SEC Interpretation: Use of Electronic Media

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 231, 241 and 271

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Use of Electronic Media

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; Solicitation of Comment.

SUMMARY: We are publishing guidance on the use of electronic media by issuers of all types, including operating companies, investment companies and municipal securities issuers, as well as market intermediaries. The guidance addresses the use of electronic media in three areas. First, we update our previous guidance on the use of electronic media to deliver documents under the federal securities laws. Second, we discuss an issuer's liability for web site content. Third, we outline basic legal principles that issuers and market intermediaries should consider in conducting online offerings. Additionally, because technology is evolving rapidly, we seek comment on a number of issues to assist us in determining whether further regulatory action is necessary.

DATES: Effective Date: The interpretations are effective on May 4, 2000. Comment Date: Comments should be submitted on or before June 19, 2000.

ADDRESSES: You should submit three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. You also may submit your comments electronically to the following electronic mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7-11-00; please include this file number in the subject line if you use electronic mail. Comment letters will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. We will post electronically submitted comment letters on our Internet web site <http://www.sec.gov>.[1]

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securities dealers), please contact Paula R. Jenson, Deputy Chief Counsel, and Laura S. Pruitt in the Office of Chief Counsel, Division of Market Regulation, at (202) 942-0073. For questions regarding broker-dealer capacity, please contact Irene A. Halpin and Joan M. Collopy in the Office of Risk Management and Control, Division of Market Regulation, at (202) 942-0772. For questions regarding investment companies and investment advisers, please contact Alison M. Fuller, Assistant Chief Counsel, and David W. Grim in the Office of Chief Counsel, Division of Investment Management, at (202) 942-0659.

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I. Introduction

By facilitating rapid and widespread information dissemination, the Internet has had a significant impact on capital-raising techniques and, more broadly, on the structure of the securities industry. Today, almost seven million people invest in the U.S. securities markets through online brokerage accounts.[2] To serve this increasing interest in online trading, there has been a surge in online brokerage firms offering an array of financial services.[3] Additionally, many publicly traded companies are incorporating Internet-based technology into their routine business operations, including setting up their own web sites to furnish company and industry information. Some provide information about their securities and the markets in which their securities trade. Investment companies use the Internet to provide investors with fund-related information, as well as shareholder services and educational materials. Issuers of municipal securities also are beginning to use the Internet to provide information about themselves and their outstanding bonds, as well as new offerings of their securities. The increased availability of information through the Internet has helped to promote transparency, liquidity and efficiency in our capital markets.

This release is designed to provide guidance to issuers of all types, including operating companies, investment companies and municipal securities issuers, as well as market intermediaries, on several issues involving the application of the federal securities laws to electronic media. In developing this guidance, we considered the significant benefits that investors can gain from the increased use of electronic media. We also considered the potential for electronic media, as instruments of inexpensive, mass communication, to be used to defraud the investing public.[4] We believe that the guidance advances our central statutory goals: ensuring full and fair disclosure to investors; promoting the public interest, including investor protection, efficiency, competition and capital formation; and maintaining fair and orderly markets.

One of the key benefits of electronic media is that information can be disseminated to investors and the financial markets rapidly and in a cost-effective and widespread manner. Our recently adopted rules permitting increased communications with security holders and the markets in connection with business combinations and similar transactions should enable issuers to take further advantage of this benefit.[5] Thus far, we have not extended the same flexible treatment to securities offerings aimed at raising capital. For these offerings, we are considering separately the liberalization of communications by issuers and other market participants.[6]

Today's interpretive guidance will do the following:

- Facilitate electronic delivery of communications by clarifying that
  - investors may consent to electronic delivery telephonically;
  - intermediaries may request consent to electronic delivery on a

"global," multiple-issuer basis;

- issuers and intermediaries may deliver documents in portable document format, or PDF, with appropriate measures to assure that investors can easily access the documents;

- an embedded hyperlink[7] within a Section 10 prospectus[8] or any other document required to be filed or delivered under the federal securities laws causes the hyperlinked information to be a part of that document;

- the close proximity of information on a web site to a Section 10 prospectus does not, by itself, make that information an "offer to sell," "offer for sale" or "offer" within the meaning of Section 2(a)(3) of the Securities Act[9]; and

- municipal securities underwriters may rely on a municipal securities issuer to identify the documents on the issuer's web site that comprise the preliminary, deemed final and final official statements.

- Reduce uncertainty regarding permissible web site content to encourage more widespread information dissemination to all investors by clarifying

  - some of the facts and circumstances that may result in an issuer having adopted information on a third-party web site to which the issuer has established a hyperlink for purposes of the anti-fraud provisions of the federal securities laws; and

  - general legal principles that govern permissible web site communications by issuers when in registration.[10]

- Facilitate online offerings by clarifying

  - general legal principles that broker-dealers should consider when developing and implementing procedures for online public offerings; and

  - circumstances under which a third-party service provider may establish a web site to facilitate online private offerings.

II. Interpretive Guidance

A. Electronic Delivery

We first published our views on the use of electronic media to deliver information to investors in 1995.[11] The 1995 Release focused on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act of 1933,[12] the Securities Exchange Act of 1934[13] and the Investment Company Act of 1940.[14] Our 1996 electronic media release[15] focused on electronic delivery of required information by broker-dealers (including municipal securities dealers) and transfer agents under the Exchange Act and investment advisers under the Investment Advisers Act of 1940.[16]

We believe that the framework for electronic delivery established in these releases continues to work well in today's technological environment. Issuers and market intermediaries therefore must continue to assess their compliance with legal requirements in terms of the three areas identified in

the releases -- notice, access and evidence of delivery. Although we believe that this framework continues to be appropriate, we provide below guidance that will clarify some regulatory issues relating to electronic delivery.[17]

1. Telephonic Consent

As noted above, one of the three elements of satisfactory electronic delivery is obtaining evidence of delivery. The 1995 Release provided that one method for satisfying the evidence-of-delivery element is to obtain an informed consent from an investor to receive information through a particular electronic medium.[18] The 1996 Release stated that informed consent should be made by written or electronic means.[19] Some securities lawyers have concluded that, based on the 1996 Release, telephonic consent generally is not permitted. Others have opined that telephonic consent may be permissible if an issuer or intermediary retains a record of the consent.[20]

In today's markets, where speed is a priority, significant matters often are communicated telephonically. It is common (and increasingly popular), for instance, for security holders to vote proxies and even transfer assets over the telephone where permitted under applicable state law.[21] In addition, investors can place orders to trade securities over the telephone. We believe these practices have developed because business can be transacted as effectively over the telephone today as it can in paper. We are of the view, therefore, that an issuer or market intermediary may obtain an informed consent telephonically, as long as a record of that consent is retained.[22] As with written or electronic consent, telephonic consent must be obtained in a manner that assures its authenticity.[23]

2. Global Consent

The 1995 Release stated that consent to electronic delivery could relate to all documents to be delivered by or on behalf of a single issuer.[24] The 1995 Release also stated that an issuer could rely on consent obtained by a broker-dealer or other market intermediary.[25] Some securities lawyers have questioned the permissible scope of consents that are obtained by broker-dealers or banks (or their agents) from investors who hold securities of multiple issuers in their brokerage, trust or other accounts. Specifically, they have asked whether an investor can consent to electronic delivery of all documents of any issuer in which that investor buys or owns securities through a particular intermediary.

We believe that an investor may give a global consent to electronic delivery -- relating to all documents of any issuer -- so long as the consent is informed.[26] Given the broad scope of a global consent and its effect on an investor's ability to receive important documents, we believe intermediaries should take particular care to ensure that the investor understands that he or she is providing a global consent to electronic delivery. For example, a global consent that is merely a provision of an agreement that an investor is required to execute to receive other services may not fully inform the investor. To best inform investors, broker-dealers could obtain consent from a new customer through an account-opening agreement that contains a separate section with a separate electronic delivery authorization, or through a separate document altogether. We believe that a global consent to electronic delivery would not be an informed consent if the opening of a brokerage account were conditioned upon providing the consent.[27] Therefore, absent other evidence of delivery,[28] we believe that if the opening of an account were conditioned upon providing a global consent, evidence of delivery would not be established.

Similarly, because of the broad scope of a global consent, an investor should be advised of his or her right to revoke the consent at any time and receive all covered documents in paper format. We recognize that a system allowing an investor to revoke consent to electronic delivery with respect to some issuers' documents, but not others, may be difficult to administer. An intermediary might be uncertain about whether or not it has complied with its delivery obligations. Thus, intermediaries, if they wish, may require revocation on an "all-or-none" basis, provided that this policy is adequately disclosed when the consent is obtained.

As noted in the 1995 Release, an informed consent must specify the type of electronic media to be used (for example, a limited proprietary system or an Internet web site).[29] This is particularly true for global consents where multiple documents may be delivered through different media. An investor should not be disadvantaged by inadvertently consenting to electronic delivery through a medium that is not compatible with the investor's computer hardware and software.[30]

Although a global consent must identify the various types of electronic media that may be used to constitute an informed consent, it need not specify the medium to be used by any particular issuer. Additionally, the consent need not identify the issuers covered by the consent. If the consent does identify the covered issuers, it also may provide that additional issuers can be added at a later time without further consent. Investors cannot be required to accept delivery via additional media at a later time without further informed consent.[31]

3. Use of Portable Document Format

The 1995 Release stated that "the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided."[32] Many issuers have interpreted this statement to preclude delivery of PDF documents which cannot be accessed without special software. Instead, those issuers use hypertext markup language, or HTML, which may be viewed without the need for additional software.[33] We believe that issuers and market intermediaries delivering documents electronically may use PDF if it is not so burdensome as effectively to prevent access. For example, PDF could be used if issuers and intermediaries

- inform investors of the requirements necessary to download PDF when obtaining consent to electronic delivery; and
- provide investors with any necessary software and technical assistance at no cost.[34]

4. Clarification of the "Envelope Theory"

The 1995 Release provided a number of examples designed to assist issuers and market intermediaries in meeting their delivery obligations through electronic media. One example provided that documents in close proximity on the same web site menu are considered delivered together.[35] Other examples confirmed the proposition that documents hyperlinked to each other are considered delivered together as if they were in the same paper envelope.[36] The premise underlying these examples has come to be called the "envelope theory."

