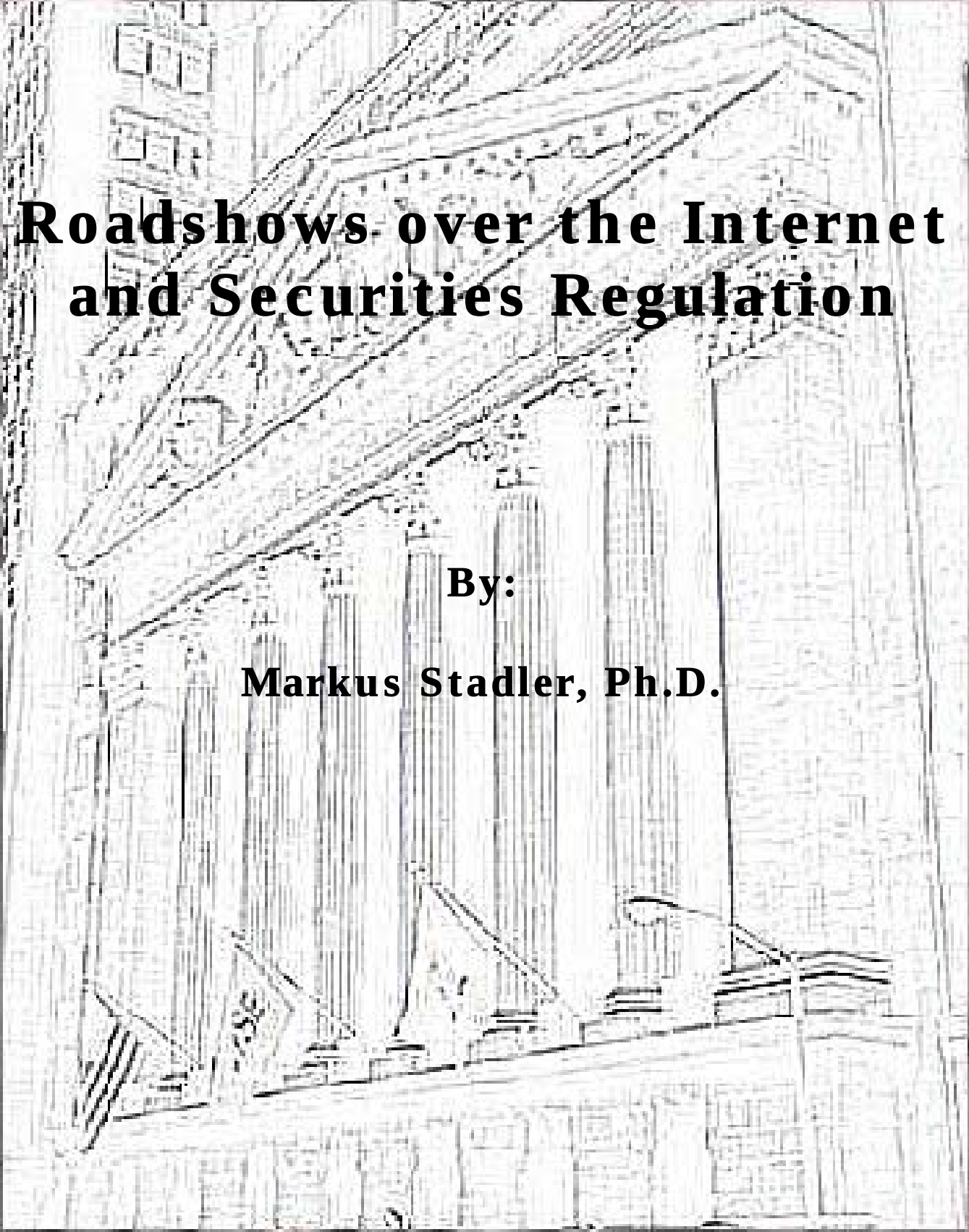




Roadshows over the Internet and Securities Regulation

By:

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(Quoted statutory provisions are those of the Securities Act of 1933, unless indicated otherwise.)

Executive Summary:

Over the past few years, hundreds of roadshows for IPOs were transmitted over the Internet to a limited circle of investment advisors and institutional investors, recently also to retail investors. The SEC has widely approved Internet roadshows by issuing no-action letters, and has suggested new regulations for on-line roadshows. These regulations would generally legalize Internet roadshows to all investors. However, they would require that Internet roadshows be filed with the SEC as ‘free writing.’ Under the current statutory situation, we will argue that Internet roadshows accessible to investment advisors and institutional investors are permissible under certain conditions. However, we are of the opinion that Internet roadshows may not be made available to retail investors under §§ 5 and 10 of the Securities Act of 1933. Insofar, the no-action practice of the SEC is beyond the regulatory scheme of the Act.

I. Introduction

Roadshows are ordinarily live presentations given to a narrow circle of investment advisors and institutional investors for the purpose of ‘book building’ before the effective date of a public offering. While roadshows are occasionally conducted before a registration statement is filed, thereby raising the problem of illicit ‘gun-jumping,’ the vast majority of roadshows take place in the post-filing period (waiting period) before the effective date. Usually, a preliminary ‘red herring’ prospectus is already filed.

