Rule 135e legend

Rule 135e provides a safe harbor for announcements, press releases and other press-related materials in connection with an offering structured pursuant to Regulation S. Inserting the legends below will have the effect of the announcement or press release ***not*** constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the announcement or press release in all-capital letters:

> NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES, CANADA OR JAPAN.

The following legend should be inserted at the end of the announcement or press release in addition to any legends or rubrics that might be required by local law or practice:

> This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

The first legend should always include Canada, ***unless*** a Canadian lawyer has been consulted. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is ***no*** need to include New Zealand. There is also practice of including a sweep-up clause (such as "and any other jurisdiction where such activity would be unlawful"). You should ***not*** use a sweep-up clause: it is of ***no*** help to the person distributing the press release.

The second legend should be inserted in announcements or press releases as its own, stand-alone paragraph. It should ***not*** be combined with other legends.

In the case of an advertisement in a non-U.S. publication, such as the *Financial Times*, the first legend can be omitted.

If the issuer is a fund or REIT, the following paragraph might be relevant. It is commonly inserted at the end of the body of the announcement rather than with other legends or disclaimers.

> The securities referred to herein may not be acquired by investors using assets of (A) an "employee benefit plan" as defined in Section 3(3) of the U.S. Employee Retirement Income Security Act of 1974, as amended (known as "ERISA"), or (B) a "plan" as defined in Section 4975 of the U.S. Internal Revenue Code of 1986, as amended.

Annex B

GATEPOST

If any materials relating to the offering, including any offering document, announcement or press release, are posted on the Company's website, the following procedures must be implemented to ensure that only permitted recipients are able to access such materials, and specifically, that any person attempting to access the offering materials from the United States is not able to access them.

The offering materials should be posted in a restricted section of the website. A person clicking on a link relating to the offering materials must go through multi-step screening procedures as outlined below. The procedures should be in place from the time the materials are posted on the website until the date that is forty calendar days from the pricing of the offering.

The link relating to the offering materials should take the potential investor to a screen on which the potential investor is asked to select a country of residence from a list provided. The list of countries must be presented in alphabetical order and must be comprehensive. It should contain a sufficient number of countries so as not to disclose which jurisdictions are restricted. The text appearing on Screen 1 should be as follows:

Screen 1:

Please select your jurisdiction of residence: **[*Drop down list of countries*]**
I confirm that I am a resident of the selected jurisdiction.

Once potential investors confirm that they are not resident in the United States, they should be directed to a screen on which they confirm the country where they are presently located, from the same list of countries as was presented in Screen 1. The text appearing on Screen 2 should be as follows:

Screen 2:

Please select the jurisdiction in which you are presently located: **[*Drop down list of countries*]**

I confirm that I am presently located in the selected jurisdiction.

Once potential investors have confirmed that they are ***not*** located in the United States, they should be directed to a screen on which they are asked to confirm the international dialing code for their country of primary residence. No drop down list is required. The text appearing on Screen 3 should be as follows:

Screen 3:

The international dialing code for my primary residence is_____

If potential investors choose the United States as their primary residence or current location in Screens 1 or 2, or if they enter 1, the international dialing code for the United States, on Screen 3, such potential investors should be directed to the rejection screen and should not be allowed to access any offering materials on the website. A comprehensive list of international dialing codes may be found on the following website: http://countrycode.org/). The text appearing on the rejection screen should be as follows:

Screen 4:

Thank you for your interest. Legal restrictions prevent us from allowing you further access to this website.

If you believe you are a resident of, and located in, a jurisdiction where viewing is permitted by law, and you can confirm that to us, please contact **[*relevant Company contact*]**.

If potential investors confirm that they are ***not*** a resident of the United States or currently located in the United States and enter an international dialing code that corresponds to their jurisdiction of primary residence, they should be allowed to proceed to the following screen:

Screen 5:

DISCLAIMER – IMPORTANT

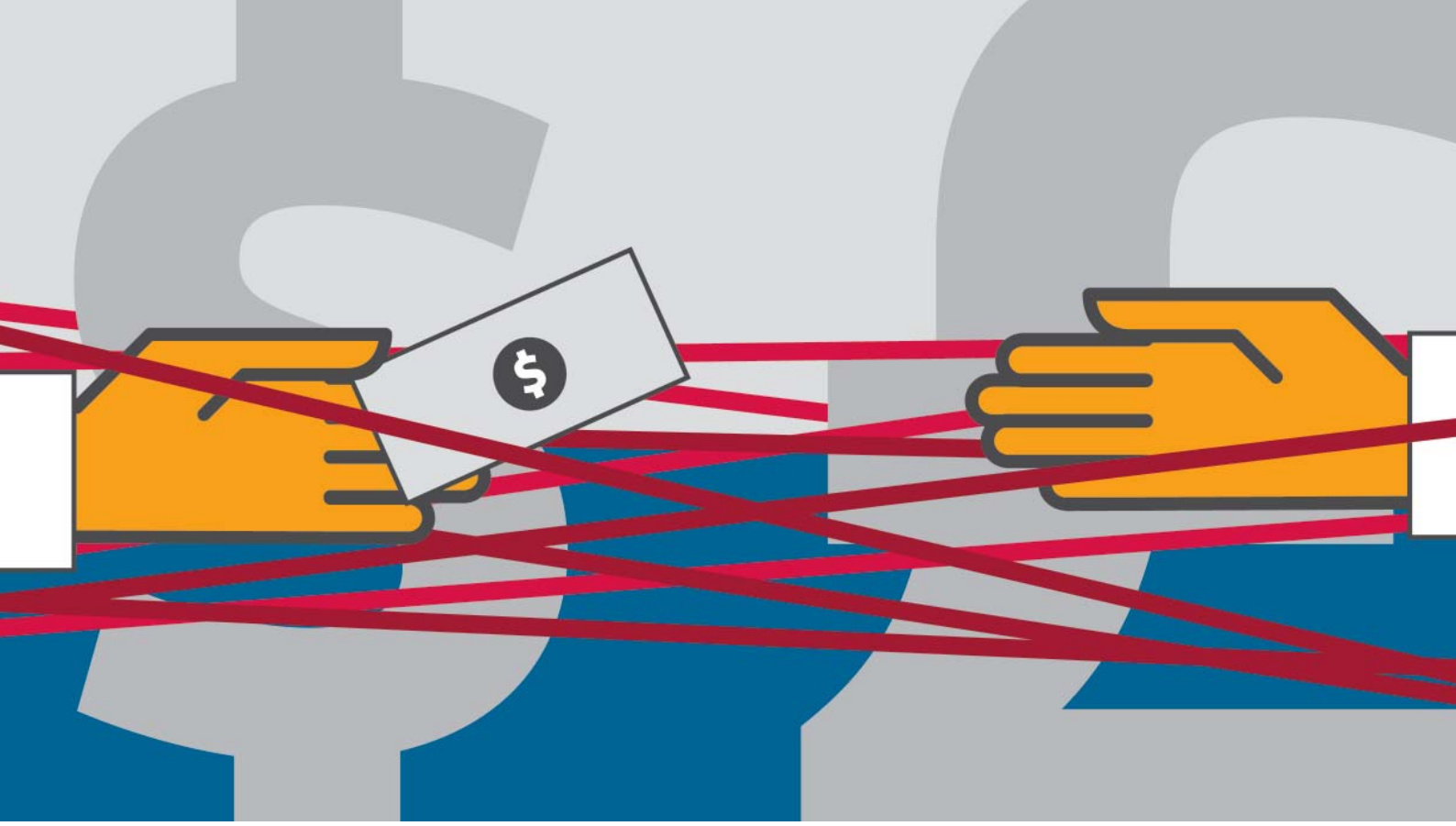
Viewing the materials you seek to access may not be lawful in certain jurisdictions. In other jurisdictions, only certain categories of person may be allowed to view such materials. Any person who wishes to view these materials must first satisfy themselves that they are not subject to any local requirements that prohibit or restrict them from doing so.

