International Securities Transactions

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During the year 2000, the most significant developments affecting Internet and cross-border securities transactions occurred in the United States, United Kingdom, Belgium, and Singapore. In other countries that proposed new regulations, most were still pending as of December 31, 2000.

I. Securities Developments in the United States

A. THE SEC's REGULATION FD

1. *Background for the Regulation*

In 2000, the U.S. Securities and Exchange Commission (SEC) adopted new Regulation FD (Reg FD, standing for fair disclosure).[1] The regulation, adopted eight months after first proposed,[2] prohibits certain employees of issuers from disclosing material nonpublic information about the issuer to persons outside the issuer unless the same information is made available to the public, either simultaneously or promptly thereafter, depending on the intent at the time of disclosure.

The SEC wanted to address what it perceived as pressure on analysts to report favorably about a company or otherwise slant their analysis in order to have continued access to

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1. *See* Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 15, 2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249), *available at* http://www.sec.gov/rules/final/33-7881.htm.

2. *See* Proposed Rule: Selective Disclosure and Inside Trading, 65 Fed. Reg. 75,590 (Dec. 20, 1999) (to be codified at 17 C.F.R. pts. 230, 243, and 249), *available at* http://www.sec.gov/rules/proposed/34042259.htm. The Proposed Release also proposed new rules to deal with insider trading, consisting of creation of a bright line between the illegal use of material inside information and permissible trading while knowingly possessing such information. It further proposed to define when a breach of family or other non-business relationship might cause liability under the misappropriation theory.

selectively disclosed information.[3] It views selective disclosure as resembling ordinary tipping and insider trading in the sense that "a privileged few gain an informational edge" from superior access to corporate insiders, rather than from their own skill, acumen or diligence.[4] In the SEC's view, selective disclosure adversely impacts on market integrity in a way similar to the adverse impact from illegal insider trading.[5]

The SEC cited the Internet and other new information technologies as making it easier for issuers to disseminate information broadly.[6] Instead of having to rely on analysts to serve as information intermediaries, issuers now can use a variety of methods, such as Internet webcasting and teleconferencing, to communicate directly with the market, in real time and without the intervention of intermediaries.[7] Accordingly, the SEC reasons, "technological limitations no longer provide an excuse for abiding the threats to market integrity that selective disclosure represents."[8] Instead, the "online revolution has created a greater demand, expectation, and need for direct delivery of market information."[9]

2. *Substance of Regulation FD*

New SEC Rules 100 and 101, adopted as part of Reg FD, provide the core of the new fair disclosure regulation, while new Rules 102 and 103 provide definition and context. Under Rule 100, an issuer who is subject to the periodic reporting rules of the Securities Exchange Act of 1934 (Exchange Act) must make public material nonpublic information whenever such information is intentionally or unintentionally disclosed to certain enumerated persons (Covered Persons) outside the issuer. Covered Persons include:

a. broker or dealer or associated with a broker or dealer such as an analyst;
b. an investment adviser, institutional investment manager that filed a report on Form 13F for the most recent quarter, a registered investment company or an unregistered private investment company (such as a hedge fund and some venture capital funds) or a person associated with any of the preceding; or
c. one of the holders of the company's securities if it is reasonably foreseeable that the person will purchase or sell the company's securities on the basis of the information.[10]

If the outside disclosure is intentional, the issuer must first disclose the information simultaneously to the public, through a Form 8-K filing or through another method (or combination of methods) reasonably designed to provide broad, non-exclusionary distribution of the information to the public.[11] Such means could, for example, include webcasting of conference calls as well as press releases.[12] If the disclosure is unintentional, the public disclosure must be made promptly afterward.[13] Promptly means as soon as reasonably

3. "We are concerned, in this regard, with reports that analysts who publish negative views of an issuer are sometimes excluded by that issuer from calls and meetings to which other analysts are invited." Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 II.A.
4. *Id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *Id.*
9. *Id.* at II.A.1.
10. *See* Regulation FD, 17 C.F.R. § 243.100(b)(1) (2001).
11. *See* Regulation FD, 17 C.F.R. §§ 243.100(a)(1) and 243.101(e) (2001) (defining "public disclosure").
12. *See* Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 II.B.4.
13. *See* Regulation FD, 17 C.F.R. § 243.100(a)(2) (2001).

practicable but in no event more than twenty-four hours or before the opening of the next trading day on the New York Stock Exchange, whichever is later.[14]

The SEC sought to mitigate liability concerns in Reg FD by providing that a violation of the regulation would not, standing alone, constitute a violation of Rule 10b-5.[15] The final rule also narrowed the scope of the regulation so that it does not apply to *all* communications with persons outside the issuer. Instead, it applies only to communications made to securities market professionals and to any holder of the issuer's securities under circumstances in which it is reasonably foreseeable that the security holder will trade on the basis of the information.[16]

The following types of communications by a company are specifically exempted from the coverage of Reg FD:

a. Disclosure made to a person who owes a duty of trust or confidence to the company (e.g., attorneys, investment bankers or accountants);
b. Disclosure made to a party which expressly agrees to maintain the disclosed information in confidence;
c. Disclosure made to a credit rating agency if the information is provided solely for the purpose of developing a credit rating and the agency's ratings are publicly available; or
d. Disclosure made in connection with a public offering of securities registered under the Securities Act of 1933 (the "Securities Act"), other than most types of shelf offerings. Because of this exclusion, traditional public offering roadshows may be conducted without triggering public disclosure. The FD Release warns that not all communications by an issuer during a public offering will be considered to be in connection with the public offering and could still be subject to Regulation FD.[17]