In the past years, roadshows have increasingly been broadcasted on the Internet. A commentator recently emphasized the benefits of on-line roadshows:

“By allowing roadshows to go online, the SEC has broadened greatly institutional investors access to roadshows. Those investors living in remote communities are able to participate in roadshows without expensive travel costs. Furthermore, investors who otherwise would not attend a roadshow due to schedule conflicts can attend Internet roadshows at their convenience. In addition, Internet roadshows potentially can provide more information than is received at live roadshows and efficiently can help “streamline” the traditional several-town show presentations.¹

The SEC, widely approving Internet roadshows, points out that its enforcement practice is a ‘*step towards greater flexibility in the offering process for issuers, underwriters and investors alike.*’² Service companies like ‘Net Roadshow, Inc.’ offer to set up and transmit roadshows on the Internet for issuers of securities.

While practical advantages for Internet roadshows are obvious, as a matter of law, it is decisive whether or not this on-line roadshow practice is in compliance with the applicable provisions of §§ 2(10) and 5(1) of the Securities Act of 1933 as enacted

¹ Gordon, SCORs of Problems with Small Corporate Issues, the Internet and the Law, WALLSTREETLAWYER.COM 17 (Jan. 1998).

² No-action letter on behalf of PNF, March 21, 1997.

by Congress. Therefore, Internet roadshows are primarily a matter of proper statutory interpretation, rather than a question of practical advantages.

In this paper we will first illustrate how electronic roadshows are designed in practice. Then we will outline the SEC's opinion and rulings, as well as proposed new regulations for electronic roadshows. Finally we will thoroughly examine whether the current use of on-line roadshows and the SEC's enforcement practice are in compliance with the Federal Securities Laws. For public offerings, we will limit the scope of this paper to roadshows broadcasted during the waiting period after a registration statement is filed. We will also shortly discuss the implications of roadshows in private placements.