The purpose of these examples was to provide assurance to issuers and intermediaries that they are delivering multiple documents simultaneously to investors when so required by the federal securities laws. For example, in a

registered offering, sales literature cannot be delivered to an investor unless the registration statement has been declared effective and a final prospectus accompanies or precedes the sales literature.[37] It is easy to establish concurrent delivery when multiple documents are included in one paper envelope that is delivered by U.S. postal mail or a private delivery service. When electronic delivery is used, however, it is somewhat more difficult to establish whether multiple documents may be considered delivered together. The guidance provided in the 1995 Release about the use of "virtual" envelopes was intended to alleviate this difficulty.

Nevertheless, some issuers and intermediaries believe that the envelope theory has created ambiguities as to appropriate web site content when an issuer is in registration.[38] Some securities lawyers have expressed concern that if a Section 10 prospectus is posted on a web site, the operation of the envelope theory causes everything on the web site to become part of that prospectus. They also have raised concerns that information on a web site that is outside of the four corners of the Section 10 prospectus, but in close proximity[39] to it, would be considered free writing.[40]

Information on a web site would be part of a Section 10 prospectus only if an issuer (or person acting on behalf of the issuer, including an intermediary with delivery obligations) acts to make it part of the prospectus. For example, if an issuer includes a hyperlink within a Section 10 prospectus, the hyperlinked information would become a part of that prospectus.[41] When embedded hyperlinks are used,[42] the hyperlinked information must be filed as part of the prospectus in the effective registration statement and will be subject to liability under Section 11 of the Securities Act.[43] In contrast, a hyperlink from an external document to a Section 10 prospectus would result in both documents being delivered together, but would not result in the non-prospectus document being deemed part of the prospectus. Issuers nevertheless may be subject to liability under Section 12 of the Securities Act[44] for the external document depending on whether the external document is itself a prospectus or part of one.

With respect to the free writing concern, the focus on the location of the posted prospectus is misplaced. Regardless of whether or where the Section 10 prospectus is posted, the web site content must be reviewed in its entirety to determine whether it contains impermissible free writing.[45] The Commission staff will continue to raise questions about information on an issuer's web site that is either inconsistent with the issuer's Section 10 prospectus or that would constitute an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act.

Municipal securities market participants involved in offering and selling municipal securities face similar issues under Exchange Act Rule 15c2-12[46] in connection with their use of electronic media. Rule 15c2-12 requires municipal securities underwriters of primary offerings to, among other things,

- obtain and review an official statement that the municipal securities issuer deems final;
- send the final official statement to any potential customer; and
- in negotiated sales, send the most recent preliminary official statement, if one exists, to any potential customer.

Under Rule 15c2-12, a final official statement can be a single document or set of documents. In a municipal securities offering, if a municipal securities

issuer puts its official statement on its web site and also establishes hyperlinks to other web sites, a question arises as to what constitutes the final official statement that a municipal securities underwriter has an obligation to obtain and send to potential customers. For purposes of satisfying its obligations under Rule 15c2-12, a municipal securities underwriter may rely on the municipal securities issuer to identify which of the documents on, or hyperlinked from, the issuer's web site comprise the preliminary, deemed final and final official statements, even if the issuer's web site contains other documents or hyperlinks to other web sites. Hyperlinks embedded within an official statement itself, however, will be considered part of the official statement, even if a municipal securities issuer has not specifically identified the embedded hyperlinked information. For any municipal securities offering subject to Rule 15c2-12, the paper and electronic versions of each of the preliminary, deemed final and final official statements must be the same. Municipal securities issuers are reminded that, whether or not the offering of their securities is exempt from Rule 15c2-12, the anti-fraud provisions of the federal securities laws apply to their official statements and other disclosures.[47]

B. Web Site Content

Issuers have raised a number of questions about their responsibility for the content of their web sites, both when they are in registration and when they are not. It is important for issuers, including municipal securities issuers, to keep in mind that the federal securities laws apply in the same manner to the content of their web sites as to any other statements made by or attributable to them. While many of these questions may be resolved by reference to current law, we recognize that further guidance would be helpful on two fundamental issues affecting web site content. We first consider issuer responsibility for hyperlinked information under the anti-fraud provisions of the federal securities laws. We then discuss the regulation of issuers' web site communications during registered offerings.

1. Issuer Responsibility for Hyperlinked Information

Issuers[48] are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets[49] regardless of the medium through which the statements are made, including the Internet. Some issuers have asked whether they can be held liable under Section 10(b) of the Exchange Act and Rule 10b-5 for third-party information to which they have hyperlinked from their web sites.[50] This concern stems largely from case law[51] and our findings in the 1997 settlement of an enforcement action.[52] These questions focus on the consequences of issuer hyperlinks to analyst research reports, although issuers also have expressed concern about their potential liability for hyperlinks to other information as well.

Whether third-party information is attributable to an issuer depends upon whether the issuer has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. In the case of issuer liability for statements by third parties such as analysts, the courts and we have referred to the first line of inquiry as the "entanglement" theory and the second as the "adoption" theory.

In the case of hyperlinked information, liability under the "entanglement" theory would depend upon an issuer's level of pre-publication involvement in the preparation of the information.[53] In contrast, liability under the "adoption" theory would depend upon whether, after its publication, an issuer, explicitly or implicitly, endorses or approves the hyperlinked information.[54]

Below we discuss factors that we believe are relevant in deciding whether an issuer has adopted information on a third-party web site to which it has established a hyperlink.[55] While the factors we discuss below form a useful framework of analysis, we caution that they are neither exclusive nor exhaustive. We are not establishing a "bright line" mechanical test. We do not mean to suggest that any single factor, standing alone, would or would not dictate the outcome of the analysis.

a. Context of the Hyperlink

Whether third-party information to which an issuer has established a hyperlink is attributable to the issuer is likely to be influenced by what the issuer says about the hyperlink or what is implied by the context in which the issuer places the hyperlink. An issuer might explicitly endorse the hyperlinked information. For example, a hyperlink might be incorporated in or accompany a statement such as "XYZ's web site contains the best description of our business that is currently available." Likewise, a hyperlink might be used to suggest that the hyperlinked information supports a particular assertion on an issuer's web site. For example, the hyperlink may be incorporated in or accompany a statement such as, "As reported in Today's Widget, our company is the leading producer of widgets worldwide." Moreover, even when an issuer remains silent about the hyperlink, the context nevertheless may imply that the hyperlinked information is attributable to the issuer.[56]

In the context of a document required to be filed or delivered under the federal securities laws, we believe that when an issuer embeds a hyperlink to a web site within the document, the issuer should always be deemed to be adopting the hyperlinked information.[57] In addition, when an issuer is in registration, if the issuer establishes a hyperlink (that is not embedded within a disclosure document) from its web site to information that meets the definition of an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act, a strong inference arises that the issuer has adopted that information for purposes of Section 10(b) of the Exchange Act and Rule 10b-5.[58]

b. Risk of Confusion

Another factor we would consider in determining whether an issuer has adopted hyperlinked information is the presence or absence of precautions against investor confusion about the source of the information. Hyperlinked information on a third-party web site may be less likely to be attributed to an issuer if the issuer makes the information accessible only after a visitor to its web site has been presented with an intermediate screen that clearly and prominently indicates that the visitor is leaving the issuer's web site and that the information subsequently viewed is not the issuer's. Similarly, there may be less likelihood of confusion about whether an issuer has adopted hyperlinked information if the issuer ensures that access to the information is preceded or accompanied by a clear and prominent statement from the issuer disclaiming responsibility for, or endorsement of, the information. In contrast, the risk of investor confusion is higher when information on a third-party web site is framed[59] or inlined.[60] We are not suggesting, however, that statements and disclaimers will insulate an issuer from liability for hyperlinked information when the relevant facts and circumstances otherwise indicate that the issuer has adopted the information.[61]

c. Presentation of the Hyperlinked Information

The presentation of the hyperlinked information by an issuer is relevant in

determining whether the issuer has adopted the information. For example, an issuer's efforts to direct an investor's attention to particular information by selectively providing hyperlinks is a relevant consideration in determining whether the information so hyperlinked has been adopted by the issuer. Where a wealth of information as to a particular matter is available, and where the information accessed by the hyperlink is not representative of the available information, an issuer's creation and maintenance of the hyperlink could be an endorsement of the selected information. Similarly, an issuer that selectively establishes and terminates hyperlinks to third-party web sites depending upon the nature of the information about the issuer on a particular site or sites may be viewed as attempting to control the flow of information to investors. Again, this suggests that the issuer has adopted the information during the periods that the hyperlink is operative.

Finally, the layout of the screen containing a hyperlink is relevant in determining whether an issuer will be deemed to have adopted hyperlinked information. Any action to differentiate a particular hyperlink from other hyperlinks on an issuer's web site, through its prominence, size or location, or to draw an investor's attention to the hyperlink, may suggest that the issuer favors the hyperlinked information over other information available to the investor on or through the site. For example, a particular hyperlink might be presented in a different color, type font or size from other hyperlinks on an issuer's web site. Where the method of presenting the hyperlink influences disproportionately an investor's decision to view third-party information, the hyperlinked information is more likely attributable to an issuer.

2. Issuer Communications During a Registered Offering

Because of the increasing use by issuers of web sites to communicate in the ordinary course of business with their security holders, customers, suppliers and others, issuers have asked us for guidance on the permissible content of their Internet communications when they are in registration.[62] An issuer in registration must consider the application of Section 5 of the Securities Act[63] to all of its communications with the public.[64] In our view, this includes information on an issuer's web site as well as information on a third-party web site to which the issuer has established a hyperlink. The Securities Act and accompanying regulations currently limit information about an offering that issuers and persons acting on their behalf may provide to investors to the content of the Section 10 prospectus and any permissible communications under available Securities Act safe harbors.[65] Thus, information on a third-party web site to which an issuer has established a hyperlink that meets the definition of an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act raises a strong inference that the hyperlinked information is attributable to the issuer for purposes of a Section 5 analysis.[66] To ensure compliance with Section 5, an issuer in registration should carefully review its web site and any information on third-party web sites to which it hyperlinks.

