11-401 Delivery of Documents by Issuers using Electronic Media Concept Proposal - Requests For Comments

I. Introduction

Developments in electronic communications technology such as the Internet have the potential to affect the way in which investors can access investment information and market research, the way in which investment products are offered to the public, and the activities of various securities market participants, including issuers and financial services intermediaries.

The Canadian Securities Administrators (the "CSA") has struck a committee to address the regulatory issues arising out of the use of the Internet and other electronic media by market participants. The CSA recognizes that technology is an important tool and that the regulatory structure should facilitate developments that encourage innovation. At the same time, innovation should not be supported by compromising investor protection or investor confidence in the integrity of the markets.

The focus of this Request for Comments is to seek comments on the following guidelines that are being considered by staff of each of the CSA (collectively, "staff") regarding the electronic delivery of information by issuers (including mutual fund issuers) to investors and potential investors under Canadian securities legislation, and other related issues. The CSA intends to consider other technology related issues in the future, such as offerings of securities over the Internet and secondary market transactions on the Internet.

II. Electronic Delivery of Information by Issuers under Canadian Securities Legislation

Recent and widespread advancements in information technology, including the Internet, provide issuers with the opportunity to disseminate information to investors and financial markets in a more timely, cost-efficient and widespread manner than traditional paper-based methods.

Staff have been reviewing whether the delivery requirements of an issuer under the securities laws in the various jurisdictions permit delivery of documents such as prospectuses and continuous disclosure material using electronic media.[1]

Staff propose that the requirements under Canadian securities legislation that use the words "communicate", "deliver", "disclose", "distribute", "forward", "furnish", "give", "inform ... by some other means", "make", "obtain", "otherwise made available",

1 The rules governing electronic filings under the System for Electronic Document Analysis and Retrieval System (SEDAR - National Instrument 13-101) apply only to filings with the Canadian securities regulatory authorities and do not affect the obligation of filers to deliver information to investors under Canadian securities legislation.

"provide", "receive", "send", "serve", and "written" can be interpreted to include delivery through electronic media unless the context otherwise specifies. The securities legislation in certain jurisdictions already specify that the delivery requirements may be satisfied by electronic means.

Staff are aware that the delivery of documents through electronic media may raise a number of issues attributable to the technological nature of such delivery. The CSA is publishing this Request for Comments for the purpose of obtaining the views of market participants on the manner in which electronic delivery can be achieved under Canadian securities legislation. In this regard staff have, among other things, reviewed a submission by the Investment Funds Institute of Canada and the interpretive releases issued by the United States Securities & Exchange Commission (the "SEC") on the use of electronic media for delivery purposes, including SEC Release No. 33-7233 (Oct. 6, 1995) (the "SEC Release"). A copy of the SEC Release follows this Request for Comments.[2]

III. Issuers using Electronic Media: Issues Relating to the "Effective Delivery" of Information

Staff are proposing that the regulatory focus concerning information delivered by issuers through electronic means should be on "effective delivery". The CSA seeks comment on whether the interpretive principles set forth in the SEC Release, including the examples provided to illustrate the application of these principles, are instructive in determining what constitutes "effective delivery" of the information. Staff are considering recommending adoption of the interpretive principles set forth in the SEC Release, as well as certain other principles identified below, to provide guidance to issuers regarding how the delivery obligations under Canadian securities laws may be satisfied.

The basic principle of the SEC Release is that the distribution of information through electronic means will satisfy the delivery requirements if such distribution results in the delivery to the intended recipients of information equivalent to information provided in paper form. Regardless of whether information is delivered in paper form or by electronic means, subject to permitted variations in formatting, it must convey all material and required information. The SEC Release focuses on notice, access and evidence of delivery.

Notice

The electronic transmission of information may not always bring to the attention of the recipient that the information is available (e.g. where information has been posted by an

2 The SEC has also published an interpretive release regarding delivery of information by dealers, transfer agents, and investment advisers (SEC Release No. 33-7288 - May 9, 1996). A specific question has been raised in this Request for Comments regarding whether the principles outlined in this Request for Comments should apply to registrants and other market participants using electronic media to satisfy the delivery requirements under Canadian securities legislation.

issuer at its web site). Information providers should consider whether an electronic communication provides timely and adequate notice that such information is available electronically, or whether it is necessary to supplement the electronic communication with another communication (i.e. in paper form or by an electronic communication to the recipient's e-mail address) that would provide notice similar to that provided by delivery in paper form through the postal mail.

Effective Access

Investors and security holders that are provided information through electronic delivery should have access to information comparable to that which would be provided if the information were delivered in paper form. Accordingly, the use of a particular medium should facilitate effective access and not be burdensome. In addition, persons should have the opportunity to retain the information through the selected medium or have ongoing access equivalent to personal retention (i.e. ability to download or print information to enable a recipient to retain a permanent record).

Evidence to Show Delivery

Issuers providing electronic delivery of information should have reason to believe that the electronic means selected will result in the satisfaction of the delivery requirements. Consideration should be given regarding the need to establish procedures to ensure that the delivery requirements under applicable Canadian securities legislation have been satisfied. Examples of evidence of the satisfaction of delivery requirements include: an e-mail return message upon receipt; and confirmation of accessing, downloading or printing.

In addition to the three main principles of notice, effective access and evidence of delivery highlighted in the SEC Release, the CSA seeks comment on the following other issues that staff believe issuers should consider in satisfying delivery requirements using electronic media.

Consent to Receive by Electronic Communication

The sender should explain to the intended recipient the sender's system for electronic delivery and obtain the intended recipient's consent to deliver through that electronic medium. However, the recipient should be provided with the right to revoke his or her consent at any time and should be informed of that right at the time of providing the consent.

Timely Delivery and Currency of Information

Information contained in an electronic communication should satisfy the requirements under Canadian securities legislation ordinarily applicable to paper documents regarding timing of delivery and currency of information.

Integrity, Security and Confidentiality of Information

Reasonable precautions should be taken to ensure the integrity, security and, where applicable, the confidentiality of the information delivered through electronic means. Internal measures should be implemented to ensure that only authorized personnel have the ability to modify, update or delete an electronic communication. Senders transmitting information electronically should tailor these precautions to the medium used in order to ensure that the information is reasonably secure from tampering or alteration, and to prevent unauthorized transactions.

Formatting

In certain circumstances, Canadian securities legislation requires particular formats to be used for offering documents (e.g. red herring requirements, font size, etc.). Staff believe that it is appropriate to modify these rules to make it clear that such requirements do not limit an issuer's ability to use electronic media. Staff are considering adopting similar formatting requirements as set forth in National Instrument 13-101 (SEDAR).

The CSA is requesting comments on the adoption of the above principles, including the application of those principles as illustrated in the examples in the SEC Release, in providing interpretive guidance to issuers regarding satisfaction of the delivery requirements by electronic means under Canadian securities legislation. Some of the examples included in the SEC Release may not be applicable given the differences that exist between Canadian and U.S. securities legislation.

IV. Other Related Issues

In addition to the issues relating to "effective delivery" of information using electronic media, the CSA is requesting comments on the following related issues: Hyperlinks and multimedia communications.

Hyperlinks

Staff are of the view that a sender of a document such as a prospectus using electronic media should be held responsible for all information that it makes available to a recipient, including information accessible through hyperlinks. The hyperlink function provides the ability to access information instantaneously. The SEC Release states that hyperlinked information may be analogized to the delivery of paper documents. The SEC's view is that information accessible through a hyperlink is similar to including the paper version of the information in the same envelope as the main document (SEC Release, example no. 16). Should all information "linked" to the prospectus be considered to be part of the prospectus and made available to all potential investors?

Multimedia Communications

Electronic communications can include such formats as audio and video presentations. The SEC permits the use of multimedia communications provided the issuer files with the SEC as an appendix a script and a "fair and accurate narrative description of the graphic or image material" (SEC Release, example no. 13). Staff are considering whether transcripts of these multimedia presentations should be required to be filed for regulatory review. The CSA invites comments on this issue. Specifically, is filing necessary or sufficient? Should the transcripts or other disclosure regarding the multimedia presentation be included in the written material delivered to investors?

V. Specific Comments Requested

In some jurisdictions, the statutory language of a limited number of provisions regarding delivery of information do not appear to be flexible enough to permit documents to be sent electronically. Should securities legislation be amended to permit electronic delivery for all types of documents (bid documents, prospectuses, proxy statements, financial statements, etc.)? If not, please identify the documents which should be treated differently and provide the reason for treating such documents differently.

