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Jane Kaufman Winn

University of Washington School of Law

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Regulating the Use of the Internet in Securities Markets

By Jane Kaufman Winn*

INTRODUCTION

As use of the Internet and other new technologies in securities markets continues to expand, the U.S. Securities and Exchange Commission (SEC) and self-regulatory organizations (SROs) within the securities industry have continued their efforts to adapt their existing regulations to these new developments.¹ Although regulators in the United States have provided guidance to market participants on many issues, many other important questions under U.S. securities law remain unanswered. Guidance with regard to securities law in other jurisdictions is almost non-existent, although transnational organizations, such as the International Organization of Securities Commissions (IOSCO), are working to remedy this situation.² In 1997 and 1998, the SEC staff issued several releases addressing issues raised by the use of the Internet and other electronic media in securities markets. These included releases authorizing changes of SRO rules to facilitate the use of the Internet or other electronic media in communications with investors.³ In a release regarding its plain English

*Associate Professor, Southern Methodist University School of Law. Ms. Winn is co-author of *THE LAW OF ELECTRONIC COMMERCE* (3d ed. 1998). The author wishes to thank Blake Bell, Alan Bromberg, and Marc Steinberg for their helpful comments on an earlier draft.

1. The SEC's World Wide Web (web) site is a rich source of information about Internet issues in securities regulation. See U.S. Securities and Exchange Commission (visited Sept. 19, 1998) <<http://www.sec.gov>>. The Subcommittee on Electronic Financial Services of the American Bar Association's Section of Business Law maintains a web site that includes a variety of Internet securities regulation resources. See Subcommittee on Electronic Financial Services, *Welcome* (visited Sept. 19, 1998) <<http://www.abanet.org/buslaw/efss>>. The law firm of Schulte Roth & Zabel maintains a web site listing various securities documents. See Stephen J. Schulte, *SEC/NASD Internet Releases, No-Action Letters and Other Pronouncements* (Fall 1998) <<http://www.srz.com/pub/noaction.html>>. Stanford University maintains a web site with information about class action securities fraud litigation. See Stanford University School of Law Robert Crown Library, *Securities Class Action Clearinghouse* (visited Sept. 19, 1998) <<http://securities.stanford.edu>>.

2. IOSCO (visited Sept. 23, 1998) <<http://www.iosco.org>>.

3. Self-Regulatory Organizations, Exchange Act Release No. 39,510, 63 Fed. Reg. 1131, 1132 (1998) (approving proposed rule change by the National Association of Securities Dealers, Inc. (NASD)) [hereinafter NASD Release]; Self-Regulatory Organizations, Exchange Act Release No. 39,511, 63 Fed. Reg. 1135, 1136 (1998) (approving proposed rule change by New York Stock Exchange, Inc. (NYSE)) [hereinafter NYSE Release].

initiative, the SEC provided additional guidance on the use of the Internet in connection with disclosure documents.⁴ In a March 1998 release, the SEC rendered advice regarding the use of the Internet in offshore securities market activities.⁵ During 1997 and 1998, the SEC issued a series of no-action letters providing guidance on such issues as the use of an issuer's Internet address in a registration statement,⁶ the transmission of public offering road shows over the Internet or through other electronic media,⁷ the use of Internet sites to market private placements,⁸ the use of Internet bulletin board services to facilitate trading in unregistered securities,⁹ and the use of credit cards as a form of payment for securities purchased over the Internet.¹⁰ With regard to secondary market operations, the SEC also issued a proposed rule on regulation of exchanges and alternative trading systems,¹¹ and an interpretative release regarding electronic trade confirmation services.¹²

Although the SEC has provided extensive guidance on certain issues, many important questions about the impact of the Internet on securities law remain unanswered. For example, online chat rooms are a well-

4. Plain English Disclosure, Securities Act Release No. 7497, 63 Fed. Reg. 6370 (1998) (to be codified in scattered sections of 17 C.F.R. pts. 228, 229, 230, 239, 274) [hereinafter Plain English Disclosure Release].

5. Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Securities Act Release No. 7516, 63 Fed. Reg. 14,806-13 (1998) [hereinafter Use of Internet Web Sites Release].

6. Baltimore Gas and Electric Co., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 14 (Jan. 6, 1997) [hereinafter BGE No-Action Letter].

7. Bloomberg L.P., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 1023 (Oct. 22, 1997) [hereinafter Bloomberg No-Action Letter]; Net Roadshow, Inc., No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,367, at 77,849 (July 30, 1997) [hereinafter Net Roadshow 1997 No-Action Letter]; Private Financial Network, SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,332, at 77,674 (Mar. 12, 1997) [hereinafter Private Financial Network No-Action Letter].

8. Lamp Technologies, Inc., SEC No-Action Letter, [Current] Fed. Sec. L. Rep. (CCH) ¶ 77,453, at 78,327 (May 29, 1998) [hereinafter Lamp Technologies 1998 No-Action Letter]; Lamp Technologies, Inc., SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,359, at 77,804 (May 29, 1997) [hereinafter Lamp Technologies 1997 No-Action Letter].

9. Internet Capital Corp., SEC No-Action Letter, [Current] Fed. Sec. L. Rep. (CCH) ¶ 77,445, at 78,295 (Jan. 13, 1998) [hereinafter Internet Capital 1998 No-Action Letter]; Internet Capital Corp., SEC No-Action Letter, [Current] Fed. Sec. L. Rep. (CCH) ¶ 77,433, at 78,225 (Dec. 22, 1997) [hereinafter Internet Capital 1997 No-Action Letter].

