process to be fearful of. Companies should make the business decision on its own merits and not because they have heard or think that the actual process of going through the SEC and all its regulations is excessively painful. It's happening all the time these days.