

FINANCIAL REGULATION IN A GLOBAL MARKET PLACE: REPORT OF THE DUKE GLOBAL CAPITAL MARKETS ROUNDTABLE

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This report summarizes the discussion of over sixty participants in the April 30, 2007 roundtable convened by the Duke Global Capital Market Center. The roundtable focused on important issues posed by the increasing globalization of securities offerings and trading markets. The invited participants were selected because of their broad experience as regulators, practitioners, or academics in international securities transactions, assuring a wide spectrum of views on the future direction of regulation.¹

SESSION ONE: WHAT CAN THE UNITED STATES DO TO MAINTAIN ITS COMPETITIVE POSITION?

A. Defining the Problem

U.S. capital markets face more competition than in the past. This reflects in large measure the greater choice enjoyed by foreign issuers today than in the past. Not too many years ago, foreign issuers had little choice in raising capital other than to do so in U.S. capital markets. Due to improvements in several foreign markets, foreign issuers have alternatives to U.S. capital markets. Further,

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1. A list of the roundtable participants and their affiliations appears in the appendix to this report.

there are weaknesses in the U.S. regulatory system that place U.S. financial markets and their participants at a disadvantage. One such problem is the multiplicity of regulators within the U.S. financial market system. For example, a market participant can find that its activities fall under the jurisdiction of the Office of the Controller of the Currency, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission, the National Association of Securities Dealers, and various state blue sky administrators, to name just a few agencies with jurisdictions that frequently overlap and that have differing regulatory styles and requirements. The multiplicity of regulators is ever more present today because financial market participants operate their businesses as consolidated groups (banking, trading, underwriting, derivatives, etc.) with converging products, as opposed to separate units. The burden posed by this multiplicity of regulations is believed at times to drive innovation and transactions from New York to London. This frequently means that retail customers are left out of transactions or their participation occurs later in the chain of events when the financial product flows back to the United States. Because our current regulatory structure is driving some products off-shore and thereby excluding U.S. retail investors from participating in these products, U.S. retail investors are deprived of the diversification benefits of holding a global portfolio.

There is a need to reexamine our regulatory framework and to do so from the ground up, for equity and debt markets, as well as for derivatives and other financial products. This reexamination must be done with an eye toward making our markets more efficient and maintaining our high standards for investor protection. To address the various political and economic interests that have developed around the existing multi-regulatory approach, any undertaking to review the existing structure requires a high-level committee. One such appropriate approach is action by the President's Working Group similar to that which led to successful reforms for futures and derivatives. Problems exist here not just with the Securities Act of 1933 and the Securities Exchange Act of 1934, but more significantly with the Investment Company Act of 1940 and the Investment Advisors Act of 1940 because they seriously restrict the products that can be offered to retail investors in the United States.

The architecture of our future regulatory system must be sensitive to the great differences that exist between institutional and retail investors. When it comes to securities regulation, one size does not fit all. Informed and efficient regulation should distinguish

between the protections accorded institutional investors and retail investors, with a much lighter hand in the former than the latter. Moreover, in rethinking the future direction of reform, the cost of regulations should be balanced with its benefits. Further, the past practice of justifying regulation because of an extremely low risk of abuse or fraud should be discontinued. This problem is particularly acute for much of the regulation that occurs under the Investment Company and Investment Advisors Acts.

B. Vision of Regulatory Reform

As noted earlier, financial services are converging in part because their products are converging. For example, both insurance and banking products frequently entail securities features. This means that a single activity can implicate multiple regulators, both at the federal and state level. Moreover, information sharing and coordination among the various agencies is at best informal. While most countries house their financial regulator within the elected administration, the group felt that the independent regulatory agency model that is embodied in the SEC has worked reasonably well. Therefore, there is not a strong sentiment to move regulatory functions to, for example, the U.S. Treasury Department. However, it would be useful to explore ways to better involve industry members in the regulatory functions such as occurs in the United Kingdom with its Takeover Panel. This would be a means of embedding within the regulatory process individuals who are the most knowledgeable. The point was made that the physical location of the Financial Services Authority (FSA), within the midst of major investment banking community in London, likely makes its ties to the industry stronger.