The CSA also specifically invites comments on whether the interpretive principles outlined in this Request for Comments should apply to registrants and other market participants using electronic media to satisfy delivery requirements under Canadian securities legislation.

The CSA invites comments on the issues raised in this Request for Comments or any other matters relating to electronic delivery that have not been included and that should be addressed by the CSA.

The CSA also specifically invites comments on any other technology related issues that should be addressed by the CSA in the future.

Comments

Interested parties are invited to make written submissions with respect to the Request for Comments. Submissions received by September 20, 1997 will be considered.

Submissions should be made to all of the Canadian Securities Administrators listed below in care of the Ontario Securities Commission in duplicate, as indicated below:

British Columbia Securities Commission

Alberta Securities Commission

Commission des valeurs mobilièrs du Québec

Saskatchewan Securities Commission

Manitoba Securities Commission

Nova Scotia Securities Commission

Ontario Securities Commission

c/o Daniel P. Iggers, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8

Submissions should also be addressed to the Commission des valeurs mobilièrs du Québec as follows:

Jacques Labelle
General Secretary
Commission des valeurs mobilièrs du Québec
Tour de la Bourse
C.P. 246, 17th Floor
Montreal, Quebec H4Z 1G3

A diskette containing the submissions (in DOS or Windows format, preferably Wordperfect) should be submitted.

Comment letters submitted in response to requests for comments are placed on the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated amongst the securities regulatory authorities, whether or not confidentiality is requested. Although comment letters requesting confidentiality will not be placed on the public file, freedom of information legislation in certain jurisdictions may require the securities regulatory authorities in those jurisdictions to make comment letters available. Persons submitting comment letters should therefore be aware that the press and members of the public may be able to obtain access to any comment letters.

Questions may be referred to:

Melody Schalm
Policy Advisor
B.C. Securities Commission
(604) 660 - 4869

Ken Parker
Director, Securities Analysis
Alberta Securities Commission
(403) 422 - 0145

Daniel Laurion
Deputy Director, Regulation and Market Development
Commission des valeurs mobilièrs du Québec
(514) 873 - 5009 EX 266

Barbara Shourounis
Director
Saskatchewan Securities Commission
(306) 787- 5842

Dave Cheop
Senior Counsel
Manitoba Securities Commission
(204) 945 - 2561

Randee Pavalow
Policy Coordinator
Ontario Securities Commission
(416) 593 - 8257

Gary Tamura
Legal Counsel
Ontario Securities Commission
(416) 593 - 8119

Bill Slattery
Deputy of Corporate Finance and Administration
Nova Scotia Securities Commission
(902) 424 - 7768

June 13, 1997

SECURITIES AND EXCHANGE COMMISSION

RELEASE NO. 33-7233; 34-36345; IC-21399

FILE NO. S7-31-95

17 CFR PARTS 231, 241 and 271

RIN 3235-AG67

USE OF ELECTRONIC MEDIA FOR DELIVERY PURPOSES

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; Solicitation of comment.

SUMMARY: The Securities and Exchange Commission (the "Commission") is publishing its views with respect to the use of electronic media for information delivery under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. This interpretive guidance is intended to assist market participants in using electronic media to provide information under the federal securities laws and to encourage continued research and development and use of such media. The Commission is seeking comment on issues discussed in this release. In a companion release, the Commission is proposing technical amendments to Commission rules that are currently premised on the distribution of paper documents.

DATES: This Interpretation is effective on October 6, 1995. Comments should be received on or before [insert date 45 days after Federal Register publication].

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Stop 6-9, Washington, D.C. 20549. Comment letters should refer to File No. S7-31-95. All comments received will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Joseph Babits or James Budge (202) 942-2910, Division of Corporation Finance; and, with regard to questions concerning investment companies or investment advisers, Robert G. Bagnall or Emanuel D. Strauss (202) 942-0660, Division of Investment Management, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

The Commission today is publishing its views with respect to using electronic media as a means of delivering information required under the Securities Act of 1933 ("Securities Act"),[1] the Securities Exchange Act of 1934 ("Exchange Act"),[2] and the Investment Company Act of 1940 ("Investment Company Act").[3]

Advances in computers and electronic media technology are enabling companies to disseminate information to more people at a faster and more cost-effective rate than traditional distribution methods, which have been largely paper-based. The Commission appreciates the promise of electronic distribution of information in enhancing investors' ability to access, research, and analyze information, and in facilitating the provision of information by issuers and others. The Commission believes that, given the numerous benefits of electronic distribution of information and the fact that in many respects it may be more useful to investors than paper, its use should not be disfavored.

Until recently, on-line use of corporate information was generally limited to large corporations and institutional investors. The dramatic growth in personal computer ownership,[4]

however, is enabling many small investors to access on-line corporate information just as readily as institutions. Access to information through electronic means permits small investors to communicate quickly and efficiently with companies as well as with each other.[5]

Use of electronic media also enhances the efficiency of the securities markets by allowing for the rapid dissemination of information to investors and financial markets in a more cost-efficient, widespread, and equitable manner than traditional paper-based methods. Recognizing the multiple benefits of electronic technology, the Commission initiated its Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system in 1984 to automate the receipt, processing and dissemination of disclosure documents filed

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1 15 U.S.C. 77a *et seq.*

2 15 U.S.C. 78a *et seq.*

3 15 U.S.C. 80a-1 *et seq*

4 While estimates of computer ownership vary from survey to survey, it is anticipated that computer ownership will grow dramatically in the next few years. One recent survey suggests that nearly half of all American households own at least one computer and about 16% of those households that own a computer subscribe to on-line services. See B. L. McLaughlan, "Wired Nations: Half of U.S. Homes Now Have a Computer," The Detroit News, July 21, 1995, Meet News section. Another survey, however, found that only 31% of American households own a personal computer. See J. Morrison, "Hot Modems, Cold Lives: Refugees From Cyberspace," The New York Times, April 30, 1995, Section 1, col. 2, p. 45.

5 See, G. Weiss, "Online Investing -- At Your Fingertips Is A Powerful New Financial Tool," Business Week, June 5, 1995, at 64.

with the Commission under the Securities Act, Exchange Act and Investment Company Act.[6]

As a result of this automation, filings made with the Commission through EDGAR are available promptly to the public and financial markets. Today, more than 70% of all domestic public companies file electronically through EDGAR, and by May 1996, all domestic registrants will be required to file electronically through EDGAR.[7]

The EDGAR rules apply only to filings made with the Commission; the rules do not affect the obligation of filers to deliver to security holders or potential investors documents such as prospectuses, tender offer materials and proxy or information statements.[8]

As the ability to send and receive information in electronic form has become more prevalent, issuers and other market participants have begun requesting interpretive guidance regarding the electronic delivery of these documents.[9]

Moreover, hundreds of issuers are providing information through electronic means, primarily through computer networks.

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6 Access to EDGAR filings is generally available through information resellers that have purchased the data from the EDGAR dissemination subsystem and created a variety of on-line and CD-ROM versions. At the present time, 20 firms purchase data and create value-added products for analysts and the investor community. In addition, there is strong interest in ensuring that EDGAR documents are available, especially to individual investors, at the lowest possible cost. In January 1993, the New York University School of Business and the Internet Multicasting Service, a non-profit organization, received a grant from the National Science Foundation to make most EDGAR material available on the Internet. This grant expired on October 1, 1995. The Commission recently announced that it would package EDGAR filings with its own separate Internet service. This service, which began September 28, 1995, makes EDGAR filings as well as certain Commission releases and announcements available on the Internet. The Internet World Wide Web site address is http://www.sec.gov.

7 In order to encourage the rapid dissemination of additional information considered valuable by many members of the investment community, the Commission today is announcing its intention to expand the capacity of the EDGAR system to accommodate the electronic filing of ownership and transaction reports filed pursuant to Section 16 of the Exchange Act [15 U.S.C. 78p] and Rule 144 [17 CFR 230.144] under the Securities Act. See Release No. 33-7231. The necessary programming already has been initiated and filers should be able to file these documents electronically on a voluntary basis by late 1995 or early 1996. A further announcement will be made when the effective date is determined.