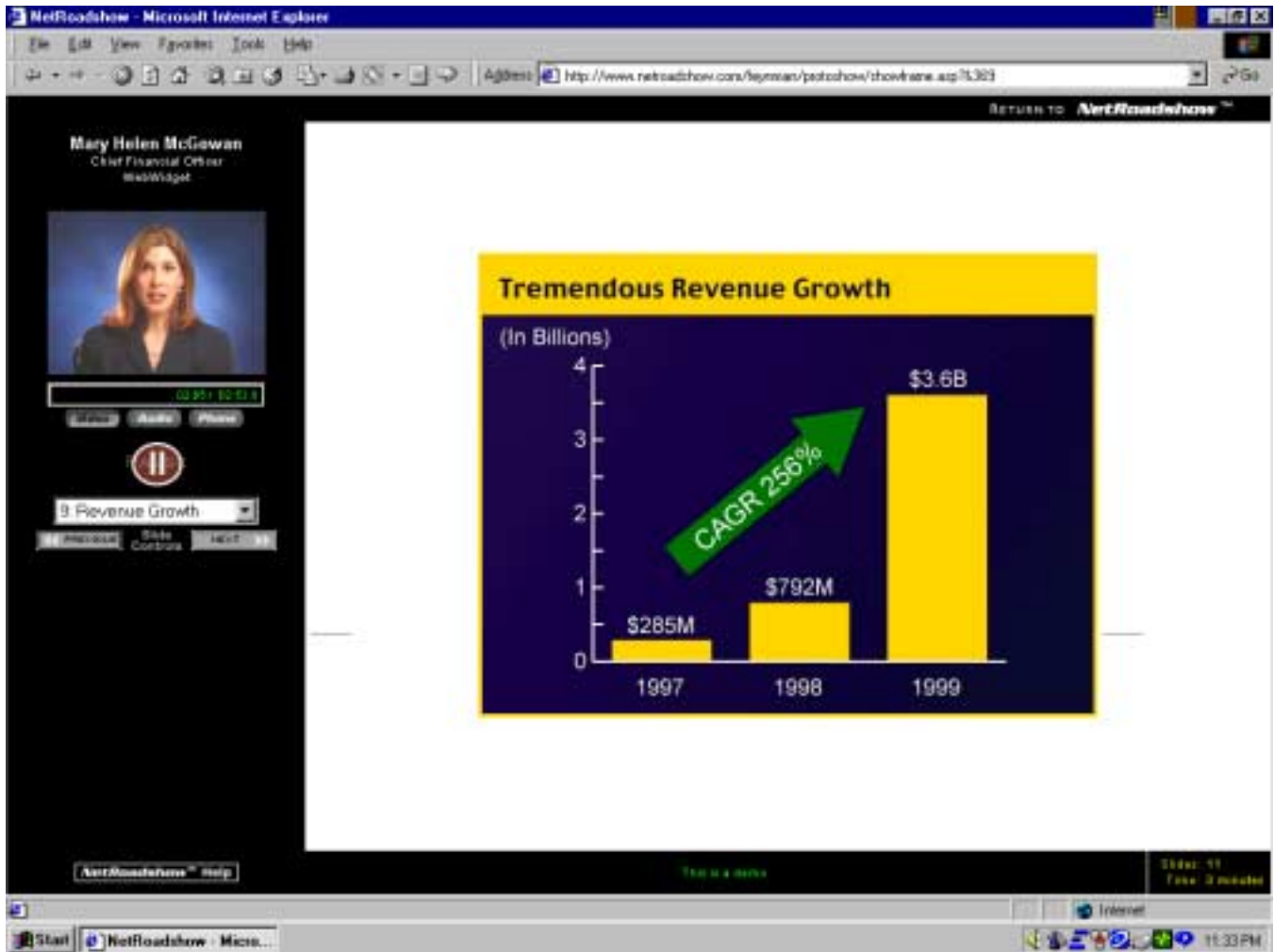
II. Internet Roadshows in Practice

Several Internet service providers now actively offer on-line roadshows for issuers of securities after they received no-action letter by the SEC.

Bloomberg L.P. conducts recorded on-line roadshows on its proprietary pages to certain of its subscribers.

Net Roadshow, Inc. has been transmitting more than 800 unedited roadshows over the Internet (and other media such as satellite, telephone circuits or cable) to a selected circle of qualified investors who would customarily be invited to roadshows, such as registered broker-dealers and investment advisors. Access is restricted via password. The access codes are changed every day, and any qualified investor gets an access password only one time so that no one can watch the roadshow longer than one day. In its request for a no-action letter, the company proposed that the show be an exact replica of the original live show, and that the show could only be viewed in its

entirety. Upon relaxation of this latter requirement by the SEC, the shows are now split in several parts that can be viewed separately. The preliminary prospectus can be downloaded and printed from the website. The presentations combine voice transmissions with illustrative and explanatory graphs and diagrams.



Net Roadshow: Demo of Internet Roadshow 1

ACTIVATE.net's service goes even further. While most of *Net Roadshow*'s broadcastings are recorded, *ACTIVATE.net* targets live transmissions of roadshows. This includes real-time interaction with the viewers in form of Q&A.³

III. The Legal Framework – Securities Act 1933

A. Public Offerings

Most roadshows are given between the filing of the registration statement and the effective date for the purpose of book building. After filing of the registration statement, § 5 (b) (1) of the Securities Act 1933⁴ renders it unlawful,

“to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security ... unless such prospectus meets the requirements of section 10.”

Therefore, the Act allows dissemination of information on securities exclusively in the form of a ‘prospectus’ that must meet the specific requirements of § 10.⁵ Any illegal distribution of prospectuses that are not in compliance with § 10 give rise to liability under § 12 (a) (1).⁶ Since the design of most roadshows does clearly not fall within the requirements of § 10, the legal key question centers on whether or not a roadshow is a ‘prospectus’ as defined by the Act, and therefore a violation of § 5 of the Act absent the necessary content of prospectuses. § 2 (10)⁷ defines the term ‘prospectus’ very broadly, including any ‘*notice, circular, advertisement, letter, or communication, written or by radio or television.*’

³ See Terzah Ewing, The Road now Taken: Shows Touting IPOs now on the Web, WALLSTREET JOURNAL, Sep. 22, 1999.

⁴ 15 U.S.C. § 77e(b)(1).

⁵ 15 U.S.C. § 77j.

⁶ 15 U.S.C. § 77l.

⁷ 15 U.S.C. § 77b(10).

B. Private Placements

In the case of private placements, the legal focus is on the problem of '*general solicitation*.' Absent any general solicitation, private securities offerings are exempt from registration if made to accredited investors and/or a limited number of non-accredited investors (35) under § 4 (2)⁸ and Rule 506. Likewise, the circle of investors for subsequent resales of exempt securities under Rule 144A is confined to 'Qualified Institutional Investors,' (QIB) as defined in Rule 144A (a) (1). Therefore, electronic roadshows in private offerings must be limited to the aforementioned investors.

IV. The SEC Enforcement Practice

Since 1997, the SEC has issued a variety of no-action letters on behalf of financial service companies that offer to design and transmit roadshows for issuers of securities. The SEC has set certain requirements for its no-action relief, but stepwisely eased these requirements over time.



A. Various No-Action Letters since 1997

1. No-Action Letter for Private Financial Network ("PFN")

The first no-action letter was issued on behalf of PFN on March 12, 1997.⁹ PFN requested the no-action letter for video broadcasting (rather than the Internet as medium of dissemination) to be transmitted to PFN's subscribers via satellite, telephone circuits and cable for reception on dedicated workplace computer screens and television

⁸ 15 U.S.C. § 77d(2).

⁹ 1997 SEC LEXIS 406.

monitors. PFN argued that the use of radio or television technology for *closed* circuit or other controlled retransmission were not ‘radio’ or ‘broadcast,’ as defined in § 2 (10).