The information contained in this website, including any material you may hereafter access, does not constitute an offer of securities for sale in the United States or any other jurisdiction. Securities may not be offered or sold in the United States absent registration under the U.S. Securities Act of 1933, as amended, or an exemption from registration. No public offering or sale of securities in the United States is contemplated. The information contained in this website, including any material you may hereafter access, is not to be provided by you to any other person, in electronic form or otherwise, and is not to be accessed, published, copied, forwarded or otherwise disseminated in or into the United States.

> If you are not permitted to view materials on this webpage or are in any doubt as to whether you are permitted to view these materials, please exit this webpage.
>
> By proceeding, you agree to comply with the terms set out above and confirm that you are a resident of the country you identified earlier and you are accessing this website from within the country you identified earlier, and you additionally represent, warrant and agree that you are not accessing this website from within the United States.

Once potential investors confirm their acceptance, they should be able to access the offering materials. If they are unable to provide confirmation, they should be taken to the rejection screen (Screen 4, above).

In addition to the United States, it is common to exclude investors from Canada and Japan. Investors from Australia and South Africa are also sometimes excluded. The American territories of American Samoa, Guam, the Mariana Islands, Puerto Rico and the U.S. Virgin Islands appear in some lists in addition to the United States. If that is the case, potential investors that select them should also be excluded.



FOLLOW-ON OFFERINGS
US PUBLICITY CONSIDERATIONS

Peter Castellon of Proskauer Rose (UK) LLP and Mark Bergman of Paul, Weiss, Rifkind, Wharton & Garrison LLP look at the US publicity considerations for listed companies conducting follow-on offerings in the context of two scenarios.

How and when (and when not) to communicate information to the markets is one of the fundamental considerations that should be addressed early on by an issuer and its underwriters once the issuer decides that it will, or is reasonably likely to, access the capital markets. The publicity considerations for companies that are already listed and expect to conduct a follow-on, or secondary, offering differ from the publicity considerations for companies that are conducting their initial public offerings (IPOs).

By definition, listed companies must consider their existing public disclosure obligations, whether under the listing rules or the market abuse rules, as well as the fact that they have a public shareholder base and interact through their investor relations or the office of the chief financial officer with existing investors, potential investors and market participants on a regular basis. Shutting down all or most public statements is simply not a viable option.

This article addresses the publicity considerations for various different forms of communications in two scenarios:

- An English plc with shares listed only on the Main Market of the London Stock Exchange that is conducting a follow-on offering, such as a placing or rights offering, which is extended into the US on a private basis to qualified institutional buyers (QIBs).
- An English company with a dual listing, with shares listed on the London Stock Exchange as well as on a US securities exchange, that is conducting a follow-on offering outside the US under Regulation S (Regulation S) of the US Securities Act of 1933, as amended (Securities Act) and in the US on a registered basis.

The considerations discussed below generally will apply to any listed or dual-listed European company.

WHY RESTRICT PUBLICITY

Securities that are offered and sold in or into the US must either be registered with the US Securities and Exchange Commission (SEC) or offered in a transaction that is structured under an exemption or exclusion from the registration requirements of the Securities Act. In contrast to most other jurisdictions, the securities laws in the US apply to each leg of a securities transaction, and apply not only to initial issuances but also to subsequent issuances, and resales. The non-US portion

of an offering frequently will be structured to comply with Regulation S. Companies listed only on the London Stock Exchange will typically extend the offering into the US on a private basis to QIBs. Companies with a dual listing, being unable as a technical matter to rely on Rule 144A of the Securities Act, typically will extend their offerings into the US on a registered basis.

Issuers and their intermediaries need to consider restrictions on publicity for various reasons. In the case of exempt transactions, restrictions on publicity will help to ensure that the private character of the offering. In the case of a registered transaction, restrictions on publicity are necessary to avoid so-called gun-jumping concerns. The SEC has a broad interpretation of what constitutes an offer, and offers can only proceed once a registration statement has been filed.

Restricting publicity can also be important in order to reduce the likelihood that an investor will later claim that it relied to its detriment on the publicity rather than on a prospectus. If nothing else, the prospectus has the benefit of containing risk factors, which discrete announcements and other public statements will not. In the US, violations of the securities laws triggered by improper publicity at the very least give rise to rights of rescission. It is therefore important that issuers and their intermediaries are aware of, and follow, the publicity guidelines that will be prepared for the offering.

ENQUIRIES

A public company will receive enquiries from a variety of sources during the ordinary course of its business, which might coincide with the launch of an offering, and will likely receive enquiries following the announcement of a follow-on offering. The likelihood of enquiries is increased if the markets are focused on the company's need for liquidity; for example, if it is running into financial difficulties.