An issuer that is in registration should maintain communications with the public as long as the subject matter of the communications is limited to ordinary-course business and financial information, which may include the following:

- advertisements concerning the issuer's products and services;
- Exchange Act reports required to be filed with the Commission;
- proxy statements, annual reports to security holders and dividend notices;

- press announcements concerning business and financial developments;
- answers to unsolicited telephone inquiries concerning business matters from securities analysts, financial analysts, security holders and participants in the communications field who have a legitimate interest in the issuer's affairs; and
- security holders' meetings and responses to security holder inquiries relating to these matters.[67]

Statements containing information falling within any of the foregoing categories, or an available Securities Act safe harbor,[68] may be posted on an issuer's web site when in registration, either directly or indirectly through a hyperlink to a third-party web site, including the web site of a broker-dealer that is participating in the registered offering.

Although our original guidance was directed at communications by reporting issuers when in registration, it also should be observed by non-reporting issuers preparing to offer securities to the public for the first time. A non-reporting issuer that has established a history of ordinary course business communications through its web site should be able to continue to provide business and financial information on its site consistent with our original guidance. A non-reporting issuer preparing for its first registered public offering that contemporaneously establishes a web site, however, may need to apply this guidance more strictly when evaluating its web site content because it may not have established a history of ordinary-course business communications with the marketplace. Thus, its web site content may condition the market for the offering and, due to the unfamiliarity of the marketplace with the issuer or its business, investors may be unable to view the issuer's communications in an appropriate context while the issuer is in registration. In other words, investors may be less able to distinguish offers to sell an issuer's securities in a registered offering from product or service promotional activities or other business or financial information.

C. Online Offerings

1. Online Public Offerings

Increasingly, issuers and broker-dealers are conducting public securities offerings online, using the Internet, electronic mail and other electronic media to solicit prospective investors. Examples of these electronic communications include investor questionnaires on investment qualifications, broker-dealer account-opening procedures and directives on how to submit indications of interest or offers to buy in the context of a specific public offering.[69] These developments present both potential benefits and dangers to investors.[70] On the positive side, numerous "online brokers" appear to have begun to give individual investors more access to public offerings, including initial public offerings, or IPOs.[71] Still, dangers accompany these expanded online investment opportunities. Retail investors often are unfamiliar with the public offering process generally, and, in particular, with new marketing practices that have evolved in connection with online public offerings. We are concerned that there may be insufficient information available to investors to enable them to understand fully the online public offering process. We also are concerned that investors are being solicited to make hasty, and perhaps uninformed, investment decisions.[72]

Two fundamental legal principles should guide issuers, underwriters and other offering participants in online public offerings. First, offering

participants can neither sell, nor make contracts to sell, a security before effectiveness of the related Securities Act registration statement.[73] A corollary to this principle dictates that "[n]o offer to buy ... can be accepted and no part of the purchase price can be received until the registration statement has become effective."[74]

Second, until delivery of the final prospectus has been completed, written offers and offers transmitted by radio and television cannot be made outside of a Section 10 prospectus except in connection with business combinations.[75] After filing the registration statement, two limited exceptions provide some flexibility to offering participants to publish notices of the offering.[76] Following effectiveness, offering participants may disseminate sales literature and other writings so long as these materials are accompanied or preceded by a final prospectus.[77] Oral offers, in contrast, are permissible as soon as the registration statement has been filed. Offering participants may use any combination of electronic and more traditional media, such as paper or the telephone, to communicate with prospective investors, provided that use of these media is in compliance with the Securities Act.

These key legal principles must underpin the development of appropriate procedures for online offerings. To date, the Division of Corporation Finance has reviewed numerous procedures in connection with online distributions of IPOs. The Division also has issued a no-action letter regarding permissible procedures for the use of the Internet in IPOs.[78] We understand, however, that a number of online brokers have urged that we make additional regulatory accommodations to facilitate online offerings. We appreciate the benefits that technology brings to the offering process and fully support the need to craft a regulatory system that maximizes these benefits. We also are mindful of our investor protection mandate and the fundamental principles established by the Securities Act for the offer and sale of securities. Many of the procedures urged upon us by online brokers may be properly the subject of regulatory action. Accordingly, in this release, we do not prescribe any specific procedures that must be followed. Instead, we will continue to analyze this area as practice, procedures and technology evolve, with a view to possible regulatory action in the future. Additionally, the Commission staff will continue to review procedures submitted in connection with online offerings.

2. Online Private Offerings under Regulation D

Broad use of the Internet for exempt securities offerings under Regulation D is problematic because of the requirement that these offerings not involve a general solicitation or advertising.[79] When we first considered whether exempt offerings could be conducted over the Internet, we concluded that an issuer's unrestricted, and therefore publicly available, Internet web site would not be consistent with the restriction on general solicitation and advertising. Specifically, the 1995 Release included an example indicating that an issuer's use of an Internet web site in connection with a purported private offering would constitute a "general solicitation" and therefore disqualify the offering as "private."[80]

Subsequently, the Divisions of Corporation Finance and Market Regulation issued interpretive guidance to a registered broker-dealer and its affiliate, IPONET,[81] that planned to invite previously unknown prospective investors to complete a questionnaire posted on the affiliate's Internet web site "as a means of building a customer base and database of accredited and sophisticated investors" for the broker-dealer.[82] A password-restricted web page permitting access to private offerings would become available to a

prospective investor only after the affiliated broker-dealer determined that the investor was "accredited" or "sophisticated" within the meaning of Regulation D.[83] Additionally, a prospective investor could purchase securities only in offerings that were posted on the restricted web site after the investor had been qualified by the affiliated broker-dealer as an accredited or sophisticated investor and had opened an account with the broker-dealer. The Divisions' interpretive letter was based on an important and well-known principle established over a decade ago: a general solicitation is not present when there is a pre-existing, substantive relationship between an issuer, or its broker-dealer, and the offerees.[84]

We understand that some entities have engaged in practices that deviate substantially from the facts in the IPONET interpretive letter. Specifically, third-party service providers who are neither registered broker-dealers nor affiliated with registered broker-dealers have established web sites that generally invite prospective investors to qualify as accredited or sophisticated as a prelude to participation, on an access-restricted basis, in limited or private offerings transmitted on those web sites. Moreover, some non-broker-dealer web site operators are not even requiring prospective investors to complete questionnaires providing information needed to form a reasonable belief regarding their accreditation or sophistication. Instead, these web sites permit interested persons to certify themselves as accredited or sophisticated merely by checking a box.

These web sites, particularly those allowing for self-accreditation, raise significant concerns as to whether the offerings that they facilitate involve general solicitations.[85] In these instances, one method of ensuring that a general solicitation is not involved is to establish the existence of a "pre-existing, substantive relationship."[86] Generally, staff interpretations of whether a "pre-existing, substantive relationship" exists have been limited to procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and, thus, implies that a substantive relationship exists between the broker-dealer and its customers. We have long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case.[87] Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a "pre-existing, substantive relationship" sufficient to avoid a "general solicitation."[88]

Notwithstanding the analysis for purposes of Section 5 of the Securities Act, web site operators need to consider whether the activities that they are undertaking require them to register as broker-dealers. Section 15 of the Exchange Act[89] essentially makes it unlawful for a broker or dealer "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills)" unless the broker or dealer is registered with the Commission.[90] The "exempted securities" for which broker-dealer registration is not required under Section 15 are strictly limited.[91] They do not include, for example, securities issued under Regulations A, D or S[92] or privately placed securities that would be "restricted" securities under Securities Act Rule 144.[93] Thus, broker-dealer registration generally is required to effect transactions in securities that are exempt from registration under the Securities Act.[94] In other words, third-party service providers that act as brokers in connection with securities offerings are required to register as broker-dealers, even when the securities are exempt from registration under the Securities Act.[95]

3. Broker-Dealer Capacity

We have noted before that broker-dealers must have adequate facilities and personnel to promptly execute and consummate all of their securities transactions.[96] As broker-dealers increasingly rely on electronic facilities, such as electronic mail and Internet web sites, to handle communications and transactions with their customers, they must have the facilities to handle the expected user volume.[97] Broker-dealers should consider taking steps to maintain their operational capability during high-volume usage (such as when investors transmit electronic indications of interest to purchase securities in online IPOs), and high-volume and high-volatility trading days (such as the immediate aftermarket trading following an IPO).[98]

D. Technology Concepts

Each technological advance brings changes to the structure of the capital markets and the securities industry. While we believe that the guidance provided in this release will be useful in the near term, we also recognize that we will need to reexamine our regulatory system and interpretive guidance as technology evolves. We will continue to examine and consider the removal of regulations that pose unnecessary barriers to electronic commerce and maintain those regulations that are essential to protect investors. In that regard, we request comment below on specific issues that may arise in the future in several areas. We also solicit comment on whether there are issues involving electronic media under the federal securities laws that we have not identified.

1. Access Equals Delivery

Various commentators have suggested that additional regulatory changes may be warranted in the use of electronic media for delivery purposes. The 1995 Release stated that issuers and market intermediaries with delivery obligations would need to continue to make information available in paper form until such time as electronic media became more universally accessible and accepted.[99] Some believe that this time has come and, therefore, that we should shift from the present delivery model to an "access-equals-delivery" model. Under the latter model, investors would be assumed to have access to the Internet, thereby allowing delivery to be accomplished solely by an issuer posting a document on the issuer's or a third-party's web site.

We believe that the time for an "access-equals-delivery" model has not arrived yet. Internet access is more prevalent than in 1995, but many people in this country still do not enjoy the benefits of ready access to electronic media.[100] Moreover, even investors who are online are unlikely to rely on the Internet as their sole means of obtaining information from issuers or intermediaries with delivery obligations.[101] Some investors decline electronic delivery because they do not wish to review a large document on their computer screens. Others decline electronic delivery because of the time that it takes to download and print a document.

We request comment, however, as to whether there are circumstances in which, consistent with investor protection, an "access-equals-delivery" model might be appropriate. How many U.S. households currently have Internet access? Is there data supporting the conclusion that most investors have access to the Internet? Similarly, is there data supporting the belief that investors who are online will rely on the Internet as their sole means of obtaining information from issuers or intermediaries? Assuming that this data exists, how will investors know when disclosure information has been

posted on an issuer's web site? If we were to adopt an "access-equals-delivery" model, would we be creating a system that requires ownership of a late-model, sophisticated computer to participate in the securities markets?

We also request comment on whether the disadvantages of electronic delivery, such as lengthy downloading time and system capacity limitations, are likely to be reduced or eliminated in the near future. Also, will documents delivered online be more readable in the future?