While many may view any regulatory reform as a race to the bottom, this need not be the case. In fact, evidence supports the view that securities regulatory standards around the world have been rising. The observation was made that, for example, as China's capital markets deepen, Chinese regulatory standards can be expected to rise. This has been the case elsewhere and goes to some measure to explain, as observed earlier, the new competitive market facing U.S. capital markets. Thus, what may be the best image is neither a race to the top or the bottom, but movement by all important markets toward a socially-optimal regulatory equilibrium.

One question raised is whether the SEC has the capacity to reform itself. This elicited several responses. First, as observed earlier, the issues transcend the SEC. Financial market participants

must contend, simply, with too many regulators on a regular basis. This prompts our earlier suggestion for the President's Working Group. Second, to the extent that reform is to be focused solely on the SEC, there are some dramatic illustrations of the agency's success in reforming itself, such as its actions following the Wheat Report and the Sommer Report. Third, the SEC can effect part of the called-for reform efforts simply by choosing how to exercise its existing authority. By being more consultative, and less enforcement oriented—i.e., prudential—the agency can move reform without having its statutory mandate changed.

C. The London Market

The vibrancy of the U.S. venture capital and private equity industry is linked inextricably to the attractiveness of U.S. IPO markets. Exit is everything to venture capitalists and private equity firms, and that regularly occurs via a public offering in which the venture capitalists and private equity firms liquidate some or most of their holdings. Thus, capital formation is dependent upon the well-being of the U.S. IPO market. As captured in the Report of the Committee on the Competitiveness of U.S. Capital Markets, the U.S. markets do have several features that make them less attractive than the London market: a robust securities class action regime, a burdensome auditor attest function called for by section 404 of Sarbanes Oxley, weaker shareholder governance rights than exist in the United Kingdom, limited work visa availability, burdensome anti-money laundering requirements, multiple regulators as contrasted with the single administrator in the United Kingdom, and a regulatory posture that is more enforcement oriented than that of the British FSA. On the latter point, the work of Professor Howell Jackson captures a vast contrast in the number of enforcement actions and the magnitude of sanctions in the United States versus the United Kingdom.² The question these data pose is whether there is equal or even greater levels of compliance with regulatory

2. In the period from 2002 to 2004, annual average government (Department of Justice, SEC, SROs and state) securities enforcement actions resulting is nearly \$5.3 billion of monetary sanctions as well as other civil and criminal penalties. Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 Yale J. Reg. 253, 280, tbl. 3 (2007). Even when adjusted for relative market capitalization, the average annual amount of monetary sanctions in public enforcement actions in the United Kingdom over this period was approximately a tenth of that in the United States. *Id.* at 284, fig. 10.

requirements in the United Kingdom than the United States without the burdens and expense of enforcement proceedings.

One feature that likely explains the regulatory differences between the London Market and the U.S. market is that the London market was designed and regulated largely as an institutional or wholesale market. In contrast, the U.S. securities framework is not so focused, and so much of its orientation continues to be guided by concerns for retail investors, even though in IPOs and most other market activities price formation occurs at the institutional level. In spite of this, much disclosure is guided to empower retail and not the more dominant institutional investors. The wholesale character of the U.K. market makes it possible for the FSA to be less enforcement oriented. When it sees a problem arising from, for example, the conflicting interests of the institutional investor and the underwriters, it customarily raises its existence to the affected parties and allows them to work through the problem; regulation or enforcement occurs in the exceptional case where the practice is abusive and not likely to be corrected or prevented by the actions of the investor. This reflects the FSA's view that there are different types of risks and different types of investors so that its response is gauged accordingly. It is likely time for the United States to reflect on its own markets and conclude that its markets are, and for some time have been, largely institutional markets. Regulation should, therefore, begin with this premise. Where there is retail participation, a different approach is appropriate. But much would likely be gained by designing at least one entire regulatory framework exclusively from the perspective of there being only institutional participation. In a sense, this would embrace a strategy similar to that taken in derivative markets where the President's Working Group supported the passage of the Commodities Futures Modernization Act of 2000, under which regulation is tiered according to investor sophistication, with less regulation for transactions involving sophisticated individuals or institutions.