Shareholder enquiries

A UK-only listed company should be able to answer non-offering related questions that it receives from a shareholder before an offering is announced in accordance with the usual restrictions under the listing regime and the market abuse regime.

Where questions relate to any potential offering that has not yet been announced, there should be a script for any spokesperson to use that sets out the appropriate answers, for which the general response will be "no comment". Shareholder questions may be prompted, for example, by concerns regarding financial difficulties that the upcoming but unannounced offering is intended to address. Once the offering has been announced, the company can answer factual questions related to the offering, provided that the answer is consistent with, and limited to, information that is contained in any formal public announcement of the offering that has been made.

In the case of an offering by a dual-listed company, the offering should be announced through a press release that meets the conditions of Rule 134 of the Securities Act (*see box "Rule 134"*). Shareholders posing questions should be directed to the announcement and no further additional information should be provided.

Rule 134

Rule 134 of the US Securities Act of 1933, as amended, permits press releases in connection with registered US offerings, provided that the information contained in it is limited to some or all of the following:

- Limited factual information about the company, including its name, the address, telephone number and email address of the company's principal offices and point of contact for investors, the company's country of organisation and the geographic areas where it conducts its business.
- The full title and expected or final amount of the securities being offered.
- The preliminary or final subscription ratios and subscription price of the securities being offered.
- A brief description of the general business of the company, including the general type of services, the principal products and the segments in which the company conducts business.
- A brief description of the intended use of proceeds of the offering, including very limited information regarding any transactions to be entered into in that respect.
- The contact information of the issuer of the press release and a statement as to whether that person is participating or expects to participate in the offering.
- Details relating to the underwriting arrangements for the offering.
- The names of the underwriters and their additional roles, if any, within the underwriting syndicate.
- The anticipated schedule for the offering, including the dates and times of the offering, and the closing and settlement dates.
- A description of the procedures by which the underwriters will conduct the offering as well as instructions relating to participation in the offering and information relating to the availability of any investor presentation.
- Any statement or legend required by any applicable law or regulation.
- The exchanges on which the securities being offered will be listed and the ticker symbols.

The press release must also include the name and address of a person from whom the US prospectus may be obtained when it is available, which is typically a US representative of one of the underwriters.

Non-shareholder enquiries

A UK-only listed company should be able to answer non-offering related questions that it receives from potential investors that are not current shareholders by answering with factual business information.

At any time during the offering process, Rule 168 (for SEC-reporting companies, such as a dual-listed company) and Rule 169 (for non-SEC reporting companies) under the Securities Act are, taken together, available as a non-exclusive safe harbour permitting the communication of regularly released factual business information. Factual business information is information that does not relate to the offering, is not released or disseminated as part of the offering and is limited to:

- Actual information about the company, its business or financial developments or other aspects of its business.
- Advertisements of, or other information about, the company's products or services.

To qualify for the safe harbour, the following conditions must be met:

- The company must have previously released the same type of information in the ordinary course of its business. There must be some track record of releasing that particular type of information, although a single previous release of information will suffice.
- The timing, manner and form in which the information is released or disseminated must be materially consistent with past practice.
- The information must be intended for persons, such as customers or suppliers, other than in their capacities as investors or potential investors.
- Only employees or agents who have historically provided this information may provide the information.

Securities analysts

Either company can speak to securities analysts that cover it in relation to both the offer and non-offer matters, and those analysts can publish research under Rule 139 of the Securities Act (*see feature article "Rule 139 of the US Securities Act: research reports", www.practicallaw.com/w-010-5583*).

Rule 135e

Rule 135e of the US Securities Act of 1933, as amended (Securities Act) (Rule 135e), provides a safe harbour for press releases and other press-related materials in connection with an offering structured under Regulation S of the Securities Act with or without a concurrent offering to qualified institutional buyers. Inserting the legends below (and otherwise complying with Rule 135e) will have the effect of the press release not constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the press release in upper case letters:

"NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES."

The following legend should be inserted at the end of the press release in addition to any legends or rubrics that might be required by local law or practice:

"This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States."

The first legend frequently includes Canada and Japan. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is also practice of including a sweep-up clause, such as "and any other jurisdiction where such activity would be unlawful". Practitioners should consider leaving out a sweep-up clause because it is of no help to the person who is distributing the press release.

The second legend should be inserted in press releases as its own, standalone paragraph. It should not be combined with other legends.

However, while it is possible, it is generally not prudent for either company to speak with analysts largely because that conversation risks triggering a premature announcement of the offering. If it is considered necessary, there should be a script agreed with the publicity working group that is advising on the offering, including counsel to the issuer and counsel to the underwriters. The company generally should not speak at any point in the offering process to securities analysts that do not cover the company following an announcement of the offering. These conversations could be seen as offering-related.

ANNOUNCEMENTS

Public companies regularly release information to the market by way of announcements, and particular attention needs to be paid if an offering is likely to be launched.

Results announcements

In both scenarios, if a company issues financial results at approximately the same time every year, whether annual or interim, it should be able to publish the results at its customary time even when an offering is pending. Indeed, in practice, the offering may well be timed to follow the announcements of the results.

In the case of an offering by a UK-only listed company extended to QIBs, the results announcement and press release should not need a Rule 135e legend or be posted behind a gatepost (*see box "Rule 135e"*) (*see "Website content" below*). Similarly, if the company issues a press release with financial results solely to comply with market abuse regulation requirements, that press release should not need to be restricted. For example, in this situation, the company could post its results in a press release in the normal way, then immediately thereafter launch its offering.

For a dual-listed company, the results announcement would be submitted to the SEC under a Form 6-K and be incorporated by reference in the registration statement filed for the US portion of the offering.

In the case of an offering to QIBs, the press release announcing the offering must comply with Rule 135c, which is often difficult because Rule 135c does not allow the managers to be named in the press release, or with Rule 135e (and be placed behind a gatepost) (*see box "Rule 135c"*) (*see "Website content" below*).

Earnings guidance

If the UK-only listed company makes financial results public at an irregular time or issues guidance at an irregular time, this should be considered offering-related from a US securities law perspective and potentially as conditioning the market. In the case of an offering to QIBs by a UK-only listed company, this type of announcement should comply with Rule 135e and be posted behind a gatepost (*see "Website content" below*).

A dual-listed company should not make any financial announcement during its offering. Any such information would need to be included in the prospectus or in a "free-writing prospectus", that is, a permitted written or oral communication that does not meet the content requirements of a statutory prospectus.

