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NOTE

GREATER INVESTOR OUTREACH AT THE CLICK OF A MOUSE: INTERNET AND CLOSED-CIRCUIT ROADSHOWS SHOULD REACH RETAIL INVESTORS

INTRODUCTION

Imagine you are a money manager who works for a major Wall Street pension fund investment company. In the last month you have sat in three different hotel conference rooms and have listened to companies try to push their securities and the reasons your firm should buy them. You are tired of attending these meetings but realize that listening to the management's sales pitch is important because it allows you to get a better sense of how the company is run in a way that reading the financial reports alone just does not provide.

Now imagine that you are presented with an alternative. You can listen to the company's presentation at your convenience at home or in the office. You can, for example, call up a certain website on your personal computer, type in a password, and view a videotaped recording of the presentation. You are told you can pause the video in the event that you would like to leave the room. You may also have the option of watching the sales presentation at home or work as it occurs elsewhere (much like you watch a live television show). You can even pose questions to the presenters via an e-mail hook-up from a personal computer. You may also have the possibility of watching a videotaped recording of the sales event after it has taken place. The benefit to you, as a busy money manager, is that you do not have to leave the home or office and can still get the benefits of watching a visual presentation about the company.

Imagine again that you are an executive of a company who would like to raise capital by selling securities to the public.

You have convinced a major Wall Street firm to underwrite the transaction, and the deal you have agreed to states that the underwriters will buy the securities at a discount price and resell them to pension fund investment companies, mutual funds, insurance companies, and other institutional investors.¹ The underwriters have told you that you will have to travel the country and make sales presentations to convince investors to buy the securities. They explain that the sales pitches are called "roadshows"² and that they tend to be fairly costly.³ The presentations are generally given over breakfast or lunch⁴ and are done before the securities are made available for retail purchase on the stock exchanges or over the counter ("OTC") markets.⁵ Now imagine that you are presented with an alternative. You can video record the sales presentations and have them made available for viewing on an Internet website. You can also record the sales demonstrations as they occur and allow investors to watch from their offices via a closed-circuit⁶ (or limited viewing) television link. Investors can also have the option of listening to the presentations after the fact (called "delayed-time") on the closed-circuit system. The benefit to you, as a securities issuer, is that you can have the presentations

¹ Institutional investors are persons who invest other people's money for large investment companies. See BLACK'S LAW DICTIONARY 801 (6th ed. 1990) [hereinafter BLACK'S LAW].

² The sales presentations are called "roadshows" because companies and their lead underwriters travel the country and abroad to give the demonstrations. See KENT D. STUCKEY, INTERNET AND ONLINE LAW § 11.02[2][a], at 11-16 (1998).

³ See Nancy Gondo, *Internet May Open Road Shows to Small Investors*, INV. BUS. DAILY, Dec. 10, 1997, at A9 (typical roadshow costs \$30,000 to \$150,000, while an Internet roadshow costs around \$15,000).

⁴ See Stephen J. Schulte, *IPO Roadshows Today: A Primer for the Practitioner*, 1068 PLI/CORP 527, 531 (Sept. 1998).

⁵ See *id.* at 533. A stock exchange is a centralized trading place where customers buy and sell stocks in an auction-like process. An over the counter market ("OTC"), on the other hand, is a decentralized place where trades are made by brokers on behalf of customers on the broker's own account. See generally LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 617-18 (3d ed. 1995).

⁶ Closed-circuit television involves the use of a privately-operated television circuit that limits reception to subscribers and provides no general broadcast capabilities. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 359 (3d ed. 1992) [hereinafter AMERICAN HERITAGE DICTIONARY].

heard by investors who might not otherwise be able to attend the traditional live roadshow presentation. You can also reduce travel costs by consolidating your viewing audience.

Finally, imagine that you are an ordinary retail investor or, in securities parlance, a "nonaccredited investor,"⁷ meaning that your yearly steady income is less than \$200,000 or you do not have a net worth of \$1,000,000 or more. You would like to receive the same information as the institutional investors because you realize that access to data is pivotal to making wise investment decisions. You have heard about roadshows and would like to attend, but are told that only institutional investors are invited.⁸ Now imagine that in the years ahead you will be able to watch the roadshows over the Internet or on a closed-circuit television system. You may also be able to buy a company's securities over the Internet after viewing the presentation.⁹ No longer will the institutional investors have this information edge because cyberspace¹⁰ will allow you to meet the issuer's management and get the same head start on an impending public offering.¹¹

Internet and closed-circuit roadshows have enormous outreach potential and relieve the securities issuer and lead underwriter of having to travel great distances. In a nutshell, this is what Internet and closed-circuit roadshows are all about.

⁷ Under Regulation D of the 1933 Act, an accredited investor is a person with a steady annual income of at least \$200,000 or a net worth of \$1 million. See 17 C.F.R. § 230.501(a) (1999). For further explanation of nonaccredited investors and electronic roadshows, see *infra* Part III.B.

⁸ See Sarah Hewitt, *SEC Takes Another Step Toward Encouraging Use of On-Line Media*, 3 No. 11 MULTIMEDIA STRATEGIST 1, 1 (Sept. 1997) (explaining that retail investors are not invited to roadshows); Linda C. Quinn & Otilie L. Jarmel, *The Road Less Traveled: The Advent of Electronic Roadshows*, 1046 PLI/CORP 233, 235 (1998) (roadshows typically attended by institutional investors, portfolio managers, analysts and securities sales persons); Schulte, *supra* note 4, at 539 n.1 ("As a general rule, individual investors are not invited to road shows").

⁹ Internet brokers and investment banks, such as WRHambrecht & Co., E*Trade, and Wit Capital, sell securities over the Internet and allow institutional and accredited investors to watch Internet roadshows. See *infra* Part III.F. (discussing WRHambrecht & Co., E*Trade, and Wit Capital).

¹⁰ Cyberspace is the worldwide network of computer terminals that facilitate the transmission of data. See *Merriam Webster Online* (visited Jan. 5, 1999) <<http://www.m-w.com>> [hereinafter MERRIAM WEBSTER ONLINE DICTIONARY].

¹¹ A public offering is a sale of securities to the general public on a stock exchange or OTC market. See STUCKEY, *supra* note 2, at 11-12.

To date, the U.S. Securities and Exchange Commission ("SEC" or "Commission") has given five companies approval to conduct Internet and closed-circuit roadshows.¹² The companies drafted creative arguments to convince the SEC that their proposed activities would not violate securities laws.¹³ The Securities Act of 1933 (the "1933 Act" or "Securities Act")¹⁴ and the Securities Exchange Act of 1934 (the "Exchange Act")¹⁵ regulate the securities markets. Congress enacted these regulations well before the advent of the computer, the Internet, electronic mail ("e-mail"), facsimiles, and television.¹⁶ The 1933 Act and the Exchange Act presupposed that investors had limited access to information.¹⁷ Mass dissemination of the disclosure documents required before a security can be issued to the public was expensive.¹⁸ A structure was needed to ensure that investors could get important information about a company before making an investment decision.

The global availability of information via the Internet and other electronic media¹⁹ has vastly altered these basic assumptions.²⁰ SEC disclosure documents posted on the world

¹² See *infra* Parts III.A-III.E. (discussing in detail the five companies). WRHambrecht & Co., E*Trade, and Wit Capital relied on the authorization given by the SEC to the other service providers to conduct their Internet roadshows. See *infra* Part III.F. (discussing WRHambrecht & Co., E*Trade, and Wit Capital).

¹³ In brief, Internet and closed-circuit roadshow service providers had to convince the SEC that their transmissions are not "radio and television" broadcasts prohibited by section 2(10) the 1933 Act. 15 U.S.C.A. § 77b(10) (West 1997). The service providers accomplished this by instituting controls that simulate oral communication and that limit the viewing audience to institutional and accredited investors. See *infra* Parts III.A-III.E.

¹⁴ Securities Act of 1933, 15 U.S.C.A. §§ 77a-77mm (West 1997 & Supp. 1999). The 1933 Act is primarily concerned with the initial distribution of securities and is designed to provide adequate information about the issuer to allow buyers to make an informed investment decision. See STUCKEY, *supra* note 2, at 11-12.

¹⁵ Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a-78l. The Exchange Act governs the secondary trading market after issuers have received SEC authorization to sell their securities to the public. See STUCKEY, *supra* note 2, at 11-3.

¹⁶ See Steven M.H. Wallman, *Regulation for a New World*, BUS. LAW TODAY, Nov./Dec. 1996, at 3 ("The '33 act was written before commercial television, faxes, e-mail, VCRs and the Internet").

¹⁷ See *id.*

¹⁸ See *id.* Under section 5(b)(2) of the 1933 Act, a prospectus must accompany or precede the delivery of a security to its buyer. See 15 U.S.C.A. § 77e(b).