The SEC issued the requested no-action letter without any deep legal reasoning. It would not take action against the video roadshow as unlawful prospectus if:

1. The video transmission is made available only to PFN subscribers who agree not to videotape, copy or further distribute the presentation;
2. Each PFN subscriber receives a filed prospectus from the issuer or the underwriters of the subject security before the presentation is transmitted;
3. The issuer and underwriters take reasonable steps to ensure that the information disclosed in the roadshow presentation is not inconsistent with the filed prospectus; and
4. Each transmission includes visual statements or "crawls" emphasizing the importance of the filed prospectus and the prohibition against videotaping, copying or further distribution of the presentation.

At the same time, the SEC pointed out that its ruling could have quite a far-reaching impact that will significantly depend on the ‘evolving nature of the electronic media and the security of its access.’ It rejected any binding power of this no-action letter for future cases. In particular, the SEC mentioned that one unsolved issue was a possible interactive design enabling viewers to participate in Q&A sessions.

2. Net Roadshow, Inc.

The first Internet roadshow case was the no-action letter request made by *Net Roadshow, Inc.* Again, without giving any explanation, the staff issued a no-action letter on Sep. 8, 1997¹⁰ for on-line roadshows, provided:

1. No transmission prior to filing of a registration statement;
2. Accessible only for institutional investors via passwords to be changed every day, and viewing being restricted to one day only;

¹⁰ 1997 WL 555935.

3. Internet roadshow will be an exact replica of the live roadshow;
4. Viewers will be advised on-screen to agree to not copy, distribute or download the roadshow;
5. Viewers will be reminded of the importance of the filed prospectus that they can print any time;
6. Issuers and underwriters will assure consistency of the on-line roadshow with the filed prospectus and the live-roadshow;
7. Viewers will not be permitted to view the roadshow selectively.

According to this no-action letter, on-line roadshows need no longer be an exact videotaped replica of the live roadshow (as in PFN's case), so long as the Internet version is not inconsistent with information in the registration statement, filed preliminary prospectus, or the live roadshow.

3. **Bloomberg, L.P.**

On Dec. 1, 1997, the SEC rendered another no-action letter to *Bloomberg, L.P.*¹¹ with conditions similar to those in the letter issued to *Net Roadshow, Inc.* However, now the SEC permitted that the viewers watch only parts of the roadshows, and the roadshow may be organized according to an agenda of the specific segments that are separately accessible. This is what can now be seen in *Net Roadshow Inc.*'s roadshow presentations as well. The viewer can access the segments of the roadshows (financial, marketing, etc.) separately with a pull-down menu (see, Figure 1 above). Moreover, the SEC allowed the delivery of the preliminary prospectus being affected by a web link to EDGAR.

¹¹ 1997 WL 739085.

4. Thomson Financial Services, Inc. / Activate.net Corp.

Two other no-action letters were issued to *Thomson Financial Services, Inc.* (Sep. 4, 1998)¹² and *Activate.net Corp.* (Sep. 1999). They contain the same conditions of the earlier letters. In addition, *Thomson* was allowed to display on its Web page and index of upcoming offerings, indicating the ones that will have on-line road shows available. Moreover, while most of the roadshows transmitted by *Net Roadshow, Inc.* were recorded and broadcasted on a delayed basis, *Activate.net* offers real-time transmission of roadshows with interactive features, allowing viewers to electronically submit questions that can be answered during the live roadshow.

5. Charles Schwab & Co, Inc.

The last one in the line of no-action letters was recently issued to *Charles Schwab & Co., Inc.* The breathtaking point in this letter is that *Schwab* may grant access to the roadshows not only to institutional investors and investment advisors, but also to high net-worth individual investors who qualify for *Schwab*'s "Gold Signature Services Accounts." These clients must have a trading history of at least 24 trades per year, or assets of more than \$ 500,000 equity in household investment positions.

6. Private Placements

Moreover, the SEC has permitted roadshows for private placements if effective procedures are implemented to restrict access to the class of investors permitted under § 4 (2).¹³ It also issued a second no-action letter to *Net Roadshow, Inc.*

¹² 1998 SEC LEXIS 837.

¹³ No-action letters to *Lamp Technologies*, July 26, 1996 and May 29, 1997.

(Jan. 30, 1998)¹⁴ with respect to resales of securities issued in a private placement (Rule 144A). The SEC conditioned the no-action letter on the following requirements:

1. Viewers are only QIB (Qualified Institutional Investors as defined in Rule 144A).
2. Confidential password protection unique to each specific roadshow and expiring upon completion of the offering.
3. Seller must declare that viewers are QIBs, that the offer is exempt, and passwords will be provided only to QIBs.
4. The company transmitting the roadshow is not an affiliate of the seller or issuer.

B. Comments of the SEC – Proposed Reform

When issuing the aforementioned no-action letters, the SEC did not develop any legal theory for its rulings. It seems that the SEC's activities are mainly driven by its efforts to allow broad dissemination of information to all investors, and the Internet is obviously an efficient medium for that. The SEC repeatedly expressed concern about selective disclosure of information to a limited circle, such as analysts, investment advisors and selected institutional investors.¹⁵ This would offer an unfair advantage to those persons over retail investors, and the price setting would entirely be in the hands of the institutional sector, while today the real driving force for price setting is often the retail market.¹⁶

In its efforts to ban selective disclosure, the SEC proposed several regulatory changes to modernize the Securities Act of 1933. The proposed new rules would open

¹⁴ 1998 WL 40252.