SHAREHOLDER DOCUMENTS

In the case of an offering to QIBs by a UK-only listed company, if the company needs to prepare a circular or a notice to shareholders in connection with its offering in order to obtain authority to issue the shares being offered, the authors believe that it should not combine the circular with the offering document for the transaction. Ideally, it should not send the circular into the US unless all of its US shareholders are QIBs, which might be unlikely to be the case or might be difficult to determine. If a circular must be sent to all shareholders, the company should first ensure that the circular is clearly a communication to shareholders and not also a selling document for the offering.

The UK-only listed company could consider distributing two circulars: one that contains only the required information for US shareholders and a more comprehensive circular for all other shareholders. The US version might contain a scaled-down version of the chairman's letter, particularly in a rights issue context where the company is facing financial difficulties. The first page of the notice of meeting should advise why US shareholders are receiving the document (namely, to comply with applicable legal requirements in respect of the rights of shareholders), that the document does not constitute an offering and that, subject to certain limitations, US shareholders will be unable to participate in the offering that is the subject of the resolutions on which they are being asked to vote.

In the case of a dual-listed company, the shareholder circular would have to be submitted to the SEC under a Form 6-K and incorporated by reference in the registration statement filed for the US portion of the offering.

NON-DEAL ROADSHOWS

An offering often will be accompanied by an investor roadshow, where the company's senior management team meets existing and potential investors to promote the offering. Non-deal roadshows are similar meetings conducted by listed companies but take place in the ordinary course of business and do not relate to a specific offering, although an offering may in fact follow soon thereafter.

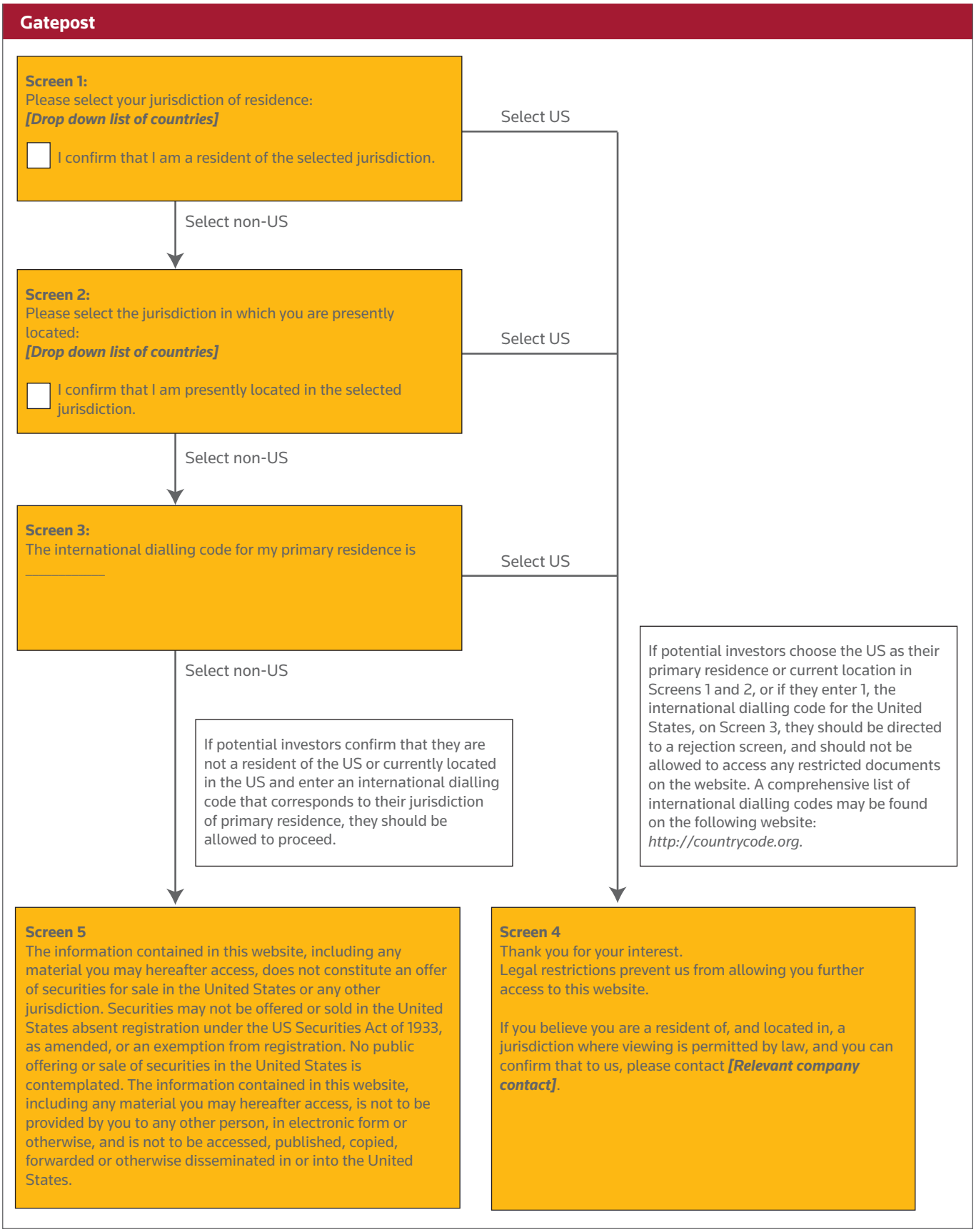
In the case of an offering to QIBs by a UK-only listed company, non-deal roadshows can present concerns if the roadshow takes place in close proximity to the offering. Shareholders may take the position that they made their investment decision for an

Rule 135c

Rule 135c of the US Securities Act of 1933, as amended (Rule 135c), allows press releases announcing an offering, provided that the following conditions are met:

- The announcement is not used for the purpose of conditioning the market in the US for any of the securities offered.
- The announcement states that the securities offered will not be or have not been registered in the US and may not be offered or sold in the US absent registration or an applicable exemption from registration requirements.
- The announcement contains no more than the following additional information:
  - The name of the issuer;
  - The title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;
  - In the case of a rights offering to security holders of the issuer, the class of securities the holders of which will be or were entitled to subscribe to the securities offered, the subscription ratio, the record date, the date on which the rights are proposed to be or were issued, the term or expiration date of the rights and the subscription price; and
  - Any statement or legend required by state or foreign law or administrative authority.