D. Prudential and Principles-Based Regulation

The choice is not between principles or rules. Rather, the aim is to achieve a better balance than presently exists, with rules as the dominant norm. Similarly, the choice is not between consultation and enforcement but rather more of the former and less of the latter. An important component of a heavier emphasis on principles is that regulated entities should move more of their compliance efforts to

higher levels in the organizations, in order for senior management and even the board of directors to engage in substantive regulatory issues. Efforts, however, must also occur at the regulatory body. A more prudential approach requires the regulator's staff to know more about the business of the regulated entities and to be able to deal substantively with greater complexity. This shift necessarily involves serious upgrading of the regulator's staff. At the same time, the regulated entities cannot be left adrift or, for that matter, without meaningful guidance. Best practices and other guidelines must be available to them. Otherwise, freedom can be a pretty scary phenomenon. It may well be the case that more rules are appropriate for transactions that enjoy greater participation by retail investors. In any case, we can expect that even in a prudential, principles-based world, compliance officers will feel a great need for guidance; this is certainly the case if there is a likelihood of governmental or private enforcement actions.

We might consider that disclosure is an area where a rules approach has worked reasonably well. Moreover, the prevalence of private litigation for disclosure violations likely calls for greater clarity in disclosure requirements, such that a rules-oriented approach to disclosure is appropriate. A more principles-based approach is more likely in the market regulation, investment company and advisor areas, where a candid dialogue can accomplish the same level of investor protection without dampening innovation or introducing costly circumvention efforts. Once again, one feature that would greatly enhance the prudential approach is the regulator's staff being familiar with the regulatee's business. This is a central feature of banking regulation where the bank examiners are most familiar with the bank's operations.

E. Litigation and Enforcement Reform

Perhaps the major concern for foreign issuers contemplating entering U.S. capital markets is the risk of private litigation. Although the number of class action filings has dropped in recent years, the dollar level of settlements is quite high. Moreover, there has recently appeared willingness of federal courts to certify securities class actions involving foreign issuers where a substantial portion of the class members are foreign nationals.³ We question whether such

3. Examples where U.S. courts have certified as plaintiffs the so-called "f-cubed class," foreign purchasers who bought a foreign issuer's securities on a foreign exchange, include Royal

actions are in the interest of the United States or, for that matter, necessary for investor protection. If not, it is appropriate for the SEC, through its historical amicus role, to express its opinion that the certification of a class action with substantial foreign class members does not advance the purpose of the U.S. securities laws.

Additionally, private enforcement extracts sums that are nearly eight times larger than government penalties and, as discussed earlier, government enforcement itself is a non-trivial concern given the current regulatory environment in the United States. We might also question whether private litigation serves a meaningful compensatory role in light of the fact that suits historically recover for the class a very small percentage of the losses they have suffered and that in many instances recoveries pose serious circularity issues, wherein class members who continue to retain an interest in the defendant company indirectly contribute to their own settlement.

While some have advised that arbitration or some other dispute mechanisms be authorized as substitutes for the present system, there was a division of opinion within the group whether this course was either feasible or desirable. The feasibility question relates to the absence of any history of class actions occurring within the arbitration process as well as to the weak discovery procedures under current arbitration procedures. What appeared attractive was developing meaningful safe harbors for various groups, such as underwriters or outside directors with respect to their due diligence exposure in public offerings, or providing other protections via the SEC's exemptive and rulemaking authority in other provisions of the securities laws.

SESSION TWO: INTERNATIONAL COOPERATION AMONG REGULATORS

There is evidence that regulators can and do from time to time find it possible to converge their various regulatory regimes. When they do converge or engage in mutual recognition, in a sense they cede power or authority to their fellow regulators. Examples of successful convergence are the Basel Banking Accords and the centralization of monetary policy with currency unification in the European Union. For there to be meaningful cooperation, regulators

Ahold, Royal Dutch Shell, Parmalat, Nortel Networks and Vivendi. *See, e.g., In re Vivendi Universal S.A. Sec. Litig.*, 241 F.R.D. 213 (S.D.N.Y. 2007); *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004).

