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The Decline of the U.S. Capital Markets: SEC Initiatives to Make the U.S. More Attractive to Non-U.S. Issuers

LESLIE GARDNER: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's webcast: "The Decline of U.S. Capital Markets and SEC Initiatives to make the U.S. more attractive to non-U.S. Issuers."

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Our presentation today will be moderated by Sabrina Bosse, who is Assistant General Counsel with the ACC. And now, I'll turn it over to Sabrina.

SABRINA BOSSE: Thank you, Leslie. Hi everyone. Again, my name is Sabrina Bosse. I'm Assistant General Counsel with ACC, and I work in the legal resources division. I also serve as liaison to a number of ACC's committees. Today's webcast is being presented by "The New to In-House Committee" and it's being sponsored by West, a Thomson Reuters business.

Our speaker today is Guy Lander. He's a partner with Carter, Ledyard and Milburn LLP. He practices in corporate securities, M&A [mergers and acquisitions] transactions, energy projects, and [international] finance. Mr. Lander practices securities law for international and U.S. companies and financial institutions. His practice emphasizes a wide range of financial transactions, including U.S. and international public and private offerings. His practice includes providing corporate governance and Sarbanes-Oxley advice to corporate clients. Mr. Lander also devotes a significant part of his time to regulatory matters for U.S. and international securities brokerage firms, investment advisors and hedge funds. Mr. Lander is, finally, author of four books on securities law and is the former Chairman of the New York State Bar Association's Securities Regulation Committee and Business Law section. So, we are thrilled to have him here.

OK, Leslie, it's time for the first verification code.

LESLIE GARDNER: Thank you, Sabrina. I would like to give out the first verification code for any attorneys who are applying for CLE. Please write this code down, as you will need it when you retrieve your certificate. Our first code is: FC1279. That is, F as in Frank, C as in Charlie, one, two, seven, nine. Thank you. And now I'll turn the presentation over to Guy.

GUY LANDER: Thank you, Leslie. OK. Can you hear me and see the slides?

LESLIE GARDNER: Everything is just great.

GUY LANDER: Good, thank you. OK, so I'm very pleased to be here today and if people have questions as we go along, please feel free to use the question box and I'll try to come back to them at the end. And if afterwards you'd like to contact me to discuss matters further, by all means do so. My contact information is at the end.

So, let's begin. This first graph is very important, and now looking back at it, after the financial collapse, it's more ambiguous than it was at the time. What this graph shows is how by both value and number of IPO's [initial public offering] the U.S., at approximately 1996, had 45% to 60% market share of all the IPO's by both value and number. And it was on a continual decline and as late as 2008 was under about 5%. So, this really caused a lot of consternation and resulted in at least three reports trying to analyze what the cause was and how to fix it. There was one by Senator Charles Schumer and Mayor Michael Bloomberg of New York, which was probably the most intensive of the three reports prepared by McKinsey. There was also a report prepared by the U.S. Chamber of Commerce, and there was a third report as well, which was [prepared by] Capital Markets Regulation.

If you go through these now—this is hard to read, I apologize, but it was very hard to get the information—essentially it tracks the graph with more precise numbers showing the U.S. market share on the top by total number of global IPO's, and on the bottom by total value. And here you can see the numbers going from 44% and 54%, all the way down to under 5% of the total number of global IPO's done in the U.S., and 1.7%, under 2%, of the total value of IPO's done worldwide, which is really a shocking come-down in a little over 10 years.

Now, these are the largest IPO's done in 2008. And if you look down the list, you'll see none—you'll see only one, VISA, done in the U.S. And then if you go down for 2007, you'll see only a couple and the same for 2006. (I apologize again for the small, tough-to-read print; unfortunately it was very hard to get the information onto slides.)

Now, when you look through the three committee reports and pull them all together, there's a consensus of about half a dozen factors that resulted in—actually exactly half a dozen factors, that resulted in the decline of the U.S. capital markets.

The first one was that many markets in Europe and Asia—especially in London—grew. America's regulatory scheme was considered excessive and burdensome by foreign companies not used to U.S. regulations.