Rule 135c is only available to companies that comply with Rule 12g3-2(b) of the US Securities Exchange Act of 1934 (Rule 12g3-2(b)). Rule 12g3-2(b) sets out a framework for non-US companies to provide information to investors. Many non-US companies comply voluntarily with the rule (*see feature article "Avoiding US reporting obligations: exemptions for non-US issuers", www.practicallaw.com/6-384-0242*). Unlike a Rule 135e-compliant press release, if a Rule 135c-compliant press release is posted on the company's website, it does not need to be placed behind a gatepost and it can be distributed in the US.



offering based on the roadshow rather than on the earnings press release, in the case of an offering made on the back of an earnings announcement, or the prospectus, if one is required. One problem is that the roadshow materials do not contain risk factors that could be relied on to indicate that caution should be exercised.

A UK-only listed company should only invite QIBs to non-deal roadshow presentations that take place in the US in advance of the announcement of the offering. Counsel to the issuer and its investment bank will need to determine how much time must elapse at a minimum between the non-deal roadshow and the launch of an offering. Many English companies only invite QIBs to ordinary course

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investor relations roadshows anyway, so this will not require a change in practice. If the company, however, has a practice of inviting institutional investors without regard to QIB status, in advance of an offering it should ask its investment bank to help it screen out non-QIBs from the invitation list. No written materials, such as the slide deck used for the presentation, should be provided to attendees.

In the case of an offering by a dual-listed company, there currently is a testing-the-waters exemption for emerging growth companies, which allows these issuers to engage in oral or written communications with potential investors that are, or are reasonably believed to be, QIBs or institutional accredited investors, either before or following the filing of a registration statement, to determine whether those investors might have an interest in a contemplated registered securities offering.

In February 2019, the SEC proposed expanding the exemption to all SEC-reporting companies and there was also legislation proposed in US Congress that would accomplish the same extension.

An emerging growth company will need to comply with the testing-the-waters exemption when conducting its non-deal roadshow in advance of an offering. Assuming the SEC proposal is adopted, non-emerging growth companies will similarly need to follow the procedures. The company should only invite QIBs and institutional accredited investors to the non-deal roadshow presentation. Pending effectiveness of the proposed rule change to expand this exemption, a dual-listed non-emerging growth company should not conduct any non-deal roadshows in the US within 30 days of its expected public filing in order to fall within the 30-day gun-jumping safe harbour. It will need to comply with the other requirements of that safe harbour, including not referring to the offering.

No written materials should be provided to attendees in any such roadshow and no information should be included in any presentation that will not also appear in the prospectus.

WEBSITE CONTENT

In the case of an offering to QIBs by a UK-only listed company, any offering-related materials that are posted on the company's website must be placed behind a gatepost (*see box "Gatepost"*). This includes any press release announcing the offering and any accompanying offering document. There is no similar requirement in the case of an offering by a dual-listed company.

It is important to note that, despite the ubiquitous nature of web-based communications, not to mention social media and other means of communicating business and other information, the governing principles on which the publicity considerations for an offering extended into the US continue to be based on SEC interpretive releases that were issued in 1998 and 2000.

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January 6, 2025

INTERNET GUIDANCE FOR FOREIGN PRIVATE ISSUERS CONDUCTING UNREGISTERED OFFERINGS: IS A GATEPOST STILL A SIGN OF THE TIMES?

The SEC last issued guidance to foreign private issuers on the use of the Internet in 1998, a copy of which is included as Annex A (the "1998 Guidance"). The 1998 Guidance discusses examples of measures that would be adequate to avoid Internet-based activities from being considered to take place "in the United States", providing different examples in the context of both U.S. and foreign entities.

In the more than twenty-five years since the 1998 Guidance was issued, there have been considerable developments in market practices around the world surrounding Internet communications relating to securities offerings, making it timely to revisit the application of the 1998 Guidance, particularly to foreign private issuers. This article focuses solely on the application of the 1998 Guidance to foreign private issuers posting disclosure on the Internet about or relating to an offering that is not being registered under the U.S. Securities Act of 1933, as amended, and is not intended to address the different considerations that may apply to U.S. domestic issuers. Furthermore, the article only deals with the registration requirements of Section 5 of the Securities Act and not jurisdictional issues or disclosure issues.[1]

The 1998 Guidance is important because, among other things, Internet-based activities in the United States that relate to securities offerings may result in unregistered offers and sales of securities that contravene the registration requirements of Section 5 of the Securities Act or that constitute "general solicitation" or "general advertising" disqualifying reliance on certain exemptions from registration under the Securities Act. Such activities may also constitute "directed selling efforts", disqualifying reliance on Regulation S under the Securities Act to

[1] As with the 1998 Guidance, we are focused only on Internet-based activities that, were they deemed to occur "in the United States", would constitute an "offer" within the meaning of Section 5(c) of the Securities Act, a "public offering" within the meaning of Section 4(a)(2) of the Act, "general solicitation or general advertising" within the meaning of Rule 502(c) of Regulation D or "directed selling efforts" within the meaning of Regulation S.

conclude that registration is not required for the offers and sales of securities taking place outside the United States.

The 1998 Guidance was principles-based, setting out the following key principles with respect to offers and sales of securities under the Securities Act:

- Posting offering or solicitation materials on a website may, or may not, be considered activity taking place "in the United States" depending on the facts and circumstances.

- If the activity is deemed to take place "in the United States", then the registration requirements of U.S. securities laws would apply to that activity, based on the requirement that all offers and sales in the United States be registered under U.S. federal securities laws or be made under an available exemption.

- Internet offers, solicitations or other communications should be considered to be taking place "in the United States", and therefore subject to U.S. registration requirements, if and only if they are "targeted to the United States".

- Market participants that implement measures reasonably designed to guard against sales or the provision of services in the United States should ***not*** be viewed as targeting persons in the United States with their Internet offers and the offers would not result in a registration obligation under Section 5.

- Measures that may be adequate for non-U.S. issuers would not necessarily be adequate measures for U.S. issuers: U.S. issuers should undertake more restrictive measures than non-U.S. issuers.

The 1998 Guidance included a statement that an offshore Internet offer made by a non-U.S. offeror would generally ***not*** be considered to be targeted at the United States if

- it includes a prominent disclaimer stating it is ***not*** directed at persons in the United States ***and***

- it employs procedures reasonably designed to guard against sales to persons in the United States.