The FD Release also narrowed the types of issuer personnel covered by the regulation. Those falling under Regulation FD are senior officials and those persons who regularly communicate with securities market professionals or with security holders.[18] The SEC believes the effect of these changes is that "Regulation FD will not apply to a variety of legitimate, ordinary-course business communications or to disclosures to the media."[19]

In addition, SEC sought in the final Regulation FD to clarify that where the regulation speaks of knowing or reckless conduct, liability will arise only when an issuer's senior official knows or is reckless in not knowing that the information selectively disclosed is *both* material and nonpublic.[20] According to the SEC, this clarification "will provide additional assurance that issuers will not be second-guessed on close materiality judgments."[21] Regulation FD also expressly provides that a violation of the regulation will not lead to an issuer's loss of eligibility to use short-form registration for a securities offering or affect security holders' ability to resell under Rule 144 under the Securities Act of 1933 (Securities Act).[22]

14. *See id.* § 243.101(d).
15. *See* Securities and Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (2001).
16. *See id.* § 243.100(b)(1) (2001).
17. *See id.* § 243.100(b)(2).
18. *See id.* §§ 243.100(a), 243.101(c).
19. Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 II.A.4.
20. *See* Regulation FD, 17 C.F.R. § 243.101(d) (2001).
21. Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 II.A.4.
22. *See* Regulation FD, 17 C.F.R. § 243.103 (2001); Act of 1933, 17 C.F.R. § 230.144 (2001).

Moreover, the final regulation expressly excludes from its scope communications made in connection with most securities offerings registered under the Securities Act.[23]

Neither the final Regulation FD nor the initial proposal defined material or nonpublic even though the regulation applies to disclosures of material nonpublic information about the issuer or its securities. In effect, Regulation FD relies on existing definitions of the foregoing terms under case law.[24] Information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision.[25] To fulfill the materiality requirement, there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[26] Information is nonpublic if it has not been disseminated in a manner making it available to investors generally.[27]

B. The Electronic Media Release

The SEC in 2000 also issued clarifications of its prior releases on the use of electronic media such as the Internet in the issuance and trading of securities. To understand the significance of the 2000 interpretations, some background is in order.

1. *Background: The 1995 Releases*

To deliver information to investors via the Internet the SEC since 1995 has articulated its view that those issuers (and their underwriters) who wish to make use of electronic media to disseminate information to investors must meet several requirements: (1) consent, (2) timely notice, (3) effective access, and (4) reasonable assurance of delivery.[28] Unlike information transmitted in paper form, an issuer must obtain the investor's informed consent to the receipt of information through the Internet. In its 2000 Interpretive Release dealing with electronic media, the SEC updated its views on requirements of the securities laws in light of the notice, access, and delivery considerations initially established in its First Interpretive Release.[29]

2. *Substance of the April 2000 Electronic Media Release*

a. Consent

The Electronic Media Release makes clear that consent to electronic delivery of issuer communications can be given by telephone within certain limits. The First Interpretive Release had indicated that one means of securing evidence of electronic delivery is to obtain an investor's informed consent to receive information through a particular electronic medium. It also indicated that consent is considered informed where the investor is informed

23. *See* Regulation FD, 17 C.F.R. § 243.100(b)(2)(iv) (2001).

24. *See* Final Rule: Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 II.B.2.

25. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Basic v. Levinson, 485 U.S. 224, 231-32 (1988).

26. *See TSC Indus. Inc.*, 426 U.S. at 449; *see also Basic*, 485 U.S. at 231-32.

27. *See, e.g.*, Securities and Exchange Comm'n v. Texas Gulf Sulphur, 401 F.2d 833, 854 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

28. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. 53,458, p. 8-9 (Oct. 26, 1995) (to be codified at 17 C.F.R. pts. 231, 241, and 271), *available at* http://www.sec.gov/rules/interp/33-7233.txt.

29. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843 (Apr. 28, 2000) (to be codified at 17 C.F.R. pts. 231, 241, and 271), *available at* http://www.sec.gov/rules/interp/34-42728.htm.

(1) that a document is to be delivered through a particular electronic medium, (2) that there may be costs associated with delivery (e.g., the cost of online time), and (3) the duration of, and types of documents covered by, the consent.[30]

The Electronic Media Release clarifies that an issuer or market intermediary may also obtain consent telephonically, provided a record of the consent is retained.[31] A telephonic consent must be obtained in a manner assuring its authenticity, such as where an investor is well known to the broker seeking the consent or the investor consents to use of an automated system accessed by PIN number.[32]

The Electronic Media Release reiterates that investors may give global consent to electronic delivery of all documents of any issuer, provided the consent is informed.[33] For example, to include global consent as merely one provision in an agreement that the investor is required to execute in order to receive other services may not fully inform the investor.[34] The breadth of a global consent makes it vital that the particular types of electronic media to be used be specified in the consent. Identification on an issuer-by-issuer basis is unnecessary, but investors cannot be required to accept subsequent delivery by additional media without additional consent.[35]

The Electronic Media Release makes clear that, while an issuer or broker-dealer can rely on consents obtained by a third-party document delivery service, the issuer or broker-dealer bears ultimate responsibility for ensuring that the consent is authentic and that all required documents are delivered.[36] Broker-dealers are advised to obtain the consent of a new customer through an account-opening agreement with a separate electronic delivery authorization or through an entirely separate document.

b. Adequate and Timely Notice

Notice to investors of the electronic information must be adequate and timely. Thus, merely posting a document on a website will not constitute adequate notice, absent evidence of actual delivery to the investor.[37] Separate notice by two paper methods, letter or postcard, or a directed Internet message (e-mail) can satisfy such actual delivery requirements.[38]

30. *See id.* at 25,843 II.A.2 (also accompanying note 26). The SEC had also indicated in the First Interpretive Release that informed consent could be obtained by written or electronic means. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, p. 9, *supra* note 28.

31. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.A.1. The record should provide the same level of detail as a written consent, meaning that it should specify the medium of electronic delivery and indicate whether the consent is global. *See id.* at n.22. A global consent is one that applies to all documents of any issuer in which an investor owns or buys stock through a broker-dealer or other intermediary. *See id.* at II.A.2.

32. *See id.* at II.A.2 and II.E, Examples 1 and 2.

33. *See id.* at II.A.2 and notes 24-26.

34. *See id.* at II.A.2.

35. *See id.* Investors also should be advised of their right to revoke a global consent at any time and to receive all documents covered by the consent in paper form. Intermediaries may require revocation on an "all-or-none" basis if this policy is disclosed at the time the investor's consent is obtained. *See id.*

36. *See id.* at n.25.

37. *See id.* at II.D.2.

38. *See id.* If an investor consents to electronic delivery of a final prospectus for a public offering by means of a website, but does not provide an electronic mail address, the issuer may post its final prospectus on the site and mail the investor a notice of the location of the prospectus on the Web along with the paper confirmation of the sale. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, p. 14, *supra* note 28, at Example 10.

c. Investor Access to Information

It is necessary that investors have access to required disclosure that is comparable to postal mail and also have the opportunity to retain the information or have ongoing access equivalent to personal retention.[39] A document posted on the Internet or made available through an online service should remain accessible for as long as any delivery requirement under SEC rules applies. When a preliminary prospectus is posted on a website, it should be updated "to the same degree as paper."[40] Paper versions of documents must be available where there is computer incompatibility or computer system failure or where consent to receive documents electronically is revoked by the investor.[41]

The Electronic Media Release confirms that Portable Document Format (PDF) may be used to deliver documents so long as the format it is not so burdensome as to prevent access.[42] In practice, this means that issuers and intermediaries may use PDF to deliver documents to investors provided that they (1) inform investors of the requirements for downloading PDF at the time of obtaining consent to electronic delivery, and (2) provide investors with necessary software and technical assistance free of charge. Under the release, an issuer can satisfy the latter requirement by providing a hyperlink to a website where the software could be downloaded and a toll-free telephone number for technical assistance.[43]

d. Reasonable Assurance of Delivery

The First Interpretive Release established that issuers should have reasonable assurance, akin to that found in postal mail, that the electronic delivery of information will actually occur. The delivery requirements can be satisfied by the investor's informed consent to receive information through a particular electronic medium coupled with proper notice of access.[44] Sufficient evidence of delivery can also include (1) an electronic mail return receipt or confirmation that a document has been accessed, downloaded or printed; (2) the investor's receipt of transmission by fax; (3) the investor's accessing by hyperlink of a required document; and (4) the investor's use of forms or other material that are available only by accessing the document.[45]

Accomplishing proof of receipt of e-mail can be achieved in much the same way as a receipt that the recipient of a registered letter signs upon delivery. The e-mail recipient can hit a reply button upon receipt of the electronic document, evidencing that receipt occurred. Institutions selling securities, particularly mutual funds, are concerned about identifying the true identity of a customer who gives electronic consent to delivery of a prospectus or

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39. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, *supra* note 28, at n.22.

40. *See id.* at note 26.

41. *See id.* at II.B. The Commission permits an offering to be limited entirely to persons that consent to receive a prospectus electronically, but if it is not so limited, a paper version of the prospectus must be given to broker-dealers to be made available to investors who do not have online access. In addition, SEC Rule 174 requires that an issuer in a public offering make paper versions available to after-market purchasers.

42. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.A.3.

43. *See id.*

44. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, *supra* note 28, at II.C.

45. *See id.* Practical questions can arise in determining whether an e-mail delivery has actually taken place. Unlike mail sent via the U.S. Postal Service, posting an e-mail message does not yet raise legal presumption that it was received. In most states and for federal purposes, a letter is presumptively received if it is deposited in the mails with full postage prepaid. *See* Compliance Navigator: Electronic Delivery of Prospectuses, 7 INTERNET COMPLIANCE ALERT 7, Apr. 6, 1998, at 7.

other disclosure documents over the Internet. Such concerns have stimulated the creation of new systems to verify the delivery of electronic materials and their opening by recipients.

3. *Expanding on the "Envelope Theory"*

The First Interpretive Release included examples suggesting that documents in close proximity to each other on the same website and documents hyperlinked together will be considered delivered together as if they had been sent in the same envelope. This "envelope theory" of electronic delivery from its inception has been a source of concern for issuers in registration. The Electronic Media Release clarifies that the envelope theory was intended to help issuers and financial intermediaries in their use of electronic media by insuring that certain documents that must accompany or precede other documents will be deemed to do so.[46] The release makes clear that information on a website will be considered part of a prospectus only where an issuer acts to make it so.[47] According to the release, where an issuer includes a hyperlink in its prospectus, it is appropriate for the issuer to assume responsibility for the information because the issuer has exhibited intent to make the hyperlinked information part of its communication with the market. In such event, the hyperlinked information will become part of the prospectus and must be filed with the SEC, making the issuer and underwriter subject to liability under Section 11 of the Securities Act.[48]

An issuer may include the website address (the uniform resource locator or URL) of the SEC's website or its own website without these websites being considered part of the issuer's prospectus provided the issuer: (1) takes steps to ensure that the URL is inactive (that is, that an investor cannot reach the website by clicking on the address included in the prospectus); and (2) includes a statement to the effect that the URL is an inactive textual reference.[49]

The Electronic Media Release also clarifies that the posting of information on a website in close proximity to a prospectus, without more, does not constitute impermissible free writing. An issuer's website content must be examined in its entirety to determine whether it contains free writing, without regard to whether, or where on the website, the prospectus is posted.[50] The issuer also has the same duty as it would through paper delivery to update the preliminary prospectus with any material changes and provide sufficient notice to potential investors of the update.[51]

4. *Expanding on the "Adoption" and "Entanglement" Theories*

The New Media Release expands on the concept of liability of an issuer or financial intermediary for third-party material hyperlinked to the issuer or intermediary's website. The SEC views the question whether such third-party information should be attributed to

46. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.A.4.

