

# *Fordham International Law Journal*

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*Volume 17, Issue 5*

1993

*Article 18*

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## Panel II Discussion

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## PANEL II DISCUSSION

**QUESTION:** One of the things I have been struck by is a difference in practice. For example, in a U.K. offering — and it's true in most parts of the world — an offering will have a prospectus that will be accompanied by all sorts of analyst research reports. Now, here in the United States, analysts appear to go virtually into Purdah. Their comments may appear in limited form “for internal distribution only,” but they don't produce research reports until a good month afterwards. I am told that this is because of fear of prospectus liability on the part of the investment bank and that if anything is published, that it becomes effectively part of the prospectus and that all kinds of ghastly, insidious consequences would follow from this.

I would be interested in any of the panel participants on this side of the dias' view on this.

**MS. KARMEL:** If I understand your question correctly, I would say there are probably two reasons for this difference in practice. One has to do with our so-called “gun-jumping” prohibitions, which put a chill on communications coming from an issuer, and to a more limited extent from analysts, during the period of time when an issuer is in registration. One of the initiatives proposed by the SEC in November should ease this somewhat for foreign companies. Perhaps Richard Kosnik can comment on that.

However, the way in which securities are sold in the United States, in contrast to how they are sold in the United Kingdom, makes for significant differences that are really somewhat hard to reconcile.

I think another reason probably does have to do with the fear of prospectus liability, because there is greater liability for misstatements made in a prospectus than there is for misstatements or omissions in the aftermarket. The reason for this is that in a lawsuit under Section 10(b) and Rule 10b-5 of the Exchange Act (the primary anti-fraud prohibition for aftermarket fraud), one has to prove *scienter* or specific intent to deceive, whereas negligence can be a basis for liability in a lawsuit based on misrepresentations or omissions in a prospectus.

**MR. KOSNIK:** I might just elaborate on one point that Professor Karmel mentioned, which is gun-jumping. Our definition

of "prospectus" under our Securities Act is very broad. The basic concept is that in this time period before the effectiveness of the registration statement, to the extent that you have written materials that you are distributing, they should be in the registration statement so you do pick up the liability. Basically it is a protection to make sure that the information is correct and the issuer and distribution participants are stepping up to what is in the registration statement. After effectiveness of the registration statement, obviously, you can distribute other materials.

QUESTION: That seems entirely clear for domestic U.S. issuers. But if you have a situation where there is an issue going on outside the United States and research is being produced, it seems rather bizarre that certain analyst research reports may be available outside the United States and not inside.

MR. KOSNIK: Again, that is one of the difficulties in the context of these cross-border offerings. To the extent you are doing things in the United States, we start with the premise, as all other jurisdictions do, that when you are in a particular jurisdiction you comply with its rules.

For example, advertising has caused some difficulty for foreign issuers. I was in London when the recent British Telecom offering was going on, and you could not walk down the street without being overwhelmed by billboards and advertisements in the newspapers. That type of advertising has caused some problems, especially when it is picked up in the international edition of the *Financial Times*. We do recognize in Regulation S, and in connection with public offerings, that there is information out there that is going to leak into the United States. But the point is that it should not be put into newspapers in the United States or with the intent of having it directed into the United States. There are differences in advertising practice. And we understand from a marketing perspective, the reasons for differing positions. As a result, I believe advertising is a perfect example of a cross-border offering difficulty that we are trying to deal with.

MS. KARMELE: I would say — and I have said this elsewhere — that I think the time has come for the SEC to re-examine its gun-jumping prohibitions, not only in the context of cross-border offerings, but also with respect to U.S. public companies, especially those companies in the continuous disclosure system. It

seems to me that what has been considered gun-jumping in the past really should be disregarded, and instead the SEC should promulgate a rule that would only prohibit fraudulent statements outside the prospectus when a company is in registration.