on both sides of the border must have enhanced enforcement powers such that a lead regulator is not limited by its national borders in activities such as freezing assets, issuing subpoenas, investigating, or even settling a matter (the SEC has this latter power but many other securities regulators do not). The past experience of five European nations cooperating in their regulation of Euronext and the forthcoming cooperation between the SEC and European regulators following the merger of Euronext and the NYSE are hopeful illustrations how regulators can work together. These steps may entail for some countries important changes in their laws, while for others the changes will be less significant. Even with mutual recognition, countries will likely retain the discretion to initiate their own enforcement actions, most likely for fraud, should the competent agency believe the foreign regulator's steps are not adequate to protect its investors. Outside the enforcement area, there is *de facto* informal mutual recognition in the case of the easy access of U.S.-based institutional investors to foreign 144A offerings. The question for the U.S. regulators is whether the freedom enjoyed by institutional investors should be extended to retail investors. As seen earlier, a cost of not extending similar freedoms to participate in foreign markets is the friction created for retail investors in acquiring global diversity in their personal portfolios. One approach is to proceed with a pilot program in which one or possibly two or three EU countries would be targeted for an initial program with a designated lead regulator or a pilot program that is focused on characteristics of the investor—i.e., qualified purchasers. A concern is avoiding politicization of the process. This can be best achieved by having clear and understandable criteria before engaging in mutual recognition.

There was discussion regarding the meaning of mutual recognition. The view was expressed that mutual recognition does not mean, and its application is not predicated upon, transactions between investors in one country, the host country, and a product or service provider from another country, the home country, receiving the same treatment as if the transaction was entirely within the local market or legal system. What mutual recognition entails is a judgment that the home market's regime and systems are sufficiently efficient and protective that U.S. investors do not encounter unreasonable risks by participating in transactions governed by the rules of the home market. There was a view that countries must retain residual authority for the host country to carry out

enforcement efforts, particularly, or perhaps solely, with respect to fraud, where it is believed necessary for investor protection or to provide relief where otherwise the remedy is believed inadequate. Also, there is cause to believe that the degree and content of mutual recognition should vary with the actor, so that the contours of mutual recognition for issuers will not be the same as for the regulation of brokers or investment advisors. Similarly, the characteristics of classes of investors will be an important factor in decisions to engage in mutual recognition. Also, local regulators are likely to retain wide discretion to take remedial and protective actions at least within their own territorial borders.

There are some areas where coordination or cooperation can only occur if there is some major rethinking of the focus of U.S. regulation. One such area is the regulation of takeovers, where the U.S. approach is quite different from that of Europe or Asia. In other countries there is the ability to acquire significant amount of stock rather quickly and without much fanfare up to thirty to fifty percent, at which point a mandatory bid for all remaining shares must be made. U.S. regulation exempts foreign issuers from many of our tender offer rules, provided that U.S. investors hold less than ten percent of the issuer's shares. With the globalization of holdings this Tier I exemption has largely become meaningless. Foreign issuers, thus, who are the subject of tender offers pose serious regulatory problems for their suitors.

Cooperation among regulators in the enforcement area would achieve a good deal of efficiencies. On this point there is at best a spotty and uneven record of success, but there are some causes for hope. For example, in the investigation of Royal Dutch Shell, the FSA and SEC divided their tasks and shared information and further cooperated in the design of appropriate sanctions. Such coordination and cooperation is difficult to imagine with respect to private enforcement actions where, as discussed earlier, there is a legitimate basis for fears on the part of foreign issuers that small U.S.-based investor holdings may provide a basis for class action recoveries on behalf of their larger number of non-U.S. investors.

One objective sought by foreign issuers is legal and regulatory predictability. This quest has greater salience in the context of instituting governing rules or principles because an overarching framework can provide a context for interpreting the relative importance of breaches of particular rules. Parties wish to know in advance what is expected of them. If articulated and understood,

when rules are violated in a material way, it is not difficult to accept that sanctions will follow, even if there is some uncertainty as to the gravity of the sanctions. Rather, predictability is more valuable in the compliance context, in determining what kinds of breaches merit a serious enforcement action. At the same time, as observed by many, the SEC has sometimes used its enforcement efforts as a means for establishing rules, practices, and norms. In this context there is an element of surprise because there was not an articulated and understood rule that preceded the enforcement effort. This phenomenon is unsettling. At the same time, predictability in enforcement is less of a concern when the object of the enforcement action is merely to require that challenged conduct cease; concerns for predictability are heightened if the regulator seeks not only cessation of the conduct but to impose a fine or other sanction on the respondent. However, these concerns for predictability are not unique to foreign issuers or global trading; the concerns arise as well for purely domestic transactions. Nonetheless, the SEC should appreciate the impact this uncertainty, particularly in conjunction with uncertainty surrounding increased criminalization of capital markets participants and transactions, has on the attractiveness of U.S. capital markets since uncertainty is never a desired quality.