¹⁹ Electronic media "involves the use of audiotapes, videotapes, facsimiles, CD-ROM, electronic mail ("e-mail"), bulletin boards, Internet Web sites and computer networks" to transmit information. Linda C. Quinn & Ottilie L. Jarmel, *Securities Regulation and the Use of Electronic Media*, 1065 PLI/Corp 371, 374 (Aug. 1998).

²⁰ See *id.*; see also Ida Picker, *Mending the Rules*, 32 INSTITUTIONAL INV. No. 9,

wide web²¹ can now be easily and cheaply downloaded by any person, located anywhere in the world. Today, it is actually much harder to limit the viewing audience than to have documents available for mass viewing on an Internet website.²²

On November 13, 1998, the SEC issued a broadsweeping proposal for public comment called the "aircraft carrier" (the "Aircraft Carrier") that would dramatically change the public offering process.²³ In brief, the Aircraft Carrier is designed to apply the timing flexibility of unregistered securities transactions (generally categorized as private placements or Rule 144A offerings)²⁴ to the public market in order to encourage the registration of securities.²⁵

The proposal has recently come into jeopardy with the resignation of Brian Lane, the director of the SEC's division of corporate finance, who is credited with spearheading the proposal.²⁶ Even so, this Note contends that the SEC should adopt the portions of the Aircraft Carrier that would allow retail investors to watch electronic roadshows.

The Aircraft Carrier expressly allows both institutional investors and retail purchasers to watch electronic roadshows for companies conducting an initial public offering ("IPO") and for secondary offerings by companies that have a reporting history with the SEC. The proposal states that "after filing a

at 2 (Sept. 1, 1998) (ever since adoption of the 1933 Act, lawmakers and regulators have "tweaked, twisted, expanded and shrunk the rules" to make them fit in a "world transformed by technology and globalization").

²¹ The world wide web is "a part of the Internet designed to allow easier navigation of the network through the use of graphical user interfaces and hypertext links between different addresses." MERRIAM WEBSTER ONLINE DICTIONARY, *supra* note 10.

²² See Wallman, *supra* note 16, at 3.

²³ The Regulation of Securities Offerings, Exchange Act Release No. 33-7606A, 1998 WL 792508, at *1-4 (Nov. 17, 1998) [hereinafter Aircraft Carrier Proposal].

²⁴ A private placement involves a direct sale of securities to sophisticated investors and eliminates the need for an underwriter. See LOSS & SELIGMAN, *supra* note 5, at 307-13. Rule 144A, on the other hand, involves the sale of unregistered securities by underwriters to qualified institutional buyers ("QIBs"). See *id.* QIBs are institutions that own or invest on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the institution. See 17 C.F.R. § 230.144A(a)(1) (1999).

²⁵ See Aircraft Carrier Proposal, *supra* note 23, at *2 ("Our proposed reforms seek to apply the issuer advantages of offering securities in the private and Rule 144A markets — timing and disclosure flexibility — to the public market").

²⁶ See Richard Hill, SEC's Lane to Step Down; 'Aircraft Carrier' May Drift in His Wake, CORP. FIN. WK., July 26, 1999, available in 1999 WL 8668793.

registration statement, any issuer or underwriter could . . . conduct electronic roadshows to institutional and retail investors without the use of password protection"²⁷ This reform, if adopted, would dramatically increase the amount of information a retail investor has about an impending public offering.²⁸ The SEC has tried to make information on securities transactions more publicly accessible and has indicated that use of the Internet may help to "level the playing field between large institutional investors and small retail investors."²⁹ Allowing a wider audience to watch roadshows would also decrease roadshow expenses, as issuers and underwriters would no longer have to travel great distances to give the presentations.³⁰ Any reduction in the cost of capital formation would have a positive effect of increasing the competitive advantage of U.S. securities markets vis-à-vis overseas exchanges.³¹ Thus, not only would issuers and investors receive benefits from Internet and closed-circuit roadshows through cost reductions and greater access to information, but the U.S. securities markets as a whole would also profit, as cost savings would provide an incentive for companies to list their securities in the United States.

²⁷ *Id.* at *66.

²⁸ See *id.* at *126 (stating that many issuers exclude some investors from roadshows and that the proposed rules would put investors with Internet access on more equal footing).

²⁹ Quinn & Jarmel, *supra* note 8, at 235 (quoting former SEC Commissioner Steven Wallman); see also Exchange Act Release No. 33-7233, 60 Fed. Reg. 53,458, 53,458 (Oct. 6, 1995 (SEC encourages use of electronic media as a means to enhance investor access to information) [hereinafter October 1995 Release]; Chairman Arthur Levitt, *Corporate Finance in the Information Age*, 1046 PLI/CORP 131 (1997).

³⁰ See Stephen M. Cutler, *Paving the Way for a Successful Road Show Online*, WALLSTREETLAWYER.COM, July 1997, at 1 (online roadshows enables investors to get information without the expense of traveling to the presentation in person); *Morgan Stanley, Goldman to Launch Internet Road Shows*, CORP. FINANCING WK., Sept. 1, 1997, available in 1997 WL 12161293 (Internet demonstrations allow investors to reduce travel requirements); *Road Shows Can Now Hit the Net*, GOING PUB.: IPO REP., Mar. 17, 1997, available in 1997 WL 12121820 (investors in smaller cities have to travel to New York or Chicago to hear the roadshow presentation).

³¹ See Wallman, *supra* note 16, at 1 ("[A]ny increase in the cost of capital eliminates some of the competitive advantage of the U.S. securities markets, and of U.S. competitors, in relation to overseas markets and competitors").

The positive aspects of the Aircraft Carrier proposal are diminished somewhat by the SEC's recommendation that all videotaped roadshows be filed along with the registration statement under new proposed Rule 425.³² The SEC also proposes to apply section 12(a)(2) of the 1933 Act³³ liability to all videotaped roadshows.³⁴ Commentators have reacted negatively to application of section 12(a)(2) liability because it appears to reopen an avenue for litigation that seemed closed after the 1995 Supreme Court decision in *Gustafson v. Alloyd Co. Inc.*³⁵ and may discourage the use of Internet roadshows.³⁶

Yet this Note argues that if retail investors are allowed to watch Internet roadshows, then the presentations will become communications relating to a prospectus³⁷ that are "widely disseminated"³⁸ such that section 12(a)(2) liability may apply. Section 12(a)(2) liability may be unavoidable should retail

³² Under the Aircraft Carrier proposal, issuers must file with the SEC "free writing," which includes videotaped roadshows, along with required materials. Aircraft Carrier Proposal, *supra* note 23, at *34-*35; see also *infra* Part II.B. (explaining "free writing").

³³ Under section 12(a)(2), a civil action can be brought against a person who offers or sells securities "by means of prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading" (emphasis added) 15 U.S.C.A. § 77l(a)(2) (West 1997).

³⁴ See Aircraft Carrier Proposal, *supra* note 23, at *36' (all free writing would have section 12(a)(2) liability).

³⁵ 513 U.S. 561 (1995).

³⁶ See Linda C. Quinn & Otilie L. Jarmel, *SEC Communications Initiative: Welcome Reform or Regulatory Retrenchment?*, INSIGHTS, Jan. 1999, at 15 ("The utility of the free communications is seriously undermined by the Commission's proposals to require that these newly permitted free writings be filed [and] to extend section 12(a)(2) of the Securities Act liability to all such filed communications . . ."). The article cites the Report of the Advisory Committee on the Capital Formation and Regulatory Processes, Securities and Exchange Commission (July 24, 1996) for support that the Aircraft Carrier proposal has been viewed by market insiders as "profound regulatory retrenchment." *Id.* at 15 n.2.

³⁷ The Supreme Court, in *Gustafson*, stated that the words "oral communications" in section 12(a)(2) must "relate to a prospectus" in order for the communications to be actionable under the statute. *Gustafson*, 513 U.S. at 567-68; see also *infra* Parts III.A.2. and IV.B.

³⁸ The *Gustafson* court also stated that suits can only be brought under section 12(a)(2) for documents and communications of "wide dissemination." *Id.* at 575.

investors be able to watch the presentations; that is, unless the SEC receives enough public pressure to remove the section 12(a)(2) liability that it has drafted into the Aircraft Carrier.

Moreover, presumably Internet service providers retain a copy of the videotaped roadshow, which a plaintiff can obtain through discovery. So, this Note further contends, the filing requirement would add no new liability because a plaintiff could obtain the videotape either from the SEC or from the roadshow service providers themselves. The filing requirement would, however, make it easier for the public to obtain a videotape that is not otherwise publicly available.

Part I of this Note focuses on the current SEC rules that have allowed for the development of Internet and closed-circuit roadshows. Part II discusses the SEC Aircraft Carrier proposal which, if adopted as currently drafted, would allow retail investors to watch roadshows. Part III discusses what companies are currently involved in this business and the technology they use to present the transmissions. Part IV explores the legal ramifications of electronic roadshows from the perspective of the issuer.