10. Technology Funding Securities Corp., SEC No-Action Letter, [Current] Fed. Sec. L. Rep. (CCH) ¶ 77,451, at 78,319 (May 20, 1998) [hereinafter Technology Funding Securities No-Action Letter].

11. Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 39,884, 63 Fed. Reg. 23,504 (1998) (to be codified at 17 C.F.R. pts. 201, 240, 242, 249) (proposed Apr. 29, 1998) [hereinafter Regulation of Exchanges and Alternative Trading Systems Release].

12. Confirmation and Affirmation of Securities Trades, Exchange Act Release No. 39,829, 63 Fed. Reg. 17,943 (1998).

established institution on the Internet. Such chat rooms, however, have often been connected with many cases of fraud and market manipulation. The status of chat rooms offered by Internet brokerage services, rather than independent third-party service providers, has not yet been clarified by the SEC. It is possible that the brokerage firm might be exposed to liability if a brokerage-firm-sponsored chat room were used in a market manipulation scheme, even though no Internet service providers have similarly been targeted by the SEC.¹³ Similarly, many corporate counsel confront issues about the use of the Internet in investor relations that have not yet been addressed by the SEC. In the private litigation context, it remains to be seen what standard will be applied should an investor seek remedies based on a material misstatement in a corporate web site as opposed to mandatory disclosure materials.

INITIAL PUBLIC OFFERINGS

The use of an Internet web site to disseminate information about a corporation raises important issues under the Securities Act of 1933 (Securities Act)¹⁴ for companies issuing securities to the public. In 1995, the SEC proposed,¹⁵ and in May 1996 finalized,¹⁶ rules that expressed its views on the electronic delivery of documents such as prospectuses, annual and semiannual reports, and proxy solicitation materials under the Securities Act, the Securities Exchange Act of 1934 (Exchange Act),¹⁷ and the Investment Company Act of 1940 (Investment Company Act).¹⁸ In 1996, the SEC also issued a concept release soliciting comments on the best means of improving the regulation of the capital formation process in the Internet setting while maintaining or enhancing investor protection.¹⁹

The 1996 Use of Electronic Media for Delivery Purposes Release establishes the principle that in order to resolve the question of whether delivery by electronic media has been accomplished for purposes of securities law should be determined by drawing an analogy to the standards applied to deliveries accomplished through the use of paper media.²⁰ If

13. Blake A. Bell, *E-Broker Chat Rooms and Federal Securities Laws*, WALLSTREETLAWYER.COM, Aug. 1998, at 1, 4.

14. 15 U.S.C. §§ 77a-77bbbb (1994 & West Supp. 1998).

15. Use of Electronic Media for Delivery Purposes, Securities Act Release No.7233, 60 Fed. Reg. 53,458 (1995) [hereinafter 1995 Use of Electronic Media for Delivery Purposes Release].

16. Use of Electronic Media for Delivery Purposes, Securities Act Release No.7289, 61 Fed. Reg. 24,652 (1996) (codified in scattered sections of 17 C.F.R. pts. 200, 228, 229, 230, 232, 239, 240, 270, 274) [hereinafter 1996 Use of Electronic Media for Delivery Purposes Release].

17. 15 U.S.C. §§ 78a-78kkk.

18. *Id.* §§ 80a-1 to 80a-64.

19. Securities Act Concepts and Their Effects on Capital Formation, Securities Act Release No. 7314, 61 Fed. Reg. 40,044 (1996).

20. See 1996 Use of Electronic Media for Delivery Purposes Release, *supra* note 16, at 24,652.

the electronic delivery results in the delivery of substantially the same information as would have been received through the delivery of paper media, then the requirements of federal securities law will have been met.²¹ The 1995 Use of Electronic Media for Delivery Purposes Release provides a wide variety of fact patterns and analyses to aid market participants in determining when electronic delivery will be considered analogous to the delivery of paper materials.²²

In addition to the examples provided in the 1995 Use of Electronic Media for Delivery Purposes Release, the SEC has provided guidance through a series of no-action letters. In 1997, the SEC staff issued a no-action letter reiterating its position that the statement "our SEC filings are also available to the public from our web site" will not, by itself, amount to incorporation by reference of all the web site contents into the prospectus.²³ Providing a hyperlink, however, from a prospectus located on a web site to the issuer's general web site may be more problematic. The 1995 Use of Electronic Media for Delivery Purposes Release indicates that providing a hyperlink out of a preliminary prospectus to an analyst's research report would be treated by the SEC as equivalent to mailing the research report with the preliminary prospectus, and would not be permitted.²⁴ The examples provided in this release relating to hyperlinks have led one commentator to recommend that a prospectus be placed on the Internet with a separate URL, with no links to it from any other material or out of it to any other material, in order to avoid liability under the Securities Act for material misstatements or omissions in the prospectus.²⁵ One option available to issuers is the possibility of contracting with a third-party service provider for the posting of the issuer's prospectus on the Internet. In 1997, Internet Capital Corporation (ICC) was issued a no-action letter with regard to its plans to establish a web site through which third-party issuers (not affiliated with ICC) would post and deliver prospectuses and other offering materials without ICC being required to register as a broker-dealer under the Exchange Act.²⁶

The new plain English rule adopted by the SEC became effective Oc-

21. *See id.* at 24,653.

22. *See* 1995 Use of Electronic Media for Delivery Purposes Release, *supra* note 15, at 53,461-67. For an analysis of the 1995 and 1996 Use of Electronic Media for Delivery Purposes Releases, see John J. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 *BUS. LAW.* 1195, 1219 n.83 (1997); Alexander C. Gavis, *The Offering and Distribution of Securities in Cyberspace: A Review of Regulatory and Industry Initiatives*, 52 *BUS. LAW.* 317, 323 n.30 (1996).