8 See Release No. 33-6977 at Section V.F (February 23, 1993) [58 FR 14628].

9 For purposes of this release, the term "electronic" refers to media such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, bulletin boards, Internet Web sites and computer networks (e.g., local area networks and commercial on-line services) to provide documents required by the federal securities laws to investors, security holders, and offerees. Such documents include: prospectuses required to be delivered in connection with offerings under the Securities Act; annual reports to security holders and proxy or information statements required to be furnished pursuant to Section 14 of the Exchange Act [15 U.S.C. 78n]; annual and semi-annual reports required by Section 30(d) of the Investment Company Act [15 U.S.C. 80a-29(d)]; documents furnished to investors in connection with tender offers or going private transactions; offering circulars delivered in connection with Regulation A [17 CFR 230.251-263] offerings; and disclosure required to be furnished in connection with Regulation D [17 CFR 230.505, 506] offerings (issuers should be mindful of the current prohibition in Rules 505 and 506 regarding general solicitation, see Examples 20 and 21). Other documents may include annual reports on Form 10-K [17 CFR 249.310] and other reports required to be furnished upon request to a security holder or the recipient of a prospectus using incorporation by reference. Additionally, this release addresses the electronic delivery of elective information, such as quarterly reports to security holders and sales literature. But see n. 12, below.

In February 1995, the Commission's Division of Corporation Finance issued an interpretive letter intending to address certain legal issues relating to electronic delivery of prospectuses ("Brown & Wood letter").[10]

The Brown & Wood letter established a number of conditions in order for a prospectus to be considered "delivered" electronically. The intention at the time of the release of the Brown & Wood letter was that the Commission would review this area in greater detail after the issuance of the letter with a view toward, through an appropriate release, providing further interpretive advice or proposed rulemaking. Because of these developments, along with the fact that none of the federal securities statutes exclusively require paper delivery of information, the Commission believes that interpretive guidance on the use of electronic media is appropriate. While the Commission anticipates that issuers and others will rely upon the guidance of this release, continued reliance on the generally more stringent requirements of the Brown & Wood letter is no longer required, but would be permissible.

This interpretive release addresses only the procedural aspects under the federal securities laws of electronic delivery, and does not affect the rights and responsibilities of any party under the federal securities laws.[11]

10 See Brown & Wood (February 17, 1995).

11 The liability provisions of the federal securities laws apply equally to electronic and paper-based media. For instance, the antifraud provisions of the federal securities laws as set forth in Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5] thereunder would apply to any information delivered electronically, as it does to information delivered in paper. As another example, Section 17(b) of the Securities Act [15 U.S.C. 77q(b)] would apply to any report circulated on the Internet just as if the report were provided in paper.
In addition, this release does not affect any applicable state laws or self-regulatory organization rules. Consequently, issuers and others need to consider the potential application of state law (e.g., state securities laws and business corporation laws) and other rules. At least one state has addressed issues relating to the use of electronic media in securities offerings. Recently, the Pennsylvania Securities Commission issued an order, effective for a period of one year beginning September 1, 1995, exempting from state qualification requirements securities offers made on the Internet where: 1) the offer indicates directly or indirectly that the securities are not being offered to persons in Pennsylvania; 2) an offer is not being made to any person in Pennsylvania by other means; and 3) no sales of the issuer's securities are made in Pennsylvania as a result of the Internet offer. See Order of the Pennsylvania Securities Commission In Re Offers Effected Through Internet That Do Not Result In Sales In Pennsylvania, dated August 31, 1995. In addition, the North American Securities Administrators Association, Inc., an association of securities commissioners from each of the 50 states, the District of Columbia, Puerto Rico, Mexico, and several Canadian provinces, has a committee that is addressing various issues, including jurisdictional authority, surrounding the use of electronic media in the offering of securities across state lines. The National Association of Securities Dealers, Inc. recently reminded its members of the applicability of its Rules for Fair Practice to electronic communications. See Special Notice to Members, 95-80, September 26, 1995.

This release addresses the delivery of information by or on behalf of issuers, as well as by or on behalf of third parties (such as persons making tender offers or soliciting proxies) with respect to issuers.[12]

Additionally, to facilitate further electronic delivery, the Commission proposes in a companion release to codify certain interpretations regarding Commission rules that are premised on the distribution of paper documents.[13]

The rules would be revised to make it clear that paper-based requirements relating to font size, bold-face type, red ink, graphics, and mailing may be modified as appropriate for documents delivered in electronic format.[14]

The proposals are not intended to affect any substantive requirement.

Given the numerous benefits of electronic media, the Commission encourages further technological research, development and application. The Commission believes that the use of electronic media should be at least an equal alternative to the use of paper-based media. Accordingly, issuer or third party information that can be delivered in paper under the federal securities laws may be delivered in electronic format.[15]

The Commission also expects that paper delivery of information will continue to be made available by issuers and others until such time as electronic media become more universally accessible and accepted, although the Commission recognizes that, for example, various offerings may now be made exclusively through electronic means.[16]

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12 Although Section 2(10) of the Securities Act [15 U.S.C. 77b(10)] defines "prospectus" to include a writing that "confirms the sale of any security," this release does not authorize transmission of confirmations, as required by Rule 10b-10 under the Exchange Act [17 CFR 240.10b-10] through electronic means. Consequently, while this release anticipates the electronic delivery of Section 10(a) prospectuses [15 U.S.C. 77j(a)], confirmations that are used to satisfy the delivery of a Section 10(a) prospectus, as permitted by Securities Act Rule 434 [17 CFR 230.434], cannot be delivered electronically at this time, unless specifically permitted as discussed below.

Under current interpretations of Rule 10b-10, confirmations may not be delivered electronically unless the Commission has specifically permitted such delivery. The Commission has recognized the use of a facsimile machine to send customer confirmations. Thus, if a customer has a facsimile machine, a broker-dealer would fulfill its confirmation delivery obligation if it sent the confirmation via facsimile transmission. Release No. 34-34962 (November 9, 1994), 60 FR 59612, 59614 n.28. The Commission, acting by delegated authority, also has allowed, under specified conditions, confirmations to be sent by electronic means. See, e.g., Thomson Financial Services (October 8, 1993). Applications for exemption from the requirements under Rule 10b-10 for delivery by paper or facsimile, pursuant to paragraph (e) of the Rule, may be sent to Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 5-10, Washington, D.C. 20549.

The Commission has directed the Division of Market Regulation to review this and other rules to determine if and under what conditions electronic delivery of information required by those rules is feasible. The Commission expects that this review will result in the issuance of additional releases relating to these rules.

13 See Release No. 33-7234.

14 See Section III, below.

15 See n. 9 and 12, above.

16 See n. 27, below

In connection with the June 1995 proposals on permitting the use of abbreviated financial statements in documents delivered to investors,[17]

comment was solicited on whether the increasing availability of disclosure through electronic media warrants reassessment of the current overall regulatory framework.[18]

Any comments received on the June 1995 proposals will be evaluated and appropriate action will be considered. By issuing this release in the interim, however, the Commission intends to assist issuers and other market participants in using electronic media to comply with the current regulatory scheme.

II. USE OF ELECTRONIC MEDIA

A. General

The federal securities statutes do not prescribe the medium to be used for providing information by or on behalf of issuers, or by or on behalf of third parties with respect to issuers.[19]

The Commission believes that delivery of information through an electronic medium generally could satisfy delivery or transmission obligations under the federal securities laws.

The federal securities laws, among other purposes, seek to promote fair and orderly markets by requiring the disclosure of material information that enables investors to make informed investment and voting decisions. The extent to which required disclosure is made, as opposed to the medium for providing it, should be most important to the analysis of whether sufficient disclosure has occurred under the securities laws. An electronic medium would not provide an adequate means for the delivery of required disclosure, and thus not serve the statutory purposes, if the medium does not permit effective communication to investors or is practically unavailable.[20]

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17 Release No. 33-7183 (June 27, 1995) [60 FR 35604].

18 See Section II.B to Release No. 33-7183.

19 But see n. 12, above.

20 Electronically delivered documents must be prepared, updated, and delivered consistent with the provisions of the federal securities laws in the same manner as paper documents. Regardless of whether information is delivered through paper or electronic means, it should, of course, convey all material and required information. If a paper document is required to present information in a certain order, then the electronic document should convey the information in substantially the same order. For example, in an audio or video prospectus, the information required to be on the cover page of a paper prospectus pursuant to Item 501(c) of Regulation S-K [17 CFR 229.501(c)] (e.g., red herring language) must be among the first information presented through the audio or video media.

Information need not be provided solely through one medium. For example, the Commission anticipates that, for practical reasons, many proxy solicitations would continue to be delivered only in paper by an issuer, while that issuer may choose to deliver other documents, such as an annual report to shareholders ("annual reports") through electronic means.