(There's something that seems to be going on with these slides. There it is.)

The attitude in America was considered too litigious. Technology and communications systems have allowed the infrastructure to be built so that real-time transactions could occur from anywhere in the world and more strict immigration laws in America and less strict immigration laws in Britain. So, to give you an example of some of these items, for instance, there was a recent article in The New York Times showing how Google's most important programmer was operating from outside the United States—actually from Toronto—because his wife could not

get a green card to come over into the States. So the immigration laws have been keeping out some of the best and brightest people, who otherwise would come to the U.S.

And what these charts show is just the sheer increase in costs for being a public company have more than doubled after Sarbanes-Oxley from about \$900,000 in 2001 to almost \$2 million in 2006.

So, for all these reasons, the cost, litigation, regulatory burdens etc, many companies have chosen to be listed in markets outside the U.S., such as AIM [Alternative Investment Market] and Asian markets and a few of the growth of those markets, at the expense of the U.S..

At the same time, there's been absolutely explosive growth in the Rule 144A market, which is a market that excludes retail investors. It's for private placements and the resales of privately placed securities among the largest institutional buyers, called Qualified Institutional Buyers or QIB.

And here you can see from 2002, the capital raised in billions was under \$500 million, and then by 2007, it had tripled to—I'm sorry, it started at \$500 billion and now it's tripled to about \$1 trillion-500 billion. And this is precisely because companies were seeking a market, which was not subject to SEC regulation as much because it's basically not Sarbanes-Oxley. Companies that are not registered in the U.S. or listed on the markets can have their securities traded on the 144A capital markets.

At the same time, Sarbanes-Oxley's competitive pressures have resulted in U.S. exchanges acquiring non-U.S. exchanges and affiliates in an effort to better compete for listings. So the U.S. markets have acquired—they've consolidated and acquired either affiliations or actual listing and trading platforms outside the U.S.

And here's a little summary of what the markets look like at this moment. Now, if you notice in B, many people are familiar with NASDAQ's tiered structure of the smallest companies trading in one tier, mid-size companies in the second, and the largest companies in the Global Select. Now the New York Stock Exchange, after the acquisition of the AMEX [American Stock Exchange] has a very similar structure, albeit at higher tiers. And the New York Stock Exchange also has trading platforms outside the U.S. in the New York Stock Exchange Euronext and Alternext. NASDAQ has forged relationships with a stack of exchanges, and there are [Rule] 144A platforms as well.

So, in response to the decrease in listings and these developments and in an effort to attract foreign private issuers, the SEC, starting about three years ago, has undertaken a series of wide-ranging initiatives that significantly reduce the regulatory burden on non-U.S. companies, and this is very important, because it's a real attempt to influence company behavior in the future.

So, here's a list of the SEC initiatives that affect foreign private issuers, some of them intentionally, a couple of them unintentionally. And I'm going to discuss each one of them quickly given the time constraints I can't go into all the detail. But, essentially, there were cutbacks in [Sarbanes-Oxley Rule] 404 internal controls in order to reduce the cost. The SEC has adopted International Financial Reporting—or IFRS—for non-U.S. companies, and is on track to have it apply to U.S. companies as well. They've cut back the deregistration difficulties.

They've modernized [SEC] Rule 12g3-2(b), which is an information supply and exemption from Exchange Act reporting.

The one initiative that's moved against the grain or which has enhanced the regulatory burdens very slightly upon private issuers is something called the Foreign Private Issuers Reporting Enhancements or FIRE. Cross-border business combinations have been smoothed out. They've also given certain very important accommodations to non-U.S. institutions in the public filing of beneficial owner reports on [SEC] Forms 13(d) and (g). I put in this issue about registration rights agreements, because it primarily affects my friends in Canada, who have been seeing an increase in this. [SEC] Rule 15a-6, although was initially pronounced dead, seems to be still a possible area where the SEC will modernize the exemptions that will enable non-U.S. broker dealers to solicit U.S. institutions. And the Oil and Gas Reporting Requirements has been very important for companies in the oil and gas industry, which, too, has cut the cost by importers.