23. *See* BGE No-Action Letter, *supra* note 6, at *1; *see also*, ITT Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 895, at *1 (Dec. 6, 1996).

24. *See* 1995 Use of Electronic Media for Delivery Purposes Release, *supra* note 15, at 53,463, example 16.

25. *See* HOWARD M. FRIEDMAN, *SECURITIES REGULATION IN CYBERSPACE* ¶ 3.06[a] (1997).

26. *See* Internet Capital 1997 No-Action Letter, *supra* note 9, at 78,225.

tober 1, 1998, thereby requiring issuers to write prospectuses in language that investors are more likely to find comprehensible.²⁷ The summary of the adopting release provides an example of the kind of prose that the SEC expects from issuers:

We are adopting the plain English rule with some changes based on the comments we received and the lessons we learned from the plain English pilot participants. The rule requires issuers to write the cover page, summary, and risk factors section of prospectuses in plain English. We are changing the existing requirements for these sections to the extent they conflict with the plain English rule. We are also giving issuers more specific guidance on how to make the entire prospectus clear, concise, and understandable. We believe that using plain English in prospectuses will lead to a better informed securities market—a market in which investors can more easily understand the disclosure required by the federal securities laws.²⁸

The Plain English Disclosure Release also provides guidance on the use of electronic media, including the Internet, in connection with disclosure documents.²⁹ The rule requires electronic filers to “state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<http://www.sec.gov>). [Issuers] are encouraged to give [their] Internet address, if available.”³⁰

The Securities Act controls the timing and content of disclosures made by issuers in their registered offerings of securities to investors by dividing the process into three time periods: pre-filing, waiting, and post-effective.³¹ During the pre-filing period, commentators recommend against establishing a new web site or making material changes in an existing web site until after a contemplated securities offering is completed in order to avoid any possible liability for conditioning the market or “gun-jumping.”³²

No securities can be sold during the waiting period which begins after filing and continues until the registration statement becomes effective.³³ Limited types of offers to sell, however, may be made.³⁴ During the waiting

27. 17 C.F.R. § 230.421 (1998).

28. Plain English Disclosure Release, *supra* note 4, at 6370.

29. 17 C.F.R. § 228.101(c)(3); *id.* § 229.101(e)(2); Plain English Disclosure Release, *supra* note 4, at 6386.

30. 17 C.F.R. § 228.101(c)(3)(1998); *id.* § 229.101(e)(2).

31. SEC, *Report to the Congress: The Impact of Recent Technological Advances on the Securities Markets* § I.B.1. (Sept. 1997) <<http://www.sec.gov/news/studies/techrp97.htm>> [hereinafter *SEC Report to Congress*].

32. FRIEDMAN, *supra* note 25, ¶ 3.01; Blake A. Bell, *Corporate Web Sites and Securities Offerings*, N.Y. L.J., May 21, 1998, at 5.

33. 15 U.S.C. § 77e(a) (1994).

34. *Id.* § 77e(b)(1).

period, underwriters often work with issuers in direct selling efforts known as "road shows" where face-to-face meetings take place in various locations with small groups of potential buyers (usually institutions) of large quantities of securities. Due to the expense of staging live road shows, some issuers and underwriters have begun using electronic road shows as an alternative medium of communication.³⁵ In 1997, the Private Financial Network, a subsidiary of MSNBC Interactive LLC, received a no-action letter from the SEC staff regarding its plan to disseminate road shows to investors using satellite, telephone, and cable video conferencing connections.³⁶ Net Roadshow received a no-action letter from the SEC regarding its plan to disseminate electronic road shows over the Internet to qualified investors.³⁷ This plan included: (i) access codes that would be issued to qualified institutional buyers and changed on a daily basis; (ii) a film reproducing the live road show in its entirety; (iii) various reminders of the importance of the printed prospectus, including a periodic crawl within the video; and (iv) a button on the screen providing a hyperlink to the prospectus.³⁸ In 1998, Net Roadshow received a second no-action letter regarding plans to disseminate road shows over the Internet with a slightly more flexible format than it proposed in 1997.³⁹ This included access codes that would expire no later than the termination date of the offering, and provisions for possible changes in the content of the Internet road show after the live road show has been filmed.⁴⁰

EXEMPT OFFERINGS

Following the success of the Spring Street Brewing Company's (Spring Street's) initial public offering (IPO) in 1995,⁴¹ Internet-based IPOs have become part of the IPO market.⁴² The Spring Street offering was conducted under Regulation A, an exemption from federal registration for nonreporting companies that permits a generalized interstate public offering of up to \$5 million during any twelve-month period.⁴³ In addition,

35. See generally Linda C. Quinn & Otilie L. Jarmel, *The Road Less Traveled: The Advent of Electronic Road Shows*, INSIGHTS, July 1997, at 3.

36. See Private Financial Network No-Action Letter, *supra* note 7, at 77,675.

37. See Net Roadshow 1997 No-Action Letter, *supra* note 7, at 77,849; see also Bloomberg No-Action Letter, *supra* note 7, at *4 (discussing the distribution to qualified subscribers of multimedia road show over Bloomberg's closed-circuit network).

38. See Net Roadshow 1997 No-Action Letter, *supra* note 7, at 77,849.

39. Net Roadshow, Inc., SEC No-Action Letter, 1998 SEC No-Act. LEXIS 107, at *1-*3 (Jan. 30, 1998).

40. *Id.* at *3-*5.