The Commission believes that the question of whether delivery through electronic media has been achieved is most easily examined by analogy to paper delivery procedures. The Commission would view information distributed through electronic means as satisfying the delivery or transmission requirements of the federal securities laws if such distribution results in the delivery[21] to the intended recipients of substantially equivalent information as these recipients would have had if the information were delivered to them in paper form.[22]

As is the case with paper delivery, there should be an opportunity to retain a permanent record of the information.

B. Guidance Regarding Electronic Delivery

The Commission believes that the analysis of whether an electronic communication is delivered or transmitted for purposes of the federal securities laws should be determined in accordance with the preceding discussion. In making such determination with respect to information communicated, in particular, over the Internet, through on-line services, or through analogous computer networks, the Commission believes that the following concepts discussed in this section reflect issues that should be considered in determining whether applicable statutory requirements have been satisfied.

This release is intended to provide guidance and a degree of certainty regarding the manner in which electronic delivery can be achieved. An issuer or other party that structures its delivery in accordance with the principles and examples set forth below can be assured that it is satisfying its delivery obligations under the federal securities laws. The Commission wishes to emphasize, however, that the factors discussed below are not the only factors relevant to determining whether the legal requirements pertaining to delivery or transmission of documents have been satisfied. If an issuer or third party develops a method of electronic delivery that differs from those discussed below, but provides assurance comparable to paper delivery that the required information will be delivered, that method may satisfy delivery or transmission obligations. The ultimate responsibility for satisfying the applicable statutory requirements remains with the issuer or other party to whom the law assigns the responsibility.

Notice. When an issuer delivers a paper document through the postal mail, the investor will most likely be made aware that new information exists and that the investor might have to take some action within a certain period of time. The Commission believes that those providing electronic information should consider the extent to which the electronic

21 Under the various federal securities statutes and rules, there are differing delivery obligations depending upon the context of the requirements. This release does not alter these requirements.

22 Issuers and other persons required to satisfy delivery requirements should consider establishing record-keeping or other procedures to evidence satisfaction of applicable requirements through electronic means. Presumably, such procedures would be analogous to comparable procedures followed when a paper document is delivered.

Those providing information also should take reasonable precautions to ensure the integrity and security of that information, regardless of whether it is to be delivered through electronic means or paper, so as to ensure that it is the information intended to be delivered.

communication provides timely and adequate notice to investors that information for them is available and, if necessary, consider supplementing the electronic communication with another communication that would provide notice similar to that provided by delivery in paper. If an electronic document itself is provided -- for example, on computer disk, CD-ROM, audio tape, videotape, or e-mail -- that communication itself should generally be sufficient notice. If the document is provided on an Internet Web site, however, separate notice would be necessary to satisfy the delivery requirements unless the issuer can otherwise evidence that delivery to the investor has been satisfied or the document is not required to be delivered under the federal securities laws.[23]

Access. When a document is delivered through the postal mail, a recipient generally is provided with access to the required disclosure. The Commission believes that recipients who are provided information through electronic delivery should have comparable access; consequently, the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided.[24]

Moreover, as is the case with a paper document, a recipient should have the opportunity to retain the information or have ongoing access equivalent to personal retention.[25]

If disclosure is made available by posting it on the Internet, making it available through on-line services, or making it available by similar means, the document should be accessible for as long as the delivery requirement applies.[26]

Finally, because of possible system failures, computer incompatibilities, and those cases, for example, where consents are used in connection with the delivery of information electronically and the person providing the consent revokes it, a necessary precaution given the current state and use of communications technology is that issuers must be able to make available paper versions of documents delivered in an electronic medium.

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23 For example, in an offering, notice of an updated or final prospectus and/or the updated or final prospectus itself need not be sent at all, through any means, to persons who have received an electronic preliminary prospectus, but to whom securities are not expected to be sold. Of course, the final prospectus would have to be delivered, through electronic means or otherwise, to those investors to whom securities are sold.

24 For example, if an investor must proceed through a confusing series of ever-changing menus to access a required document so that it is not reasonable to expect that access would generally occur, this procedure would likely be viewed as unduly burdensome. In that case, delivery would be deemed not to have occurred unless delivery otherwise could be shown.

There are some circumstances where burdensome procedures may be appropriate. See Example 48.

25 In many cases, the investor will be able to download the document from the electronic medium, which is sufficient to satisfy this need.

26 For example, after a paper preliminary prospectus has been provided, issuers make the most recent version of the prospectus available to all persons to whom they expect to sell. If an issuer posts electronically a preliminary prospectus on its Web site, the prospectus should be updated to the same degree as paper and be available to all persons to whom the issuer expects to sell securities in reliance on the electronic delivery of the prospectus. It likely would not be sufficient to show effective delivery if the information was merely posted for a brief period of time and then taken off the Web site, absent some other showing that delivery of the updated prospectus actually had occurred. In the case of a continuous offering, the prospectus should remain available for as long as the issuer will rely on its delivery through the electronic system. Annual reports should be available electronically for a sufficient length of time for delivery to be satisfied. In the case of proxy soliciting materials regarding the election of directors, investors might reasonably expect the proxy soliciting materials and annual report to be available on the Web site until their votes have been cast and the meeting adjourned.

Specifically, the Commission believes that, as a matter of policy, where a person has a right to receive a document under the federal securities laws and chooses to receive it electronically, that person should be provided with a paper version of the document if any consent to receive documents electronically were revoked or the person specifically requests a paper copy (regardless of whether any previously provided was revoked).[27]

C. Evidence to Show Delivery

Providing information through postal mail provides reasonable assurance that the delivery requirement is satisfied. The Commission believes that issuers and others[28] providing electronic delivery of information should similarly have reason to believe that any electronic means so selected will result in the satisfaction of the delivery requirements. Examples of procedures evidencing satisfaction of the delivery requirements include: (1) obtaining an informed consent from an investor to receive the information through a particular electronic medium[29] coupled with assuring appropriate notice and access, as discussed above; (2) obtaining evidence that an investor actually received the information, for example, by electronic mail return- receipt or confirmation of accessing, downloading, or printing (see example 36); (3) disseminating information through certain facsimile methods (see example 32); (4) an investor's accessing a document with hyperlinking to a required document (see examples 15 and 35); and (5) using forms or other material available only by accessing the information (see examples 31 and 33).

27 This policy would not preclude an issuer from structuring its offering as one that will be made only through electronic documents. However, companies conducting initial public offerings must consider prospectus delivery requirements for secondary market trading under Securities Act Rule 174 [17 CFR 230.174].

Further, if a potential investor makes it known that the receipt of information through electronic means by that person is no longer to be relied upon by the issuer (for example, due to the revocation of a consent previously given), then the issuer would not be able to rely on the electronic delivery of information subsequently to provide information to such person. If such subsequent information is required to be provided under the federal securities laws to such person because, for example, the person is now a shareholder and is entitled to receive a proxy statement then, absent some alternative, the issuer would be required to deliver the information through paper.

28 For example, broker-dealers, banks, associations and other fiduciary entities may have delivery obligations to forward proxy soliciting materials and annual reports to shareholders under Exchange Act Rules 14b-1 and 14b-2 [17 CFR 240.14b-1 and 240.14b-2]. See Example 29.

29 If a consent is used, the consent should be an informed consent. Recipients generally should be apprised: that information provided would be available through a specific electronic medium or source (e.g., via a limited proprietary system, or at a World Wide Web site); of the potential that investors may incur costs (e.g., on-line time); and of the period during, and the documents for, which the consent will be effective. For instance, investors should be made aware of whether the consent extends to more than one type of document. If an investor revokes a consent that extends to more than one document, and consent is being relied upon by the provider of the information to ensure effective delivery or transmission, future documents should be delivered in paper unless the provider of the information has an alternative mechanism for ensuring effective electronic delivery. If not, it would appear likely that continued electronic delivery, after revocation of the consent, would not be considered to result in the investor's having access to the information and, therefore, the delivery requirement would not be satisfied.

Moreover, an issuer could rely on consents provided to an underwriter, a brokerage firm or other service provider. Similarly, an underwriter or brokerage firm could rely on a consent that its customer provided to the issuer, and deliver that issuer's documents through the same electronic medium. Information may be provided through more than one medium; for example, proxy statements and proxy cards might continue to be delivered in paper while prospectuses might be delivered electronically. If the recipient of information provides a general consent to receive all documents electronically, it would be permissible for a provider of information to attempt to accommodate that request if the provider so desired.

The Commission requests comment on these concepts and on whether additional or alternative concepts would be more useful.

