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**Issuers Using The Internet Still Bound By Securities Laws**

Abstracted from: *Is There A Need For New Rule-Making: Securities Offerings, The Internet, And The SEC*

By: Hansjoerg Heppe *SMU Institute of International Banking & Finance, Dallas, TX*  
**Securities Regulation Law Journal** - Vol. 31, No. 1, Pgs. 50-80

Overview: *Considers the financial industry's use of the Internet during the process of marketing registered securities offerings. Examines four SEC releases regarding the use of electronic media and the Internet, and concludes that the existing regulatory structure is sufficiently flexible to cover the new electronic arena.*

**Communications have changed.** Investment bankers and other professionals involved in registered securities offerings have embraced the Internet. Whether the existing securities laws and regulations are up to the new task is Hansjoerg Heppe's query while examining electronic delivery, gun-jumping, electronic road shows, and fair disclosure. One of the key elements in a registered offering is the delivery of SEC-mandated documents. While the original drafters of the 1933 and 1934 Acts clearly contemplated the mailing of paper prospectuses to investors, the SEC acknowledges that communications have changed. In 1995 and 1996 releases, the SEC outlined three elements of adequate electronic delivery: investors must have notice that the information is available electronically; they must have access to the electronic information; and the issuer (or an intermediary) must have evidence of delivery. Issuers must be careful during the period when they are planning an offering but have not yet filed a registration statement, limiting their public communications to ordinary-course business and financial information. They may not issue nonroutine corporate publicity, which includes statements contained on, or linked to, the corporate website.

**Watch out for jumping guns.** If the company is so young that it has no history of regularly disclosing information to the market, the author reminds, even posting routine business news on its website may illegally condition the market. Thus issuers planning a public offering must monitor information posted on the company's website, especially any new information placed on the investor-relations page. Significantly, if the issuer plans to use only the traditional paper format for its prospectus, information appearing electronically on its website might still operate to condition the market. Some observers warn companies to take care about including an Internet address in their paper prospectus. Doing so, the author warns, may increase the likelihood that potential investors will visit the site and the risk that they might then become conditioned.

**Electronic road shows.** Road shows have always been oral presentations. The author notes that attendees traditionally do not receive any written materials, lest the issuer be charged with having issued an impermissible written prospectus. As early as 1933, Section 2(a)(10) of the Securities Act prohibited electronic offerings during the waiting period (when the only form of electronic offering was a radio advertisement). By the late 1990s however, SEC no-action letters began to pave the way for electronic road shows. The SEC allowed Private Financial Network to broadcast videos of public offering road shows, as long as it limited the distribution, made certain that subscribers received a prospectus before the broadcast, and took reasonable steps to ensure that the information in the road show was not inconsistent with that in the prospectus. As the SEC gained more experience with electronic road shows, it began to loosen the conditions and expand the number and type of permitted viewers—a deliberate departure from the traditional prohibition against electronic offerings during the waiting period, suggests the author.

**Investor democracy and fair disclosure.** As an advanced medium of communications, the Internet has opened a new world of access to information for individual investors. They can access financial information on the same terms as market professionals, including news developments and market data. Further leveling the playing field, Regulation FD eliminates the unfairness of companies selectively providing material information to analysts, institutional investors, and insiders before disclosing it to the general public. The issuer must now disclose the information to everyone by a method reasonably designed to provide broad, nonexclusionary distribution to the public. The author points out that the Internet can be an effective method of disclosing the information, but it cannot serve as the only communication mechanism. Issuers cannot simply post the information on their own websites. Rather, the website must function in conjunction with other methods, such as press releases, press conferences, or public conference calls.

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