So, let's take a look at each one a little more in detail. In 2007, the SEC cut back the requirements for [Rule] 404 or internal controls compliance. And they've done it in a number of ways, which I'm not sure are fully appreciated by the market. The first one is: They permitted management to evaluate internal controls using a top-down, risk-based approach. And this is an effort to cut through the thicket of difficulties from the overly intensive auditing mechanics that had been in place before. So, by enabling management to look at the internal controls by using a top-down, risk-based approach, it should be more practical and less costly. At the same time, they pushed the overhaul of the auditing standard that governs internal controls, actually replacing the former Auditing Standard No. 2 with Auditing Standard No. 5. And this, too, permits the auditors to tailor and scale their evaluations according to the company's facts and circumstances, again adopting a top-down, risk-based approach. They've also issued certain interpretations that address certain concerns of foreign private issuers in an effort to reduce the cost of the process.

Now, what they've done is, in addition to permitting a more practical top-down, risk-based approach to the auditing standards, they've also cut back the auditing opinions that were required from two to one. So the hope was that this would reduce the cost by as much as 50%. Now, accurate information about the affects of these both—Auditing Standard No. 5 and the interpretive guides—is not yet available. Anecdotally, a survey conducted by the Financial Executives International had shown that the average cost of [Rule] 404 internal controls were declining by as much as 40% in 2006, from a 24% decline in 2007, and that was before the changes; that was resulting just from people learning what's required and getting more familiar and faster with it. The hope is that, additionally, these changes will result in further reductions. At least anecdotally from those auditors I've spoken to, I've been told that auditing expenses have gone down. It's hard to say exactly why; whether it's attributable to people mastering the process or people learning these reduced burdens and taking advantage of them.

The next one is IFRS. That enables foreign private issuers to use IFRS, International Financial Reporting Standards, as issued by the IASB in London, without a reconciliation to U.S. GAAP [Generally Accepted Accounting Principles]. So this has become quite an important development. Generally, Canadian companies can certainly use it, beginning in 2011. China and India have also accepted IFRS. So far, the two major non-IFRS jurisdictions are the U.S. and Japan. And actually, currently, the main activity on the U.S. front is concerning IFRS, and the

SEC has published a roadmap so that eventually the U.S. will have the infrastructure. In other words, people will have—accounting professionals and our schools will be teaching it, they'll be learning it, and the CPA exam will test for it so that the U.S. can use IFRS as well and we'll have only one standard, one accepted accounting set of standards.

Now, deregistration from the Exchange Act was, before these revisions, viewed as a reason why many foreign companies, particularly in Germany, were not entering the U.S. Basically, the fear was that you really couldn't leave the U.S. reporting system, so you were stuck in it, and people were therefore reluctant to go in. Something they used to call the Roach Motel: You could get into the U.S. reporting system as a foreign private issuer, but you couldn't get out.

So, the SEC has cut back and made the deregistration rules enabling foreign private issuers to leave the Exchange Act reporting system both manageable and understandable. Essentially, you have to meet these general conditions, which are: The issuer seeking to leave must have been reporting at least for a year, must be current and have filed at least one annual report. It has to be listed in its home country, so there's at least one other regulator overseeing the company. It could not have been active in conducting registered offerings within the last 12 months, except for some minor technical offerings. And it really has to have less—no more than 5% of its worldwide average daily trading volume of the class in the U.S. If that's the case, it can leave. If it closes down its U.S. listing—so let's say at this moment it has 20% of its average daily trading volume in the U.S., and once it closed the listing in order to deregister, it can close the listing and take its trading down below 5%, but they would have to wait a year before it could delist.