41. A detailed description of the offering is available in ANDREW D. KLEIN, WALL-STREET.COM: FAT CAT INVESTING AT THE CLICK OF A MOUSE 80-83 (1998).

42. See Rhonda M. Abrams, *Online Stock Offerings Still Not Netting Many Takers*, CIN. ENQUIRER, Apr. 26, 1998, at D3.

43. KLEIN, *supra* note 41, at 83; see 17 C.F.R. § 230.251(b) (1998).

Rule 504 provides an exemption from Securities Act registration for offerings of up to \$1 million that can be used for direct public offerings marketed using the Internet.⁴⁴

Private placements using the Internet are also possible. Section 4(2) of the Securities Act exempts from registration "transactions by an issuer not involving any public offering."⁴⁵ This section is construed to cover only offerings limited to persons who are sophisticated or otherwise able to fend for themselves.⁴⁶ Rules 505 and 506 under the Securities Act exempt certain limited offerings to accredited investors that do not involve "general advertising."⁴⁷ The SEC has indicated that securities offered through Internet sites must include some method to restrict access to the specific classes of investors.⁴⁸ Accreditation may be accomplished by requiring prospective investors to complete a questionnaire, and access may be restricted by requiring the use of a password.

This position has been further clarified through a series of no-action letters issued by the SEC staff. In 1996, in the IPOnet no-action letter,⁴⁹ the SEC approved a procedure that included requiring prospective investors to complete a questionnaire that would permit the issuer to determine if the investor was qualified to participate in a private placement; accredited investors would then be issued a password allowing them access to the offering materials.⁵⁰ The Angel Capital Electronic Network was organized in 1997 by the U.S. Small Business Administration to offer both registered and exempt securities issued by small businesses to accredited investors using a web site.⁵¹ The SEC staff issued a no-action letter confirming that the operators of this network, who would neither receive compensation for their efforts nor give advice to prospective investors, would not be required to register as broker-dealers pursuant to the Exchange Act.⁵²

In 1997, the SEC staff issued a no-action letter to Lamp Technologies,

44. See 17 C.F.R. § 230.504(b)(2).

45. 15 U.S.C. § 77d(2) (1994).

46. See, e.g., SEC v. Murphy, 626 F.2d 633, 646 (9th Cir. 1980) (finding that there was not sufficient evidence of an offeree's sophistication to determine the availability of a private offering exemption).

47. 17 C.F.R. § 230.502(c); see also *id.* § 230.505(b)(1); *id.* § 230.506(b)(1).

48. See 1995 Use of Electronic Media for Delivery Purposes Release, *supra* note 15, at 53,463-64, example 20.

49. IPOnet, SEC No-Action Letter, 1996 SEC No-Act. LEXIS 642 (July 26, 1996) [hereinafter IPOnet No-Action Letter]. The IPOnet web site can be accessed at <<http://www.e-iponet.com>>.

50. See IPOnet No-Action Letter, *supra* note 49, at *2.

51. See Small Business Administration, *The Process and Analysis Behind ACE-Net* (visited Sept. 24, 1998) <<http://www.sba.gov/ADVO/acenet/report.html>>; see also Robert A. Prentice, *The Future of Corporate Disclosure: The Internet, Securities Fraud, and Rule 10b-5*, 47 EMORY L.J. 1, 16 (1998).

52. Angel Capital Electronic Network, SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,305, at 77,516, 77,521-22 (Oct. 25, 1996) [hereinafter Angel Capital Electronic Network No-Action Letter].

Inc. (Lamp Technologies)⁵³ for its plan to market private investment company funds⁵⁴ to investors who agreed to pay a monthly subscription fee and who were “qualified eligible participants” as defined in Rule 4.7 under the Commodity Exchange Act.⁵⁵ The SEC agreed that it would not consider such offerings a public offering of securities under either the Securities Act or the Investment Company Act.⁵⁶ In 1998, Lamp Technologies received a second no-action letter permitting it to remove the requirement that investors pay a subscription fee in exchange for access to the service, and merely to require that investors qualify as “accredited investors” under the Securities Act rather than satisfying the higher standard of “qualified eligible participants” under the Commodity Exchange Act.⁵⁷

SECONDARY MARKETS

The use of the Internet and other new technologies to reduce communication and transaction costs is making significant inroads into the operation of secondary markets for securities. Online discount brokerage services are enjoying a phenomenal increase in popularity, while more established brokerage firms are working quickly to adapt to new conditions.⁵⁸ New communications technology is lowering the cost of creating new secondary securities markets where none existed before, as well as lowering the costs of operating existing secondary markets.

In 1998, Technology Funding Securities Corporation (TFSC) received a no-action letter from the SEC staff with regard to its plan to accept credit cards as a form of payment for fund shares purchased through its web site.⁵⁹ TFSC needed confirmation from the SEC that accepting credit cards as a form of payment would not violate section 11(d)(1) of the Exchange Act⁶⁰ prohibiting underwriters participating in an offering from extending or arranging for the extension of credit to a customer on any of the securities that are being offered.⁶¹ TFSC undertook to (i) permit credit card purchases only for transactions executed through its web site;

53. See Lamp Technologies 1997 No-Action Letter, *supra* note 8.

54. Sections 3(c)(1) and 3(c)(7) of the Investment Company Act exempt from registration requirements certain funds below a certain size, offered to a limited number of investors, or offered only to certain pre-qualified investors. 15 U.S.C. § 80a-3(c)(1), (c)(7) (1994 & Supp. II 1996).