D. Examples

A series of examples is provided below to illustrate various applications of the above concepts and to provide guidance in applying them to specific facts and circumstances. The analysis required to determine compliance with the delivery requirements is fact-specific, and any different or additional facts might require a different conclusion. Although this interpretation is effective immediately, the Commission requests comment on whether other examples might be appropriate for publication in a subsequent release.

Securities Act

(1) Company XYZ places its final prospectus on its Internet Web site. Company XYZ then confirms by mail the sale of securities to investors with a note stating that the final prospectus is available on its Web site and giving the Internet location of the Web site.

Unlike paper delivery of a final prospectus where access to the document can be presumed with delivery, not all investors purchasing securities could be presumed to have the ability to access the final prospectus via an Internet Web site. Therefore, absent other factors such as express consent from the investor or an investor's actually accessing the document on the Web site, the procedures described above by themselves would not satisfy the delivery requirements under the Securities Act.

(2) Company XYZ places its final prospectus on its Internet Web site. Company XYZ then confirms by mail the sale of securities to those investors who have consented to electronic delivery via the Company's Internet Web site. A note on the bottom of the confirmation[30] states that the final prospectus is available on its Web site and the Internet location of the Web site.

This would satisfy delivery obligations, as it is reasonable to presume that investors who have consented to delivery of the final prospectus via an Internet Web site have the ability to access the final prospectus once such investors are supplied with notice of the Internet location of the Web site.

(3) While reviewing Company XYZ's preliminary prospectus on its Internet Web site, Investor John Doe consented to delivery of all future documents only through electronic mail, not by Web site access. Company XYZ subsequently places its

30 A separate document accompanying the confirmation also may be used.

final prospectus on its Internet Web site. Company XYZ then confirms by mail the sale of securities to John Doe. A note on the bottom of the confirmation states that the final prospectus is available on its Internet Web site and the location of that Web site.

Again, absent other factors such as John Doe's actually accessing the final prospectus on the Web site, the above-stated procedure of Company XYZ would not by itself satisfy the obligations to deliver the final prospectus to John Doe, as John Doe consented to delivery only by electronic mail, not via an Internet Web site. If consent is to be relied upon, the consent should indicate the specific electronic medium or media that may be used for delivery.

(4) While reviewing Company XYZ's preliminary prospectus on its Internet Web site, Investor John Doe consented to delivery of all future Company documents by 3 1/2" floppy disk. Company XYZ places its final prospectus on its Internet Web site. Company XYZ then confirms by mail the sale of securities to John Doe. A 3 1/2" floppy disk containing the final prospectus is included with the confirmation. This would satisfy the obligation to deliver the final prospectus to John Doe, since the Company included with the confirmation the final prospectus on a 3 1/2" floppy disk.

(5) Investor John Doe consents to delivery of all documents electronically via Company XYZ's Web site. Two days after consenting, John Doe realizes that the online service he subscribes to does not allow Internet access. John Doe notifies Company XYZ that he is revoking his consent for any electronic delivery as he is not able to access the Company's Internet Web site. Three weeks later, John Doe receives in the mail a confirmation of his purchase of Company XYZ's securities stating the Internet location of the Company's Web site where the final prospectus can be obtained.

Since John Doe revoked his consent for electronic delivery, the Company's notice to John Doe is insufficient because the Company knows that its attempted delivery through the Internet will not satisfy the statutory requirements for John Doe. A final paper prospectus would have to be delivered to John Doe instead. Although a consent is revocable at any time, revocation would have to be given to the company or its agent a reasonable time before electronic delivery has commenced for the company to be on notice that electronic delivery will not satisfy the statutory requirements.

(6) Company LMN, a non-reporting issuer, commences an initial public offering. Company LMN agrees with its underwriter, Brokerage Firm DFG, to place its preliminary prospectus on the Company's Internet Web site at least 48 hours prior to confirmations being sent. Investors John and Jane Doe are both expected to purchase securities in the Company's initial public offering. Both John and Jane Doe previously provided Company LMN with consents for electronic delivery through the Company's Internet Web site. Brokerage Firm DFG, pursuant to its

prospectus delivery obligation under Exchange Act Rule 15c2-8(b),[31] provides notice to John and Jane Doe at least 48 hours prior to sending them confirmations.

The underwriter may satisfy its obligation under Rule 15c2- 8(b) to John and Jane Doe by this means since both have consented to electronic delivery through the Company's Internet Web site. Although consent was not provided directly to the underwriter, the underwriter can rely on the consent supplied to the Company. Similarly, had the consent been provided to the underwriter, the Company could rely on it as well.

(7) Company ABC contracts with Company QRS, a computer technology company, to place its preliminary and final prospectuses on Company QRS's Internet Web site. Investor John Doe requests a copy of Company ABC's preliminary prospectus via electronic mail from Company ABC's underwriter, Brokerage Firm DFG. The underwriter sends a return electronic mail to John Doe asking if he would like the electronic or paper version of the preliminary prospectus. John Doe replies that the electronic version via the Internet Web site would be preferable. The underwriter then informs John Doe of the Internet location of Company QRS's Web site where the preliminary prospectus for Company ABC is available.

This would satisfy Brokerage Firm DFG's obligation to take reasonable steps to furnish to any person making a written request for a prospectus a copy of such prospectus.[32]

John Doe's request for the electronic version via the Internet indicates that such electronic delivery would be effective.[33]

(8) Company XYZ sends the final prospectus via electronic mail to those investors that previously had requested delivery by electronic mail.

The Company would meet its delivery obligation with this procedure.

(9) Company XYZ places a preliminary prospectus on its Internet Web site. After a material amendment to the registration statement, it is determined that recirculation of an updated prospectus will be required prior to effectiveness. Company XYZ updates the preliminary prospectus on its Web site.

31 17 CFR 240.15c2-8(b).

32 Exchange Act Rule 15c2-8(c), (d) [17 CFR 240.15c2- 8(c), (d)].

33 In Release No. 34-35705 (May 11, 1995) [60 FR 26604], the Commission stated that a managing underwriter may discharge its obligations pursuant to Rule 15c2-8(g) or (h) by delivering a prospectus (or any portion thereof) electronically to a participating broker-dealer, if the recipient broker-dealer expressly consents to delivery in such form, consistent with the Brown & Wood letter. As reflected in that release and as further discussed n this release and Examples 6 and 7 above, it is the Commission's view that broker-dealers may use a variety of means to satisfy the prospectus delivery obligations of Rule 15c2-8, including electronic delivery.

The Company need only send notice of the update to those investors who are expected to purchase securities in the offering (or takes other measures to deliver the information to those investors). There is no need to send notice to individuals who are not expected to purchase securities in the offering.

(10) Company XYZ places its final prospectus on its Internet Web site. Its underwriters mail confirmations of sales to all purchasers. At the same time the confirmations are mailed, the underwriters send via electronic mail notice of the location of the Internet Web site where the final prospectus is available. Notice is sent to all investors who had consented to electronic delivery via an Internet Web site and who provided their electronic mail addresses for purposes of being notified. To those investors that did not provide an electronic mail address but did consent to electronic delivery of the final prospectus, the underwriters mailed the notice of the location of the Internet Web site with the confirmation.

As the notice made investors aware of the availability and location of the electronic document, the delivery requirement would be satisfied.

(11) Company XYZ posts its final prospectus for sale of its common stock on its Internet Web site. Company XYZ's stock is traded on the New York Stock Exchange (NYSE). The NYSE requests 300 paper copies of Company XYZ's final prospectus pursuant to Securities Act Rule 153.[34]

Rather than sending 300 copies of its final prospectus to the NYSE, Company XYZ provides the NYSE with notice of its Internet Web site, where the final prospectus can be accessed and downloaded.

This would be insufficient delivery under Securities Act Rule 153. Company XYZ must supply the 300 paper copies to the NYSE. The NYSE must be in the position to provide paper copies of Company XYZ's final prospectus because there is no reasonable expectation that delivery would otherwise be satisfied with regard to investors who do not use any electronic means to receive information. The NYSE would, however, satisfy its delivery obligations with respect to any investor who received delivery of the information through electronic means.

(12) Company XYZ places its preliminary prospectus on its Internet Web site. Upon effectiveness of its registration statement, the Company decides to deliver a term sheet pursuant to Securities Act Rule 434. The term sheet, however, will not be placed on the Company's Web site, but will be delivered in paper format with confirmation of the sale to all investors.