¹⁵ Commissioner Laura S. Unger, Speech Feb. 18, 1999 at the University of Texas School of Law 21st Annual Conference on Securities Regulation and Business Law: "The Commission generally disfavors selective disclosure of information. ... The Internet may push selective disclosure by the wayside."; *see also*: SEC Report to the Congress: The Impact of Recent Technological Advances on the Securities Markets.

¹⁶ Commissioner Isaac C. Hunt, Speech Feb. 26, 1999 at the Practicing Law Institute's SEC SPEAKS.

up communications during the traditional post-filing waiting period in an effort to ‘democratize’ access to information between retail and institutional investors.¹⁷ Companies would be allowed to distribute ‘*free writing*’ over the Internet, including electronic roadshows. However, though the “**Aircraft Carrier**” Release proposals do not contain filing requirements for electronic roadshows, the SEC suggests that material disclosed in on-line roadshows would need to be filed with the SEC under a new Rule 425, and be subject to liability under § 12 (a) (2).¹⁸ Several financial institutions expressed concern about this filing requirement. It would induce issuers and underwriters to narrowly limit the information contained in the roadshows in an effort to limit their liability under § 12 (a) (2), thereby curtailing the purpose of encouraging wide dissemination of information and running counter to the purpose of the proposed regulatory reform.¹⁹

The SEC’s proposals²⁰ would provide for the following regulations:

- Companies may make offers and disseminate offering information (as ‘free writing’) to *all investors* during the waiting period *in any form* without each communication having to meet the requirements of § 10.
- Though *filing* would be required, the free writing need not be delivered to the SEC.

¹⁷ Commissioner Laura S. Unger, Speech June 11, 1999, at the Ninth Annual New England Securities Law Conference.

¹⁸ *Id.*

¹⁹ E.g., Comment of Salomon Smith Barney and Citibank, letter to the SEC of June 30, 1999; *see also* Commissioner Isaac C. Hunt’s comments, Speech Feb. 26, 1999 at the Practising Law Institute’s SEC SPEAKS.

²⁰ SEC Release No. 33-7606A; 34-40632A; IC-23519A, File No. S7-30-98.

- Rule 134 would be limited to investment companies. Under the new regulation, other investors would not need the Rule 134 safe harbor.

V. Statutory Analysis – Public Offerings

However, until these new regulations will have been enacted, we need to abide by the current statutory guidelines and look to what Congress meant with the term ‘prospectus’ in the Securities Act of 1933. Ordinarily, according to the landmark decision *Gustafson v. Alloyd Co.*,²¹ the term ‘prospectus’ contains three elements:



- (1) Written communication (‘document’),
- (2) widely disseminated to the public
- (3) in a public offering.

1. Written communication

In their request for no-action letters, applicants repeatedly suggested that Internet roadshows not be treated as ‘written communications’ within the meaning of § 2 (10).²² This argument has little merit. True is that a prospectus needs to be embodied in some kind of written document.²³ That can clearly be inferred from § 12 (2) relating to “prospectus or oral communication.” This phrasing basically means that, once a written

²¹ 513 U.S. 561, 115 S. Ct. 1061 (1995).

²² See also, Speech of SEC Commissioner Laura S. Unger, Jan. 27, 2000, at the San Diego Securities Institute: “The conditions in the electronic roadshow line of no-action letters are designed to make roadshows more like “oral” offers.”

²³ see, *Gustafson*, at 574: while not every written communication automatically constitutes a prospectus, personification in a document is a necessary prerequisite for a prospectus.

prospectus is filed, any oral communication related to this prospectus may give rise to § 12 (2) liability.²⁴ As an inverse argument, the prospectus itself must be in writing.

However, this requirement of a written document must sharply be distinguished from the *medium* of communication. The words ‘*written or by radio or television*’ in § 2 (10) indicate that the *dissemination* of the material might very well be effected by other means than physical distribution of the actual written material, *i.e.*, radio or television. The Act does not expressly mention the Internet; however, transmission of video and voice clips on the Net is certainly a special kind of “television” within the meaning of § 2 (10). Excluded are merely oral face-to-face or telephonic conversations that are not evidenced in a written document.²⁵

It can reasonably be assumed that most roadshows are somehow documented in writing. The *Net Roadshow, Inc. Demo* (p. 3) displays graphs with text and numbers, and the spoken part has presumably an underlying text version. Therefore, the writing requirement is the wrong element to make Internet roadshows immune from liability under §§ 5, 11, 12.

2. Public Offering – Wide Dissemination to the Public

A more promising point of departure to legalize Internet roadshows is the requirement of ‘*wide dissemination to the public*.’ This element is immediately coupled with the requirement that the underlying offer be ‘public.’ The majority opinion in *Gustafson* limits §§ 12 and 10 to public offerings, and consequently requires that a prospectus be disseminated to the public, while dissenting Justices Thomas, Scalia,

²⁴ See, *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3rd Cir. 1991).