55. See Lamp Technologies 1997 No-Action Letter, *supra* note 8, at 77,804. Qualified eligible investors, among other things, must have an investment portfolio of at least \$2 million. 17 C.F.R. § 4.7(a)(i), (a)(ii)(B)(1)(i).

56. See Lamp Technologies 1997 No-Action Letter, *supra* note 8, at 77,809.

57. See Lamp Technologies 1998 No-Action Letter, *supra* note 8, at 78,330.

58. Anita Raghavan, *Why Wall Street Firms Trail in On-Line Battle*, WALL ST. J., June 2, 1998, at C1.

59. See Technology Funding Securities No-Action Letter, *supra* note 10, at 78,319.

60. 15 U.S.C. § 78k(d) (1994).

61. *Id.*

(ii) include a prominent warning aimed at discouraging investors from carrying the purchase price of shares as debt on their credit card accounts; (iii) refrain from paying its employees a commission or charging investors a commission in connection with their share purchases; and (iv) refrain from issuing credit cards.⁶² These restrictions substantially alleviate the risk that TFSC staff will encourage prospective investors to make speculative investments with borrowed money.

On December 31, 1997, the SEC agreed to proposed rule changes submitted by the NASD and the NYSE that would permit broker-dealers to eliminate the requirement of prior approval of all written correspondence with clients, and to substitute procedures for random spot checks of written and electronic correspondence instead.⁶³ These rule changes were designed to update the rules of SROs such as the NASD and the NYSE to bring them into line with the changes in the SEC's interpretations regarding the use of electronic media under federal securities law.⁶⁴ Broker-dealers subject to the NASD and NYSE revised rules will be required to develop reasonable procedures for review of registered representatives' communications with the public, taking into account the size and structure of the broker-dealer's business as well as the type of customers it serves.⁶⁵

In 1996, the SEC staff issued no-action letters in connection with several issuer-sponsored bulletin board services,⁶⁶ and announced that it would no longer respond to requests for no-action letters with regard to such services.⁶⁷ The SEC required that issuers not participate in the trading and not offer investment advice regarding trades.⁶⁸ The SEC also issued a no-action letter in connection with a not-for-profit third-party-operated Internet bulletin board service.⁶⁹

62. See Technology Funding Securities No-Action Letter, *supra* note 10, at 78,323.

63. See NASD Release, *supra* note 3, at 1132; NYSE Release, *supra* note 3, at 1137.

64. For "guidance in using electronic media to satisfy delivery requirements under the federal securities laws," see Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisors for Delivery of Information, Securities Act Release No. 7288, 61 Fed. Reg. 24,644, 24,646 (1996).

65. See NASD Release, *supra* note 3, at 1132; NYSE Release, *supra* note 3, at 1136; see also Self-Regulatory Organizations, Exchange Act Release 39,866, 63 Fed. Reg. 19,778, 19,779 (1998). Subsequent to the approval of the proposed rule changes in the NASD Release, the NASD proposed a further rule change to postpone the effective date of the changes to permit it time to review comments received subsequent to the SEC approval. See Self-Regulatory Organizations, Exchange Act Release 39,665, 63 Fed. Reg. 9032, 9032 (1998).

66. Real Goods Trading Corp., SEC No-Action Letter, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,226, at 77,131-34 (June 24, 1996) [hereinafter Real Goods Trading No-Action Letter]; Spring Street Brewing Co., SEC No-Action Letter, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,201, at 77,001 (Apr. 17, 1996).

67. PerfectData Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 700, at *4 (Aug. 5, 1996).

68. Real Goods Trading No-Action Letter, *supra* note 66, at 77,134.

69. See Angel Capital Electronic Network No-Action Letter, *supra* note 52, at 77,521.

In 1998, the SEC staff issued a no-action letter in connection with a third-party-operated Internet bulletin board service operated on a for-profit basis.⁷⁰ ICC proposed a web site that would provide a directory of companies with small capitalization and lightly traded common stock for which there is no liquid market, as well as access to each company's public filings, a brief summary of factual information about the company from its Form 10-K, price quotes from the relevant stock exchange or NASDAQ, and a periodic newsletter.⁷¹ The web site would provide a bulletin board so that prospective purchasers or sellers could communicate their interest in trading.⁷² The bulletin board would include information about the prospective purchasers or sellers, but transactions would not take place on the bulletin board, and ICC would not be involved in completing trades.⁷³ ICC would receive a fee from the companies listed on its bulletin board, but it could neither provide any advice regarding the companies, nor receive any commissions in connection with trades.⁷⁴ Prospective purchasers and sellers would be required to register with ICC and would be issued a password in order to gain access to the bulletin board.⁷⁵ Although Internet bulletin board systems are offering important new services to investors in companies with thinly traded shares, the Internet is also affecting larger, more liquid markets as well.

Technological developments are rapidly blurring the distinction between markets, intermediaries, and service providers throughout securities markets. Market participants have introduced new products and services that incorporate new technologies in ways that were unimaginable in the 1930s when the regulatory framework in place today was designed. Many of the services that were once provided only by centralized exchanges regulated under the Exchange Act are now provided by alternative trading systems that share few characteristics with traditional exchanges. The complex, cumbersome obligations that apply to registered exchanges today seem ill-suited to regulate many of the alternative trading systems now in operation or under development. As a result, the SEC has generally regulated alternative trading systems as broker-dealers rather than as exchanges. This, however, creates disparities that affect investors, market intermediaries, and other markets, and may fall short of meeting the SEC's objective of preserving basic investor protections while still encouraging market innovation. For example, an activity on such alternative systems is not fully disclosed to, or accessible by, public investors, and may not be adequately monitored by regulators for market manipulation and fraud.⁷⁶

70. See Internet Capital 1998 No-Action Letter, *supra* note 9, at 78,295-96.

71. *Id.* at 78,296.