Delivery of a mixed medium final prospectus would satisfy delivery obligations. Generally, if investors received the preliminary prospectus electronically, issuers are encouraged to deliver all documents that constitute the final prospectus in

34 17 CFR 230.153.

electronic format. However, confirmations cannot be furnished electronically unless the Commission has specifically approved such delivery.[35]

(13) Company XYZ wants to deliver to investors a CD-ROM version of its prospectus. The CD-ROM version includes within the prospectus a movie illustrating the Company's operations. Investors viewing the CD-ROM prospectus would not have to exit the prospectus in order to view the movie, as the movie is actually a part of the prospectus.

While Company XYZ may include the movie as part of the prospectus, it would need to file with the Commission as an appendix to the prospectus the script of the movie and a fair and accurate narrative description of the graphic or image material just as it would have to supplementally provide to the Commission scripts and descriptions of such material in sales material.

(14) Company XYZ places a copy of its final prospectus on its Internet Web site. The electronic final prospectus will remain there throughout the period for which delivery is required. Company XYZ also places supplemental sales literature on its Internet Web site. Both the sales literature and the prospectus can be accessed from the same menu, are clearly identified on, and appear in close proximity to each other;[36] the supplemental sales literature may be accessed before viewing or downloading the prospectus.

Sales literature, whether in paper or electronic form, is required to be preceded or accompanied by a final prospectus.[37]

In this example, the prospectus would accompany the sales literature since investors can access both the prospectus and sales literature from the same menu. The sales literature and final prospectus should appear in close proximity to each other on the menu. For example, the sales literature should not be presented on the first page of a menu while the final prospectus is buried within the menu.

(15) Company XYZ places its sales literature in a discussion forum located on the Internet World Wide Web. The sales literature contains a hyperlink to the Company's final prospectus. While viewing the literature the individual can click on a box marked "final prospectus," and almost instantly the person will be linked directly to the Company's Web site and the final prospectus will appear on the person's computer screen.

Sales literature, whether in paper or electronic form, is required to be preceded or accompanied by a final prospectus. The hyperlink function enables the final

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35 See n. 12, above.

36 In this example, the prospectus is accessible on the same menu as the supplemental sales literature; consequently, the existence of the prospectus and its location are readily ascertainable by the investor viewing the sales literature.

37 Section 5(b) of the Securities Act.

prospectus to be viewed directly as if it were packaged in the same envelope as the sales literature. Therefore, the final prospectus would be considered to have accompanied the sales literature. Consequently, the placing of sales literature in a discussion forum on a Web site would satisfy delivery obligations provided that a hyperlink that provides direct access to the final prospectus is included.

(16) Company XYZ places a preliminary prospectus on its Internet Web site and provides direct access via a hyperlink to a research report on the Company written by ABC Corporation, a registered brokerage firm. The investor reviewing the preliminary prospectus can click on a box marked "ABC's research report" and the investor will be linked to the brokerage firm's Web site where the research report is available.

The hyperlink function provides the ability to access information located on another Web site almost instantaneously. This direct and quick access to ABC's research report would be similar to the Company including the paper version of the research report in the same envelope that it is using to mail the paper version of the preliminary prospectus to potential investors. During the waiting period, the Company may make offers only through the use of a preliminary prospectus,[38] whether in paper or electronic format; therefore, its use of the research report under these circumstances would not be permissible.

(17) Company XYZ places its final prospectus on its Internet Web site. The Company then mails sales literature to individuals for whom delivery through the Internet Web site was effective (regardless of whether the individuals consented to delivery). Similarly, Brokerage Firm ABC mails Company XYZ sales literature to its customers for whom delivery through the Internet Web site was effective (regardless of whether the individuals consented to delivery). In the forepart of Company XYZ's sales literature is notice of the availability and Internet Web site location of its final prospectus.

The mailing of sales literature to these individuals is permissible, provided that notice of the availability of the final prospectus and its Internet Web site location accompanies or precedes the sales literature. When notice is included within sales literature, it should be in the forepart of the literature and clearly highlighted to make investors aware of the availability and location of the final prospectus.

(18) Company XYZ places a tombstone advertisement complying with Securities Act Rule [39] on its Internet Web site.

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38 Section 5(b) of the Securities Act.

39 17 CFR 230.134.

This would be permissible, provided that the advertisement otherwise complies with Rule 134.

(19) Company XYZ files a registration statement with the Commission. The Company then places a "tombstone" advertisement in accordance with Securities Act Rule 134 in the Wall Street Journal. In the advertisement the Company includes the name and address of the underwriter from whom a paper prospectus can be obtained as well as the location of its Internet Web site where an electronic prospectus can be obtained.

This inclusion of an electronic address for obtaining the materials in this "tombstone" advertisement would be permissible under Rule 134. (Similarly, an advertisement made pursuant to Rule 14a-2(a)(6)[40] indicating the availability of proxy soliciting materials and the location of an Internet Web site where electronic proxy soliciting materials could be obtained would be permissible.)

(20) Company XYZ wants to raise $5 million by selling its common stock in a private placement pursuant to Securities Act Rule 506 of Regulation D. The Company places its offering materials on its Internet Web site, which requires various information from a person attempting to access the materials to be provided to the Company prior to displaying the offering materials.

The placing of the offering materials on the Internet would not be consistent with the prohibition against general solicitation or advertising in Rule 502(c) of Regulation D.[41]

Where prospective purchasers have been otherwise located without a general solicitation, a proprietary computer service could be used to deliver required disclosure documents.

(21) Company XYZ wants to raise $5 million by selling its common stock in a private placement pursuant to Rule 506 of Regulation D to certain individuals who have been located without a general solicitation. The Company transmits the offering materials via electronic mail addresses provided by these persons.

This would not be inconsistent with the offering restrictions in the rule.

(22) Company XYZ pays John Doe $10,000 to write a report about the Company and post the report on the Internet. John Doe writes the report and places it on the Growth Companies Investment Bulletin Board located on the Internet. The report does not disclose the $10,000 that the Company paid John Doe.

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40 17 CFR 240.14a-2(a)(6).

41 17 CFR 230.502(c). In Release 33-7185 (June 27, 1995), the Commission solicited comment on the question of whether the prohibition against general solicitation in Regulation D offerings should be reconsidered.

The Securities Act requires that the $10,000 compensation paid by Company XYZ to John Doe be disclosed in the report, regardless of whether it is in electronic or paper form.[42]

Exchange Act

(23) Company XYZ places its annual report and proxy soliciting materials on its Internet Web site. The Company then sends notice to all its record holders that its annual report and proxy soliciting materials are available on its Internet Web site along with the Internet location of the Web site and a telephone number that shareholders may call to request a paper copy.

Similar to Example (1), a company should not presume that all record holders have the ability to access the annual report and proxy soliciting materials via an Internet Web site. Therefore, absent other factors such as a consent from, or actual access by, a Company shareholder, posting of the annual report and proxy soliciting materials via the Company's Internet Web site would be insufficient to constitute delivery to all record holders. The Company, however, may place the materials on its Web site, but in this instance, it also would need to furnish paper copies of the materials to its record holders.

(24) In January 1995, Company XYZ places a copy of its final prospectus on its Internet Web site. The prospectus will remain there throughout the period for which delivery is required. Prior to viewing the final prospectus, Investor John Doe provides an express consent to the delivery of the prospectus and all future documents related to the offering via Company XYZ's Web site. Investor John Doe subsequently purchases the securities. In connection with its May 1995 annual meeting, Company XYZ places proxy soliciting materials on its Web site and places an advertisement in the Wall Street Journal indicating that its proxy materials are now available on its Web site.

This advertisement by itself, even coupled with the express consent that related to the offering documents, is insufficient for the company to assume that it has delivered its proxy statement to Investor John Doe. Although John Doe had provided consent to receiving documents electronically, there is no reason to believe that notice provided in the Wall Street Journal would make John aware of the availability of the proxy materials. Company XYZ must provide more direct delivery or notice to John Doe of the proxy materials. Notice by publication in a newspaper or on a Web site or bulletin board is insufficient.

(25) In September 1994, John Doe, a shareholder in Company XYZ, requests all future corporate communications including proxy statements and annual reports to

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42 Section 17(b) of the Securities Act.

shareholders ("annual report") to be delivered electronically through the Company's Internet Web site. The consent form states that Company XYZ expects that its annual report and proxy materials for its annual meeting will be available on its Web site on April 1, 1995. On April 1, 1995, the Company places its annual report and proxy soliciting materials on its Web site.