2. Electronic Notice

The 1995 and 1996 Releases stated that notice of the availability of electronically delivered disclosure documents must be delivered directly to each investor. The 1995 Release further stated that notice on an Internet web site and otherwise by publication in a newspaper is insufficient to alert a consenting investor of the availability on a web site of a disclosure document.[102]

We continue to believe that direct notice of the availability of electronic disclosure documents is necessary unless an issuer or market intermediary can otherwise establish that delivery has been made. For example, a broker-dealer cannot meet its confirmation obligation under Exchange Act Rule 10b-10[103] by simply placing a notice on its web site that a customer must "pull" down to access. Rather, a Rule 10b-10 confirmation must be sent directly to the broker-dealer's customer. Additionally, messages posted to an investor's account at his or her broker-dealer's web site regarding the availability of electronic disclosure documents are insufficient, unless they are promptly forwarded directly to the investor. We request comment, however, as to whether changes in the sophistication and expectations of Internet users as well as advances in Internet technology warrant re-evaluation of our position on whether account messages on an Internet web site provide sufficient notice. Were we to adopt such an approach, would it result in shifting the burden from issuers to notify security holders of the availability of electronic disclosure documents to security holders to search for material information? Would a burden shift be consistent with our investor protection mandate?

3. Implied Consent

In lieu of "access-equals-delivery," some commentators have argued for changes to our electronic delivery scheme, particularly with respect to investor consent to electronic delivery. We understand that obtaining investor consent poses the most significant barrier to the use of electronic delivery by issuers and market intermediaries.[104] Some have suggested that electronic delivery would be more common if issuers and intermediaries with delivery obligations were permitted to use a form of implied consent to evidence satisfaction of delivery. Under an implied consent model, an issuer could rely on electronic delivery if investors do not affirmatively object when notified of the issuer's or intermediary's intention to deliver documents in an electronic format. Proponents of implied consent argue that the difficulties in obtaining investors' consents to electronic delivery result not from the unwillingness of investors to use an electronic medium, but rather from investors' inattention to requests for affirmative consent.

We are concerned that investors would be significantly and adversely affected by implied consent through their inadvertent failure to object. We understand that in many circumstances investors are not inattentive to requests for consent to electronic delivery, but rather, purposely do not consent.[105] Thus, we generally believe that it would not be appropriate for issuers or intermediaries to rely on implied consent.[106] We request

comment, however, as to whether there are particular circumstances under which an implied consent model would be appropriate.[107] For example, would it be appropriate where investors previously have provided an electronic mail address to an issuer or intermediary and have indicated that electronic mail is one of their methods of communication for investing purposes? How would the fact that investors sometimes change their electronic mail addresses affect an implied consent model?

4. Electronic-Only Offerings

The 1995 Release stated that, as a matter of policy, issuers and market intermediaries with delivery obligations would need to continue to deliver paper copies of documents that are required to be delivered until such time as electronic media becomes more universally accessible and accepted.[108] This policy, however, does not preclude "electronic-only" offerings. In an "electronic-only" offering, investors are permitted to participate only if they agree to accept electronic delivery of all documents in connection with the offering. The 1995 Release provided that an issuer could structure its offering as one that would be effected entirely through electronic media.[109] Even in these offerings, however, an issuer or intermediary must provide the required documents in paper form if an investor revokes his or her consent before valid delivery is made. Additionally, the 1995 and 1996 Releases both provided that a paper copy of information previously delivered electronically should be delivered whenever an investor so requests, even when the revocation is made after electronic delivery or there has been no revocation at all.[110]

Should the paper back-up system be required for offerings where participation is conditioned upon consent to electronic-only delivery?[111] If not, would there be any adverse effects? Would we be creating a two-tiered system with access to some offerings available only to investors with Internet access? Should an issuer be permitted to require investors to pay for paper delivery when they have consented to electronic-only delivery? If the paper back-up system were no longer required, how should investors be advised of any payment requirement and any attendant risks? In the event of technical difficulties, how would issuers and intermediaries comply with their delivery obligations, other than by providing paper delivery? Should there be an exception to paper delivery where technological difficulties would prevent electronic delivery in a timely manner? What disclosures should be included in the notice to investors? If the paper back-up system were no longer required generally, are there any particular types of offerings, such as dividend reinvestment and direct stock purchase plans, or DRSPPs, where the paper back-up system should be retained?

If the paper back-up system were no longer required for public offerings, how would issuers meet their prospectus delivery requirements for secondary market trading?[112] Should an issuer be permitted to condition participation in offerings upon consent to electronic delivery of all required Exchange Act reports? If not, should an issuer be required to obtain a separate consent from security holders in the newly public issuer in order to permit electronic-only delivery of required Exchange Act reports?

For a mutual fund, would there be any potential adverse effects of limiting electronic-only offerings to investors who provide an irrevocable consent to electronic delivery of all future disclosure documents, including shareholder reports, proxy solicitation materials and prospectuses provided in connection with the purchase of additional fund shares?

5. Access to Historical Information

One of the unique characteristics of the Internet is the continuous

availability of information once it is posted on a web site. For example, a press release disseminated over a wire service or through other customary means is considered to have been "issued" once, and thereafter is not recirculated to the marketplace. The same press release posted on an issuer's web site potentially has a longer life because it provides a record that can be accessed by investors at any time and upon which investors potentially could rely when making an investment decision without independent verification. In effect, a statement may be considered to be "republished" each time that it is accessed by an investor or, for that matter, each day that it appears on the web site.

Commentators have suggested that if a statement is deemed to be republished, it may potentially give rise to liability under Section 10(b) of the Exchange Act and Rule 10b-5.[113] We request comment on how to facilitate the availability of historical information on the Internet consistent with the federal securities laws. Additionally, how can technology help minimize investor confusion while providing for the accessibility of potentially useful information?

6. Communications When in Registration

Although we believe that our long-standing guidance on permissible communications is adequate to address many of the questions applicable to an issuer's web site content when in registration, we recognize that the Internet has spawned new types of businesses that do not easily fit within the existing disclosure framework. For example, many issuers not only use their web sites to conduct business through the Internet, their web sites are their businesses. In this instance, when an issuer is in registration, how should the issuer segregate its business activities from its offering activities? In other words, how can an issuer comply with its obligations under Section 5 of the Securities Act while maintaining communications to the marketplace related solely to its legitimate business activities?

Are there special considerations for mutual funds because they continuously offer and sell their shares to the public and, therefore, always maintain effective registration statements? For a mutual fund that continuously offers its shares, what, if any, facts and circumstances should overcome the strong inference[114] that hyperlinked information on a third-party web site that meets the definition of an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act is attributable to an issuer for purposes of anti-fraud liability?

7. Internet Discussion Forums

Another distinguishing characteristic of the Internet is its facility for interactive discussion. This discussion can, and does, cover virtually any subject, including issuers and their securities. In the corporate context, at least three different means of Internet "discussions" have evolved. First, many web sites offer moderated discussion forums, typically led by a real-time moderator and featuring a guest "expert." Other web sites contain "bulletin boards," cyberspace message centers where comments concerning issuers, securities or industries can be posted and saved for viewing over an extended period of time. Finally, numerous web sites host discussion groups, or "chat rooms," with real-time postings and viewing by participants on a wide variety of topics.

These discussion forums present unique and often difficult problems for issuers.[115] We request comment on any issues relating to Internet discussion forums. In particular, what effect, if any, do discussion group communications have on an issuer's stock price? In addition, should issuers or broker-dealers that host online discussion forums adopt and maintain

"best practices" for participation in these forums? If so, who should establish these best practices, and what should be included in them?

Another area of significant concern involves the use of Internet discussion forums by an issuer's employees. Are issuers currently using specific procedures covering the use of electronic forms of communications by their employees? If so, what are these "best practices"?

E. Examples

A series of examples is provided below to illustrate various applications of the interpretations outlined in this release and to provide guidance in applying them to specific facts and circumstances. We note, however, that these examples are non-exclusive methods of ways to comply with the above interpretations. Additionally, the analysis required to determine compliance with the federal securities laws is fact-specific, and any different or additional facts might require a different conclusion. We request comment on whether other examples might be appropriate for publication.

(1) Investor John Doe gives XYZ Delivery Service his informed consent over the telephone using automated touch tone instructions (after accessing the service using a personal identification number).[116] The automated instructions informed John Doe of the manner, costs and risks of electronic delivery. The consent related to electronic delivery of documents. Before delivering any electronic documents to Investor John Doe, XYZ Delivery Service sends Investor John Doe a letter confirming that he had consented to electronic delivery.

The confirming letter sent by XYZ Delivery Service provides assurance that John Doe consented to the same extent as if he had provided a written or electronic consent. Thus, XYZ Delivery Service's procedures would evidence satisfaction of delivery. We also note that XYZ Delivery Service has reason to be assured of the authenticity of John Doe's telephonic consent because of his use of a personal identification number.

(2) In speaking with Broker DEF over the telephone, Investor Jane Doe (a long-term customer of Broker DEF) consents to electronic delivery to all future documents of Company XYZ on Company XYZ's Internet web site. Broker DEF agrees to notify Jane Doe by electronic mail (or other acceptable means of notification) that Company XYZ has posted the documents on its web site when the posting occurs. Before obtaining Jane Doe's consent, Broker DEF advises Jane Doe that she may incur certain costs associated with delivery in this manner (for example, online time and printing) and possible risks (for example, system outages). Broker DEF also advises Jane Doe that the term of the consent is indefinite but that the consent can be revoked at any time. Broker DEF maintains a signed and dated memorandum in its files regarding the details of the conversation.

In this situation, Jane Doe's consent would be informed regarding the manner, costs and risks of electronic delivery. We also note that Broker DEF has reason to be assured of the authenticity of Jane Doe's telephonic consent because Jane Doe is well known to Broker DEF.

(3) In seeking a global consent to electronic delivery from Investor John Doe, Broker DEF specifies that the electronic media that may be used to deliver documents will be CD-ROM, an Internet web site, electronic mail or facsimile transmission, and further advises John Doe that if he does not have access to all of these media he should not consent to electronic delivery. John Doe consents to electronic delivery from Broker DEF.

In this situation, John Doe's consent would be informed regarding the manner of electronic delivery. The consent need not specify which form of

media a specific issuer may use.