72. *Id.* at 78,295-96.

73. *Id.* at 78,297.

74. *Id.* at 78,299, 78,302.

75. *Id.* at 78,302.

76. See Regulation of Exchanges and Alternative Trading Systems Release, *supra* note 11, at 23,505.

Computerized alternative trading systems may include processes that “centralize, display, match, cross or otherwise execute” trades.⁷⁷ These alternative trading systems include Instinet,⁷⁸ the Arizona Stock Exchange,⁷⁹ and POSIT⁸⁰—ITG Inc.’s portfolio system for institutional trading. These systems use different proprietary algorithms for matching buyers and sellers in ways that maintain confidentiality, liquidity, and alternative pricing mechanisms. In 1998, alternative trading systems handled over twenty percent of the orders in securities listed on the NASDAQ stock market, and almost four percent of orders in securities listed on registered exchanges.⁸¹

In 1996, Congress authorized the SEC to find ways to adapt its regulatory framework to deal with changes in market structures brought about by the use of new technologies.⁸² In 1997, the SEC published a concept release soliciting public comment on a broad range of questions raised by the dramatic effects of technology on securities trading.⁸³ The concept release sought comment on two alternatives proposed by the SEC: incorporation of alternative trading systems into a tiered-exchange regulation framework, under which the changes would be subject to requirements tailored to their size and role in the market, or through the enhancement of broker-dealer regulations.⁸⁴ After reviewing the comments received, and in light of market conditions, the SEC proposed revisions to various rules that effectively combine the two approaches set out in the concept release.⁸⁵ Alternative trading systems would be able to choose whether to register as national securities exchanges under the Exchange Act, or to register as broker-dealers and comply with the additional requirements being proposed as new Regulation ATS.⁸⁶ The SEC is attempting to insure that innovation is not stifled, while at the same time preserving established features of U.S. securities markets, such as market stability, price accuracy, capacity adequacy, and fair and impartial term accessibility.

77. See *SEC Report to Congress*, *supra* note 31, § IV.C.4.

78. See Instinet (visited Sept. 19, 1998) <<http://www.instinet.com>>. Instinet was created more than 25 years ago as a computer network to permit professional investors to execute block trades. See *id.*

79. See Arizona Stock Exchange (visited Sept. 19, 1998) <<http://www.azx.com>>.

80. For information about POSIT, see *ITG POSIT* (visited Oct. 19, 1998) <<http://www.itginc.com/products/prods.html>>.

81. See Regulation of Exchanges and Alternative Trading Systems Release, *supra* note 11, at 23,505.

82. National Securities Markets Improvements Act of 1996 § 105(b), 15 U.S.C. § 78mm (Supp. II 1996).

83. Exchange Act Release No. 38,672, 62 Fed. Reg. 30,485 (1997).

84. *Id.* at 30,487.

85. See Regulation of Exchanges and Alternative Trading Systems Release, *supra* note 11, at 23,505.

86. *Id.*

The SEC and SROs are working to find ways to take advantage of new technology in the clearing and settlement process, and to promote greater competition among service providers in this area. The SEC has issued an interpretative release regarding matching services provided by electronic trade confirmation vendors.⁸⁷ This interpretative release is designed to open the door to competition for The Depository Trust Company (DTC) in the market for trading services.⁸⁸ At the same time, DTC, a company which together with its affiliated organization, the National Securities Clearing Corporation, provides clearing and settlement services for almost all U.S. securities markets, has revised its rules to streamline the process of matching the buy and sell side of trades through its institutional delivery system.⁸⁹

TRANSNATIONAL TRANSACTIONS

Recent advances in information processing and communication technology have accelerated the decades-old trend for securities markets to become transnational in scope and character,⁹⁰ and the Internet is only accelerating this trend. Although the securities of U.S. issuers have been available on exchanges organized outside the United States for many years, the Internet makes it possible for issuers to reach out to investors outside the United States without requiring the services of regulated intermediaries in the United States or abroad. Likewise, U.S. investors using the Internet and wishing to participate directly in foreign capital markets no longer necessarily require the services of regulated intermediaries. The U.S. issuers and securities markets intermediaries that intend to provide information to U.S. investors through web sites are at the same time providing information to prospective investors outside the United States, raising the specter of potential liability under the securities laws of any country where a prospective investor with access to the Internet resides. The U.S. courts and regulators will also be forced to reevaluate the extraterri-

87. Confirmation and Affirmation of Securities Trades, Exchange Act Release No. 39,829, 63 Fed. Reg. 17,943 (1998). The release also included a request for comments on alternatives to regulating new entities that offer electronic trade matching services as clearing agencies. *Id.*

88. *See id.* at 17,943.