Now, one, I think, little-appreciated ramification of these rules is its effect on M&A transactions. Basically, if a non-U.S. issuer acquires a U.S. or reporting issuer, then there's a tag-you're-it quality in that the acquirer becomes the successor and is stuck with the target's Exchange Act reporting obligations, which would mean the acquirer would become an Exchange Act reporting company, even if it hadn't been before the acquisition and didn't particularly want to. So, that, in a way, acted as a poison pill that impeded acquisitions by foreign companies of U.S. publicly registered companies. And the SEC has developed an elegant solution to the problem, by basically saying that if the target has met the prior Exchange Act reporting conditions—in other words the target was reporting for a year and was current in its reporting and had one annual report filed—and the acquirer meets the other conditions—so if the acquirer was never trading in the U.S., it would have under 5% of its shares trading in the U.S. for example—then the acquirer would not be tagged with successor liability as an Exchange Act reporting company and could successfully acquire the U.S. company without triggering U.S. reporting obligations. This exemption can be very useful in M&A transactions, particularly those where the shares issued in consideration to take over do not require SEC registration, such as in a 3(a)(10) plan of arrangement. Now there are certain forms and technical requirements for delisting and deregistering that have to be carefully planned and timed, but it can be done fairly easily.

Rule 12g3-2(b) is something that when I first started practicing and learned about, there were very few people who knew about it. It seems to have become much more popular now. Essentially, it's an exemption from Exchange Act reporting. So, if you file it, if you qualify for the exemption, then you can avoid Exchange Act registration. So, typically speaking, if a foreign private issuer has more than \$10 million in assets, more than 500 shareholders of record,

and more than 300 holders registered in the U.S., then it would normally be required to register under the Exchange Act, just by virtue of shares becoming widely held, even if it did not list on the exchange. So what Rule 12g3-2(b) says [is]: If you meet our conditions and essentially are passive and not actively entering the U.S. markets and agree to provide us in the U.S. with the same information you provide in your home country, then you will not trigger Exchange Act reporting, which means you wouldn't be a SOX [Sarbanes-Oxley Act]-obligated company and the other ramifications of Exchange Act reporting. So, if you maintain a listing on a primary exchange outside the U.S., if you publish in English the same disclosure documents you publish in your home country, and you're available publicly on the internet such as through CDARS [Certificate of Deposit Account Registry Service] and you have no other Exchange Act reporting obligation, which essentially means you didn't do a public offering in the U.S., and you didn't list in the U.S., then you can avail yourself—the company can take advantage of Rule 12g3-2(b). And now it's self-executing so you no longer need to prepare a formal letter to the commission and send in a stack of copies of your public documents. And, thereafter, you just have to maintain your compliance with the exemption in order to avoid Exchange Act reporting obligations.

Now, FIRE, the Foreign Issue Reporting Enhancements, is one of the few parts of the recent SEC initiative—one of the few sets of SEC initiatives—that added to the burden of foreign private issuers. Basically, it changed the testing rules as to when issuers test their eligibility for foreign, private issuer status to the last business day of the second fiscal quarter. Now they do have to report by segments. In a slightly different test, the Canadian [Form] 40F issuers and the chain—and what the additional disclosure is, the company would have to disclose if it changes its certifying accounts and goes opinion shopping, certain fees and charges if it has an ADR program. And something that's actually quite useful is that under Stock Exchange rules, not under SEC rules, if you were filing your annual report before you got a pass from certain corporate governances under Sarbanes-Oxley requirements, but you had to disclose in your annual report what those differences were between your home country governance requirements and those that would have been applicable to you as a U.S. issuer. So, rather than leaving this disclosure of differences in corporate governance requirements under the Stock Exchange rules, the revisions have effectively pulled that into the annual report and makes it easier to file, actually, in a way that's kind of useful.

The SEC still wants to incentivize people, foreign private issuers, to use IFRS and SEC filing, so they maintain an accommodation that first time adopters of IFRS can present their financial statements from the last two, rather than the last three fiscal years under IFRS.

The cross-border business combination rules have been significantly smoothed out as a result of the SEC's experience with the rules over the last 10 years since they were adopted. Essentially, the SEC has taken a look at all the no-action letters interpretations and other experience they had, where the rules had to be made more flexible or changed to accommodate cross-border M&A transactions, and codified them in the new cross-border rules. They're very complex and quite long. I have a client advisory on the subject if you need further information. But I do want to mention that the Canadian issuers, the MJDS [Multi-Jurisdictional Disclosure System] rules remain simpler and easier to use and provide a broader exemption to a larger group of issuers, so for them, those with up to 40% of the shareholders resident in the U.S., the MJDS provides a better exemption.