47. *See id.* However, in the context of mandated disclosure, the Commission previously stated, "if an investor must proceed through a confusing series of ever-changing menus to access a required document so that it is not reasonable to expect that access would generally occur, this procedure would likely be viewed as unduly burdensome." *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, *supra* note 28, at II.B, n.24.

48. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.A.4, n.41 and 42.

49. *Id.* at n.41.

50. *Id.* at n.45.

51. *See id.* at n.6, Example 9.

the issuer as dependent upon whether (1) "the issuer has involved itself on the preparation of the information," or (2) "explicitly or implicitly endorsed or approved the information."[52] In addressing issuer liability for third-party statements such as analysts, the SEC as well as the courts have called the first line of inquiry the "entanglement theory" and the second the "adoption theory." Whereas the entanglement theory hinges on the issuer's involvement in preparation of materials *prior* to their publication, the adoption theory depends upon explicit or implicit endorsement or approval of the hyperlinked materials by the issuer *after* their publication.[53] A notion of the adoption of information would apply to hyperlinked information that is implicitly or explicitly approved or endorsed. The Release noted a number of factors relevant to determining adoption.[54]

a. Context of a Hyperlink

If a hyperlink is contained in a mandated disclosure document, the information is deemed adopted.[55] Thus, if third-party information that meets the definition of an "offer to sell" is hyperlinked with an issuer or financial intermediary's website during registration, it will be adopted for purposes of both disclosure liability under Section 10 of the Securities Act and SEC Rule 10b-5, as well as raise potential "gun-jumping" or "free writing" problems. Likewise, if an issuer or financial intermediary states or otherwise implies that the hyperlinked information is supported by, or supports statements of, the issuer or intermediary, the information is deemed adopted.[56]

b. Risk of Investor Confusion

The Electronic Media Release asserts that an issuer or intermediary is more likely to be deemed to have adopted hyperlinked information if there are no precautions taken to avoid investor confusion as to the source of the information.[57] The Release suggests that an intermediate screen clearly and prominently indicate that the viewer is leaving the issuer or intermediary's website, and the information that follows is not the issuer's or intermediary's.[58]

In addition, the use of clear and prominent disclaimers of responsibility for or endorsement of the hyperlinked information should precede or accompany access to the hyperlinked information. In the end, however, disclaimers alone will not insulate an issuer from responsibility for information made available to investors whether by hyperlink or otherwise if the total context supports adoption.[59]

c. Manner of Presentation of Hyperlinked Information

The Electronic Media Release suggested that if an issuer or financial intermediary uses hyperlinks to direct visitors to particular information, or changes hyperlinks from time to time depending on the specific information included on the third party's site, selective use

52. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.B.1.
53. *See id.*
54. *See id.*
55. *See id.* at II.B.1.a.
56. *See id.*
57. *See id.* at II.B.1.b.
58. *See id.*
59. *See id.*

of the hyperlink would support adoption.[60] Similarly, formatting the hyperlink to focus visitors' attention to specific information may result in adoption.[61]

d. Entanglement Theory Avoided

Although the SEC views the entanglement theory as overlapping the adoption theory, the Electronic Media Release elects not to discuss application of the entanglement theory to hyperlinked information on third-party websites.[62] The entanglement theory relates primarily to research reports; the First Interpretive Release had taken the position that, by posting a research report on its website, or hyperlinking to it, an issuer would risk entangling itself with or adopting the report and having the statements in the report attributed to it for liability purposes.[63] An issuer that has entangled itself "[by placing] its imprimatur, expressly or impliedly, on the [report]," will be alleged to have adopted the statements in the report as its own and, thus, may be liable under Rule 10b-5 under the Exchange Act for any statement in the report that is false or misleading.[64] To date, there is no bright line test as to what constitutes entanglement of a type that will justify attribution of an analyst's statements to a company. However, an issuer should avoid such actions as providing information to an analyst that the analyst uses in its report, distributing the analyst's report, or editing or approving its final version.[65]

C. SEC Rule 155

1. *Substance of Rule 155*

Early in 2001, the SEC adopted a new and final Rule 155 under the Securities Act.[66] It provides safe harbors for (1) an offering registered under the 1933 Act following an abandoned private offering and (2) a private offering following an abandoned registered offering. The effect of the safe harbors is to prevent the registered and private offerings from being integrated with each other. As the SEC explains in the Rule 155 Release, swift changes in

60. *See id.* at II.B.1.c.

61. The National Association of Securities Dealers, Inc. (NASD) has taken the position that NASD members will not be responsible for the content and filing of material contained in a third-party hyperlink if the link is ongoing, that is, continuously available and the content of the site, as well as responsibility for updating or changing it, is outside the member company's control or if the link is to general reference and educational material, so long as the linked site does not refer to the member. Letter from T. Selmon, NASD to Craig Tyle, General Counsel, Investment Company Institute (Nov. 11, 1997), *available at* http://www.nasdr.com/2910/2210_01.htm.

62. *See* SEC Interpretation: Use of Electronic Media, 65 Fed. Reg. 25,843, *supra* note 29, at II.B.1.A, n.55.