89. Self-Regulatory Organizations, Exchange Act Release No. 39,832, 63 Fed. Reg. 18,062, 18,063-64 (1998).

90. *See generally* SEC, *Internationalization of the Securities Markets* (1987), available in HAL S. SCOTT & PHILIP A. WELLONS, *INTERNATIONAL FINANCE: TRANSACTIONS, POLICY AND REGULATION* 38 (1998); Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997); Roberta S. Karmel, *Changing Concepts of Extraterritoriality*, N.Y. L.J., Jan. 30, 1998, at 3.

torial application of U.S. securities law as U.S. investors gain access to foreign capital markets through the Internet.⁹¹

On March 23, 1998, the SEC issued the Use of Internet Web Sites Release that provides guidance on the application of U.S. securities law to offers over web sites of securities or investment services by “issuers, investment companies, broker-dealers, exchanges, and investment advisers.”⁹² The U.S. securities laws generally apply whenever U.S. investors are targeted through the use of the mails or other means of interstate commerce.⁹³ The SEC states in the release that the Internet is an instrument of interstate commerce, so the “posting of information on a web site may constitute an offer of securities or investment services” under U.S. law.⁹⁴ The SEC notes, however, that it is both impractical for the SEC to attempt to regulate all offers made to U.S. investors over the Internet, given the enormity of the task, and undesirable from a policy perspective, given that to attempt to do so might stifle innovation that would benefit investors.⁹⁵ Therefore, if offshore issuers and financial service providers using web sites to market their services take reasonable precautionary measures to avoid targeting offers to persons in the United States or U.S. persons, the SEC will not treat the web site as subject to U.S. securities laws.⁹⁶ This approach follows the lead of state regulators acting through the North American Securities Administrators Association (NASAA), which adopted a resolution in 1996 regarding securities offered on the Internet.⁹⁷ This resolution, adopted by thirty-two states,⁹⁸ provides that offers of securities over the Internet will be treated as exempt from a state’s securities laws when the offers indicate that they are not being offered to residents of that state.⁹⁹

91. U.S. courts have recognized U.S. jurisdiction over fraudulent conduct where substantial conduct or its effects take place within the United States. *See, e.g.,* *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121, 124 (2d Cir. 1995) (finding that a foreign issuer of stock is subject to U.S. jurisdiction because, *inter alia*, its U.S. activities were not merely “preparatory”).

92. *See* Use of Internet Web Sites Release, *supra* note 5, at 14,807. *See generally* Francine J. Rosenberger, *SEC Clarifies Investment Companies’ Use of the Internet*, WALLSTREETLAWYER.COM, May 1998, at 1,1.

93. *See* Securities Act § 5, 15 U.S.C. § 77e (1994); Exchange Act § 15(a), 15 U.S.C. § 78o(a); Investment Company Act § 7(d), 15 U.S.C. § 80a-7(d); Investment Advisors Act § 203(a), 15 U.S.C. § 80b-3(a) (1994 & Supp. II 1996).

94. *See* Use of Internet Web Sites Release, *supra* note 5, at 14,808.

95. *See id.*

96. *See id.*

97. *See* NASAA, *NASAA Internet Resolution* (visited Sept. 19, 1998) <<http://www.nasaa.org/bluesky/guidelines/resolu.html>>; *see also* Use of Internet Web Sites Release, *supra* note 5, at 14,808. This approach was first taken by Pennsylvania in 1995, with the additional requirement that no sales in fact take place. *See* Arthur B. Laby, *The SEC Has Issued an Interpretative Release Delineating the Instances When an Offshore Offering of Securities Made on the Internet Must Be Registered*, NAT’L L.J., Apr. 20, 1998, at B6.

98. *See* NASAA, *supra* note 97.

99. *Id.*

The Use of Internet Web Sites Release states that an offshore Internet offer would not be considered to be targeted at U.S. investors if the web site included a prominent disclaimer making it clear that the offer was directed only at countries other than the United States.¹⁰⁰ The web site would also have to include procedures reasonably designed to guard against sales to U.S. persons, such as requesting investors' mailing addresses or telephone numbers.¹⁰¹ The SEC also indicates that should U.S. investors successfully circumvent procedures reasonably designed to exclude them, the offering of securities or investment services will not, after-the-fact, be viewed as having been targeted at U.S. investors.¹⁰² If the offeror chooses to use a third-party service provider to distribute information over the Internet, additional procedures may be required to establish that reasonable precautions were taken to avoid targeting U.S. investors.¹⁰³ For example, if the information is distributed through an investment-oriented web site with substantial U.S. clients or subscribers, or is hyperlinked to investment-oriented web sites, additional precautions may be required. The release emphasized that the determination of whether measures were reasonably designed to guard against sales to U.S. investors will depend on the facts and circumstances of each case.¹⁰⁴

The Use of Internet Web Sites Release addresses not only securities issued under the laws of foreign jurisdictions, but also securities issued in the United States but exempt from U.S. registration requirements targeting foreign investors.¹⁰⁵ The release states that the SEC will scrutinize such activity more closely than offshore offers because a U.S. participant is involved, but registration will not be required if the issuer uses procedures reasonably designed to insure that only non-U.S. persons receive the offer.¹⁰⁶ Foreign securities may simultaneously be offered publicly to non-U.S. investors and privately to U.S. investors.¹⁰⁷ The release again states that the offering will not be deemed a public offering under U.S. law if the issuer uses procedures reasonably designed to insure that only non-U.S. persons receive the offer.¹⁰⁸ One step that an issuer may take, which would indicate that measures reasonably designed to guard against offers to U.S. investors were used, would be to include a disclaimer on its web

100. See Use of Internet Web Sites Release, *supra* note 5, at 14,808.

101. *Id.* at 14,809.

102. *Id.* at 14,808.

103. *Id.* at 14,809.

104. See Laby, *supra* note 97, at B6. "The release addresses registration obligations, not fraud. The SEC presumably will continue to apply its anti-fraud provisions to offshore offerings, even if they are not subject to registration." *Id.*

105. See Use of Internet Web Sites Release, *supra* note 5, at 14,810.

106. *Id.*

107. *Id.* at 14,811.