This Note concludes by contending that the SEC should enact the provisions in the Aircraft Carrier that allow retail investors to watch roadshows. This development would be a positive step that would move the SEC towards its goal of equalizing access to information between institutional investors and the retail community. It would also strengthen the U.S. securities markets as a whole. The filing requirement, combined with the section 12(a)(2) liability, might make Internet roadshows somewhat less attractive compared to traditional oral presentations where there is no filing requirement;³⁹ but the negatives are outweighed by the greater public interest in allowing retail investors to have increased access to information and in the cost savings for issuers through avoiding traditional roadshow expenses.

³⁹ In the Aircraft Carrier Proposal, the SEC only asked for public comment as to whether "videotaped roadshows" should be filed as free writing; no mention was made of otherwise live roadshows. Aircraft Carrier Proposal, *supra* note 23, at *316 n.313.

I. OVERVIEW OF U.S. REGULATIONS CONCERNING PUBLIC OFFERINGS

A. *Securities Laws Governing Public Offerings*

It is important to understand the current public offering process and the role of traditional roadshows before discussing Internet and closed-circuit roadshows. The main documents required for a public offering are a registration statement, a preliminary prospectus, and a final prospectus.⁴⁰ The prospectus is part of the registration statement and serves to provide adequate investor information about the offering and its issuer.⁴¹ Section 2(10) of the 1933 Act defines "prospectus" as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security."⁴²

Written material about the securities provided by the issuer or underwriter during what is known as the waiting period must satisfy the information requirements of section 10 of the 1933 Act.⁴³ While any written material that meets the SEC rules can qualify as a "prospectus," generally the only writing that meets the information requirements of section 10 is a preliminary prospectus⁴⁴ or "red herring."⁴⁵ The preliminary prospectus is part of the registration statement and is typically distributed to potential investors during the roadshow presentation.⁴⁶ The securities are priced after the roadshow, once the issuer and lead underwriter have gauged investor interest in the offering and have negotiated the possible price ranges that investors are willing to pay for the securities.⁴⁷

⁴⁰ See STUCKEY, *supra* note 2, at 11-12.

⁴¹ See *id.*

⁴² 15 U.S.C.A. § 77b(10) (West 1997).

⁴³ 15 U.S.C.A. § 77j.

⁴⁴ The preliminary prospectus contains information about the securities being offered, use of proceeds, and the company's finances and operations. See 17 C.F.R. § 230.430 (1996).

⁴⁵ The preliminary prospectus is also called a "red herring" because a red-colored legend is posted on the cover page. The red legend is removed from the final prospectus. See Schulte, *supra* note 4, at 539 n.13.

⁴⁶ See *id.* at 533.

⁴⁷ See *id.*

B. *Three Significant Time Periods in the Public Offering Process*

All sales of securities must comply with section 5 of the 1933 Act unless the sale falls within an exemption.⁴⁸ Section 5 of the Act divides the public offering process into three distinct time periods: (1) the pre-filing period, (2) the waiting or pre-effective period, and (3) the post-effective period.⁴⁹ The pre-filing period covers the preliminary negotiations between issuers and underwriters before the registration statement is filed with the SEC.⁵⁰ Section 5(c) prohibits oral and written offers during the pre-filing period and section 5(a) bans sales of the securities until the SEC declares the registration statement effective.⁵¹ The waiting period begins when the registration statement is filed with the SEC and ends when the statement is declared effective.⁵² During the waiting period, the prohibitions in section 5(c) no longer apply to oral offers to sell the securities; written offers, however, may be made only in the preliminary prospectus.⁵³ The post-effective period follows after the SEC has declared the registration statement effective.⁵⁴ The securities can be sold to investors during this period provided that the issuer has filed a final prospectus with the SEC that meets the requirements of section 10(a).⁵⁵ The public offering process ends when the securities are sold at the public offering price, for the most part to the investors who were solicited at the roadshows.⁵⁶

The restrictions on oral and written offers are intended to ensure that the section 10 prospectus is the primary means for investors to obtain information about an impending public offering.⁵⁷ According to the SEC, "Congress' goal [in limiting oral and written communication] was to prevent high pressure sales practices and to provide investors with an opportunity to

⁴⁸ See STUCKEY, *supra* note 2, at 11-12.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See 15 U.S.C.A. §§ 77e(a), 77e(c) (West 1997).

⁵² See STUCKEY, *supra* note 2, at 11-12.

⁵³ See 15 U.S.C.A. § 77e(b)(1).

⁵⁴ See STUCKEY, *supra* note 2, at 11-12.

⁵⁵ See 15 U.S.C.A. §§ 77e(a), 77e(b).

⁵⁶ See STUCKEY, *supra* note 2, at 11-12.

⁵⁷ See Aircraft Carrier Proposal, *supra* note 23, at *56.

become familiar with the investment.”⁵⁸ The SEC admits, however, that the means used to achieve this goal should be modified to reflect advances in communications technology, and that current restrictions on communication prevent investors from receiving important information on a timely basis.⁵⁹

C. Roadshows Allowed During Waiting Period

It is customary for the lead underwriter to organize a roadshow during the waiting period.⁶⁰ The presentations provide an opportunity for institutional investors, securities analysts, and salespersons to meet the issuer's management and allow the company to present its business strategy and expectations for the securities.⁶¹ Meetings are generally held in major cities in the United States (typically New York and Boston), Canada and abroad with large audiences, but one-on-one meetings with major investors are also common.⁶² Roadshows often involve the use of video presentations, slide projections, charts, and graphs that highlight items in the preliminary prospectus.⁶³ No written material other than the preliminary prospectus is circulated to investors,⁶⁴ and lawyers are asked not to attend so that management can speak “more freely.”⁶⁵ Management and underwriters field questions from the audience following the presentation.⁶⁶

Roadshows have traditionally been considered oral offers that are acceptable under the 1933 Act during the waiting period.⁶⁷ The Act defines an “offer” broadly to include not only

⁵⁸ *Id.*

⁵⁹ See *id.* (“We do not believe that it is appropriate to unnecessarily hinder communication when allowing them would provide benefits to investors and issuers as well as reflect current practices and realities”).

⁶⁰ See Hewitt, *supra* note 8, at 1; Quinn & Jarmel, *supra* note 8, at 235; Schulte, *supra* note 4, at 533.

⁶¹ See Hewitt, *supra* note 8, at 1; Quinn & Jarmel, *supra* note 8, at 235; Schulte, *supra* note 4, at 532-33.

⁶² See Hewitt, *supra* note 8, at 1; Schulte, *supra* note 4, at 532-33.

⁶³ See Hewitt, *supra* note 8, at 1; Schulte, *supra* note 4, at 532.

⁶⁴ See STUCKEY, *supra* note 2, at 11-16.

⁶⁵ Kimberly Weisul, *Wall Street Road Shows Take Off on the Internet, Despite Hurdles*, INVESTMENT DEALERS' DIG., Sept. 29, 1997, at 14 (lawyers are not invited to roadshows because companies want to talk “off the record”).

⁶⁶ See Schulte, *supra* note 4, at 532-33.

⁶⁷ See HOWARD M. FRIEDMAN, SECURITIES REGULATION IN CYBERSPACE 3-14

any attempt to dispose of a security for value but also the publication of statements that do not constitute an express offer but may "arous[e] public interest in the issuer or in the securities of an issuer."⁶⁸ Oral offers are allowed, but the same offer made in writing or broadcast over radio and television is not permitted, because the definition of prospectus under section 2(10) includes radio and television broadcasts.⁶⁹

The SEC has historically encouraged the use of roadshows because they allow "investors to become acquainted with the information contained in the registration statement and to arrive at an unhurried decision concerning the merits of the securities."⁷⁰ But the current roadshow structure has been increasingly criticized because it excludes retail investors.⁷¹ In the Aircraft Carrier proposal, the SEC commented that "[i]ssuers and their agents are known to deliberately provide some information during the waiting period only orally," and that the current structure leads to selective disclosure because none of the slides, graphs or other nonprospectus information presented at a roadshow is filed with the SEC.⁷² This, according to the SEC, "creates an incentive for issuers and underwriters to omit information or to provide it in a manner that is not readily available to investors for later reference."⁷³ The Aircraft Carrier proposal would allow issuers to pass out nonprospectus materials, but would require issuers to file these documents along with the information that is required to be in the registration statement.⁷⁴

(1997); STUCKEY, *supra* note 2, at 11-16 n.79; Schulte, *supra* note 4, at 533; Larry W. Sonsini et al., *The Regulation of the Registration and Distribution Process Under the Securities Act of 1933*, 867 *PLI/CORP* 564, 624-25 (Nov. 1994); Russell B. Stevenson, Jr., *The Waiting Period and SEC Processing*, C951 *ALI-ABA* 133, 136 (July 28, 1994).

⁶⁸ Publication of Information Prior to or After Effective Date of Registration Statement, Exchange Act Release No. 33-3844, 22 Fed. Reg. 8359 (Oct. 8, 1957).

⁶⁹ See 15 U.S.C.A. § 77b(10) (West 1997).