63. *See* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. at 53,458, *supra* note 28, Example 6.

64. *See* Elkind v. Ligget & Myers, 635 F.2d 156, 163 (2d Cir. 1980). The court held that Liggett had not entangled itself in the preparation of the analysts' reports in question to a degree that would make the reports attributable to Liggett. While Liggett had reviewed and commented upon the reports, it had not commented on earnings forecasts or leave inaccuracies uncorrected. *See* discussion of entanglement cases in Eileen S. Ewing, *Fraud on the Cybermarket: Liability for Hyperlinked Misinformation Under Rule 10b-6*, 56 Bus. Law 375, 384-86 (2000).

65. *See* Linda Quinn & Ottilie Jarmel, *Securities Regulation and the Use of Electronic Media—Year 2000, in* The Internet Age: What Securities Need to Know to Survive 70 (PLI 2000).

66. Final Rule: Integration of Abandoned Offerings, No. 33-7943, (Jan. 26, 2001) (to be codified at 17 C.F.R. pt. 230), *available at* http://www.sec.gov/rules/final/33-7943.htm (hereinafter Rule 155 Release).

market conditions may cause an issuer to reassess the attractiveness of making an offering registered with the SEC under the Securities Act as compared with a private offering. For example, a company that files a registration statement for an initial public offering (IPO) may find that there are too few public investors to make a registered offering worthwhile. Conversely, a company that starts a private offering may find sufficient investor interest to justify making a registered offering.

In either of these situations, traditional Securities Act principles may lead to integration of the two offerings. In other words, commencement of a registered offering may be considered a general solicitation for purposes of the subsequent private offering, thus making the private placement exemption unavailable. Conversely, commencement of the private offering may be considered "gun-jumping" for purposes of the subsequent registered offering, that is, the making of offers of the registered securities prior to the filing of the registration statement.

The SEC's prior guidance in this area has been limited to the suggestion of a six-month "cooling-off" period as well as a five-part "facts and circumstances" test. Rule 155 does not supersede the SEC's prior guidance, that is, it is not the exclusive way of complying with the 1933 Act in these situations. The rule applies to private offerings, that is, unregistered offerings of securities exempt under Sections 4(2) or 4(6) of the 1933 Act or Rule 506 of Regulation D. The SEC considered but rejected suggestions to the effect that the rule should extend to other exemptions that permit general solicitations or offers to less sophisticated investors.

2. *Rule 155(b): Abandoned Private Offering Followed by Registered Offering*

A private offering will not be considered part of an offering for which the issuer later files a registration statement if (a) "no securities are sold in the private offering"; (b) "the issuer and any person acting on its behalf terminate all offering activity before the filing of the registration statement"; (c) "the final prospectus and any preliminary prospectus disclose information about" (i) "the size and nature of the private offering" (including the type of security offered and the general purpose of the offering), (ii) the date on which the offering was abandoned, (iii) that no offers were accepted, and (iv) "that the prospectus for the registered offering supersedes any offering materials used in the private offering"; and (d) the issuer does not file the registration statement until thirty calendar days after termination of all offering activity in the private offering unless the offerees in the private offering consisted only of (or were reasonably believed to have been) (i) accredited investors or (ii) persons with such knowledge and experience in financial and business matters as to be capable of evaluating the risks and merits of the proposed investment.[67]

According to the SEC, the preceding conditions were designed to ensure a clean break between the private and registered offering and also as ensuring that offerees in the private offering understand this break as they consider an investment in the registered offering.[68]

The safe harbor's requirement that the prospectus disclose information about the private offering also serves the purpose of alerting the SEC staff to the abandoned private offering and to the issuer's decision to pursue the alternative of a registered offering. According to the Rule 155 Release, the staff will be monitoring carefully the use of Rule 155, that it may request supplemental information about the private offering and that the staff will consider

67. *Id.* at II.D.
68. *See id.*

carefully whether the standards of the safe harbor are met in acting upon requests for acceleration.

3. *Rule 155(c): Abandoned Registered Offering Followed by Private Offering*

An offering for which an issuer files a registration statement will not be considered part of a later commenced private offering if (a) securities were sold in the registered offering (or proceeds received, in escrow or otherwise); (b) the issuer withdraws the registration statement in accordance with Rule 477 (discussed below); (c) the issuer and any person acting on its behalf do not commence the private offering earlier than thirty calendar days after the effective date of the withdrawal of the registration statement; (d) the issuer notifies each offeree in the private offering (i) that the offering is not registered under the 1933 Act, (ii) that the securities will be restricted securities not eligible for resale without registration or an exemption, (iii) that purchasers in the private offering will not have the protections of Section 11 of the 1933 Act, (iv) that a registration statement for the abandoned offering was filed and withdrawn (specifying the date of withdrawal); and (e) any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the filing of the registration statement and that are material to the investment decision in the private offering.[69]

As in the case of the first safe harbor, the Rule 155 Release states that the second safe harbor's conditions are designed to ensure that the private offering is separate and distinct from the registered offering and that offerees in the private offering are aware that they will not have the legal protections that accompany registration under the 1933 Act.

The Rule 155 Release cautions that the SEC would consider an issuer's use of a registered offering to generate publicity for the purpose of soliciting purchasers in a private offering to be a plan or scheme to evade the registration requirements of the 1933 Act.

4. *Withdrawal of Registration Statement*

As noted above, SEC Rule 155(c) requires an issuer to withdraw its registration statement as a condition to relying on the safe harbor to commence a private placement. Under an amendment to SEC Rule 477, an issuer's application for withdrawal of a non-effective registration statement will become effective upon filing unless the SEC notifies the issuer within fifteen calendar days that the application will not be granted. The issuer must state in its application that no securities were sold pursuant to the registration statement and, if it anticipates relying on Rule 155(c) to make a private offering, must make a statement to this effect (but "without discussing any terms of the private offering").[70]

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69. *See id.* at II.E.