²⁵ *Gustafson*, at 562.

Ginsburg, and Breyer, referring to the former holding of the Seventh Circuit in *Pacific v. Allen*,²⁶ don't get to like the public offering requirement, and expand the term 'prospectus' to any private communication in non-public offerings.²⁷ As an argument *a maiore ad minus*, the proponents of the latter view should certainly consider *private* communications in a public offering a 'prospectus', too. Thus, Internet roadshows, whether or not given to a narrowly selected ('private') audience, would be deemed an unlawful prospectus via television. Luckily enough for the providers of Internet roadshows, in the light of the majority opinion in *Gustafson*, the holding in *Pacific* is not governing any more.

However, the minority's view in *Gustafson* and the Seventh Circuit's opinion in *Pacific* do have merit at first glance. Amazingly enough, even after centuries of practice in statutory construction, the Supreme Court still seems not to agree on a common general approach to statutory interpretation. While the majority opinion in *Gustafson* more refers to sources outside the four corners, the minority points out that the essential point in every case involving construction of a statute be the language itself. Ample authority supports this.²⁸ It can reasonably be assumed that Congress knows how to properly use the English language, and, absent clear ambiguity or other compelling reasons, there is no reason to leave the four corners of the statute. The language of § 2 (10), in pertinent part, gives a broad definition of the term 'prospectus,' including communication media that ordinarily involve wide dissemination (e.g.,

²⁶ *Pacific Dunlop Holdings Inc. v. Allen & Co. Inc.*, 993 F.2d 578 (7th Cir. 1993).

²⁷ *Id.* See also, *SEC v. Kienlen*, 755 F. Supp. 936 (D. Or. 1991): In this case, a brochure that was handed out in a meeting to investors was deemed a 'prospectus.' Unfortunately, the case does not contain any details as to the number and classification of these investors.

²⁸ *Pacific*, at 582; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935 (1975).

‘advertisement,’ including dissemination on TV and radio), along with those that might be used in a more selective manner (e.g., ‘letter,’ ‘notice’), as well as means in the middle of the road (e.g., ‘circular’). This indicates that the definition encompasses *all* kinds of dissemination, from broadcasts to the general public, over circulars and other advertisements to mere letters and notices. According to the minority, there’s nothing in the language for the proposition that a prospectus be contingent on a broad distribution to a public audience.

The majority derives its opposite view from the term ‘*communication*.’ If this term, as suggested in *Pacific*, included all written non-public communication, it would render the preceding words ‘notice, circular, advertisement, letter’ redundant since these are all special cases of written communication. Therefore, under the doctrine of *noscitur sociis*, the term ‘written communication’ must have a narrow scope in order to give some meaning to the other terms in § 2 (10). Since ‘communication’ clearly referred to ‘radio or television’, apparently media with wide dissemination, the entire list suggested to public communication only. This argument is not compelling. It is not uncommon that statutes give a broad general definition along with an exemplary list.

Equally unavailing is the majority’s reference to legislative history. Indeed, the Supreme Court has increasingly taken recourse to legislative history in the past decades.²⁹ However, legislative materials are usually scattered expressions of opinions by house members or group of members that don’t necessarily reflect the whole legislator’s view. While it is true that in the case in question here some legislative

²⁹ Jorge L. Carro & Andrew R. Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 JURIMETRICS J. 294, 303 (1982).

sources clearly refer to communications of wide dissemination,³⁰ others indicate the opposite.³¹ The legislative history that the majority tries to capitalize on is simply inconclusive in the light of inconsistent statements.

However, there's one argument in the majority opinion that we believe is inescapable: The principle that specific terms should be given the same meaning throughout the Act as a whole. It is widely undisputed that a prospectus, as referred to in § 10 (a) (1) of the Act, applies to public offerings only since reference is made to the registration statement to be filed in accordance with § 5 that applies to public offerings only. It is certainly true that, as the minority contends, specific terms are not necessarily used consistently in a comprehensive act.³² In particular, the meaning might vary in different parts of an act. However, the 1933 Securities Act is a pretty lean and clearly organized code with nearly 30 sections only. And the term 'prospectus' seems to be so crucial that Congress provided for a detailed definition in § 2 (10). Hence, it is hardly conceivable that the meaning of the term 'prospectus,' should have various meanings in different sections of the 1933 Act. We therefore conclude that, in compliance with the majority in *Gustafson*, information given by the issuer of securities is a 'prospectus' falling within §§ 10 (a) (1) and 12 (a) (2) only if distributed in a public offering, reaching a certain level of wide dissemination to the public. From here it is obvious, that the decisive benchmark for roadshows is the **level of dissemination**.

³⁰ H.R. Rep. No. 85, 73d Congress, 1st Sess., 10 (1933): "The statements ..., although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security ...".

³¹ H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 26-27 (1933): This Conference Report, explaining the Act in its final form, nowhere suggests a limitation to public offerings or wide dissemination.