As an example of a procedure designed to guard against sales in the United States, the 1998 Guidance suggested that the offeror could ascertain the purchaser's residence by asking for a mailing address or telephone number, and then block participation if a U.S. mailing address or a telephone number with a U.S. area code were provided. Procedures such as this, whether intended to block access to a website or certain portions of it by U.S. persons or to preclude the receipt of securities or services in the United States, can be generally described as a "gatepost" designed to keep U.S. persons out. Annex B contains an example of a gatepost procedure that was developed and employed by certain market participants seeking to achieve compliance with the 1998 Guidance.

The 1998 Guidance was, however, very clear that the procedures it discussed, including the concept of a gatepost, were ***not*** intended to be exclusive and that other procedures that guard against sales in the United States could also be used to demonstrate that an offer, solicitation or other communication is not targeted at the United States.

The following are examples of communications where, consistent with the market practices and procedures currently being followed in certain jurisdictions, it may generally be concluded that the communication is ***not*** directed at persons in the United States:

Example I: Rule 135c press releases

A press release or announcement that substantially complies with the principles of Rule 135c can be posted on a foreign private issuer's website ***without*** a gatepost, even if the issuer is not a registrant and is not Rule 12g3-2(b) compliant or eligible.

Example II: Rule 135e press releases

A press release or announcement that complies with Rule 135e can be posted on a foreign private issuer's website without a gatepost so long as the material is posted in the same way as other documents that are ***not*** offering-related are posted on the website.

This assumes that the press release or announcement is posted with other press releases and announcements of the company. For example, if the issuer creates a web page or a microsite titled "rights offering" or "share placing" a different analysis would need to take place to determine whether a gatepost is needed. If a foreign private issuer wants an announcement or

press release to feature more prominently on the website than other announcements or press releases, it could consider relying on Rule 135c instead of Rule 135e or it could consider posting a rule 135c-compliant announcement or press release on its website (without a gatepost) and distributing a separate Rule 135e-compliant press release outside the United States. A press release or announcement may also be required to be posted on a third-party website by local law or regulation. See Example IV.

Example III: Offering documents

An offering document for an *unregistered offering* and any related shareholder circular that is ***not*** specifically targeted to the attention of U.S. investors may be posted on a foreign private issuer's website ***without*** a gatepost, so long as the documents contain appropriate legends and any U.S. sales are made only in compliance with an available U.S. exemption from registration. "Specifically targeted" would include posting an offering document with a U.S. wrap or posting a separate version of the offering document that contains U.S. disclosure not included in the local version. "Specifically targeted" would also include posting an English-language offering document on a website where other documents are predominantly in another language. This assumes that the offering document is posted with other documents or presentations of the company with no greater prominence. For example, if the issuer creates a webpage or microsite titled "rights offering" or "share placing" and includes the offering document there, a different analysis would need to take place to determine whether a gatepost is needed.

In some jurisdictions, issuers are required to post announcements, press releases, offering documents or circulars on a third-party website. These third-party websites typically do not have gateposts. Examples of this practice include the following:

- English public companies are required to post all press releases on the RNS website and certain offering documents on the website of the FCA National Storage Mechanism.
- Spanish public companies are required to post all press releases on the website of the local regulator.
- Canadian public companies are required to post all material press releases and all public offering documents and continuous disclosure documents on SEDAR (the website operated by the Canadian securities regulatory authorities).

- German public companies are required to post ad hoc announcements on the website of the local regulator.

Example IV: Rule 135e press releases (third-party websites)

Any Rule 135e-compliant press release that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website ***without*** a gatepost, once it has been posted on the third-party website.

Example V: Offering documents (third-party websites)

Any offering document for an *unregistered offering* and any related shareholder circular that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website ***without*** a gatepost, once it has been posted on the third-party website so long as the documents contain appropriate legends.

Example VI: Continuous disclosure documents

Any continuous disclosure document, current or periodic reporting document, or proxy document or circular required under local law or regulation, may be posted on a foreign private issuer's website ***without*** a gatepost, whether or not the document relates to an offering, so long as the material is posted in the same way as other documents are posted on the website as part of the foreign private issuer's home country disclosure compliance even if the foreign private issuer is conducting a registered offering or an *unregistered offering* at the time and so long as documents relating to the offering contain appropriate legends. None of these documents should normally be considered targeted at the United States, unless extraordinary measures are taken to bring them specifically to the attention of persons in the United States.

Example VII: Ad hoc announcements

An ad hoc announcement is required to be made in certain jurisdictions by way of a press release or website posting for the purpose of disclosing material information. If a foreign private issuer is required by a relevant regulatory authority or under applicable law to post an ad hoc announcement regarding an offering of securities on the issuer's website without a gatepost, the issuer may do so, whether or not the issuer is making a bona fide offering outside the United States, so long as the announcement otherwise complies with Rule 135e

and so long as the announcement does not contain any more information about the offering of securities than is required by the relevant regulatory authority or under applicable law.

As used in this article, *unregistered offering* includes any of the following:

- a combined Rule 144A/Regulation S offering
- an offering in the United States pursuant to another exemption combined with a Regulation S offering (for example a Section 4(a)(2)/Regulation S offering or a Regulation D/Regulation S offering or a Section 4(1½)/Regulation S offering)
- a stand-alone Regulation S offering
- a Regulation S offering that is concurrent with an SEC-registered offering.

The examples in this article apply to both equity and debt offerings. The observations in this article are limited to offerings of conventional securities involving customary market participants and marketing processes.

We also assume customary scope of the Internet-based activities consistent with an issuer's general ordinary course practice (i.e., in the same manner as non-offering related material) and without any unusual facts or circumstances. For example, the initial launch of a publicly available website, initial publication of information in English, unduly prominent display of offering-related information within a website, unduly promotional rather than informational content, unusual links to offering-related content or creating dedicated webpages or microsites (e.g., titled "rights offering" or "share placing") may raise specific issues not considered here. IPOs would generally need to be considered in a different light from a routine follow-on offering.

Investment banks and frequent issuers may have internal procedures that are more restrictive than the examples provided here. Those procedures might take into account reputational concerns and factors specific to the investment bank or issuer. Market participants should ***always*** check if internal procedures would apply a different result.

LinkedIn did not exist in 1998. Sometimes officers of foreign private issuers or bankers will post on LinkedIn about an IPO or other securities offering with which they were involved. The CEO might post a photograph ringing the bell at the local stock exchange on the first day of trading.