⁷⁰ Offers and Sales of Securities by Underwriters and Dealers, Exchange Act Release No. 33-4697, 29 Fed. Reg. 7317 (May 28, 1964).

⁷¹ See Gondo, *supra* note 3, at A9 (criticizing current roadshow structure and stating that Internet roadshows may one day target retail investors); see also Aircraft Carrier Proposal, *supra* note 23, at *64 ("[w]hile . . . roadshows are valuable to some investors because they provide a forum for investors' questions, their value is curtailed because of the limited audience").

⁷² Aircraft Carrier Proposal, *supra* note 23, at *64.

⁷³ *Id.*

⁷⁴ See *id.*

II. OVERVIEW OF THE AIRCRAFT CARRIER PROPOSAL

A. *Restructuring of Public Offerings into Three Classes*

The Aircraft Carrier proposal calls for the restructuring of the public offering process into Form A, Form B, and Form C issuers.⁷⁵ Form A would cover the public offerings of smaller issuers⁷⁶ and larger issuers that have a limited history or no history of reporting to the SEC.⁷⁷ Form A issuers would have to largely adhere to current SEC registration rules except that certain "seasoned issuers"⁷⁸ would be able to incorporate by reference disclosure documents already filed with the SEC into their prospectus sooner than current rules allow.⁷⁹ In general, Form A issuers would have to file a registration statement with the SEC before making their first offer.⁸⁰ But they would be allowed more freedom to communicate outside of the prospectus once the registration statement is filed.⁸¹

Large, seasoned issuers, on the other hand, would file with the SEC using the new Form B.⁸² Form B could also be used by small issuers that do not meet Form B's eligibility require-

⁷⁵ Form A would replace current Forms S-1 and F-1. *See id.* at *2.

⁷⁶ A small issuer is a company that has less than \$25 million in annual revenue and less than \$25 million in "public float." *Id.* at *41. Public float refers to "the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates of the issuer." John J. Huber et al., *The Aircraft Carrier: The SEC Sets a New Course for Public Offerings*, at 7 n.17 (Latham & Watkins, 1998).

⁷⁷ Non-seasoned issuers are those companies that do not have at least 12 months of reporting history under the Exchange Act and do not have at least one annual report filed with the SEC. *See Aircraft Carrier Proposal, supra* note 23, at *28.

⁷⁸ These seasoned issuers are companies that have been reporting under the Exchange Act for at least 24 months and have filed at least two annual reports with the SEC or companies that have filed Exchange Act reports for at least 24 months and have a public float of \$75 million or more. *See id.*

⁷⁹ *See id.* at *30.

⁸⁰ *See id.* at *2.

⁸¹ *See id.*

⁸² A large issuer is a company that has \$250 million in public float or an average daily trading volume ("ADTV") in U.S. markets for its equity shares of \$1 million and \$75 million in public float. To be considered "seasoned," a large issuer must also have at least 12 months of reporting history under the Exchange Act and have filed at least one annual report with the SEC. *See Aircraft Carrier Proposal, supra* note 23, at *56. Form B would replace Forms S-3 and F-3. *See id.* at *9.

ments for offerings solely to qualified institutional buyers ("QIBs"), large buyers with securities holdings in excess of \$100 million not of the issuer.⁸³ Form B issuers would no longer have to file a registration statement with the SEC before making offers to investors.⁸⁴ A filing would be required only before sales are made to the public.⁸⁵ The SEC would screen, but not review, the registration statement that is filed.⁸⁶ The issuer and its underwriter would designate the effective date of registration and would have complete control over when to sell the securities.⁸⁷ Finally, Form C would cover business combinations (e.g., mergers and acquisitions) and exchange offers (e.g., exchange of private unregistered shares for public registered shares).⁸⁸

B. *Issuer Communications Related to Offerings Loosened*

For both Form A and Form B issuers, the prospectus would no longer be the "exclusive" written document used to offer securities and the sole basis for liability.⁸⁹ Instead, the SEC is proposing an "inclusive" prospectus approach that would allow the use of nonprospectus offering materials, which would be filed with the registration statement.⁹⁰ Aircraft Carrier divides offering materials into either "offering information" or "free writing."⁹¹ Any information that is required to be in the prospectus would be deemed "offering information."⁹² All offering information would create issuers' liability under section 11 of the 1933 Act;⁹³ meaning that issuers would be held strictly liable for any misrepresentations or omissions in offer-

⁸³ See *id.*

⁸⁴ See *id.* at *9.

⁸⁵ See *id.*

⁸⁶ See Aircraft Carrier Proposal, *supra* note 23, at *1. Filings by smaller and unseasoned issuers would be subject to review before they are declared effective, while medium-sized issuers could designate their effective date much like Form B issuers. See *id.* at *122.

⁸⁷ See *id.* at *8.

⁸⁸ Form C would replace Forms S-4 and F-4. See *id.* at *37.

⁸⁹ *Id.* at *4.

⁹⁰ Aircraft Carrier Proposal, *supra* note 23, at *4.

⁹¹ *Id.* at *6-*7.

⁹² *Id.* at *7.

⁹³ 15 U.S.C.A. § 77k(a) (West 1999).

ing information.⁹⁴ "Free writing" materials, on the other hand, would consist of (1) information that is not required in the prospectus or (2) required information that is contained in both the prospectus and in nonprospectus sales materials.⁹⁵ Free writing would not be held to the strict liability standard, but would, instead, be held to the section 12(a)(2) negligence and Rule 10b-5 fraud standards.⁹⁶

The Aircraft Carrier proposal would allow Form A issuers, and those working on their behalf,⁹⁷ to communicate freely at any time except 30 days before a registration statement is filed under proposed Rule 167.⁹⁸ The disclosure requirements in a Form A prospectus would essentially remain the same as under current law.⁹⁹ Form A issuers could not conduct a roadshow until *after* filing a registration statement.¹⁰⁰ Once a registration statement is filed, Form A issuers could disseminate written sales materials that do not meet the definition of a prospectus, but would have to file these materials before first using them.¹⁰¹

Form B offering communications would be unrestrained at all times.¹⁰² The more liberal approach to communication for Form B issuers is based on the assumption that there is "plentiful, thoroughly scrutinized" market information about large, seasoned companies.¹⁰³ Issuer communication would not unduly condition the market because independent outside information, such as unaffiliated press reports, would counterbal-

⁹⁴ See Aircraft Carrier Proposal, *supra* note 23, at *35.

⁹⁵ See *id.*

⁹⁶ See *infra* Part IV.B.

⁹⁷ Persons who work on behalf of the issuer include underwriters (their sales force) and any participating dealer. See Aircraft Carrier Proposal, *supra* note 23, at *6.

⁹⁸ See *id.* at *35-*37. The Commission is also considering allowing some limited communication during the 30 day period, extending it as far as 90 days, or even limiting it to 20 days. See *id.* at *61.

⁹⁹ See *id.* at *2.

¹⁰⁰ See *id.* at *34 (stating that Form A issuers can disseminate free writing materials only after the issuer files a Form A registration statement).

¹⁰¹ See Aircraft Carrier Proposal, *supra* note 23, at *126.

¹⁰² See *id.* at *2 ("For Form B offerings, we would allow oral and written communications in any format at any time regardless of whether the offering is imminent or on-going."). Proposed Rule 166 would allow Form B issuers, and those acting on their behalf, to communicate freely before the "offering period" begins. The offering period is 15 days before the first offer. See *id.*

¹⁰³ *Id.*

ance biased company communication.¹⁰⁴ A roadshow could be conducted *before or after* filing a registration statement for Form B issuers under proposed Rule 166.¹⁰⁵ All offering information and free writing used by or on behalf of the issuer before filing the registration statement, including sales material distributed at a roadshow, would have to be filed with the registration statement.¹⁰⁶ All offering information and free writing used thereafter would also have to be filed, before it could be used, by amending the registration statement.¹⁰⁷ These materials would be available at the SEC web site for public scrutiny.¹⁰⁸

The SEC has asked for public comment as to whether roadshows that are videotaped so that they can be viewed on the Internet and other electronic media should be filed as free writing.¹⁰⁹ The SEC believes that should issuers have to file videotaped roadshows, this would dramatically decrease the current problems of selective information disclosure.¹¹⁰ But the filing requirement would also increase the potential for issuer and underwriter liability exposure because a record would remain with the SEC of the presentation that was given. Issuers and underwriters would, therefore, have to watch more carefully what is said at the roadshow presentation in order to avoid liability.

¹⁰⁴ See *id.* at *56.

¹⁰⁵ See Aircraft Carrier Proposal, *supra* note 23, at *66 (Form B issuers "could use the Internet and other media to conduct electronic roadshows before and after filing a registration statement" under proposed Rule 166).

¹⁰⁶ There is no requirement that free writing materials be delivered to interested investors. See *id.* at *316 n.317. See generally Huber et al., *supra* note 76, at 23-24.

¹⁰⁷ See Aircraft Carrier Proposal, *supra* note 23, at *126.