(4) Investor Jane Doe consents to delivery via a third-party delivery service's Internet web site of all future documents of Company ABC, Company XYZ and any additional companies in which she invests in the future. Jane Doe subsequently purchases securities of Company DEF. Thereafter, Company XYZ and Company DEF post their final prospectuses on the third-party web site and notify Jane Doe by electronic mail (or other acceptable means of notification) of the availability of the prospectuses. Company ABC does not post its prospectus on the third-party web site but delivers a CD-ROM version of its prospectus.

Company XYZ has satisfied its delivery obligations. Additionally, although not specifically identified in the consent, Company DEF has satisfied its delivery obligations because the consent covered delivery by companies added at a later date. Absent other factors indicating that Jane Doe actually accessed Company ABC's CD-ROM prospectus, however, Company ABC's procedure would not satisfy its delivery obligations because Jane Doe consented to delivery only by an Internet web site. If consent is to be relied upon, the consent must cover the specific electronic medium or media that may be used for delivery.

(5) Investor John Doe consents to delivery of all future documents of Company XYZ electronically via Company XYZ's Internet web site, including documents delivered in PDF. The form of consent advises John Doe of the system requirements necessary for receipt of documents in PDF and cautions that downloading time may be slow. Company XYZ places its proxy soliciting materials and annual report to security holders in PDF on its Internet web site, with a hyperlink on the same screen enabling users to download a free copy of Adobe Acrobat (software permitting PDF viewing) and a toll-free telephone number that investors can use to contact someone during Company XYZ's business hours for technical assistance or to request a paper copy of a document.

Company XYZ has satisfied its delivery obligations. Under these circumstances, John Doe can effectively access the information provided.

(6) Company XYZ, which is engaged in a public offering of its securities, places its preliminary prospectus on its Internet web site. In the Business section of the prospectus, Company XYZ has placed a hyperlink to a report by a marketing research firm located on a third-party web site regarding Company XYZ's industry.

Because the hyperlink is embedded within the prospectus, the report becomes a part of the prospectus and must be filed with the Commission. In addition, Company XYZ must obtain a written consent from the person preparing the report in accordance with Securities Act Rule 436, 17 CFR 230.436. This consent also must be filed with the Commission. Moreover, the report will be subject to liability under Section 11 of the Securities Act, as well as other anti-fraud provisions of the federal securities laws.

(7) Company XYZ, which is engaged in a public offering of its securities, places its preliminary prospectus on its Internet web site. Each of the topics in the Table of Contents is a hyperlink, allowing investors to pick a topic and immediately be hyperlinked to the section in the prospectus relating to that topic.

The hyperlinks present no federal securities law issues. The hyperlinks do no more than allow investors to turn electronically to a specific page in the prospectus.

(8) Company XYZ, which is engaged in a public offering of its securities,

places its preliminary prospectus on its Internet web site. Immediately following the button for the prospectus on the web site, Company XYZ offers investors the ability to download its financial statements in spreadsheet format. This financial information is not modified in any way from that contained in the filed document.

The provision of financial statements in spreadsheet format would be permissible when the download results only in a mere difference in format without any difference in text. The completeness of the financial statements must not be compromised by any difference in the electronic version from the paper version.

III. Solicitation of Comment

We invite anyone who is interested to submit written comments on this release. We request comment not only on the specific issues discussed in this release, but also on any other approaches or issues involved in facilitating the use of electronic media to further the disclosure purposes of the federal securities laws. We request comment from the point of view of both parties providing the disclosure, such as issuers and those acting on behalf of issuers, and parties receiving and using the disclosure, such as investors and security holders.

List of Subjects in 17 CFR Parts 231, 241 and 271

Securities

Amendment of the Code of Federal Regulations

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as set forth below:

PART 231 - INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 231 is amended by adding Release No. 33-7856 and the release date of April 28, 2000, to the list of interpretive releases.

PART 241- INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

2. Part 241 is amended by adding Release No. 34-42728 and the release date of April 28, 2000, to the list of interpretive releases.

PART 271- INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

3. Part 271 is amended by adding Release No. IC-24426 and the release date of April 28, 2000, to the list of interpretive releases.

By the Commission.

Jonathan G. Katz
Secretary

Dated: April 28, 2000

Footnotes

1 We do not edit personal, identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

2 Katrina Brooker, They Want You Wired; Brokerage Firms of All Kinds are Tripping Over Themselves to Compete Online for Customers, Fortune, Dec. 20, 1999, at 113. See also Online Brokerage: Keeping Apace of Cyberspace, Report of Laura S. Unger, Commissioner, U.S. Securities and Exchange Commission, Nov. 1999 (the Unger Report), at 1 (the percentage of equity trades conducted online in the first quarter of 1999 was 15.9% of all equity trades). The report is available on our Internet web site at < http://www.sec.gov/news/spstindx.htm>.

3 It is estimated that over 160 brokerage firms offer their customers the ability to trade securities online. See the Unger Report, n. 2 above, at 15.

4 Through March of this year, we had filed approximately 120 Internet-related enforcement actions. See Statement of Chairman Arthur Levitt before the Senate Subcommittee on Commerce, Justice, State and the Judiciary, Committee on Appropriations, re: Appropriations for Fiscal Year 2001, Mar. 21, 2000. The statement is available on our Internet web site at < http://www.sec.gov/news/testmony/ts052000.htm>. We also have conducted three Internet enforcement sweeps. See SEC Steps Up Nationwide Crackdown Against Internet Fraud, Charging 26 Companies and Individuals for Bogus Securities Offerings, SEC Press Release 99-49 (May 12, 1999); SEC Continues Internet Fraud Crackdown, SEC Press Release 99-24 (Feb. 25, 1999); Purveyors of Fraudulent Spam, Online Newsletters, Message Board Postings, and Websites, SEC Press Release 98-117 (Oct. 28, 1998). These press releases are available on our Internet web site at < http://www.sec.gov/news/presindx.htm>.

5 See Securities Act Release No. 7760 (Oct. 22, 1999) [64 FR 61408]. This new regulatory system relaxes restrictions on communications in cash tender offers, mergers, exchange offers and proxy solicitations.

6 We also are considering separately the use of road shows in the capital-raising context.

7 A "hypertext link," or "hyperlink," is an electronic path often displayed in the form of highlighted text, graphics or a button that associates an object on a web page with another web page address. It allows the user to connect to the desired web page address immediately by clicking a computer-pointing device on the text, graphics or button. See Harvey L. Pitt & Dixie L. Johnson, Avoiding Spiders on the Web: Rules of Thumb for Issuers Using Web Sites and E-Mail, in Practising Law Institute, Securities Law & the Internet, No. 1127 (1999), at 107-118, n. 5.

8 In this release, when we refer to a Section 10 prospectus, we are referring both to prospectuses satisfying the requirements of Section 10(a) of the Securities Act, 15 U.S.C. §77j(a), and prospectuses satisfying the requirements of Section 10(b) of the Securities Act, 15 U.S.C. §77j(b).

9 15 U.S.C. §77b(a)(3).

10 "In registration" is a term that refers to the entire registration process under the Securities Act, "at least from the time an issuer reaches an understanding with the broker-dealer which is to act as managing underwriter [before] the filing of a registration statement" until the end of the period during which dealers must deliver a prospectus. See Securities Act Release No. 5180, at n. 1 (Aug. 16, 1971) [36 FR 16506]. An issuer will not be considered to be "in registration" at any particular point in time solely because it has filed one or more registration statements on Form S-8,

17 CFR 239.16b, or it has on file a registration statement for a delayed shelf offering on Form S-3, S-4, F-3 or F-4, 17 CFR 239.13, 239.25, 239.33 or 239.34, and has not commenced or is not in the process of offering or selling securities "off of the shelf."

11 Securities Act Release No. 7233 (Oct. 6, 1995) [60 FR 53458] (the 1995 Release).

12 15 U.S.C. §77a, et seq.

13 15 U.S.C. §78a, et seq.

14 15 U.S.C. §80a-1, et seq.

15 Securities Act Release No. 7288 (May 9, 1996) [61 FR 24644] (the 1996 Release). The 1996 Release also provided additional examples supplementing the guidance in the 1995 Release. Since 1996, we have further addressed the use of electronic media in the context of offshore sales of securities and investment services, see Securities Act Release No. 7516 (Mar. 23, 1998) [63 FR 14806] (the 1998 Release), and cross-border tender offers, see Securities Act Release No. 7759, Section II.G (Oct. 22, 1999) [64 FR 61382].

16 15 U.S.C. §80b-1, et seq.

17 In Section D below, we also request comment on a number of additional issues involving electronic delivery.

18 See the 1995 Release, n. 11 above, at n. 29 and the accompanying text.

19 See the 1996 Release, n. 15 above, at n. 23.

20 See John R. Hewitt & Richard B. Carlson, Securities Practice and Electronic Technology, Law Journal Seminars-Press (1998), at 3.01[1].

21 See Stephen I. Glover & Lanae Holbrook, Electronic Proxies, Nat. L. J., Mar. 29, 1999, at B5; See also Jennie Blizzard, Investor Relations Gets Tech Updates; Proxy Voting Among the Signs of Change, Rich. Times Dispatch, Mar. 28, 1999, at E1. Similarly, mutual fund shareholders may effect purchases and redemptions of fund shares telephonically, where permitted by the fund and under applicable state law.

22 The record of telephonic consent should contain as much detail as any written consent, including whether the consent obtained is global and what electronic media will be used.

23 See, for example, Ex. 1 and Ex. 2 in Section E below.

24 See the 1995 Release, n. 11 above, at Ex. 3 (consent by investor John Doe to delivery of all future documents by electronic mail) and Ex. 26 (consent by record holder Jane Doe to delivery of all documents via Company XYZ's web site).

25 Id. at Ex. 6. Under this interpretation, we also believe, and we further clarify today, that an issuer or broker-dealer may rely on a consent obtained by a third-party document delivery service, but the issuer or broker-dealer retains the ultimate responsibility for assuring that the consent is authentic and for the delivery of required documents.

26 Generally, a consent is considered to be informed when an investor is apprised that the document to be provided will be available through a specific electronic medium or source (for example, through a limited proprietary system or at an Internet web site) and that there may be costs

associated with delivery (for example, in connection with online time). In addition, for a consent to be informed an investor must be apprised of the time and scope parameters of the consent. For example, an investor should be made aware of whether the consent is indefinite and extends to more than one type of document. See note 29 of the 1995 Release, n. 11 above, for a discussion of the information that must be disclosed in an informed consent.