A post on LinkedIn would ***not*** constitute general solicitation, general advertising or directed selling efforts in connection with an *unregistered offering* if it is posted after the transaction has priced and the book has closed, so long as the text of the post indicates finality.

The post may ***not*** suggest that investors buy securities.

The post may ***not*** comment on how the securities are trading.

The post may ***not*** be forward-looking in any way.

Examples of posts that are acceptable include the following:

> "Thrilled to have helped the Widget Company on its offering."
>
> "It was a long journey, but the Widget Company finally had its first day of trading today."
>
> "Delighted to have helped the Widget Company reach this milestone."

We have intentionally only covered LinkedIn and ***not*** other social media.

Andrew Beck (Torys)
Alyssa Caples (Cravath)
Peter Castellon (Proskauer)
Dorothee Fischer-Appelt (Greenberg)
Robert Grauman (Fresenius)
Peter Halasz (Schulte)
Guy Lander (Carter Ledyard)
Rob Lando (Osler)
Jim McDonald (Skadden)
Prabhat Mehta (Sidley)
Ash Qureshi (Fried Frank)
Ettore Santucci (Goodwin)
Evan Simpson (Sullivan)

U.S. Securities and Exchange Commission

Interpretation:
Re: Use of Internet Web Sites To Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 231, 241, 271, 276

(Release Nos. 33-7516, 34-39779, IA-1710, IC-23071)

International Series Release No. 1125

STATEMENT OF THE COMMISSION REGARDING USE OF INTERNET WEB SITES TO OFFER SECURITIES, SOLICIT SECURITIES TRANSACTIONS OR ADVERTISE INVESTMENT SERVICES OFFSHORE

AGENCY: Securities and Exchange Commission

ACTION: Interpretation

SUMMARY: The Securities and Exchange Commission is publishing its views on the application of the registration obligations under the U.S. federal securities laws to the use of Internet Web sites to disseminate offering and solicitation materials for offshore sales of securities and investment services.

EFFECTIVE DATE: March 23, 1998

FOR FURTHER INFORMATION CONTACT: Paul Dudek, Chief, and Rani Doyle, Attorney, Office of International Corporate Finance at 202-942-2990 (with respect to Securities Act issues); Paula Jenson, Deputy Chief Counsel, Division of Market Regulation, at 202-942-0073 (with respect to broker-dealer registration issues), Elizabeth King, Senior Special Counsel, Division of Market Regulation, at 202-942-0140 (with respect to exchange registration issues); and Karrie McMillan, Assistant Chief Counsel, Sarah A. Wagman, Special Counsel, and Brendan C. Fox, Attorney, Division of

Investment Management, at 202-942-0660 (with respect to matters relating to investment companies and investment advisers).

SUPPLEMENTARY INFORMATION

I. EXECUTIVE SUMMARY

The Internet permits market participants to disseminate advertisements and other information regarding securities and investment services across national borders. Because persons in the United States have access to this securities-related information, market participants have expressed uncertainty about the application of the registration requirements of the U.S. securities laws to their offshore Internet offers (i.e., offers over Internet Web sites of securities or investment services that by their terms are not made to U.S. persons). Today, we are providing our views on how issuers, investment companies, broker-dealers, exchanges and investment advisers may use Internet Web sites to solicit offshore securities transactions and clients without the securities or investment company being registered with the Commission under the Securities Act of 1933 [1] or the Investment Company Act of 1940, [2] or without the investment service provider registering under the Investment Advisers Act of 1940, [3] or the broker-dealer or exchange registering under the broker-dealer and exchange registration provisions under the Securities Exchange Act of 1934. [4]

The purpose of this interpretation is to clarify when the posting of offering or solicitation materials on Internet Web sites would not be considered activity taking place "in the United States." We are only providing clarification on this aspect of the registration requirements and are not altering the fundamental requirement that all offers and sales in the United States be registered under the U.S. securities laws or made under an applicable exemption.

Under this interpretation, application of the registration provisions of the U.S. securities laws depends on whether Internet offers, solicitations or other communications are targeted to the United States. We would not view issuers, broker-dealers, exchanges, and investment advisers that implement measures that are reasonably designed to guard against sales or the provision of services to U.S. persons to have targeted persons in the United States with their Internet offers. Under these circumstances, Internet postings would not, by themselves, result in a registration obligation under the U.S. securities laws.

The determination of whether measures reasonably designed to guard against sales to U.S. persons have been implemented depends on the facts and circumstances, and can be satisfied through different means. We discuss in this release examples of measures that are adequate to serve this purpose for both U.S. and foreign entities. We also discuss why measures that are adequate for foreign issuers would not necessarily be adequate measures for U.S. issuers. U.S. issuers should undertake more restrictive measures when using the Internet to solicit offshore securities transactions.

This interpretation does not address the anti-fraud and anti-manipulation provisions of the securities laws, which will continue to reach all Internet activities that satisfy the relevant jurisdictional tests. [5] Even in the absence of sales in the United States, we will take appropriate enforcement action whenever we believe that fraudulent or manipulative Internet activities have originated in the United States or placed U.S. investors at risk. Further, we are not addressing the circumstances under which a U.S. court could exercise personal jurisdiction over a non-U.S. person with respect to that person's offshore Internet offer.

The interaction between the U.S. securities laws and the Internet can be expected to continue to evolve. As technology and practice develop, we may revisit these and related issues.

II. BACKGROUND

A. The Global Reach of the Internet

The development of the Internet presents numerous opportunities and benefits for consumers and investors throughout the world. It also presents significant challenges for regulators charged with protecting consumers and investors. Regulators in many countries are attempting to administer their respective laws to preserve important protections provided by their regulatory schemes without stifling the Internet's vast communications potential. [6] We share this goal in our administration of the U.S. securities laws. [7]

Information posted on Internet Web sites concerning securities and investments can be made readily available without regard to geographic and political boundaries. [8] Additionally, the interactive nature of the Internet makes it possible for investors to purchase electronically the securities or services offered. For these and other reasons, we believe that the use of the Internet by market participants and investors presents significant issues under the U.S. securities laws.