¹⁰⁸ See *id.* The SEC posts disclosure documents via the "Electronic Data Gathering Analysis and Retrieval" system ("EDGAR") at its web site. See *U.S. Securities and Exchange Commission* (visited June 20, 1999) <<http://www.sec.gov>>. The SEC has gathered and indexed documents on EDGAR since May 6, 1996. See *id.*

¹⁰⁹ See Aircraft Carrier Proposal, *supra* note 23, at *316 n.313.

¹¹⁰ See *id.*

III. ELECTRONIC ROADSHOWS RECEIVE SEC APPROVAL

A. *Private Financial Network No-Action Letter Sets New Ground*

In 1997 and 1998, the SEC issued five no-action letters¹¹¹ that opened the door for electronic media roadshows.¹¹² The first no-action letter was issued to the Private Financial Network ("PFN") in March 1997.¹¹³ PFN asked the SEC to rule on the applicability of section 2(10) to its proposal to transmit roadshows to its subscribers, who were largely broker-dealers¹¹⁴ and investment advisers,¹¹⁵ over closed-circuit television or to personal computers on either a live or delayed-time basis.¹¹⁶ The use of limited access television was historically problematic because the 1933 Act's definition of prospectus includes communication by television.¹¹⁷ PFN was nonetheless able to convince the SEC that Congress did not intend section 2(10) of the 1933 Act to cover limited access roadshow transmissions.

¹¹¹ A no-action letter is a written statement from the SEC that it will not take punitive measures against a company should it decide to undertake a proposed activity that the SEC regulates. See generally *Requests for Exemptive, No-Action and Interpretative Letters*, 63 Fed. Reg. 3285 (1998) (to be codified at 17 C.F.R. pt. 140) (defining "no-action letters").

¹¹² See generally Stephan J. Schulte & Steven J. Spencer, *Road Shows in the Electronic Age — SEC No-Action Letters Addressing Use of the Internet and Closed Circuit Systems*, MONDAQ BUS. BRIEFING, June 26, 1998, available in 1999 WL 8709996.

¹¹³ See Private Financial Network, SEC No-Action Letter, 1997 SEC No-Act. LEXIS 406 (March 12, 1997) [hereinafter PFN No-Action Letter]. PFN is a wholly-owned subsidiary of "MSNBC Interactive LLC," a joint venture of the National Broadcasting Co. Inc. and Microsoft Corp. See *id.* at *2.

¹¹⁴ A "broker" is an agent who buys and sells securities for customers for a commission, BLACK'S LAW, *supra* note 1, at 193, while a "dealer" is a person who buys securities for his/her account and then resells them to customers for a premium. *Id.* at 399. Investment banks that undertake both activities are called "broker-dealers." *Id.* at 193.

¹¹⁵ An investment adviser reviews the feasibility of a securities offering for interested customers. See *id.* at 825.

¹¹⁶ See PFN No-Action Letter, *supra* note 113, at *2-3. At the time of the PFN no-action letter, the subscribers totaled around 100. See *id.* at *3. PFN is distributed to subscribers by secured telephone circuits, fiber optic or other cable and by satellite. A decoder is given to PFN subscribers so that they can receive the satellite information. See *id.* at *3.

¹¹⁷ See 15 U.S.C.A. § 77b(a)(10) (West 1997).

1. Limited Access Transmissions are Not Broadcasts

PFN argued that electronic media technology had outpaced securities laws and that the SEC should try to conform the old understanding of "television" to today's technological developments.¹¹⁸ According to PFN, when Congress enacted section 2(10) it "simply did not consider" that a roadshow could be viewed on a "secure[d] person-to-person video transmission[.]"¹¹⁹ PFN asserted that in 1954 when the word "television" was added to section 2(10),¹²⁰ it was only used to describe broadcasts of mass communication scattered over a 360-degree radius, meaning that any person with a television set or radio within the transmission area could pick up the broadcast signal.¹²¹ Thus, technological advances in electronic media, PFN argued, had outgrown the prototypical understanding of "television." PFN asked the SEC to rule that video transmissions are not "television" within the meaning of section 2(10) so long as the transmissions are limited to a discrete audience.

PFN further argued that only a radio and television "broadcast" could be deemed a prospectus based on a reading of section 10(f) of the 1933 Act.¹²² Section 10(f) states, "[i]n any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe."¹²³ The word "television," as in section 2(10), was also added to section 10(f) in 1954.¹²⁴ PFN asserted that by separating the words "radio and television" from "broadcast," Congress sought to express that only mass communication to the public, as opposed to limited communication to a discrete audience, constituted a prospectus.¹²⁵ PFN, thereby, successfully argued two alternative legal theories to obtain the SEC approval: first, that Congress in 1954 was not aware that television could one

¹¹⁸ See PFN No-Action Letter, *supra* note 113, at *10-*14.

¹¹⁹ *Id.* at *14.

¹²⁰ See *id.* at *11-*12.

¹²¹ See *id.*

¹²² See *id.* at *10-*11.

¹²³ 15 U.S.C.A. § 77j(f) (West 1997).

¹²⁴ See PFN No-Action Letter, *supra* note 113, at *11 n.5 (citing Pub. L. No. 22, § 10(d), 73d Cong. (1993)); see also S. REP. NO. 1036, at 18; H.R. REP. NO. 1542, at 26, 83d Cong. (1954) (noting technical amendments to then § 10(d)).

¹²⁵ See PFN No-Action Letter, *supra* note 113, at *11.

day be used to reach limited audiences via closed-circuit systems; and second, that Congress intended to distinguish "television" from "broadcasts" based on an understanding that they were two distinct concepts even though closed-circuit technology had not yet been invented.¹²⁶

2. A Prospectus Involves Communication of Wide Dissemination

PFN also relied on the *Gustafson* case to assert that limited access video transmissions should fall outside the scope of section 2(10).¹²⁷ *Gustafson* established that Congress intended the term "prospectus" in section 2(10) to cover only documents or communications of "wide dissemination."¹²⁸ After *Gustafson*, plaintiffs could only bring suits under section 12(a)(2) for securities violations surrounding public offerings.¹²⁹ PFN was able to remain within the *Gustafson* rule by assuring the SEC that only subscribers would receive the transmission and that each subscriber agreed "not to videotape, copy or further distribute the transmissions."¹³⁰ Furthermore, each subscriber would get a copy of the preliminary prospectus along with the video transmission.¹³¹ The SEC's

¹²⁶ See *id.* at *10-*12; see also Levitt, *supra* note 29, at 135 ("The Securities Act . . . was written in 1933. The first transatlantic call had been placed just a few years before. The first talking motion picture had been produced. The radio and telephone were the front line of communication technology. The diesel locomotive had recently been introduced. We live in a very different world today.").

¹²⁷ See PFN No-Action Letter, *supra* note 113, at *13-*14.

¹²⁸ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Justice Kennedy, writing for the majority, deduced that Congress intended the word "prospectus" in section 2(10) to cover only documents of wide dissemination based on reasoning that if the word "communication" in the section 2(10) definition of prospectus covered any and all forms of communication, it would render "notice, circular, advertisement [and] letter" redundant; thus, a better reading of prospectus is one that narrows the definition to documents of mass communication. *Id.* at 574-75.

¹²⁹ See *id.* at 584.

¹³⁰ PFN No-Action Letter, *supra* note 113, at *6. See generally *Up Next: Net Road Shows SEC Issues No-Action Letter to MSNBC Unit*, FIN. NET NEWS, Mar. 17, 1997, available in 1997 WL 12170788 [hereinafter *Up Next*] (stating that limiting the audience to subscribers helped PFN establish that the video transmissions are not broadcasts).

¹³¹ See PFN No-Action Letter, *supra* note 113, at *6.

approval cleared the way for new technologies to enter the market that allow institutional investors who could not attend a traditional roadshow to watch the presentation anyway.

B. *Net Roadshow Conducts First Internet Roadshow*

Internet roadshows had not yet received approval when the PFN no-action letter was issued in March 1997. However, news reports hinted that an Internet-based no-action letter was pending before the SEC.¹³² SEC officials openly touted the future use of Internet roadshows as a "legitimate means" for an issuer to communicate with a large audience.¹³³ The SEC issued the much-anticipated second no-action letter to Net Roadshow Inc. ("Net Roadshow") in July 1997 based on its proposal to transmit roadshows over the Internet on a delayed-time basis ("Net Roadshow I" proposal).¹³⁴ Net Roadshow staff members videotape the live roadshow presentation using regular video equipment and then transmit the information onto an Internet website using an advanced video product.¹³⁵ To view the presentation, institutional investors contact an institutional salesperson or the underwriter's syndicate¹³⁶ department to get an access code that is valid for one day.¹³⁷ The SEC agreed that Net Roadshow's Internet roadshows are permissible based on Net Roadshow's assertion that *only* qualified investors "who would customarily be invited to attend a

¹³² See *Up Next*, *supra* note 130, at 1 (stating that "[a]nother no-action request regarding electronic road shows is pending before the SEC, according to [SEC] officials," but that further details were not provided).