³² *Atlantic Cleaners & Dryers, Inc. v. U.S.*, 286 U.S. 427, 52 S. Ct. 607 (1932).

a. Investment Advisors

Making a roadshow available to **investment advisors** does clearly not reach a level of dissemination that would make it an unlawful prospectus. Investment advisors are more intermediaries between the issuer and the public; they provide advice, counsel, publications, etc. (§ 201 of the Investment Advisers Act of 1940³³). In their capacity of ‘financial service intermediaries,’ they are not part of the public entitled to the specific protection of §§ 10, 12.

However, a problem certainly arises if investment advisors would serve as a ‘pass-through instance,’ passing information they receive from on-line roadshows on to their investing clients. This would entirely obstruct the protection purpose of the Act. Consequently, it is crucial that investment advisors accessing electronic roadshows keep the information confidential. In this respect, the common practice of requesting that the viewer agree not to download, print, or disseminate, as required by the SEC in the no-action letters, should generally be sufficient to protect the public from unauthorized dissemination. Investment Advisors are licensed and subject to rules of professional ethic. They are prohibited from improper use of non-public information (§ 204A of the Investment Advisers Act 1940³⁴). Therefore, it is reasonably assured that online-roadshows accessible to investment advisors will not unduly obstruct the protection that §§ 10, 12 provide to the public. Insofar, it is appropriate to apply the well-established rules of *proximate causation*, under which responsibility usually shifts when another third party criminally or tortiously intervenes.³⁵ Particularly, it is not sufficient cause of

³³ 15 U.S.C. § 80b-1.

³⁴ 15 U.S.C. § 80b-4a.

³⁵ E.g., *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 893 P.2d 367 (1995).

action that somebody “facilitated” the wrongful act of a third party,³⁶ unless the initial act is so grossly negligent that the third party’s act is obviously foreseeable.³⁷ Applying these principle here, distributors of electronic roadshows can reasonably rely that the roadshow will not be unlawfully disseminated by the viewers since, as registered investment advisors, they are subject to professional rules and obligations imposed on them by the Investment Advisers Act. The theoretical possibility that viewers of the electronic roadshows violate the confidentiality covenants is of no relevance. This does not create sufficient risk for a liability so long as reasonable care is taken by password protection.

b. Institutional Investors

The same should apply to **institutional investors**. Most institutional investors are either investment companies (§ 3 Investment Company Act 1940³⁸) if they are primarily engaged in the business of investing, reinvesting, or trading of securities, or, if they do not fall within the reach of the Investment Company Act, are usually investment advisors according to the Investment Advisers Act 1940 (§ 202 (11) (A):³⁹ banks). Therefore, they are subject to registration and supervision by the SEC either under the Investment Advisers Act (*see, above*), or under the Investment Company Act (§§ 8: registration, 38, 42: enforcement by the SEC). Hence, it is sufficiently ascertained that these institutional investors will not make improper use of the information obtained from on-line roadshows, facing administrative investigations and restraining orders as

³⁶ E.g., *Buchler v. Oregon Corrections Div.*, 316 Or. 499, 853 P.2d 798 (1993), overruling *Kimbler v. Stillwell*, 303 Or. 23, 734 P.2d 1344 (1987).

³⁷ E.g., *McLaughlin v. Mine Safety Appliance Co.*, 226 N.Y.S.2d 407, 181 N.E.2d 430 (N.Y. App. 1962).

³⁸ 15 U.S.C. § 80a-3.

³⁹ 15 U.S.C. § 80b-2.

the SEC ‘deems necessary or appropriate in the public interest or for the protection of investors (§ 38 (b) Investment Company Act⁴⁰).

c. Retail Investors

On the other end, we are of the opinion that access to roadshows for ‘**retail investors**,’ as offered by *Schwab* to its ‘Golden Account’ customers, is an outright violation of §§ 5 (a) (1), 10 (a). Though these customers represent only 20% of Schwab’s total customer base, they are a substantial part of the public. Abstractly, everyone can meet the prerequisites for a Golden Account with *Schwab* (\$ 500,000 in assets and 24 trades over the past year). The amount of \$ 500,000 might be earned, inherited, or won in a state lottery. Any level of sophistication or the like does this not reflect. Likewise, a statistic of 24 trades is meaningless – in particular, a high number of trades might indicate a lack of consistent investment strategy. Moreover, an accumulation of a half million dollars is typically what plenty of retired citizens live on. Moreover, there is no practical guideline to classify these selected ‘retail investors’ who qualify for access to roadshows: Why \$ 500,000? What if *Net Roadshow, Inc.* would suggest offering access to investors with a net worth of \$ 400,000? Should we decide that the amount of \$ 500,000 is appropriate at this time, shall it be adjusted every year for inflation? One could argue that a reliable guideline could be the definition of an ‘accredited investor’ in Rule 501 (a) (in particular subsec. (5) and (6) for individual investors). However, these rules are made for small and private placements, and are not appropriate to be applied in the different setting of public offerings.

⁴⁰ 15 U.S.C. § 80a-37(b).