27 We recognize that some brokerage firms require accounts to be opened online and all account transactions to be initiated and conducted online. In these instances only, the opening of a brokerage account may be conditioned upon providing global consent to electronic delivery.

28 See the 1995 Release, n. 11 above, at Section II.C.

29 See n. 18 above.

30 See, for example, Ex. 3 in Section E below.

31 See, for example, Ex. 4 in Section E below.

32 See the 1995 Release, n. 11 above, at n. 24 and the accompanying text.

33 In 1999, we began modernizing the Electronic Data Gathering, Analysis and Retrieval, or EDGAR, system. See Securities Act Release No. 7684 (May 17, 1999) [64 FR 27888]. One effect of the modernization was to allow filings to be submitted in HTML. Filers also were given the option of accompanying their required filings with unofficial copies in PDF.

34 See, for example, Ex. 5 in Section E below. We remind issuers and intermediaries that we will not consider an electronically delivered document to have been preceded or accompanied by another electronic document unless investors are provided with reasonably comparable access to both documents. See the 1996 Release, n. 15 above, at Ex. 4.

35 See the 1995 Release, n. 11 above, at Ex. 14.

36 Id. at Ex. 15 and Ex. 16.

37 See Sections 2(a)(10) and 5(b) of the Securities Act, 15 U.S.C. §§77b(a)(10) and 77e(b).

38 Some securities lawyers have raised similar issues concerning the use of a web site in connection with proxy solicitations, tender offers and other transactions that require documents to be filed or delivered under the federal securities laws. Although the guidance in this section focuses on issues relating to the registration process, it applies by analogy to all documents required to be filed or delivered under the federal securities laws.

39 In Example 14 of the 1995 Release, see n. 11 above, we stated that documents that appear in close proximity to each other on the same web site menu are considered delivered together. Given the layout of a typical web page, which often includes multiple "buttons" spread throughout the page rather than in menu format, issuers may be confused by our reference in the 1995 Release to "menu." Two or more documents will be considered to be delivered together if the buttons are in proximity to each other on the same screen, whether or not they are on the same "menu."

40 By "free writing," we mean communications that would constitute an "offer to sell," "offer for sale" or "offer," including every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value under Section 2(a)(3) of the Securities Act made by

means other than a prospectus satisfying the requirements of Section 10 of the Securities Act, 15 U.S.C. §77j. Section 2(a)(10) of the Securities Act defines the term "prospectus."

41 When an issuer includes a hyperlink within a document required to be filed or delivered under the federal securities laws, we believe it is appropriate for the issuer to assume responsibility for the hyperlinked information as if it were part of the document. We believe that the inclusion of a hyperlink to an external web site or document demonstrates the hyperlinking party's intent to make the information part of its communication with investors, security holders and the markets. Additionally, because written offers must be made exclusively through a Section 10 prospectus, when an issuer includes a hyperlink to an external web site or document within a Section 10 prospectus, the issuer expresses its intent to have the hyperlinked information treated as part of this exclusive means of offering its securities. An issuer (or person acting on behalf of the issuer, including an intermediary with delivery obligations) must make it clear to investors where the document from which it is hyperlinking begins and where it ends.

We are aware that today many standard software programs can automatically convert an inactive uniform resource locator, or URL, into an active hyperlink, either at the time the document including the URL is created or when the document is later accessed. Consequently, as with an embedded hyperlink, an issuer that includes a URL to a web site in a Section 10 prospectus or other document required to be filed or delivered under the federal securities laws is responsible for information on the site that is accessible through the resulting hyperlink. To the extent that the document is required to be filed with the Commission, the hyperlinked information must be filed as part of the document. Inclusion of the URL to the Commission's Internet web site is mandated by some of our disclosure requirements. See, for example, Item 502(a)(2) of Regulation S-K, 17 CFR 229.502(a)(2); Item 12(c)(2)(ii) of Form S-3, 17 CFR 239.13. Additionally, the Division of Corporation Finance has previously indicated that the inclusion of the URL for an issuer's web site in a registration statement, along with the statement "[O]ur SEC filings are also available to the public from our web site," will not, by itself, include or incorporate by reference the information on the site into the registration statement (unless the issuer otherwise acts to incorporate the information by reference). See Division of Corporation Finance interpretive letters Baltimore Gas and Electric Company (Jan. 6, 1997); ITT Corporation (Dec. 6, 1996). In these two situations, we would not consider the presence of the URL to make our web site, or an issuer's web site, as the case may be, part of a document if the party presenting the URL takes reasonable steps to ensure that the URL is inactive (for example, by removing "a>href" tagging) and includes a statement to denote that the URL is an inactive textual reference only.

42 An issuer may not use embedded hyperlinks exclusively to satisfy the line item disclosure requirements of its filings under the federal securities laws. For example, an issuer filing a registration statement on Form S-1, 17 CFR 239.11, could include embedded hyperlinks to its Exchange Act reports so that they are readily available, but only if the issuer otherwise includes full disclosure of all required issuer information within the body of the Section 10 prospectus. This is because the Commission's rules and forms contemplate a single comprehensive, integrated document so that readers can understand the document's content without having to access numerous other documents.

We also note that simply embedding a hyperlink within a document does not satisfy the line item disclosure requirement for the incorporation of certain information by reference as provided under the Commission's rules

and forms. In order for a document to be incorporated by reference in a filed document, an issuer must include a statement to that effect in the document listing the incorporated documents. See, for example, Item 12(a) of Part I of Form S-3; General Instruction G(4) of Form 10-K, 17 CFR 249.310; Exchange Act Rule 12b-23(b), 17 CFR 240.12b-23(b).

43 15 U.S.C. §77k. See, for example, Ex. 6 in Section E below. Of course, other Securities Act and Exchange Act liability provisions also may apply. See, for example, Sections 12(a)(2) and 17(a) of the Securities Act, 15 U.S.C. §§77l(a)(2) and 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C §78j(b), and Rule 10b-5, 17 CFR 240.10b-5. Although a prospectus or other disclosure document on an issuer's web site may contain a hyperlink to an external web site or document under the circumstances described in this section, a hyperlink to an external site or document (including exhibits) currently may not be embedded in any filed EDGAR document. See Rule 105 of Regulation S-T, 17 CFR 232.105; Securities Act Release No. 7684 (May 17, 1999) [64 FR 27888]. However, filers may include hyperlinks to different sections within a single HTML document. Under our recently adopted rules implementing the next phase of EDGAR modernization, the system now permits hyperlinks from an EDGAR filing to its exhibits and to other filings in the EDGAR database on our Internet web site at <http://www.sec.gov>. See Securities Act Release No. 7855 (Apr. 24, 2000) [65 FR 24788]. The new rules address the liability treatment of material hyperlinked from the EDGAR database into EDGAR filings, but do not address broader issues of hyperlinks on issuers' web sites.

44 15 U.S.C. §77l.

45 See n. 40 above. While the proximity of information on an issuer's web site to a Section 10 prospectus posted on the same site will determine whether multiple documents are delivered together, it does not dispose of the issue of whether the information would constitute an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act. We provide guidance in Section B below about permissible communications on an issuer's web site when the issuer is in registration.

46 17 CFR 240.15c2-12.

47 See Exchange Act Release No. 7049 (Mar. 9, 1994) [59 FR 12748]. All issuers, whether offering and selling securities in registered or exempt offerings, are subject to anti-fraud liability. See Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5.

48 While our guidance in this section addresses the responsibilities of issuers, broker-dealers and investment advisers also should carefully consider their responsibilities for hyperlinked information.

49 See Securities Act Release No. 6504 (Jan. 20, 1984) [49 FR 2468]. Where a statement is materially misleading, an issuer and any persons responsible for the statement would be liable under the anti-fraud provisions of the federal securities laws. See, for example, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied sub nom., Coates v. SEC, 394 U.S. 976 (1969).

50 When an issuer is offering or selling securities, similar questions arise under Section 17(a) of the Securities Act. Although our discussion is framed in terms of Section 10(b) of the Exchange Act and Rule 10b-5, it applies equally to questions arising under Section 17(a).

51 See n. 54 below.

52 See In the Matter of Presstek, Inc., Exchange Act Release No. 39472

(Dec. 22, 1997), n. 54 below.

53 See, for example, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980); In the Matter of Syntex Corp. Sec. Litig., 855 F.Supp. 1086 (N.D. Cal. 1993); In the Matter of Caere Corp. Sec. Litig., 837 F. Supp. 1054 (N.D. Cal. 1993).

54 See, for example, In the Matter of Cypress Semiconductor Sec. Litig., 891 F. Supp. 1369, 1377 (N.D. Cal. 1995), aff'd sub nom. Eisenstadt v. Allen, 113 F.3d 1240 (9th Cir. 1997) ("distributing analysts' reports to potential investors may, depending on the circumstances, amount to an implied representation that the reports are accurate"); In the Matter of RasterOps Corporation Sec. Litig., [1994-95 Tr. Binder] Fed.Sec.L.Rep. (CCH) ¶98,467 (N.D. Cal. 1994) ("act of circulating the reports amounts to an implied representation that the information contained in the reports is accurate or reflects the company's views"). See also Presstek, n. 52 above. In Presstek, we stated that "in the Commission's view, under certain circumstances, an issuer that disseminates false third-party reports may adopt the contents of those reports and be fully liable for the misstatements contained in them, even if it had no role whatsoever in the preparation of the report." Id. at 32.

55 We do not discuss the application of the "entanglement" theory to hyperlinked information on third-party web sites. We recognize that the "entanglement" and "adoption" theories often overlap and that some of the factors relating to an adoption analysis also may apply to an entanglement analysis. Once the threshold issue of whether hyperlinked third-party information has been adopted by an issuer has been answered, a trier of fact would then turn to the issue of whether a claim has been established under Section 10(b) of the Exchange Act and Rule 10b-5. A claim under Section 10(b) and Rule 10b-5 generally includes the following elements:

- misrepresentation of a material fact or omission of a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading,

- in the sale, or in connection with the purchase or sale, of a security,

- with the requisite state of mind, or scienter.