¹³³ In an interview on Internet issues, SEC Commissioner Isaac C. Hunt, Jr. stated:

I think that in this day and age to say that the road show or the documents used in the road show or the talks used in the road show can't be transmitted electronically is essentially not realistic given the number of people who use the Internet and how attractive that must be to issuers to use this as a legitimate means of communication.

Id.

¹³⁴ See Net Roadshow, Inc., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 864 (Sept. 8, 1997) [hereinafter Net Roadshow I].

¹³⁵ See Hewitt, *supra* note 8, at 1.

¹³⁶ A "syndicate" is "[a] group of investment bankers who together underwrite and distribute a new issue of securities or a large block of an outstanding issue [of securities]." BLACK'S LAW, *supra* note 1, at 1450.

¹³⁷ See Net Roadshow I, *supra* note 134, at *5-*6; see also Hewitt, *supra* note 8, at 1.

live roadshow" would be given the password necessary to view the presentations.¹³⁸ Limiting the viewing audience, as in the PFN proposal, was critical to establish that the Internet presentations are not the general "broadcasts" that Congress intended to regulate when it enacted section 2(10).¹³⁹ Net Roadshow also relied on the section 10(f) distinction between "radio or television" and "broadcasts," and the *Gustafson* case, to argue that limited audience viewing of Internet information should not be deemed a prospectus because the information is not widely disseminated.¹⁴⁰ SEC approval of Internet roadshows hinged on restricting the audience to institutional investors and once again excluded the retail investment community.

In February 1999, Net Roadshow received oral authorization from the SEC to expand its service to individual accredited investors.¹⁴¹ The SEC was not willing to give a written no-action letter because the Aircraft Carrier proposal, if adopted as drafted, might eliminate the individual investor financial thresholds altogether.¹⁴² Also noteworthy, in March 1999, Broadcast.com acquired Net Roadshow and subsequently offered \$50 million of Broadcast.com common stock.¹⁴³ Expansion of Internet roadshows to individual accredited investors is an important step towards allowing individual retail investors to watch the presentations.

¹³⁸ Net Roadshow I, *supra* note 134, at *5-*6.

¹³⁹ See *id.* at *11-*14.

¹⁴⁰ *Id.* Net Roadshow also assured the SEC that the preliminary prospectus would retain its primacy because viewers would be encouraged to read the document through the display of a large and conspicuous button throughout the roadshow that says "preliminary prospectus." *Id.* at *7.

¹⁴¹ Allyson Vaughan, *Firm Gets Approval From SEC to Include Individuals in Virtual Roadshows*, CORP. FINANCING WK., Feb. 8, 1999, at 1. In general, an exempt securities offering under Rule 505 or 506 of Regulation D can be made to any number of "accredited investors." STUCKEY, *supra* note 2, at 11-19 n.89. The SEC used the Regulation D definition of accredited investor to expand the acceptable audience for public and private electronic roadshow from solely institutional investors to individuals who meet certain income and net worth requirements.

¹⁴² See Vaughan, *supra* note 141, at 10.

¹⁴³ See *Broadcast.com Completes NetRoadshow Acquisition*, PR NEWswire, Mar. 16, 1999, available in LEXIS, News Library, Current News File.

C. *Bloomberg, LP No-Action Letter Follows Precedent*

The SEC issued a third no-action letter in December 1997 to Bloomberg, LP ("Bloomberg") based on its proposal to transmit roadshow presentations over its closed-circuit "multi-media system"¹⁴⁴ on both a real and delayed-time basis.¹⁴⁵ Viewers can watch either a live roadshow or a recorded version by typing a password on a keypad attached to dedicated Bloomberg terminals or to individual computers that receive Bloomberg data feeds.¹⁴⁶ In February 1999, the company announced its plan to expand its service to an Internet website in order to compete with the other Internet service providers.¹⁴⁷

In its legal analysis, Bloomberg did not offer its own argument as to why closed-circuit or Internet transmissions to discrete audiences are not broadcasts of wide dissemination proscribed in section 2(10) of the 1933 Act. Instead, it relied on the March 1997 PFN and July 1997 Net Roadshow no-action letters.¹⁴⁸ As with the PFN and Net Roadshow no-action letters, Bloomberg also agreed to take measures to limit the audience to institutional investors.¹⁴⁹ Bloomberg assured the SEC that the audience would be limited to Bloomberg subscribers who received permission from an underwriter to view the transmission.¹⁵⁰ The burden would be on the underwriters to ensure that the audience remained limited to qualified investors.

One difference between the Bloomberg concept and the PFN and Net Roadshow systems is that the Bloomberg service allows viewers to send e-mail messages to the ongoing

¹⁴⁴ "Multi-media" systems combine the use of different media (e.g., television, video, music, and lighting) to deliver a given message. See AMERICAN HERITAGE DICTIONARY, *supra* note 6, at 1186.

¹⁴⁵ See Bloomberg L.P., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 1023, at *4 (Dec. 1, 1997) [hereinafter Bloomberg].

¹⁴⁶ See *id.* at *4-*5.

¹⁴⁷ See Bloomberg to Expand Electronic Roadshows to Net, FIN. NET NEWS, Feb. 15, 1999, available in LEXIS, News Library, Current News File. Bloomberg indicated in its no-action request that it may expand its electronic roadshow service to the Internet. See Bloomberg, *supra*, note 145, at *5 n.1.

¹⁴⁸ See Bloomberg, *supra*, note 145, at *12-*14.

¹⁴⁹ See *id.* at *7-*8.

¹⁵⁰ See *id.* at *8. The underwriter must agree "in writing with Bloomberg not to enable a viewer to receive the transmission unless the viewer is an institutional investor, investment adviser or other person [typically invited to roadshows]." *Id.*

roadshow, which are read by the on-site Bloomberg representative.¹⁵¹ This e-mail feature allows investors who could not attend the roadshow to pose questions to the issuer's management just as if they were a live audience member. The Bloomberg service arguably presents the closest replication to attendance at the live roadshow through the viewers' ability to pose questions to the presenters.

D. *Net Roadshow Receives No-Action Letter for Rule 144A Roadshows*

The SEC issued a fourth no-action letter in January 1998, again to Net Roadshow, which sought approval to use the Internet to transmit private offering roadshows consistent with Rule 144A ("Net Roadshow II" proposal).¹⁵² In its legal analysis, Net Roadshow relied, in part, on a July 26, 1996 interpretive letter sent by the Commission to a company called "IPONET," which sells securities to institutional investors over the Internet.¹⁵³ IPONET posts notices of private placement offerings on its website and allows investors to place a buy order for the securities.¹⁵⁴ The company was able to convince the SEC that this technology does not constitute a "general solicitation" or "general advertisement," as prohibited by the regulations governing private placements, because access to the service is limited to institutional investors.¹⁵⁵ Unlike IPONET, the Net Roadshow proposal did not give viewers the option to purchase the securities over the Internet; viewers could only watch a videotaped recording of the roadshow.¹⁵⁶ Thus, the same reasoning that convinced the SEC to allow

¹⁵¹ See *id.*

¹⁵² Net Roadshow, Inc., SEC No-Action Letter, 1998 SEC No-Act 107 (Jan. 30, 1998) [hereinafter Net Roadshow II].

¹⁵³ See *id.* at *9-*10.

¹⁵⁴ See IPONET, SEC No-Action Letter, 1996 WL 431821, at *2-3 (July 26, 1996).

¹⁵⁵ *Id.* Regulation D, section 502(c) prohibits any "general solicitation" or "general advertisement" of investors in connection with a private placement. 17 C.F.R. § 230.502(c) (1999). IPONET determines that members are institutional investors by asking persons to complete an on-line questionnaire that is verified to ensure that the person is not a retail purchaser. See Net Roadshow II, *supra* note 152, at *3.

¹⁵⁶ See Net Roadshow II, *supra* note 152, at *11-*12.

securities sales over the Internet for private placement offerings was expanded to permit electronic roadshow communication for Rule 144A sales.

E. Thomson Financial Services, Inc. Closed-Circuit and Internet No-Action Letter

The SEC issued a fifth no-action letter to Thomson Financial Services, Inc. ("Thomson") in September 1998 based on its proposal to conduct audiovisual transmissions of roadshows to qualified investors over the Internet or via Thomson's private network on a real or delayed-time basis.¹⁵⁷ As with the Bloomberg proposal, a person cannot view a Thomson roadshow unless the underwriter has authorized him/her to do so.¹⁵⁸ Also, closed-circuit viewers of a live roadshow can submit questions, which are answered during the presentation at the discretion of the sponsoring underwriter.¹⁵⁹ Thomson relied on the same arguments used in the other no-action letters mentioned above to assert that limited transmissions to discrete audiences should not be governed by section 2(10) of the 1933 Act.¹⁶⁰ The SEC once again granted the no-action letter, subject to restrictions similar to those of the other electronic roadshows.