Now, I have included in your materials a brief description of the cross-border rules, which basically are broken out under Tier 1 [and they] really target the foreign private issuer with 10% or less of its shareholders held by U.S. investors. Those Tier 1 transactions get an almost complete pass—or a largely complete pass—on the Tender Offer rules and, to some extent, the registration requirements and the heightened disclosure requirements for going private.

The Tier 2 rules are rules where the target is a foreign private issuer and between 10% and 40% of its shareholder base are in the U.S. These rules do still require tender offer filings, but they do have some accommodations. And here is some quick looks at some of the more important changes refining how the 10% and 40% ownership tests are calculated, when they're keyed off of, and some alternate tests. And they've also expanded various relief under the Tier 1 and Tier 2 and made it more consistent in the going private rules as well.

OK, the next big area is beneficial ownership reporting by non-U.S. institutions. In other words, your [SEC Rule] 13D-1(B) previously permitted only financial institutions that were registered with a relevant U.S. authority to file 13Gs. In other words, if you look at 13D-1(B), it says that banks, brokerage firms, insurance companies that hold securities passively without intent to change control of the issuer need not file 13Ds, but instead can file 13Gs on a much more relaxed schedule. Essentially, they must file it before Valentine's Day of the next year for the previous year if they held more than 5% of the company's shares on December 31. But these rules were only available to banks, brokerage firms, insurance companies, investment advisors, etc. that were registered in the U.S. They've since changed the rules so that similar foreign institutions can file under lax Schedule 13G rather than 13D. And there are some requirements, in that the foreign institution has to certify they are subject to a regulatory scheme comparable to the one applicable to similar U.S. institutions and provide the 13D information that would otherwise be required if the SEC asks for it, and it has to confirm that it holds the registered securities in the ordinary course of business and not with a purpose of influencing a change in control.

Now, that's all well and good. But what makes this most interesting is: If you qualify for the 13G, then you also get a pass on Section 16 shareholder reporting, which is very important. This is something one of my clients had a deep interest in, we got no action letter on it and spoke to the SEC to try to make sure it was in the M&A release and it's a big issue for large financial organizations. Sometimes if they go over 5% or 10% of the stock, it can take as many as six people to clear the 13D and then the Section 16 reports before they're filed.

We've also put in a request to the FTC to change the similar HSR [Hart-Scott-Rodino] Antitrust filings, which apply if a client's position exceeds \$65 million. Now the changes in [SEC] Rule 144, I think, have been important in the liquidity of foreign private issuer's and securities. In other words: the Securities Act restrains resales of restricted securities or controlled securities held by an affiliate. Now, registration rights agreements have been put in place to facilitate resales during the 144 holding period before the shares can be resold freely.

So, now, non-affiliates can resell after six months if a company is reporting on the Exchange Act and is current in its filings, and non-affiliates can resell after one year without any restrictions if the company is not reporting.

Now, number two: Non-affiliates reselling after one year if the company is not reporting tends to apply to foreign private issuers, because the vast majority of them are not SEC registered nor reporting, and this removes the liquidity restraint alleged after a year, rather than two years. And if they are reporting, it could be as little as six months.

In practice, what has resulted is that in PIPE [private investment in public equity] deals investors still demand immediate liquidity and demand penalties for failing to register in compliance with registration rights agreements. But in non-PIPE deals, companies are limiting the registration rights to affiliates and excluding smaller stockholders. And for non-reporting foreign private issuers, although it does reduce the period from two years to one year, it's really not much of an issue because investors normally have liquidity if the company has one liquid market outside the U.S. So, when a typical global or cross-border financing [happens] there will be a large block of shares sold outside the U.S. under Regulation S, and part of it sold in the U.S. under private placement rules, and if the foreign issuer is not reporting and does not really have substantial U.S. market interests in securities, the shares sold in the U.S. can be immediately resold, and, therefore, liquefied on the market outside the U.S.