Liability to a private plaintiff also requires proof that the plaintiff justifiably relied on the statement containing the material misrepresentation or omission and was injured as a result. See, for example, Robbins v. Koger Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997). Investor reliance on a material misrepresentation or omission need not be shown in a Commission enforcement action. See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Under certain circumstances, there may be a rebuttable presumption of reliance. See, for example, Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (discussing the "fraud on the market" theory). Similarly, where materiality is established, reliance in an omissions case is presumed. See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).

56 See Section B.1.c below.

57 See Section A. 4 above.

58 See Section B.2 below for a discussion of the effect of an issuer hyperlink to information on a third-party web site for purposes of Section 5 of the Securities Act.

59 "Framing" involves a form of hyperlinking. Upon clicking highlighted text, graphics or a button, information from a separate web site is imported into

the web site that is being used and is displayed within a constant on-screen border, or frame. In this case, information from an issuer's web site and the hyperlinked web site would be visible at the same time. The user may not be aware that the displayed material is actually from a different web site.

60 "Inlining" is similar to framing but does not result in a visible border. As with framing, information from an issuer's web site and the hyperlinked web site would be visible at the same time. Also, as with framing, a web site user may not be aware that the displayed material is actually from a different web site.

61 Some of our prior statements may have created the erroneous impression that the use of a disclaimer, in and of itself, may be effective to shield an issuer from adoption of, and liability under Section 10(b) of the Exchange Act and Rule 10b-5 in connection with, information on a third-party web site to which the issuer has established a hyperlink. See, for example, the 1998 Release, n. 15 above, in which we addressed when the posting of offering or solicitation materials on a web site would not be considered activity taking place in the United States. The 1998 Release did not address the anti-fraud provisions of the federal securities laws, however, which continue to reach all Internet activities that satisfy the relevant jurisdictional tests. We do not view a disclaimer alone as sufficient to insulate an issuer from responsibility for information that it makes available to investors whether through a hyperlink or otherwise. To conclude otherwise would permit unscrupulous issuers to make false or misleading statements available to investors without fear of liability as long as the information is accompanied by a disclaimer. Further, we remind issuers that specific disclaimers of anti-fraud liability are contrary to the policies underpinning the federal securities laws. See Section 14 of the Securities Act, 15 U.S.C. §77n, Section 29(a) of the Exchange Act, 15 U.S.C. §78cc(a), Section 47(a) of the Investment Company Act, 15 U.S.C. §80a-46(a), and Section 215(a) of the Investment Advisers Act, 15 U.S.C. §80b-15(a).

62 In Securities Act Release No. 7606A (Nov. 13, 1998) [63 FR 67174], we proposed exemptions to address many of the issues in this area. We will continue to consider these proposals as part of a broader regulatory review of restrictions on communications. We also have adopted rules relaxing restrictions on communications in the business combination context. If a registered offering involves a merger or other business combination, new Securities Act Rules 165 and 166, 17 CFR 230.165 and 230.166, enable the parties to the transaction or persons acting on their behalf to communicate information about the transaction and the parties to it outside of the Section 10 prospectus. See Securities Act Release No. 7760 (Oct. 22, 1999) [64 FR 61408]. Thus, information relating to a business combination may remain on an issuer's web site provided it is filed in accordance with Securities Act Rule 425, 17 CFR 230.425.

63 15 U.S.C. §77e.

64 Except with respect to business combinations, no offers of any kind may be made before filing a registration statement. Section 5(c) of the Securities Act, 15 U.S.C. §77e(c). During the period between filing and delivery of the final prospectus, written offers and offers transmitted by radio or television must conform to the requirements of Section 10 of the Securities Act. See Sections 2(a)(10) and 5(b) of the Securities Act.

65 See n. 68 below. From a policy standpoint, regulating communications during the offering process can be justified as a reasonable balancing of the incentives that the process creates for participants to stimulate interest in

an issuer's securities. During the offering process "the increased compensation to distributors and the compressed period of the selling effort, as well as the issuer's interest in obtaining funds, set up a situation in which potential conflicts of interest between investors and sellers are enhanced." See Reforming the Securities Act of 1933 -- A Conceptual Framework, an Address by Linda C. Quinn, Director, Division of Corporation Finance, Securities and Exchange Commission, to the American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities, Fall Meeting, Nov. 11, 1995, at 6.

66 See Section B.1.a above for a discussion of the effect of an issuer hyperlink to information on a third-party web site for purposes of the anti-fraud provisions of the federal securities laws. We note that the "safe harbor" from Section 5 of the Securities Act contained in Securities Act Rule 137, 17 CFR 230.137, that permits broker-dealers not participating in a distribution to publish or distribute research without the research being deemed to be an "offer" for purposes of Sections 2(a)(11) of the Securities Act, 15 U.S.C. §77b(a)(11), and the "safe harbors" from Section 5 contained in Securities Act Rules 138 and 139, 17 CFR 230.138 and 230.139, that permit broker-dealers to publish or distribute research without the research being deemed to be an "offer to sell" or "offer for sale" for purposes of Sections 2(a)(10) and 5(c) of the Securities Act, do not extend to permit issuers to publish or distribute the same information. See the 1995 Release, n. 11 above, at Ex. 16.

67 See, for example, the information guidelines contained in Securities Act Release No. 5180 (Aug. 16, 1971) [36 FR 16506]; Securities Act Release No. 5009 (Oct. 7, 1969) [34 FR 16870]; Securities Act Release No. 4697 (May 28, 1964) [29 FR 7317]; and Securities Act Release No. 3844 (Oct. 8, 1957) [22 FR 8359].

68 Limited issuer statements about an offering may be made (electronically or otherwise) before the filing of a registration statement. Securities Act Rule 135, 17 CFR 230.135, permits an issuer to notify the public of a proposed offering of securities during the pre-filing period as long as the contents of the notice do not exceed the items specified in the rule. Securities Act Rule 135c, 17 CFR 230.135c, permits issuers subject to the reporting requirements of the Exchange Act, and certain exempt foreign issuers, to make public announcements of proposed private offerings of securities without any such announcement being deemed an "offer" for purposes of Section 5 of Securities Act, as long as it is not used to condition the market and is limited to the factual items specified in the rule. These safe harbors also may be invoked after the filing of a registration statement. Once a registration statement has been filed, an issuer may publish (electronically or otherwise) a brief description of its business and limited additional information on the securities being offered. Securities Act Rule 134, 17 CFR 230.134, permits an issuer to make limited offering communications following the filing of a registration statement as long as the contents of the communications are limited to the items specified in the rule and the other conditions of the rule are met.

Securities Act Rule 135e, 17 CFR 230.135e, permits a foreign private issuer and other offering participants to provide journalists with access to offshore press activities that discuss a present or proposed offering of securities. Rule 135e requires that press-related materials be released only outside the United States and that press conferences be held outside the United States. As a result, we believe that dissemination through the Internet by the issuer or other person covered by Rule 135e of these materials or press conferences will not comply with Rule 135e unless procedures are implemented to assure that only permitted recipients under the rules are able to access the information.

We also have adopted special safe harbor rules for mutual funds, which, unlike typical corporate issuers, continuously offer and sell their shares to the public and, therefore, are continuously subject to the limitations on issuer communications under the Securities Act. Securities Act Rule 482, 17 CFR 230.482, permits a mutual fund to advertise performance and other information about the fund, provided that the advertisement contains only information the substance of which is included in the fund's prospectus. Securities Act Rule 134 contains special provisions for mutual funds, permitting funds to advertise a broad range of information, other than performance information.

69 See Division of Corporation Finance no-action letter Wit Capital Corporation (July 14, 1999).

70 We are aware that municipal securities issuers and municipal securities underwriters have begun to evaluate the online offering process and that a limited number of offerings have been conducted over the Internet. At this time, we are not addressing the implications of online municipal securities offerings, but we encourage comment on this topic. We remind municipal securities issuers and other municipal securities market participants, however, of the potential issue that arises if the municipal securities offering also involves an offering of a separate security that is not being sold pursuant to the exemption from registration contained in Section 3(a)(2) of the Securities Act, 15 U.S.C. §77c(a)(2). If the municipal securities offering involves an offering of a separate security that is being sold in reliance on an exemption from registration contained in Section 4(2) of the Securities Act, 15 U.S.C. §77d(2), or Regulation D, 17 CFR 230.501, et seq., or in a registered offering, our discussion in Section C.2 below applies. We, therefore, caution municipal securities offering participants wishing to offer municipal securities online to evaluate carefully whether any separate security is being sold.

71 See Joseph Weber & Peter Elstrom, Transforming the Art of the Deal, Bus. Wk., July 26, 1999, at 96; Shawn Tully, Will the Web Eat Wall Street?, Fortune, Aug. 2, 1999, at 112.

72 There also have been numerous reports where investors complained that they did not receive shares in an online IPO. See Randall Smith, So Far, "E-Underwriting" Gets a Slow Start, Wall St. J., Aug. 16, 1999, at C1. See also Randall Smith, Online Brokers to Form Bank in Bid for IPOs, Wall St. J., Nov. 15, 1999, at C1; Randall Smith & Lee Gomes, How Get Rich Hopes of Linux Techies Went Up in Flames, Wall St. J., Aug. 18, 1999, at A1.

73 Section 5(a) of the Securities Act, 15 U.S.C. §77e(a).

74 Securities Act Rule 134(d), 17 CFR 230.134(d).

75 See Sections 2(a)(10) and 5(b) of the Securities Act. Section 5(c) of the Securities Act also proscribes both oral and written offers before the filing of a registration statement or while the registration statement is subject to a refusal order, stop order or, before effectiveness, any other public proceeding or examination under Section 8 of the Securities Act, 15 U.S.C. §77h. For a description of the new rules regarding communications in a business combination context, see n. 62 above.

Mutual funds are permitted to make written offers before delivery of the final prospectus under Securities Act Rule 482 (permitting advertisements containing only information "the substance of which" is included in the fund's prospectus) and Securities Act Rule 498, 17 CFR 230.498 (permitting the use of a "profile," a summary disclosure document). Both Rule 482 advertisements and fund profiles are prospectuses under Section 10(b) of the Securities Act, which permits a prospectus that omits in part or

summarizes information to be used to make offers before delivery of the final prospectus.