A final concern with developing a vision for regulation is whether markets will over time evolve to be merely electronic places in space without a home country in any traditional sense. This image poses the ultimate challenge for a cooperative, borderless approach to globalization of offerings and trading.

SESSION THREE: DISCLOSURE METHODS AND ACCOUNTING IN A GLOBAL MARKET PLACE

As we look at how SEC disclosure practices have in many areas reflected disclosure approaches embraced by IOSCO, and vice versa, it is apparent that in many respects there already is mutual recognition in disclosure issues. There has been a good deal of progress in identifying within major capital markets at least the areas for which mandatory disclosure should occur. A major qualification of this is with respect to accounting disclosures, where reconciliation to U.S. GAAP continues to be required. However, recently not only did the SEC embrace the nearly imminent prospect that International Financial Reporting Standards (IFRS) will be acceptable for foreign issuers entering U.S. markets, but also suggested that IFRS could perhaps be used by domestic issuers. The movement to IFRS and

U.S. GAAP as primary systems for financial reporting will be the most significant step toward having truly global capital markets. Acceptance of IFRS reflects not that standards have converged to the extent that they are now mirror images of each other. Indeed, each system differs and will continue to differ from the other in important ways so that users of each can likely learn much by more closely examining and borrowing from the other. What the pending SEC developments reflect is a high comfort level with the overall quality of IFRS, not the close proximity on all reporting metrics of IFRS to U.S. GAAP. There is a lingering concern, however, that IFRS may suffer from acute balkanization in that each or many countries within the European Union may have their own IFRS variations on numerous matters. This phenomenon can be held within reasonable limits by a strong central European regulator overseeing reporting practices within the European Union. With respect to auditing practices and procedures, the SEC and Public Company Accounting Oversight Board (PCAOB) have wisely followed a course of working closely with individual countries' national accounting organizations to achieve similar levels of comfort with their systems and our expectations. These informal cooperative efforts have been successful and should be continued. Another qualification is that a greater similarity in disclosure practices exist between the European Union and United States than between Hong Kong or Japan and the United States. Thus, in those countries convergence does not exist at the regulatory level but rather via practices imposed by private ordering within the sophisticated Rule 144A offering market.

With respect to the accounting industry itself, there are significant structural concerns, the most observable being the high level of concentration of auditing services among the Big Four accounting firms. Indeed, in some industry classifications most of the auditing is concentrated in two or sometimes even a single Big Four firm. A particular concern that arises from concentration is whether this impacts the quality of auditing services. The bright side is that the revenues of non-Big Four firms are growing at a far faster rate than for the Big Four among non-Fortune 500 firms. Therefore, for firms, for example, in the Russell 2000 there is a reasonable choice among auditors. One factor that might contribute to firm concentration is that state professional requirements compel auditing firms to be organized as partnerships and also restrict ownership to licensed accountants so that firms are seriously restricted in their ability to raise capital. A more significant factor that contributes to

concentration is the reputational issue, which appears to be embedded in firm size such that smaller firms will continue to enjoy a diminished standing vis-à-vis the Big Four and, accordingly, will remain smaller firms. Large companies do not want to take the reputational risk of being audited by other than a Big Four firm. Moreover, there is a feasibility issue within certain industry classifications so that there are, as a practical matter, only two or sometimes three accounting firms that have the experience and staff to perform an audit of the firm.