Unlike the delivery of paper annual reports and proxy soliciting materials, where the mere appearance in the mail of such materials places the shareholder on notice within close proximity to the time when shareholder action is requested, the advance request in this example, without more, may not be close enough in time to the requested action to be effective. However, if the Company reasonably expects for other specific reasons, such as a history of communications with that shareholder, that the shareholder would have effective delivery of the information through the Web site, then the procedure could be acceptable.

(26) Record holder Jane Doe consents to delivery of all documents via Company XYZ's Web site. On April 1, 1995, Company XYZ provides notice to Jane Doe that its annual report and proxy materials are available on its Web site for its annual meeting scheduled to be held on May 5, 1995. On April 5, 1995, Jane Doe notifies the Company that her computer is broken and requests a paper copy of the annual report and proxy materials.

Because Jane Doe's notice to the Company indicates that electronic delivery will be ineffective, the Company should provide Jane Doe with paper copies of the annual report and proxy materials within a reasonable time of her request. She does not need to withdraw her consent in order to receive the paper copies.

(27) Company XYZ places its quarterly report to shareholders and Forms 8-K on its Internet Web site and advertises the location of its Web site in the Wall Street Journal. The Company takes no other action to deliver these materials to shareholders.

This would be permissible, since there generally is no requirement to deliver such materials to shareholders at all.

(28) Company XYZ places its annual report and proxy soliciting materials for the election of directors on its Internet Web site and provides notice to all record holders that previously had consented to electronic delivery via the Company's Web site. The record holders are instructed to print the proxy card, execute the proxy and then mail it back to the Company.

This would be consistent with the proxy rules.

(29) Brokerage Firm ABC solicits its customers who are beneficial owners of Company XYZ to determine whether they would like to receive Company XYZ's annual report and proxy soliciting materials electronically via the Internet rather

than in paper. The Brokerage Firm then informs the Company that 100 beneficial holders would like to receive the materials electronically and 200 beneficial holders would prefer paper materials.

The Company provides the Brokerage Firm with the location of its Internet Web site where the materials are posted and copies of its paper documents for the 200 beneficial owners who do not wish to receive the electronic delivery. The Brokerage Firm then forwards the notice of the location of the electronic materials to those beneficial holders who consented to receive electronic delivery and forwards the paper materials to those who did not.[43]

This would be consistent with the proxy rules.

(30) Company XYZ wishes to produce its annual report on videotape and CD-ROM. The videotape and CD-ROM will contain all the material information disclosed in the glossy annual report. Before distributing the Company's annual report, the Company sends a letter asking its shareholders whether they would be interested in receiving the Company's annual report on videotape or CD-ROM instead of paper. The Company then sends the videotape version of its annual report to its shareholders who wish to receive the videotape and the CD-ROM version to those shareholders who wish to receive the CD-ROM. The paper glossy annual report is sent to those shareholders who do not wish to receive either electronic format.

The federal securities laws do not preclude the delivery of a document through different media.

Mutual Funds

The Commission is aware that investment companies, particularly open-end investment companies ("mutual funds" or "funds") have been active in using electronic means to communicate with their shareholders and prospective investors.[44]

Given the extent to which funds have embraced the new technologies, the Commission believes that it is appropriate to include the following additional examples, which are tailored to the fund industry. Unless otherwise noted, however, investment companies other than mutual funds and other corporate issuers or third parties may use these examples for guidance as well.

43 Exchange Act Rule 14b-1. This example also is applicable to delivery by banks and other entities pursuant to Rule 14b-2. communicate with their shareholders and prospective investors.

44 See E. Savitz, "Let A Thousand Web Site Bloom," Barron's, June 26 1995, at 50.

Examples

(31) A fund sends an e-mail to a recipient with a prospectus attached. The prospectus file includes an application form. The recipient fills out the form and mails it with a check to the fund.

Delivery of the prospectus may be inferred from the recipient's use of the form (provided the fund can identify it as coming from the electronically transmitted prospectus).

(32) A current prospectus is faxed to a potential investor who has requested the prospectus and provided the phone number of the fax machine.

This transmission satisfies the prospectus delivery requirements.

(33) A current prospectus and an application are faxed to a potential investor. The investor did not request the fax, but the sender knows the investor's fax machine phone number.

If the investor completes and mails in the application form included in the faxed prospectus, delivery of the electronic prospectus may be inferred.

(34) A fund sends an unsolicited e-mail with a prospectus attached in one file, and supplemental sales literature in a separate file. The investor can access the sales literature and the prospectus with equal ease.

The fund may send the supplemental sales literature in this fashion.[45]

Electronic delivery of the prospectus may be inferred even if the prospectus is not accessed. This would be analogous to an investor receiving by mail a prospectus and supplemental sales literature in the same envelope and electing to review the sales literature, but not the prospectus.

(35) A fund posts its supplemental sales literature and prospectus on a file server for open access over the Internet. The supplemental sales literature contains hyperlinks to the fund's electronic prospectus and includes a caption referring the investor to the prospectus. The investor would not need any additional software or need to take burdensome steps to access the prospectus and thus has reasonably comparable access to both documents. This system also provides for the downloading or printing of prospectuses and sales literature. An investor would

45 Sections 2(10)(a) and 5(b) of the Securities Act.

not be required to retrieve, download, or print a prospectus before viewing the sales literature. The system does not require any consent by its users.

When a user accesses the supplemental sales literature, electronic delivery of the prospectus can be inferred. This scenario is analogous to an investor's selecting an envelope containing a paper prospectus and supplemental sales literature from a display at an office of a broker-dealer. This electronic delivery of the prospectus would be sufficient for other purposes if the fund could reasonably establish that the investor has actually accessed the sales literature or the prospectus.

(36) A prospectus is made available through an on-line system that allows users to access, download or print the entire prospectus and has the capacity to track which users accessed, printed or downloaded which documents.

A fund may rely upon a user's having accessed, printed or downloaded a prospectus for the fund in order to deliver supplemental sales literature or an order form for the fund or to establish delivery of the prospectus in connection with a sale of fund shares.

(37) A fund's prospectus is available through an on-line service that does not have the capacity for downloading or printing or to track retrieval by a user. Investors do not provide any consent. The fund mails or e-mails supplemental sales literature, or an application to all of the service's subscribers, without including a prospectus.

Absent other factors that would indicate delivery of the prospectus, the fund may not send the supplemental sales literature or an application in this fashion, because it is not preceded or accompanied by the prospectus for purposes of Section 2(10)(a) of the Securities Act.[46]

This would be true even if the general subscription agreement for the service contained a provision consenting to receipt of documents, because such consent would not be sufficient to give the fund reason to believe that delivery requirements relating to the prospectus will actually be satisfied.

(38) A server available through the Internet contains a fund's prospectus and application form in separate files. Users can download or print the application form without first accessing, downloading or printing the prospectus; the form includes a statement that by signing the form, the investor certifies that he or she has received the prospectus. Logistically it is significantly more burdensome to access the prospectus than the application form (e.g., the investor needs to download special software before accessing the prospectus).

46 This is analogous to printing a fund prospectus in a magazine of general circulation and subsequently mailing supplemental sales literature to the magazine's subscribers, which would not comply with Sections 2(10) and 5(b) of the Securities Act. See William C. Lloyd (State of Wisconsin), June 7, 1990.

The statement in the form about receipt of the prospectus would not by itself constitute electronic delivery of the prospectus, and the application form is not evidence of delivery of the prospectus, given the need to download special software before the prospectus can be viewed.

(39) A server available through the Internet contains a fund's prospectus. Users must download the prospectus to view or print it. When a user downloads the prospectus, the user receives the prospectus and an application form in separate files. It is not significantly more burdensome to access the prospectus than the application form (e.g., no additional software is necessary to read either document, although the documents may be in different formats). If the fund can identify the application form as coming from the electronic system, electronic delivery of the prospectus can be inferred. The application form is evidence of delivery of the prospectus.

(40) A fund's prospectus and application form are available through an electronic system like that described in the preceding example, except that the investor needs to download special software before the prospectus and application form can be downloaded.

If the fund can identify the application form as coming from the electronic system, electronic delivery of the prospectus can be inferred. The application form is evidence of access to the prospectus.

(41) A fund sends an e-mail with an attached file containing an advertisement satisfying the requirements of Securities Act Rule 482.[47]

There is no prospectus delivery requirement in this context; a Rule 482 advertisement need not be preceded or accompanied by a prospectus.

(42) A fund transmits prospectuses over an electronic bulletin board. Investors provide specific consent to receipt of the prospectus through that system. The consent states that the current version of the prospectus will be made continuously available and notice of material amendments will be given by mail, e-mail, or some other manner specifically directed to investors.