76 See Securities Act Rules 134 and 135, n. 68 above.

77 See Sections 2(a)(10) and 5(b) of the Securities Act. A confirmation of sale is not deemed a non-conforming prospectus when sent or given after the effective date of a registration statement if a prospectus satisfying the requirements of Section 10(a) of the Securities Act is sent or given before or with the confirmation.

78 See Wit Capital Corporation, n. 69 above.

79 See Rule 502(c) of Regulation D, 17 CFR 230.502(c). General solicitation or advertising is prohibited in offerings under Rules 504, 505 and 506 of Regulation D, 17 CFR 230.504, 230.505 and 230.506. An exception to the prohibition against general solicitation applies to some limited offerings under Rule 504(b)(1), 17 CFR 230.504(b)(1), when an issuer has satisfied state securities laws of specified types. See Securities Act Release No. 7644 (Feb. 25, 1999) [64 FR 11090]. The discussion in this section presumably also would apply to private offerings conducted in reliance on the exemption from registration contained in Section 4(2) of the Securities Act.

Municipal securities issuers and other municipal securities market participants conducting online offerings are directed to our discussion in n. 70 above of the issue that arises if the municipal securities offering also involves an offering of a separate security that is not being sold pursuant to the exemption from registration contained in Section 3(a)(2) of the Securities Act.

80 See the 1995 Release, n. 11 above, at Ex. 20.

81 Divisions of Corporation Finance and Market Regulation interpretive letter IPONET (July 26, 1996).

82 Id.

83 See Rules 501(a) and 506(b)(2)(ii) of Regulation D, 17 CFR 230.501(a) and 230.506(b)(2)(ii).

84 See Division of Corporation Finance interpretive letters Woodtrails - Seattle, Ltd. (Aug. 9, 1982) (providing that no general solicitation exists when an issuer or any person acting on its behalf made offers to investors in prior limited partnerships sponsored by the general partner of the issuer); E.F. Hutton Co. (Dec. 3, 1985) (providing that no general solicitation exists when an offer is made to customers of a broker-dealer because of the broker's pre-existing, substantive relationship with its customers; further, providing that the requisite relationship could be established through a questionnaire providing the broker-dealer with sufficient information to evaluate the offeree's sophistication and financial situation). See also Division of Corporation Finance interpretive letters H.B. Shaine & Co., Inc. (May 1, 1987); Bateman Eichler, Hill Richards, Inc. (Dec. 3, 1985).

85 These web sites would also call into question the ability of an issuer to form a reasonable belief, before sale, as to the qualification of the purchaser, which may be necessary depending on the nature of the exemption. See, for example, Rule 506(b)(2)(ii) of Regulation D. See also Section 3(c)(7) of the Investment Company Act, 15 U.S.C. §80a-3(c)(7).

86 See Securities Act Release No. 6825 (Mar. 15, 1989) [54 FR 11369] at n. 12 ("the staff has never suggested, and it is not the case, that prior relationship is the only way to show the absence of a general solicitation").

87 Id.

88 We encourage web site operators offering these services to work with the Commission staff to resolve any securities law issues raised by their activities. We understand that securities lawyers may have interpreted staff responses to Lamp Technologies, Inc. as extending the "pre-existing, substantive relationship" doctrine to solicitations conducted by third parties other than a registered broker-dealer. See Divisions of Investment Management and Corporation Finance no-action letters Lamp Technologies, Inc. (May 29, 1998) and Lamp Technologies, Inc. (May 29, 1997). We disagree. In the Lamp Technologies no-action letters, the staff of the Divisions of Investment Management and Corporation Finance recognized a separate means to satisfy the "no general solicitation" requirement solely in the context of offerings by private hedge funds that are excluded from regulation as investment companies pursuant to Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, 15 U.S.C. §§80a-3(c)(1) and 80a-3(c)(7).

89 15 U.S.C. §78o.

90 See Section 15(a)(1) of the Exchange Act, 15 U.S.C. §78o(a)(1).

91 See Section 3(a)(12) of the Exchange Act, 15 U.S.C. §78c(a)(12). These "exempted securities" include instruments such as interests or participations in any common trust fund or similar fund maintained by a bank, or certain interests or participations in a single or collective trust fund or securities arising out of a contract issued by an insurance company issued in connection with qualified plans (see Section 3(a)(12)(A)(iii) and (iv) of the Exchange Act, 15 U.S.C. §§78c(a)(12)(A)(iii) and (iv)), as well as mortgage securities (see Exchange Act Rule 3a12-4, 17 CFR 240.3a12-4) and certain designated foreign government securities (see Exchange Act Rule 3a12-8, 17 CFR 240.3a12-8).

92 17 CFR 230.251, et seq., 230.501, et seq. and 230.901, et seq.

93 17 CFR 230.144. The term "exempted securities" for broker-dealer registration purposes under the Exchange Act also does not include securities issued by religious, educational or charitable organizations that are exempt from registration under Section 3(a)(4) of the Securities Act, 15 U.S.C. §§77c(a)(4), or securities that are exempted from registration by means of one of the transactional exemptions found in Section 4 of the Securities Act, 15 U.S.C. §77d.

94 See the IPONET interpretive letter, n. 81 above. The Division of Market Regulation's response in this interpretive letter required that a registered broker-dealer maintain overall supervision of IPONET's activities; otherwise, IPONET would have been required to registered as a broker-dealer under Section 15(a) of the Exchange Act. The Commission requests the Division of Market Regulation to consider whether the activities of a web site operator, such as described in the no-action letters to Lamp Technologies, Inc., see n. 88 above, require the web site operator to register with the Commission as a broker-dealer.

95 Staff guidance is available regarding whether a person is a broker-dealer subject to registration with the Commission. Questions on this subject should be addressed to the Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-1001, (202) 942-0073.

96 See Exchange Act Release No. 8363 (July 29, 1968) [33 FR 11150]. See also Exchange Act Release No. 15194 (Sept. 28, 1978) [43 FR 46397];

Exchange Act Release No. 6778 (Apr. 16, 1962) [27 FR 3991].

97 See In the Matter of Lowell H. Listrom, 50 SEC 883, 887 n. 7 (1992).

98 See Division of Market Regulation Staff Legal Bulletin No. 8 (Sept. 9, 1998), available on our Internet web site at < http://www.sec.gov/rules/othern/slbmr8.htm>.

99 See the 1995 Release, n. 11 above, at n. 16 and the accompanying text.

100 See, for example, Richard S. Dunham, Across America, A Troubling "Digital Divide," Bus. Wk., Aug. 2, 1999, at 40; Michelle Singletary, "Digital Divide" Isn't Just about Internet Access, The Wash. Post, Aug. 22, 1999, at H-1.

101 See Andy Serwer, A Nation of Traders, Fortune, Oct. 11, 1999, at 116, 120 (quoting Charles Schwab CEO David S. Pottruck as saying "`[c]ustomers want a variety of [information] distribution channels . . . . face to face, the mail, the telephone and the Web.'"). Additionally, the National Association of Securities Dealers, Inc. has recognized that the Internet is not sufficient to serve as the sole means of disseminating material corporate information. In January 1999, we issued an order granting approval of a rule change by the NASD that stipulated that the Internet may not be a substitute for the dissemination of corporate news to security holders through traditional news services. See Exchange Act Release No. 40988 (Jan. 28, 1999) [64 FR 5331]. In that release, we explained that "[w]hile Nasdaq believes that it is generally in the public interest to encourage widespread dissemination of information to investors through the Internet, it also believes that it must maintain a level playing field for all investors, including those who do not have Internet access or who may not generally rely on the Internet as their primary source of material corporate news."

102 See the 1995 Release, n. 11 above, at Ex. 24.

103 17 CFR 240.10b-10.

104 See Alexander C. Gavis & Scott Maylander, Mutual Funds and Electronic Delivery: Promise Versus Reality, wallstreetlawyer.com, Feb. 1999, at 1.

105 For a discussion of the impediments to electronic delivery, see n. 101 above and the accompanying text.

106 We set forth alternative procedures in the 1995 Release enabling an issuer to satisfy the evidence-of-delivery element without obtaining informed consent, but only where there is some other indication that the document was in fact received. See the 1995 Release, n. 11 above. None of these procedures, however, permits an issuer or intermediary with delivery obligations to assume consent based upon an investor's inaction. In contrast, the 1996 Release provided that an issuer could presume consent to electronic delivery by employee-security holders who use the electronic mail system "in the ordinary course of performing their duties and ordinarily are expected to log-on to electronic mail routinely to receive mail and communications." See the 1996 Release, n. 15 above, Ex. 1. This interpretation still stands, but we do not extend it to other situations.

107 We recently adopted rules that allow issuers and broker-dealers to rely on implied consent to "householding" of prospectuses and security holder reports; that is, delivery of a single prospectus or report to two or more investors that are members of the same family and share the same residential address. See Securities Act Release No. 7766 (Nov. 4, 1999) [64 FR 62540]. Under these rules, consent to householding can be implied only

if adequate advance notice is given to the investors and they do not object. Due to concerns expressed by commentators, our rules permit householding to a shared electronic address only if the investors consent in writing. Id. We have proposed similar rules for delivery of proxy and information statements to households. See Securities Act Release No. 7767 (Nov. 4, 1999) [64 FR 62548].

108 See the 1995 Release, n. 11 above, at n. 16 and the accompanying text.

109 Id. at n. 27. Companies conducting public offerings must consider prospectus delivery requirements for secondary market trading under Securities Act Rule 174, 17 CFR 230.174. Id.

110 See the 1995 Release, n. 11 above, at n. 27 and the accompanying text and the 1996 Release, n. 15 above, at n. 17 and the accompanying text.

111 This could arise either when an issuer is conducting an electronic-only offering, or when an issuer is conducting a traditional offering, but certain members of the underwriting syndicate that are online brokers offer only electronic delivery.

112 See Securities Act Rule 174.

113 See, for example, Mary Lou Peters, Avoiding Securities Law Liability for a Company's Web Site, Insights, April 1999, at 16; Steven E. Bochner & Anita S. Presser, Corporate Disclosure in the Electronic Age: The Web Site -- Opportunities and Pitfalls, wallstreetlawyer.com, Apr. 1998, at 1.

114 See n. 66 above and the accompanying text.

115 See the Unger Report, n. 2 above, at 75.

116 This example and Example 2 represent alternative ways of recording a telephonic consent. These examples are not the only ways to comply with the interpretation.

http://www.sec.gov/rules/interp/34-42728.htm