Moreover, with a high number of individual investors, electronic roadshows cannot be effectively prevented from further distribution. Unlike investment advisors, private investors are not bound by professional rules. There is no reason to believe that a confidentiality agreement that is effected by a mouse click will efficiently prevent private investors from improper use of the information. We believe that dissemination to individual investors – notwithstanding password protection and confidentiality covenants - creates sufficient risk that the information will improperly be further distributed. Therefore, offering access to private individual investors violates the securities laws in two distinct ways:

First, it infringes on the protection the Act provides for the benefit of those *investors who actually view the roadshow*.

Secondly, it unduly facilitates *improper further distribution to other investors* who might not even meet the requirements of a “Golden Account” customer.

From a legal point of view, it is not understandable why the SEC granted the requested no-action letter to Schwab. The practical reasons quoted by the SEC cannot justify this decision. As long as the legislator does not change the laws, the SEC has to enforce them as enacted by Congress.

3. Special Features of Electronic Roadshows

a. Live Interactions

Live interaction, as offered by *Activate.net* should not give rise to any particular legal concerns. Live interaction of viewers in form of Q&A sessions and the like does not affect the level of dissemination. Moreover, the improvised Q&A part can certainly not be deemed written communication. Insofar, the risk that the live Q&A

part will be considered an unlawful ‘prospectus’ is even lower than for the remainder of the on-line roadshow.

b. Possibility to view Selected Parts of the Roadshow

Since the SEC’s no-action letter to *Bloomberg*, it is common practice that viewers can access parts of the roadshows on a pull-down menu. This, too, is not problematic for the crucial issue of dissemination. However, the issuer should make sure that the distinct parts are fully understandable on their own, and need not further reference to other parts. Otherwise, the viewer could get distorted incomplete information by viewing selected sections of the show only, and be entitled to recovery under § 12 (a) (2).

c. Hyperlinks to Outside Information

Some issuers want to post **hyperlinks** on the roadshow site to outside information, such as analysts’ research reports, etc. This certainly creates the risk that the issuer becomes “entangled” with this outside information and may be deemed issuer’s own information, thereby establishing potential liability for the accuracy of this outside information.⁴¹ In our opinion, this “entanglement” can be avoided by a clearly legible remark close to the hyperlink that the viewer will access *outside* information. However, the issuer should also be advised to balance the information available via hyperlinks in order to avoid any distorted picture: E.g., in a case where many analysts’ reports are unfavorable but one, it would certainly be deceptive to provide a hyperlink

⁴¹ See Commissioner Laura S. Unger, Speech June 11, 1999, at the Ninth Annual New England Securities Law Conference.

to the one positive report without mentioning that various other analysts expressed a less optimistic opinion.

VI. Statutory Analysis – Private Placements

In the framework of private placements, on-line roadshows do not have any unique legal implications. So far as the solicitation for private placement stays within the limits of § 4 (2), Rule 506, and Rule 144A for resales, the Act does not put any restrictions on written information forwarded to the placees,⁴² provided the information is accurate. In particular, the means of communication is irrelevant. It makes no difference whether the offeror mails written material to the potential investors, sends e-mail messages, or makes the information available on-line. In the latter case, the only prerequisite is that it is reasonably assured that only ‘accredited investors’ and a limited number of non-accredited investors under § 4 (2), or ‘qualified investors’ in the case of resales under Rule 144A, respectively, will have access to the roadshow. This is a question of efficient password protection. Moreover, since the offerors are not prohibited from sending the same information to the placees in a written brochure, no ban on downloading or printing is mandatory.⁴³

In the light of these clear statutory guidelines, reliance on no-action letters seems unnecessary.⁴⁴

⁴² Quinn and Jarmel, *Securities Regulation and the Use of Electronic Media*, SECURITIES LAW & THE INTERNET 879 (1998).

⁴³ John F. Olson, et.al., *Securities in the Electronic Age*, 2000, ¶ 1-96.

⁴⁴ Id.

VII. Liability for Roadshows

A. Illegal Dissemination

If the scope of dissemination of the roadshow exceeds the limits outlined above (wide dissemination in public offerings; general solicitation in private placements), the issuer and other defendants, as defined in the Act in pertinent part, are strictly liable under §§ 5 (1), 10 (a) (1), 12 (a) (1). In this case, the accurateness of the information contained in the on-line roadshow is irrelevant. The improper *distribution* of information is a cause of action *per se*.

Moreover, it should be mentioned that the SEC's no-action letters do not immunize against liability toward third-party investors. No-action letters merely state that the SEC will not take any enforcement steps. However, it is outside the scope of the SEC's regulatory power to infringe on private cause of actions that aggrieved investors might have. In particular, *Schwab* may not rely that the SEC no-action letter bar retail investors from claiming liability under § 12 (a) (1) on grounds of illegal distribution of a prospectus that does not meet the requirements of § 10.

B. Inaccurate Information

Even if the dissemination of the electronic roadshow stays within the applicable limits, liability, of course, may arise for false information under § 12 (a) (2). This is a general topic that bears no specific implications for electronic roadshows.