The SEC had proposed to amend Rule 15a-6 for non-U.S. broker-dealers to—Rule 15a-6 really sets the parameters for when a non-registered foreign broker can solicit U.S. investors and engage in transactions with them under very tight complex menu. The modernization of it in the proposal was done after a long consultation with the industry, and was considered a very good proposal. After the financial markets collapsed and the changeover of management in the SEC, it was thought that the new senior executives with the SEC were hostile to it, and it was considered dead. But a recent speech [by] Mary Shapiro and Elise Walters has basically signaled that they weren't happy with it because they said it went too far, but that something will emerge.

Now, again, I have given you much more information and detail in the slides, so you can take these and look at them if you need more detail on the actual ins and outs of a lot of these issues.

Oil and gas reporting has been particularly important for those in the industry. We do a lot of cross-border deals with oil and gas companies in Canada, for instance. And there it really is a non-issue because the MJDS permits companies to meet the U.S. disclosure requirements by using Canadian disclosure documents. So, at least for those companies, it's less important. But for others it's quite important, and [it] essentially modernizes the SEC rules along the Canadian disclosure rules.

So, before we stop here for a moment, I think the first order of business is to kind of look back over this and say, "Will these rules help restore the high market share of IPO's historically enjoyed by U.S. capital markets? Will CEOs and CFOs choose to list securities in the U.S.?" Now, I suggest to you that CEOs and CFOs sit back and make rational economic choices as to what's best for them. So it's very hard to say how the world will unfold going forward, and whether on an economic basis these rules will help foster a recovery or an increase in listings. I think the average CFO and CEO will sit back and try to do a cost-benefits analysis, looking at which market will offer their companies the lowest cost of capital, which market will offer their companies the highest valuation, whether there is at least one sufficiently liquid market for their shares elsewhere so they don't need the U.S. listing, whether they need it, and the costs of regulatory burdens of the U.S. listing.

In other words, I think the older model was that, if a company, let's say a cigarette company from the U.S., moved into Mexico in a big way to sell its cigarettes, it would list on the Mexican Exchange. And if it moved down to Brazil, it would list on the Brazilian Exchange, as part of its increased visibility and presence. I think now CEOs, and particularly CFOs, will not go for the increased cost of multiple listings, unless it's absolutely required. And, basically, investors, with the way the SEC's liquidity rules, particularly Regulation S, Rule 144, 144A, etc, enable resales, as long as the company has one deep and liquid market, even if it is outside the U.S., that is usually enough. I think the SEC, hopefully in the future, will dedicate economists to monitor and analyze the rules to ascertain whether they're effective in achieving their goals. But we really won't know how this will unfold until the next cycle is well under way.

OK. That kind of brings you up to date on what I think are the most important developments for the cross-border practice, but obviously there have been some others since the financial crisis. The SEC has undertaken a wide-ranging initiative to increase international cooperation, to raise regulatory standards across borders, and improve coordination across borders. The SEC feels it's no longer a closed system and that companies may arbitrage the rules to go to the jurisdiction with the lower regulatory burdens, so it's increasing its international cooperation in order to force their better rules elsewhere, as well as foster enforcement actions elsewhere.

Obviously, one of the big issues on the Hill is financial services regulation, and putting aside credit rating agencies and over-the-counter derivatives, obviously hedge funds is one of the areas where the SEC is intent on closing the gap. There is a number of bills, at least five, on the Hill to regulate hedge funds and their managers. I think a sketch of one possible bill would eliminate the 15-client exemption—or at least eliminate that the fund is one client—and this version is excluding non-U.S. advisors, and registration based on assets under management, now \$25 million, may be increased to as much as \$100, and a measure of systemic risk to the fund may be added as well.

The SEC enforcement division—I mention this because this affects companies in the cross-border area as well—is reorganized into units, and notice that one of the new units is not only asset management, market trading abuse structured products, OTC (over the counter) stuff, but also Foreign Corrupt Practices Act, which is of interest to a lot of cross-border, international companies. When you drill down to the corporate finance division, which is the division we, as practicing securities lawyers, work with the most, they are continuing to work on IFRS to make it possible to apply to U.S. companies. They do have a couple of rulemaking proposals out there; the more controversial one of which is this shareholder-democracy type of rule for proxy access. In other words, shareholders meeting their standards for holding a certain percentage of the company stock—I think it's one or two percent for the largest companies and five for the smallest—for some period of time—I think a year—can have their nominees included in the company's proxy statement and therefore up for election. Now, that proposal, I understand, because it's more controversial, is encountering resistance and tougher sledding, so it probably won't come out this year.