F. Internet Brokers and Investment Banks Rely on the No-Action Letters

Following the lead of PFN, NetRoadshow, Bloomberg and Thomson, Internet brokerage and investment banking firms,

¹⁵⁷ See Thomson Fin. Servs., Inc., SEC No-Action Letter, 1998 WL 575139 (Sept. 4, 1998) [hereinafter Thomson]. Thomson's Internet and closed-circuit roadshow services are co-produced by First Call and Dalcomp, subsidiaries of the Thomson Corporation. See *id.* at *1.

¹⁵⁸ See *id.* at *2.

¹⁵⁹ See *id.* at *3.

¹⁶⁰ See *id.* at *4-*5.

such as WRHambrecht & Co.,¹⁶¹ E*Trade¹⁶² (and its sister company E*Offering which offers IPOs online)¹⁶³ and Wit Capital,¹⁶⁴ have started to present their own electronic roadshows.¹⁶⁵ At the WRHambrecht & Co., E*Trade, and Wit Capital websites, investors can not only watch the roadshow, but they can also place a buy order for the securities presented.¹⁶⁶ These online brokerage and investment banking firms have encouraged retail investment in IPOs—the once vanguard of institutional investors, money managers, and wealthy individual investors.¹⁶⁷ E*Trade and WRHambrecht & Co. present the full Internet roadshow to institutional investors and individual accredited investors,¹⁶⁸ while Wit Capital presents a more limited roadshow that can be viewed by all investors.¹⁶⁹ Wit Capital displays taped question and answer ses-

¹⁶¹ WRHambrecht & Co. uses an innovative "Dutch auction" system to sell the securities to the lowest bidder instead of relying on an investment bank to set the public offering price. See Sidney Hill, *IPOs for the Masses*, FIN. SERVICE ONLINE, June 1999, available in LEXIS, News Library, Current News File; see also WRHambrecht & Co. (visited June 20, 1999) <<http://www.wrhambrecht.com>>.

¹⁶² See E*Trade (visited Aug. 31, 1999) <<http://www.etrade.com>>.

¹⁶³ See E*Offering, *The Investment Bank of E*Trade* (visited Aug. 31, 1999) <<http://www.eoffering.com>>. E*Offering is an online bank that is 28 percent owned by E*Trade securities. See *New Web Investment Bank to Lead Charge for Retail Investor Access to Road Shows*, FIN. NET NEWS, June 14, 1999, available in 1999 WL 8881682 [hereinafter *Lead Charge*].

¹⁶⁴ See Wit Capital (visited Aug. 31, 1999) <<http://www.witcapital.com>>.

¹⁶⁵ A review of LEXIS and Westlaw SEC No-Action Release files indicates that, as of August 31, 1999, no no-action letters were filed by WRHambrecht & Co., E*Trade, E*Offering, or Wit Capital regarding Internet roadshows, indicating that these companies relied on the existing Internet roadshow no-action letters already filed with the SEC.

¹⁶⁶ See E*Trade, *supra* note 162; Wit Capital, *supra* note 164; WRHambrecht & Co., *supra* note 161.

¹⁶⁷ See Daniel Eisenberg, *Share the Wealth: Online Investment Banks Want to Take Firms Public on the Net, So Consumers Can Have a First Crack at IPOs*, TIME DIGITAL, May 17, 1999, at 22 (stating that retail investors currently do not have access to IPOs and that Internet brokerage firms are overturning this tightly controlled system); Edward Iwata, *Riding the IPO Bandwagon: Online Brokerages are Letting Average People Buy Into Initial Offerings*, SAN FRANCISCO EXAMINER, Aug. 15, 1999, available in 1999 WL 6876283 ("[U]pstart brokerage firms . . . have stormed the Internet and started to level the playing field for mom-and-pop investors and day traders."); Joseph Weber & Peter Elstrom, *Transforming the Art of the Deal*, BUS. WK., July 26, 1999, at 96 ("[T]he Net is reshaping the way underwriters bring offerings to the market.").

¹⁶⁸ See E*Trade, *supra* note 162; WRHambrecht & Co., *supra* note 161.

¹⁶⁹ See Mark Kollar, *Wit Capital Sets First Web Roadshows to Public*, WEB FIN., Jan. 12, 1998, available in 1998 WL 30695156.

sions with issuer executives rather than presenting the full roadshow.¹⁷⁰ This roadshow material is deemed part of the prospectus.¹⁷¹

Officials from WRHambrecht, E*Offering and Wit Capital have indicated their interest in allowing retail investors to watch Internet roadshows.¹⁷² A new online investment banking firm called "E InvestmentBank" has even considered approaching the other Internet brokers and investment banks to see if they are interested in collectively requesting that the SEC change its "no-retail-investor-access" policy.¹⁷³ These developments evidence the growing discontent with the current restrictive regulatory environment.

G. Aircraft Carrier Would Relax No-Action Letter Restrictions

The control mechanisms used by the Internet roadshow service providers to restrict the viewing audience would become unnecessary should the SEC adopt the provisions in the Aircraft Carrier that would allow retail investors to watch Internet roadshows.¹⁷⁴ First, the Aircraft Carrier proposal abolishes the need to limit the audience to institutional and accredited investors because it expressly authorizes electronic roadshow communication to retail investors.¹⁷⁵ Second, service providers would no longer have to take measures to simu-

¹⁷⁰ See *Roadshows Hitting Cyberspace: SEC Won't Bar On-Line Investment Presentations*, CHICAGO TRIB., Mar. 16, 1998, available in 1998 WL 2835194 [hereinafter *On-Line Investment*].

¹⁷¹ See Kollar, *supra* note 169.

¹⁷² See *Lead Charge*, *supra* note 163 (stating that "Tiffany Faircloth, v.p. of business development for E*Offering, . . . is also interested in making road shows available for individual investors"); *On-Line Investment*, *supra* note 170 ("By permitting outfits like Net Roadshow and Bloomberg to offer institutions-only video of company presentations . . . 'the government is sanctioning the two-tier system,' says Andrew Klein, founder of Wit Capital."); Telephone Interview with Sharon L. Smith, Director of Administration, WRHambrecht & Co. (June 21, 1999) (stating that WRHambrecht & Co. would like to display Internet roadshows to retail investors because it would help to equalize access to information between retail investors and institutional buyers).

¹⁷³ See *Lead Charge*, *supra* note 163.

¹⁷⁴ See Aircraft Carrier Proposal, *supra* note 23, at *66; see also *New Rules Would End Road Show No-Action Requests*, FIN. NET NEWS, Nov. 23, 1998, available in 1998 WL 10099189 (stating that if aircraft carrier is adopted, firms would no longer have to file no-action requests to conduct electronic roadshows).

¹⁷⁵ See Aircraft Carrier Proposal, *supra* note 23, at *66.

late oral communication and would, therefore, not be obligated to restrict the number of times that a person can view the roadshow.¹⁷⁶ Lastly, issuers would no longer have to limit written material to the preliminary prospectus because the Aircraft Carrier would allow issuers and underwriters to distribute other sales material at the roadshow so long as the issuer files the materials with the SEC.¹⁷⁷

IV. ISSUER LIABILITY EXPOSURE AS A RESULT OF ELECTRONIC ROADSHOWS

A. *Issuers Must Present Same Text Over Electronic Media*

All electronic media service providers that requested no-action letters have assured the SEC that the content of the electronic roadshow would be the same as in the live presentations, with companies reserving the right to edit downtime or misstatements and mistakes.¹⁷⁸ The ability to remove misstatements or mistakes is important in minimizing potential liability. But it depends on the issuer or underwriter realizing that a potentially material misstatement or omission has been made and must be amended before the roadshow is released for audience viewing. Newfound prudence is in order especially since, as discussed further below, section 12(a)(2)'s reasonable care standard may apply to these communications.

B. *Videotaped Roadshow Free Writing Liability May Be Unavoidable*

Under the Aircraft Carrier proposal, section 10(b)¹⁷⁹ of the Exchange Act, Rule 10b-5¹⁸⁰ promulgated thereunder, and section 12(a)(2) would apply to Internet roadshows.¹⁸¹ Rule

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See Bloomberg, *supra* note 145, at *6 n.3; Net Roadshow I, *supra* note 134, at *7 n.1; Net Roadshow II, *supra* note 152, at *6 n.1; PFN No-Action Letter, *supra* note 113, at *8 n.2.

¹⁷⁹ 15 U.S.C.A. § 78j(b) (West 1997).

¹⁸⁰ 17 C.F.R. § 240.10b-5 (1999). The SEC has indicated that the antifraud provisions in the Exchange Act and the 1933 Act apply fully to electronic communications. See October 1995 Release, *supra* note 29, at *53459 n.11.