70. The SEC noted in the Rule 155 Release that several frequently encountered integration problems are not addressed by its adoption of SEC Rule 155. These include:

- the treatment in negotiated M&A transactions lock-up agreements reached prior to the filing of a registration statement (which the SEC says it is continuing to consider as a separate rulemaking project),
- the registered resale of private securities (i.e., PIPE transactions) (to which Rule 152 and related interpretations continue to apply),
- the integration of more than one private offering (to which the five-factor test and Rule 502(a) continue to apply), or
- concurrent public and private offerings (to which the Black Box and Squadron Ellenoff letters continue to apply).

In 2000, the SEC also issued Regulation S-P, regarding the privacy of personal financial information (Release No. 34-42974, June 22, 2000). The SEC's privacy rules are required under provisions of the

II. Developments in the United Kingdom

A. Financial Services and Markets Act

Prior to 2000, the Financial Services Act provided the statutory framework for securities regulation in the United Kingdom.[71] In June 2000, Parliament passed the Financial Services and Markets Act (FSMA).[72] The FSMA was designed to replace the Financial Services Act, and to regulate both banks and insurance companies. Once the FSMA has been fully implemented, there will be one securities, banking, and insurance regulator, the Financial Services Authority (FSA), which will absorb the regulatory roles of existing self-regulatory organizations.[73]

1. *Jurisdiction Over Foreign Offerings: General*

In determining what foreign offerings might be subject to U.K. jurisdiction, the Act made the key issue whether online offering materials accessible in the United Kingdom have been directed at or made available in the United Kingdom.[74] U.K. securities regulators, including the Securities and Futures Authority (SFA), and the Investment Management Regulatory Organization Ltd. (IMRO), issued guidelines to address this question.[75] When the Financial Services Authority (FSA) replaced the SFA in 1998 as the principal regulatory body, it issued guidelines that provide that any material categorized as an investment advertisement that is disseminated over the Internet shall be deemed to have been issued in the United Kingdom if directed at people in the United Kingdom. or made available to them other than by way of a periodical published and circulated primarily outside the United Kingdom.[76]

2. *"Directed" to U.K. Persons*

In determining what type of Internet solicitations are "directed at persons in the United Kingdom,"[77] the FSA guidelines would examine the content of the offeror's website, searching disclaimers and warnings stating that the offeror's investment services are only available in specified jurisdictions or that the services are unavailable in jurisdictions where the firm

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Gramm-Leach-Bliley Act, financial services reform legislation signed into law in 1999. Under the statute, the SEC and other federal financial regulatory agencies were required to issue rules to protect the privacy interests of consumers of financial products and services.

Meanwhile, in its release, the SEC said the new rules require brokers, dealers, investment companies, and registered investment advisers to:

- disclose to individuals their policies concerning the protection of personal information, including how they can block or opt out of the transmission of personal information to unaffiliated persons; and
- establish procedures to protect the security, confidentiality, and integrity of customer records and information.

According to the SEC, "the rules are substantially similar to rules adopted by the other federal financial regulatory agencies last month."

71. Financial Services Act, 1986, c. 60, pt. I, c. V (Eng.).

72. Financial Services and Markets Act, 2000 c. 8 (Eng.).

73. *See* Financial Services Act, 1986, c. 60, pt. I, c. V (Eng.). The FSA is in practice the only securities and banking regulator in the United Kingdom.

74. *See id.* pt. X § 207(3).

75. *See generally* IMRO, Notice to Regulated Firms (May 1997); SFA, Board Notice 416 (Apr. 25, 1997).

76. Financial Services Authority, § B(11), *available at* http://www.fsa.gov.uk/pubs/other/gr02_1998.pdf.

77. *Id.* § B(ii)(a) ¶ 16(d).

is not authorized by local law to promote or sell the product.[78] The FSA also took note of technical details such as whether the disclaimers are posted on the home page, capable of being accessed through hyperlinks throughout the website, and capable of being viewed in the same browser format as the rest of the website.[79] In addition, the FSA would scour the website for clues suggesting that the offer being made is aimed at U.K. investors—for example, the financial projections are stated in pounds sterling, the website has been listed under the U.K. section of a search engine, the website has been promoted in a U.K. chat room or similar facility, or the website has been advertised in the U.K. media market.[80]

The FSMA generally provides that a person may not in the course of business communicate an invitation or inducement to engage in investment activity, unless the communication is approved or is made by an authorized person.[81] A communication originating outside the United Kingdom, however, does not fall under this ban unless it is "capable of having an effect in the United Kingdom."[82] The restrictions will apply to communications, which means they will apply to e-mails and pages on a website. Unless an exemption applies, financial promotion communications must either be issued by an FSMA-authorized firm or be approved by such a firm. In either case, the communications must contain specified disclosures and risk warnings.

3. *Various Ambiguities*

The phrase, "communication originating outside the physical boundaries of the United Kingdom,"[83] while vague and unclear, more than likely refers to items published by an offeror whose principal operations are located outside the United Kingdom. To determine the point of origin of an electronic communication, the FSA may look at the physical location of the offeror rather than the server. Another point of ambiguity stems from the FSMA's failure to specify what types of communications are "capable of having an effect in the United Kingdom."[84] The phrase could possibly cover any communication that relates to the purchase or sale of investments situated in the United Kingdom, such as shares in U.K. companies.