But the other proxy disclosure rule is important, and that is the one for disclosure enhancements, in other words increasing the disclosure to accompany proxy statements. And here, even though this applies to U.S. companies only and non-U.S. companies get a pass, it sets the standard for non-U.S. companies, which they tend to follow, and through their local jurisdictions changes the

regulatory rules. So the new proxy disclosure enhancement addressed the concern of a possible disconnect between compensation practices that might force their taking on increased risk in order to get paid larger bonuses and the resulting risk for the company. They're looking at expanding beyond the senior executives whose compensation has a material effect on the company. They're seeking disclosure about how the board oversees risk and about whether one or two people hold the Chairman and CEO roles. And they're also looking at disclosure about fees paid to compensation consultants, trying to ascertain whether the fees paid to consultants incentivizes them to recommend higher pay and increased risk based on that basis.

There are proposals for say on pay, in other words, companies that are receiving TARP [Troubled Asset Relief Program] or financial crisis funding—or bail out money as it's called—will be required to let shareholders vote on executive pay. This will be an annual non-binding vote. And the SEC is also looking into what they call the “proxy plumbing.” That is the actual mechanics of the proxy's process and the issuer's ability to communicate with shareholders.

The SEC is also looking at—and I am talking about now the division of corporation finance—it is also looking at revamping the Section 13 Beneficial Ownership Reporting Rules. What they're really getting at is the idea of companies buying votes without bearing the economic risk. There have been two cases recently, one an enforcement action [and] one in Delaware, where large funds have acquired voting rights while at the same time entering into derivative or other transactions which insulate them from any investment risk to the underlying shares.

They have also teed-up a full disclosure project, which will review all of the old rules for filing and updating information with the goal of really trying to ascertain whether the information they're currently requiring is useful and how to improve it. Meredith Cross and others at the SEC have reported that M&A is coming back; in other words they're getting more calls about M&A transactions in the planning stages, not completely unfurled—they're not unfurling the transactions yet. And as I said earlier, Rule 15a-6 is merely sleeping and will be revisited and revised and it's not dead.

So, that wraps up my presentation. I know I ran through a lot of complex topics. If people have questions, please feel free to send them in. And thank you very much. I'll wait a few minutes to see if anyone has any questions.

LESLIE GARDNER: We do have one question, Guy, and that question is...

GUY LANDER: OK, can you hear me?

LESLIE GARDNER: Yes, we can hear you.

GUY LANDER: OK. What impact does the shift towards deregulation have for a securities practitioner? I think the answer to that is it has a great impact. It just depends on the particular context or transaction you're handling, as well as what your client's goals are. Because these rules have become more flexible and if you're—in light of these rules, I think it's easier for foreign private issuers to operate in this regulatory environment. I think as a side point it's worth noting that the charts I showed at the outset, now, in retrospect, I think some people might view them as having fueled the regulatory push. And maybe in retrospect that was not such a good

idea. I don't believe that. I think these rules are very important that they would change, but I have heard that in some quarters. Were there other questions?

LESLIE GARDNER: We have no more questions from the audience at this time.

GUY LANDER: OK, so I thank everybody for attending, and if you have further questions, I left my contact information at the back of the slide, and I'd be happy to help you if I can.

LESLIE GARDNER: Secondly, let me give the second verification code. For any attorneys who are applying for CLE credit, make sure you write this code down, as you'll need it when you retrieve your certificate. Our second code is 2454HR. That is 2, 4, 5, 4, H as in Horse, R as in Romeo. And thank you. And on behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thanks again for listening to today's program. Please log back into your SmartPros account, click on the course listing in your "My Courses" page if you wish to apply for CLE just follow the directions there to enter the verification codes and you can print your certificate.

Thanks again, everyone. Have a great day.

SABRINA BOSSE: Thank you, everyone.