The prospectus delivery requirements will be satisfied with respect to subsequent additional purchases by those investors.

(43) A fund places its prospectus on its Internet Web site and revises the electronic version whenever the prospectus is modified. The fund materially amends the prospectus and decides to send a postcard or e-mail to persons to whom the

47 Rule 482 [17 CFR 230.482] permits a registered investment company or business development company to use an "omitting prospectus" advertisement that contains only information the substance of which is included in the company's Section 10(a) prospectus.

prospectus has been delivered through electronic means or who have consented to electronic delivery notifying them of the availability of the amended prospectus.

This procedure provides for delivery of the prospectus to those who have consented and to those to whom the prospectus has been previously delivered (if the fund expects those persons to be able to receive the amended prospectus). Alternatively, the fund could choose to satisfy its prospectus delivery requirements by sending a paper copy of the amended prospectus to investors in the fund, including investors who consented to receive documents electronically.

(44) A fund places its prospectus on its Internet Web site. Potential investor John Doe obtains access to the prospectus. John Doe does not purchase shares in the fund. Subsequently, the prospectus is amended.

The fund does not need to provide John Doe with notice of the amendment.

(45) A fund puts proxy solicitation materials on the fund's server on the World Wide Web. At the same time, the fund sends out postcards or e-mail messages (with investors having consented to receive notification by e-mail) giving notification that the proxy materials are available. Investors have signed up to receive documents through the server.

This would be consistent with the proxy rules.

(46) A fund transmits annual and semi-annual reports over an electronic bulletin board system. The fund makes the current versions of these materials available and informs investors who have consented to electronic delivery of this fact. The fund provides separate notification each time a shareholder report is posted by including the notification in the preceding quarterly account statement or shareholder newsletter. The notice informs investors of a date by which the report will be available.

Notification to shareholders in a statement or newsletter delivered within the preceding quarter would be considered sufficient notice under Section 30(d) of the Investment Company Act[48] and the rules thereunder to constitute delivery.

(47) A fund sends investors upon request a CD-ROM containing its current prospectus and registration statement materials for the fund's offering.

This would provide delivery to investors.[49]

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48 15 U.S.C. 80a-29(d).

(48) Prospectuses and other materials are available through a computer server that requires users to obtain a user ID and password before they can access documents on the system. The process for obtaining the ID and password requires significant information from the user and involves a delay of one day or even several days before the user can access the system. After a user accesses a prospectus, a fund sends him or her supplemental sales literature.

The process provides for delivery of the prospectus. Although the system imposes burdens in the process for obtaining access to the prospectus, these burdens are part of the process of providing access to all the information, including the supplemental sales literature, and not burdens upon access to the prospectus that is delivered.

(49) A prospectus is made available through an on-line system that allows users to download the entire prospectus. The system does not permit on-line viewing. An investor downloads the prospectus.

Assuming downloading, this method would satisfy the delivery requirements because on-line viewing is not a prerequisite to electronic delivery.

(50) A fund provides its prospectus, annual and semi-annual reports through an Internet Web site. After one year, the fund decides to terminate the Web site.

The fund may cease making its prospectus available through the Web site as soon as the fund no longer plans to rely on electronic delivery for satisfying its prospectus delivery requirements.[50]

Generally, an annual or semi-annual report should be available until superseded by a later report. The fund in this example could terminate the posting of the most recent report when it is superseded by a new one, or earlier if it provides a replacement paper copy to shareholders who received the report electronically.

(51) The text of a fund's prospectus transmitted electronically on a CD-ROM or an Internet Web site follows the sequence requirements of Form N-1A.[51]

The prospectus includes a summary, which contains hyperlinks that allow the investor to move to later sections of the prospectus or to other documents (e.g., the fund's statement of additional information or annual report). The summary is part of the prospectus text that is subject to the form's sequence requirements.

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49 The analysis would be the same if an investor requests and receives information on a diskette.

50 Continued sales of fund shares or delivery of sales literature or application forms to investors who had received the prospectus electronically would require delivery of paper prospectus to those investors. Funds should consider whether paper prospectuses should also be sent to other investors (e.g., recent purchasers).

51 17 CFR 274.11A.

Even though the hyperlinks allow an investor to choose to view information out of sequence, the prospectus satisfies the requirements of Form N-1A, because the main text does comply with the sequence requirement.

(52) A fund places its prospectus (information required by Part A of Form N-1A) on its Internet Web site. The fund does not put its Statement of Additional Information ("SAI") (information required by Part B of Form N-1A) on its Web site; instead, it provides a paper copy of its SAI free of charge to any person that requests it.

Delivery of a paper copy of an SAI does not prevent a fund from satisfying its prospectus delivery requirements electronically.

III. PROPOSED AMENDMENTS

This release is intended to address practices involving electronic delivery that are acceptable under current rules; no substantive changes to filing or delivery requirements are contemplated here. However, in order to make it clear that current rules should be read to encompass electronic as well as paper dissemination, the Commission is proposing in a companion release a number of technical amendments to its rules.[52]

IV. ELECTRONIC FILING ISSUES

As emphasized previously, this release addresses only issues relating to electronic delivery of required disclosure documents and does not affect the Commission's electronic filing requirements. However, the Commission recognizes that the same rapid development of electronic communications in recent years that has led to the issuance of this release also has implications for how the Commission should receive, process and make publicly available the documents filed with it pursuant to the federal securities laws. Currently, filings are accepted by the Commission only in the electronic formats prescribed by the EDGAR system, or in paper, where the filer has not yet become subject to mandated electronic filing requirements or where there is an exemption pursuant to the electronic filing rules. While EDGAR may be modified in the future to accept and process a broader array of electronic formats, there may be ways to allow the filing of documents prepared and delivered in other electronic media on a more expedited timetable. As the Commission continues with its review of this area, it intends to issue additional releases. Comment on the costs and benefits to filers and the federal

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52 See Release No. 33-7234 for the text of those amendments. Rule changes are proposed to be made to the following rules and forms: Rule 253 of Regulation A [17 CFR 230.253]; Rule 420 of Regulation C [17 CFR 230.420]; Rules 481 and 482 of Regulation C [17 CFR 230.481, 230.482]; Rule 605 of Regulation E [17 CFR 230.605]; Rule 304 of Regulation S-T [17 CFR 232.304]; Forms F-7 [17 CFR 239.37], F-8 [17 CFR 239.38], F-9 [17 CFR 239.39]; F-10 [17 CFR 239.40] and F-80 [17 CFR 239.41]; Rule 12b-12 [17 CFR 240.12b-12]; Rule 13e-3 [17 CFR 240.13e-3]; Rule 13e-4 [17 CFR 240.13e-4]; Schedule 13E-4F [17 CFR 240.13e-102]; Rule 14a-3 [17 CFR 240.14a-3]; Rule 14a-5 [17 CFR 240.14a-5]; Rule 14a-7 [17 CFR 240.14a-7]; Rule 14c-4 [17 CFR 240.14c-4]; Rule 14c-7 [17 CFR 240.14c-7]; Rule 14d-5 [17 CFR 240.14d-5]; Schedule 14D-1F [17 CFR 240.14d-102]; Schedule 14D-9F [17 CFR 240.14d-103]; and Rule 8b-12 [17 CFR 270.8b-12]; Rule 30d-1 [17 CFR 270.30d-1] and Rule 30d-2 [17 CFR 270.30d-2].

government with respect to these issues should be provided by persons submitting comment on these issues.

V. SOLICITATION OF COMMENT

Any interested persons wishing to submit written comments relating to the views expressed in this release, or with respect to the rule proposals in the companion release, are invited to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C., 20549. Commenters should refer to File Number S7-31-95. Comment is requested not only on the specific issues discussed on the release, but on any other approaches or issues that should be considered in connection with facilitating the use of electronic media to further the disclosure purposes of the federal securities laws. Comment is sought 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 shareholders. The Commission further requests comment on any competitive burdens that might result from the adoption of the proposals. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under Section 23(a) of the Exchange Act.[53]

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 INTERPRETIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 231 is amended by adding Release No. 33-7233 and the release date of October 6, 1995, to the list of interpretive releases.

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

2. Part 241 is amended by adding Release No. 34-36345 and the release date of October 6, 1995, to the list of interpretive releases.

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

53 15 U.S.C. 78w(a).

3. Part 271 is amended by adding Release No. IC-21399 and the release date of October 6, 1995, to the list of interpretive releases.

By the Commission.

Jonathan G. Katz
Secretary

Dated: October 6, 1995