4. *The Treasury and Exemptive Authority*

Some of the apparent jurisdictional sting under FSMA is being remedied by the Treasury, which is authorized to wield exemptive authority.[85] The Treasury indicated in a draft Financial Promotion Exemptions Order that it would exempt from regulation communications that are sent from locations outside the United Kingdom and that are not directed at persons in the United Kingdom.[86] The proposed measure, Article 15, would thus exempt non-U.K. websites, which can be visited by persons in the United Kingdom, so long as the investments or investment services being offered are not made available to U.K. residents. To meet the exemption, the website would have to state expressly that it is not addressed

78. *See id.* § B(ii)(b) ¶ 17(i).
79. *See id.* ¶ 17(ii).
80. *See id.* ¶ 17(iii)-(vi).
81. *See* Financial Services and Markets Act, 2000 c. 8 (Eng.), § 21(1).
82. *Id.* § 21(3).
83. *Id.*
84. *Id.*
85. *See id.* § 21(4-5, 7).
86. *See* Financial Services and Markets Bill: Financial Promotion–A Consultation Document, pt. 2, § 2.12 (HM Treasury, Mar. 1999), *available at* http://www.hm-treasury.gov.uk/pub/html/docs/finprom.html.

to, and should not be relied on by, persons in the United Kingdom.[87] The person who publishes or originates the communication may take the further precautionary step of establishing a system or procedure that prevents people in the United Kingdom from engaging in the investment activities featured on the website.[88] The Treasury's safe harbor will not apply if any of these conditions are not met. The Treasury will, however, look to see if one or more of the conditions are present when determining whether or not a communication is directed at persons in the United Kingdom.[89]

III. Developments in Belgium

In 2000, the Belgian Banking and Finance Commission (BFC) issued a circular interpreting the effect of the Internet on investment services.[90] The BFC noted that other supervisory authorities had viewed services or securities being offered from abroad as being offered locally where "directed at or made available to investors there."[91] It noted that in determining this issue, a check generally is made as to whether residents of the country concerned are being targeted.[92] The circular suggests that an institution seeking to prevent its website from being misunderstood in non-targeted countries can take one or more of the following measures as precautions: (1) stating on the website that the offer is made to investors of a well-defined geographic zone and using methods to verify a potential investor's location; (2) ensuring that the website content does not include information about places other than the zone, for example, does not refer to pounds sterling if Britain is not in the zone; (3) limits access to all or parts of the website by passwords assigned only to the target group; and (4) contacts local authorities to make sure the site does not breach local regulations.[93]

IV. Developments in Singapore

A. Background

The Monetary Authority of Singapore (MAS) in 2000 issued guidelines (the Guidelines) on offers of shares, debentures, and unit trusts through the Internet to the public in Singapore. The Guidelines apply to offers of all shares, debentures, and unit trusts to the public in Singapore using the Internet (e-offerings). The Guidelines cover both initial as well as secondary offers of securities.

While the Guidelines provide guidance on how e-offerings may be made so as to keep within the parameters of the Singapore Companies Act, they do not deal with commercial issues such as authentication of applications, repudiation of contracts or security of payments made through the Internet. The Guidelines do not have the force of law and do not override the provisions of any applicable laws or regulatory requirements.[94] Although a

87. *See id.* § 2.17.

88. *See id.*

89. *See id.*

90. *See* Financial Services Via the Internet: Prudential Requirements, Circular D1 2000/2 (Banking & Fin. Comm'n, May 5, 2000), *available at* http://www.cbf.be/mov.htm.

91. *Id.* ¶ 30.

92. *See id.*

93. *See id.* ¶ 31.

94. *See* Guidelines on Offers of Securities Through the Internet, § 1.2 (Monetary Auth. of Sing. May 2, 2001), *available at* http://www4.gov.sg/rcb/information/trust/internetsec.html.

breach of the Guidelines is not, in itself, a violation of law, an e-offering that is not made in accordance with the Guidelines (to the extent that the Guidelines reflect the requirements of the Companies Act) may be in breach of the Companies Act.[95]

B. Content of Guidelines

The Guidelines require an issuer/manager/distributor/agent inviting applications from, or making offers to, the public for the subscription or purchase of securities through the Internet (issuer) to ensure that a printed copy of the prospectus concerning the offer has been registered with the ROC before an e-offering is made.[96] Copies of the printed prospectus must be available to the public.

1. *E-Prospectus Requirements*

In addition, the e-offering must be accompanied by a prospectus in electronic form transmitted over the Internet (e-prospectus). Information in the e-prospectus must not only be the same as that in the printed prospectus, but must also be in substantially the same sequence. An e-prospectus would be deemed to have complied with this requirement if any differences in format and layout between the e-prospectus and the printed prospectus are immaterial and the e-prospectus does not differ in content from the printed prospectus.[97] Immaterial differences include the use of (1) hyperlinks within the e-prospectus to other sections of the prospectus and to the application form; (2) a zoom facility allowing enlargement/reduction of fonts/images; (3) different font types, colors, and sizes (but not less than eight-point Times); and (4) different margins and spacing.[98]

The legibility of the e-prospectus should not be compromised. If the issuer wishes to use audio-visual aids within the e-prospectus or use an e-prospectus that is materially different in any manner from the printed prospectus, it is advisable to first seek legal advice and, if applicable, apply for specific exemptions under the Companies Act. The e-prospectus should be clearly demarcated such that a potential investor would have no doubt as to which information forms part of the prospectus and can be relied on, and vice versa.[99]

It is important that a prospective investor be given an opportunity to access a copy of the e-prospectus before being given access to the application form. For example, the application form may appear at the end of the e-prospectus or a link to the e-prospectus may be placed at the beginning of the web page displaying the application form.[100]

The e-prospectus should disclaim that information not forming part of the e-prospectus can be relied on. The disclaimer should appear either before a prospective investor is given access to the application form, or on the application form itself.[101] Potential investors should be able to read or download or print a copy of the e-prospectus, which should state clearly where the printed prospectus may be obtained. If applicable, investors should be able to print a copy of the electronically submitted application form.[102]

95. *See id.*
96. *See id.* § 2.1.
97. *See id.* § 2.2.
98. *See id.*
99. *See id.*
100. *See id.* § 3.2.
101. *See id.* § 3.3.
102. *See id.* §§ 3.4-3.6.