Since little is known about the financial resources of individual Big Four firms it is not possible to conclude how large a threat they face from litigation. However, their risks are largely uninsurable due to the lack of meaningful actuarial data. Firms are, thus, self-insured. As such, each firm faces the non-trivial risk of large judgments should there be an audit failure. Also, given the threat of non-proportional liability that exists under the securities laws and the significant losses investors can suffer at the hands of reporting errors, auditors have little choice than to settle, once a motion to dismiss the suit against them has been lost. These considerations present the case for some sensible limit on the liability of accountants (and perhaps others such as outside directors or underwriters). Liability fears have had an effect in constricting auditors' engagement in the reporting process to the financial statements such that their review and participation in other reporting areas—i.e., the MD&A—is less likely today than in years earlier. The question was raised whether limiting the accountants' liability is consistent with a regime of unlimited underwriter liability when the latter has significantly less time allocated to the issuer's transactions and its preparation than the former.

One area of friction for a foreign issuer entering U.S. capital markets is the greater independence requirements for auditors in the United States. This may well force the issuer into changing its accountant, which, due to a variety of considerations, it is ordinarily unwilling to do. Some expressed the view that the SEC would be well-advised to reexamine the standards for auditor independence against the practices that exist in competing markets.

APPENDIX

Roundtable Participants and Affiliations

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| Abigail Arms | Shearman & Sterling LLP |
| Alan Beller | Cleary Gottlieb Steen & Hamilton LLP |
| Ashar Qureshi | Cleary Gottlieb Steen & Hamilton LLP |
| Ashley Alder | Herbert Smith |
| Brian Lane | Gibson, Dunn & Crutcher LLP |
| William P. Rogers, Jr. (Bud) | Cravath, Swaine & Moore LLP |
| Daniel Cunningham | Allen & Overy LLP |
| David B. H. Martin | Covington & Burling LLP |
| David A. Katz | Wachtell, Lipton, Rosen & Katz |
| David A. Sneider | Simpson Thacher & Bartlett LLP |
| Edward Fleischman | Linklaters |
| Ellen J. Odoner | Weil, Gotshal & Manges LLP |
| Jeffrey W. Rubin | Hogan & Hartson LLP |
| Kirk A. Davenport | Latham & Watkins LLP |
| Matthew J. Mallow | Skadden, Arps, Slate, Meagher & Flom LLP |
| Meredith B. Cross | Wilmer Cutler Pickering Hale and Dorr LLP |
| Michael Bray | Clifford Chance LLP |
| Michael D. Mann | Richards Kibbe & Orbe LLP |
| Norman D. Slonaker r | Sidley Austin LLP |
| Paul Etienne Kumleben | Davis Polk & Wardwell |
| Paul Michalski | Cravath, Swaine & Moore LLP |
| Peter Bevan | Linklaters |
| Richard C. Morrissey | Sullivan & Cromwell LLP |
| Richard J. Sandler | Davis Polk & Wardwell |
| Robert Mundheim | Shearman & Sterling LLP |
| Valerie Ford Jacob | Fried, Frank, Harris, Shriver & Jacobson LLP |
| Walter A. Looney | Simpson Thacher & Bartlett LLP |
| John Coffee | Columbia Law School |
| Mitu Gulati | Duke University School of Law |
| Donald Langevoort | Georgetown University Law Center |
| Howell Jackson | Harvard Law School |
| Jonathan Macey | Yale Law School |

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| Ed Rock | University of Pennsylvania Law School |
| Hal Scott | Harvard Law School |
| Randall Thomas | Vanderbilt University Law School |
| Richard Walker | Deutsche Bank |
| Rachel Robbins | NYSE Group, Inc. |
| Greg Palm | Goldman Sachs |
| Gary Lynch | Morgan Stanley |
| Joseph Polizzotto | Lehman Brothers |
| David Aufhauser | UBS |
| Mark Harding | Barclays Bank PLC |
| Ed Knight | NASDAQ Stock Market, Inc. |
| Timothy Mayopoulos | Bank of America |
| Mary Bernard | Credit Suisse First Boston |
| John Liftin | Bank of New York |
| Michael Helfer | Citigroup |
| John White | Securities and Exchange Commission |
| Erik Sirri | Securities and Exchange Commission |
| Andrew Donohue | Securities and Exchange Commission |
| Ethiopsis Tafara | Securities and Exchange Commission |
| Walt Lukkens | Commodity Futures Trading Commission |
| Robert Steel | U.S. Department of the Treasury |
| Mark Sobel | U.S. Department of the Treasury |
| Crispin Waymouth | European Union - Delegation of the European Commission to the United States |