108. *Id.* at 14,810.

site reflecting the existence of the two separate offers, and stating that the Internet offer is not being made in the United States.¹⁰⁹

In the United Kingdom (U.K.), the Financial Services Authority (FSA), a newly organized regulatory agency charged with oversight of all U.K. financial markets, has announced that under section 57 of the Financial Services Act, any web site advertising financial services could be deemed to be issued in the U.K.¹¹⁰ The Financial Services Act requires investment advertisements in the U.K. to be issued by an authorized person or approved by such a person, and failure to comply with this requirement is a criminal offense; therefore anyone posting an advertisement for financial services on the Internet is committing a crime in the U.K. if prior approval in the U.K. has not been secured.¹¹¹ Although the FSA recognizes the practical limits on its enforcement powers, it is nevertheless taking the position that until the Financial Services Act is modified by Parliament, the FSA must be bound by its terms and can only exercise discretion in the use of its enforcement powers.¹¹² In its May 28, 1998 press release, the FSA indicates that it will consider Internet advertising on a case-by-case basis, and will take into account such factors as whether the content of the advertisement is targeted at persons in the U.K. and the effectiveness of procedures for restricting access to individuals for whom it is lawful to do so.¹¹³

Although based on different rationales, the U.S. and U.K. seem to be in accord that the determination of whether an Internet posting constitutes "targeting" their country's investors depends on the facts of the case.¹¹⁴ Regulators in these countries are charged with oversight of two of the largest capital markets in the world,¹¹⁵ and have already made some progress in addressing the issues raised by the Internet. If a relatively sophisticated jurisdiction such as the U.K., with its long experience in the operation and regulation of financial markets, responds to the use of the Internet by financial institutions in other countries by finding violations of

109. *Id.* at 14,811.

110. Financial Services Act, 1986 § 57 (Eng.); see Financial Services Authority, *The FSA Issues Guidance on Investment Advertisements on the Internet* (May 28, 1998) <<http://www.fsa.gov.uk/press/fsa29-98.htm>> [hereinafter *FSA Press Release*].

111. Section 57(1) of the Financial Services Act of 1986 prohibits unauthorized persons from "issu[ing] or caus[ing] to be issued an investment advertisement in the United Kingdom unless its contents have been approved by an authorized person." Financial Services Act, 1986 § 57(1). Violation of § 57(1) constitutes a criminal offense and may also give rise to civil liability; in addition, contracts entered into as a result of a breach of § 57(1) may be unenforceable. Financial Services Act, 1986 § 57(3)-(6); see Michael D. Mann et al., *Managing the Risk of Enforcement Action Based on Web Site Activity (Part 1)*, WALLSTREETLAWYER.COM, June 1998, at 1, 4.

112. See *FSA Press Release*, *supra* note 110.

113. *Id.*

114. See Laby, *supra* note 97, at B6; *FSA Press Release*, *supra* note 110.

115. See HAL S. SCOTT & PHILIP WELLONS, *INTERNATIONAL FINANCE: TRANSACTIONS, POLICY AND REGULATION* 54 (5th ed. 1998).

its criminal law, it is an ominous indication of what other jurisdictions with less experience in regulating international capital markets will conclude.

Legislation has been introduced in the U.K. to address the extraterritorial jurisdiction issues raised by the FSA release, and it is reasonable to expect that Parliament will act to revise the Financial Services Act soon.¹¹⁶ Not all countries can be expected to act promptly to revise their existing securities market regulations should similar extraterritorial jurisdictional problems be discovered. IOSCO works to promote harmonization in regulatory standards for securities markets across jurisdictions and cooperation between national securities regulators on enforcement matters.¹¹⁷ IOSCO has formed a technical committee to address issues raised by new technologies, and has published a paper entitled *Report on Enforcement Issues Raised by the Increasing Use of Electronic Networks in the Securities and Futures Field*,¹¹⁸ which discusses problems and opportunities created by the Internet that regulators must address.¹¹⁹ In addition, IOSCO has established an Internet task force that is expected to release a report discussing Internet issues by the end of 1998.¹²⁰

CONCLUSION

Because competitive forces will continue to push participants in securities markets to find ways to take advantage of new technologies such as the Internet, regulators in the United States and other countries will have to continue reexamining their existing laws in light of new developments in global securities markets. Jurisdictions such as the United States, which are committed to protecting individual investors and the integrity of capital markets, will come under increasing pressure to reconsider the level of protections they offer if new technologies make it easier for businesses to raise the capital they need in less regulated markets outside the United States. In recent years, the SEC has followed a policy of adapting U.S. laws on an incremental basis, providing guidance on a limited number of issues and reserving judgment on many others, as the impact of new technologies become apparent. The U.S. regulators are at the forefront of developments internationally, so it remains unclear whether recent U.S. developments will form a persuasive model for other jurisdictions to follow in updating their own securities laws.

116. Telephone Interview with Martin Hollobone, Senior Executive, Enforcement and Legal Services Division, FSA (July 31, 1998).

117. IOSCO, *Objectives of IOSCO* (visited Sept. 19, 1998) <<http://www.iosco.org/text01.html>>.

118. See IOSCO Technical Committee, *Report on Enforcement Issues Raised by the Increasing Use of Electronic Networks in the Securities and Futures Field* (visited Sept. 19, 1998) <<http://www.iosco.org/press/presscomm970922.html>>.

119. *Id.*

120. See Michael A. Geist, *From Fact-Finding to Rulemaking—The IOSCO Internet Initiative Rolls On*, WALLSTREETLAWYER.COM, June 1998, at 37, 37.