2. *Use of Hyperlinks*

The issuer may provide a hyperlink to an e-prospectus posted on another website provided the e-prospectus on that other website complies with the requirements for e-prospectuses set out in the Guidelines. Hyperlinks into the prospectus must not be done in a way as to selectively present only parts of the prospectus.[103] Hyperlinks should bring the prospective investor directly to the front page of the e-prospectus or a page that displays the contents of the prospectus in its entirety. There should be detours to other web pages or websites, and the prospective investor must be able to navigate from the front page of the e-prospectus to the other pages of the prospectus.[104]

Hyperlinks are allowed within the e-prospectus to enable one to navigate from page to page or section to section and from other web pages/websites to the e-prospectus. Hyperlinks from within the e-prospectus to other web pages/websites are not allowed, however, other than to the application form and any documents, that are required to be made available for inspection under the Companies Act or the Singapore Exchange's Listing Manual.[105] The website containing such documents must contain only those documents and must be subject to the same safeguards to prevent tampering as is required for the website containing the electronic prospectus. The contents of the electronic version of such documents must be the same as the printed versions of those documents.

Every issuer must submit, to the Registrar of Companies (ROC) (or the Monetary Authority of Singapore, in the case of unit trusts), a written confirmation signed by a director of the issuer to the effect that the e-prospectus contains the same information in substantially the same sequence as the printed prospectus with the ROC, and that any differences between the format and layout of the e-prospectus and the printed prospectus are immaterial, and that such differences do not render the contents of the e-prospectus different from that of the printed prospectus, and that the legibility of the e-prospectus is not compromised.[106] Also, the director must confirm that the web page(s) containing the offer complies with the requirements of the Guidelines including the requirement that the prospective investor must be given an opportunity to access a copy of the e-prospectus before being given access to the application form.[107]

The statement must also provide the address of the Internet website containing the offer.[108] Where access to the website is restricted (e.g., to authorized users), appropriate arrangements should be made to allow the authorities access to the website (e.g., by provision of a password).[109] The statement must be submitted to the ROC no later than the first day of the launch of the e-offer. In addition, the issuer/manager should inform any appointed distributor/agent of the requirement that distributor/agent submit a statement of confirmation if that distributor/agent offers securities through the Internet.[110] The issuer must post on its website a warning statement that an application form downloaded from the

103. *See id.* § 4.1.
104. *See id.*
105. *See id.* § 4.2.
106. *See id.* § 6.1.
107. *See id.*
108. *See id.* § 6.2.
109. *See id.*
110. *See id.* § 6.3.

website should not be distributed to other persons unless accompanied by the e-prospectus or a printed copy of the prospectus.[111]

Although the issuer is not prohibited from maintaining the e-prospectus on its website or the hyperlink to the e-prospectus on another website after the offer closes, it is encouraged to remove the e-prospectus or the hyperlink after a reasonable amount of time has lapsed from the close of the offer. As a general guide the e-prospectus or hyperlink should be removed after a period of four weeks of closing.[112] Where the issuer continues to maintain the e-prospectus or the hyperlink on its website, reasonable steps should be taken to ensure that no applications or monies can be accepted once the offer expires.[113] Further, it is important that the issuer does not give prospective investors the impression that the offer is still open.[114] (This requirement does not apply to offers of units in a unit trust where the prospectus has not expired.)

C. Regulation of Advertisements of Offerings of Securities on the Internet

The regulatory authorities have also set out regulatory principles for advertisements of offerings of securities on the Internet by way of subsidiary legislation.[115] The same principles apply to public offerings of shares, debentures, and unit trusts. However, for issuers of unit trusts, the prospectus requirements of Singapore's Companies Act are amended to incorporate the Internet advertising rules, whereas the ROC may grant an exemption from the prospectus requirements of the Singapore Companies Act with respect to any advertisement posted on the Internet offering or calling attention to a public offer (or intended offer) by an issuer of its shares or debentures, provided the rules are followed.

The rules for such an exemption, or unit trust advertising compliance, are as follows:

- The advertisement must be linked to an electronic copy of the prospectus and it must refer to the prospectus and a form of application for the shares or debentures, whether the prospectus or form of application is in electronic form or not.
- The advertisement must state that a printed copy of the prospectus in relation to the offer or intended offer of the shares or debentures has been registered with the Registrar and copies thereof are made available to the public.
- The advertisement must state clearly where a printed copy of the prospectus may be obtained.
- The advertisement must contain a statement that only information which forms part of the prospectus can be relied on in respect of the offer or intended offer.
- A copy of the screen flows of the advertisement must be lodged with the Registrar.
- The advertisement must be based on or derived from information contained in the prospectus.
- The advertisement must not contain any misleading information or misrepresentation.[116]

111. *See id.* § 7.

112. *See id.* § 7.1.

113. *See id.*

114. *See id.*

115. *See* Companies (Advertisement on Internet) Notification 2000, No. S 53/2000 (Sing. Registrar of Co. & Bus. Feb. 4, 2000), *available at* http://www.gov.sg/rcb/information/trust/gn532000.html.

116. *Id.*