¹⁸¹ The Aircraft Carrier proposal expressly states that "[free writing] communi-

10b-5 and section 12(a)(2) provide causes of action against issuers and underwriters¹⁸² for any misrepresentation or omission of a material fact in an interstate offer or sale of securities.¹⁸³ In actions brought under Rule 10b-5, the plaintiff must demonstrate that the defendants acted with scienter,¹⁸⁴ while section 12(a)(2) requires only negligence.¹⁸⁵ Given that section 12(a)(2) places a lesser burden of proof on plaintiffs than Rule 10b-5, it is understandable that commentators oppose the application of section 12(a)(2) liability to videotaped roadshows.

Commentators suggested after the landmark *Gustafson* decision that section 12(a)(2) liability may not apply to Internet roadshows.¹⁸⁶ Section 12(a)(2) may not be applicable

cations made during the offering period would be subject to the provisions of section 12(a)(2) under the Securities Act and the antifraud provisions of the Securities and the Exchange Acts." Aircraft Carrier Proposal, *supra* note 23, at *125.

¹⁸² A broker who watches an Internet roadshow and conveys false or misleading information to a client the broker has solicited may also be liable under section 12(a)(2) as a "statutory seller." See *Pinter v. Dahl*, 486 U.S. 622, 654-55 (1988). This case expanded the traditional privity requirement between buyers and sellers for section 12(a)(2) actions to persons who are "motivated at least in part . . . to serve [their] own financial interests or those of the securities owner." *Id.* Privity is easily met in a class action suit based on material misstatements or omissions at an Internet roadshow, since all class members can claim they were solicited by the same communication. See FED. R. CIV. P. 23(a) (prerequisites for a class action suit, including "commonality" of the claims).

¹⁸³ In *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), the Supreme Court held that a statement is material if there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Id.* at 449. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a Rule 10b-5 case, the U.S. Supreme Court adopted a materiality standard based on that articulated in *TSC Industries*. See *id.* at 230-32.

¹⁸⁴ See *Aaron v. SEC*, 446 U.S. 680, 691 (1980) ("scienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (scienter involves the "intent to deceive, manipulate, or defraud"). See generally Jaikaran Singh, *Watch Your Mouth: Section 12(a)(2) Liability for Oral Statements Made at Road Shows*, 23 J. CORP. L. 541 (1998).

¹⁸⁵ See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 585 (1995) (Thomas, J., dissenting) ("If the seller [of a security] acted negligently in making the misstatements, the buyer may sue to rescind the sale"); see also *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 689 (3d Cir. 1991) ("Section 12(2) [unlike section 10(b) and Rule 10b-5] makes actionable negligent misrepresentation absent proof of scienter or fraud"); *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 505 (5th Cir. 1990) (negligence is the standard of care in a Section 12(a)(2) action). Section 12(2) has been renumbered to 12(a)(2).

¹⁸⁶ See *Quinn & Jarmel*, *supra* note 8, at 236 n.6 (stating that section 12(2)

because password restrictions prevent the communications from being widely disseminated, a requirement for section 12(a)(2) liability after *Gustafson*.¹⁸⁷ However, Internet roadshows would arguably become "communications of wide dissemination" should the password protections be removed so that any person with Internet access can watch the transmissions. *Gustafson* would no longer be dispositive because the viewing audience would not be restricted. Thus, even if the SEC were not to expressly provide for section 12(a)(2) liability for videotaped roadshows, a clever plaintiff's lawyer might nonetheless be able to argue that section 12(a)(2) should apply to Internet roadshows that can be viewed by a general audience.¹⁸⁸

Moreover, once the roadshow is videotaped, it becomes a litigation document that can be obtained through discovery, if the plaintiff can prove that the videotape contains relevant evidence.¹⁸⁹ The filing requirement would, therefore, add no liability exposure because a plaintiff could either obtain the videotape from the SEC or from the Internet service providers themselves. The filing requirement would, however, make it easier for a plaintiff to obtain a videotape that is not otherwise publicly available.

may not apply to Internet roadshows given the restrictive nature of the audience after the *Gustafson* decision); Julia B. Strickland & David Neier, *Regulation of Road Shows*, 962 PLI/Corp 133, 136 (1996) ("[f]ollowing *Gustafson*, it appears that section 12(2) actions predicated on statements made or material distributed at road shows where the general public is not present will be difficult to sustain").

¹⁸⁷ See *Gustafson*, 513 U.S. at 574-75.

¹⁸⁸ The *Gustafson* court indicated that under Section 12(a)(2) "oral communications" that "relate to a prospectus" are actionable. *Gustafson*, 513 U.S. at 567. section 12(a)(2) liability may, therefore, apply to Internet roadshows since the purpose of the presentations is to highlight statements made in the preliminary prospectus. See Bloomberg, *supra* note 145, at *5-*6 ("sponsoring underwriters . . . will agree . . . to ensure that the information disclosed in the road show is not inconsistent with the prospectus"); Net Roadshow I, *supra* note 134, at *9 ("The viewer will be informed by a periodic crawl . . . of the importance of viewing the filed prospectus."); PFN No-Action Letter, *supra* note 113, at *6 ("steps [will be taken] to ensure that information disclosed in the road show is not inconsistent with the filed prospectus").

¹⁸⁹ Videotapes are discoverable along with other "photographic" material. FED. R. EVID. 1001(2) ("Photographs" include still photographs, x-ray films, video tapes, and motion pictures."). Under the Federal Rules of Evidence, a plaintiff must assert that the videotape contains evidence that makes the existence of some fact more or less probable. See FED. R. EVID. 401 (defining "relevant evidence").

Finally, the Aircraft Carrier proposal calls for the elimination of Rule 144A offerings and the exchange offer for public shares that frequently follow (called "Exxon Capital" exchanges based on a series of SEC interpretive letters that allowed the development of these offerings).¹⁹⁰ If this provision is adopted, then presumably Rule 144A Internet roadshows would no longer exist and would be taken over by public offering roadshows that have the section 12(a)(2) liability. The elimination of Rule 144A offerings is one of the primary objections to adoption of the Aircraft Carrier proposal and has been hotly opposed by practitioners who specialize in debt offerings.¹⁹¹

CONCLUSION

The growing use of Internet and closed-circuit roadshows has allowed for greater investor access to roadshow presentations. However, the concept is still in its developmental stages and will require significant salesmanship to convince investors and analysts of its advantage over live roadshows.¹⁹² Its greatest benefit is the cost savings for the issuer and lead underwriter in not having to travel great distances to give the

¹⁹⁰ See Aircraft Carrier Proposal, *supra* note 23, at *52 ("If the Commission decides to adopt [the Aircraft Carrier proposal], the staff of the Division of Corporation Finance would repeal the line of interpretive letters concerning Exxon Capital exchange offers"). See generally Morgan Stanley & Co. Inc., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 762 (June 5, 1991); Exxon Capital Holdings Corp., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 682 (May 13, 1988).

¹⁹¹ See John C. Coffee, Jr., *The SEC Aircraft Carrier is Under Attack*, 221 N.Y. L.J. 5 (Mar. 18, 1999) at 5 ("[P]ractitioners and investment bankers who specialize in the debt securities field . . . are incensed by the proposal in the Aircraft Carrier release to withdraw [the Exxon Capital interpretive letters]"); Quinn & Jarmel, *supra* note 38, at 7 n.20 ("[Aircraft Carrier discourages private placements . . . by proposing to abolish 'Exxon Capital' exchange offers and to increase the difficulty of reselling restricted securities on a registered basis").

¹⁹² See *Net Roadshow Eyes Financial Shows Online*, INTERACTIVE PR & MARKETING NEWS, Oct. 3, 1997, available in LEXIS, News Library, Current News File (stating that investment bankers can easily get information on an issuer without attending a live roadshow; therefore, Internet roadshows may not present a means to access issuer information that is not otherwise already available); see also Timothy J. Mullaney, *Finance on the Net*, BUS. WK., May 10, 1999, at 112 (discussing roadshows and quoting a fund manager as saying, "I never invest in a company unless I or one of our analysts has met management face-to-face").

presentations. It also allows investors and analysts to decide for themselves when to watch the roadshow rather than having to attend the presentation on a set time and date.

The 1933 Act prohibition on "radio and television broadcasts" during the waiting period is an impediment to the expansion of Internet roadshows to retail investors. The federal securities laws were enacted well before the advent of television, computers, faxes, e-mail, and the Internet, at a time when the global dissemination of information was expensive and impractical. Today, information can be sent worldwide over the Internet almost instantaneously. Companies can easily and cheaply load their annual financial reports and other data onto a web site for viewing by interested investors. Moreover, readily accessible market information, especially for large public firms, exists on electronic media and paper-based sources to counteract company communication.

Government regulation, while well-intended, is keeping retail purchasers on an unequal footing with institutional investors and individual accredited investors. The SEC should, therefore, adopt the portions of the Aircraft Carrier proposal that would allow retail investors to watch electronic roadshows. While the filing requirement and section 12(a)(2) liability for videotaped roadshows lessens the attractiveness of Internet Roadshows, the benefits of allowing a wider audience to view the presentations outweigh the disadvantages. The filing requirement and expansion of liability, if adopted, would simply force companies to be more careful than ever before about the statements made at roadshows.

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