Although this release focuses on Internet Web sites, the Internet offers a variety of forms of communication. We distinguish between Web site postings and more targeted Internet communication methods. More targeted communication methods are comparable to traditional mail because the sender directs the information to a particular person, group or entity. These methods include e-mail and technology that allows mass e-mailing or "spamming." Information posted on a Web site, however, is not sent to any particular person, although it is available for anyone to search for and retrieve. [9] Offerors using those more targeted technologies must assume the responsibility of identifying when their offering materials are being sent to persons in the United States and must comply fully with the U.S. securities laws.

B. Regulation of Offers

Many registration requirements under the U.S. securities laws are triggered when an offer of securities or financial services, such as brokerage or investment advisory services, is made to the general public.

- Under the Securities Act, absent an exemption, an issuer that offers or sells securities in the United States through use of the mails or other means of interstate commerce must register the offering with the Commission. [10] An offering of securities may be exempt from registration if it is conducted as a "private placement," without any general solicitation of investors. [11]
- Under the Investment Company Act, a foreign investment company may not use the mails or other means of interstate commerce to publicly offer its securities in the United States or to U.S. persons unless the investment company receives an order from the Commission permitting it to register under the Investment Company Act. [12] A foreign investment company may, however, make a private offer of its securities in the United States or to U.S. persons in reliance on one of the exclusions from the definition of "investment company" under the Investment Company Act. [13]
- Under the Advisers Act, an adviser is prohibited from using the mails or other means of interstate commerce in connection with its business as an investment adviser, unless the adviser is registered with the Commission, or is exempted or excluded from the requirement to register. [14]
- Under the Exchange Act, a broker or dealer generally must register with the Commission if it uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security. [15]
- Under the Exchange Act, an exchange generally must register with the Commission if it uses the mails or any means of interstate commerce for the purpose of using its facilities to effect any transaction in a security or to report any such transaction. [16]

The posting of information on a Web site may constitute an offer of securities or investment services for purposes of the U.S. securities laws. [17] Our discussion of these issues will proceed on the assumption that the Web site contains information that constitutes an "offer" of securities or investment services under the U.S. securities laws. [18] Because anyone who has access to the Internet can obtain access to a Web site unless the Web site sponsor adopts special procedures to restrict access, the pertinent legal issue is whether those Web site postings are offers in the United States that must be registered.

III. OFFSHORE OFFERS AND SOLICITATIONS ON THE INTERNET

A. General Approach

Some may argue that regulators could best protect investors by requiring registration or licensing for any Internet offer of securities or investment services that their residents could access. As a practical matter, however, the adoption of such an approach by securities regulators could preclude

some of the most promising Internet applications by investors, issuers, and financial service providers**.**

The regulation of offers is a fundamental element of federal and some U.S. state securities regulatory schemes. Absent the transaction of business in the United States or with U.S. persons, however, our interest in regulating solicitation activity is less compelling. [19] We believe that our investor protection concerns are best addressed through the implementation by issuers and financial service providers of precautionary measures that are reasonably designed to ensure that offshore Internet offers are not targeted to persons in the United States or to U.S. persons. [20]

B. Procedures Reasonably Designed to Avoid Targeting the United States

When offerors implement adequate measures to prevent U.S. persons from participating in an offshore Internet offer, we would not view the offer as targeted at the United States and thus would not treat it as occurring in the United States for registration purposes. What constitutes adequate measures will depend on all the facts and circumstances of any particular situation. We generally would not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the United States, however, if:

- The Web site includes a prominent disclaimer making it clear that the offer is directed only to countries other than the United States. For example, the Web site could state that the securities or services are not being offered in the United States or to U.S. persons, or it could specify those jurisdictions (other than the United States) in which the offer is being made; [21] and
- The Web site offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering. For example, the offeror could ascertain the purchaser's residence by obtaining such information as mailing addresses or telephone numbers (or area code) prior to the sale. This measure will allow the offeror to avoid sending or delivering securities, offering materials, services or products to a person at a U.S. address or telephone number.

These procedures are not exclusive; other procedures that suffice to guard against sales to U.S. persons also can be used to demonstrate that the offer is not targeted at the United States. Regardless of the precautions adopted, however, we would view solicitations that appear by their content to be targeted at U.S. persons as made in the United States. Examples of this type of solicitation include purportedly offshore offers that emphasize the investor's ability to avoid U.S. income taxes on the investments. [22] We are concerned that the advice that we provide to assist those who attempt to comply with both the letter and spirit of the securities laws will be used by others as a pretext to violate those laws. Sham offshore offerings or procedures, or other schemes will not allow issuers or promoters to escape their registration obligations under the U.S. securities laws.

C. Effect of Attempts by U.S. Persons to Evade Restrictions

We recognize that U.S. persons may respond falsely to residence questions, disguise their country of residence by using non-resident addresses, or use other devices, such as offshore nominees, in order to participate in offshore offerings of securities or investment services. Thus, even if the foreign market participant has taken measures reasonably designed to guard against sales to U.S. persons, a U.S. person nevertheless could circumvent those measures.

In our view, if a U.S. person purchases securities or investment services notwithstanding adequate procedures reasonably designed to prevent the purchase, we would not view the Internet offer after the fact as having been targeted at the United States, absent indications that would put the issuer on notice that the purchaser was a U.S. person. This information might include (but is not limited to): receipt of payment drawn on a U.S. bank; provision of a U.S. taxpayer identification or social security number; or, statements by the purchaser indicating that, notwithstanding a foreign address, he or she is a U.S. resident. Confronted with such information, we would expect offerors to take steps to verify that the purchaser is not a U.S. person before selling to that person. [23] Additionally, if despite its use of measures that appear to be reasonably designed to prevent sales to U.S. persons, the offeror discovers that it has sold to U.S. persons, it may need to evaluate whether other measures may be necessary to provide reasonable assurance against future sales to U.S. persons.

D. Third-Party Web Services

An issuer, underwriter or other type of offshore Internet offeror may seek to have its offering materials posted on a third-party's Web site. In that event, if the offeror uses a third-party Web service that employs at least the same level of precautions against sales to U.S. persons as would be adequate for the offshore Internet offeror to employ, we would not view the third-party's Web site as an offer that is targeted to the United States. [24]

When an offeror, or those acting on its behalf, uses a third-party's Web site to generate interest in the Internet offer, more stringent precautions by the offeror than those outlined in Section III.B. may be warranted. These precautions may include limiting access to its Internet offering materials to persons who can demonstrate that they are not U.S. persons. For example, additional precautions may be called for when the Internet offeror:

- Posts offering or solicitation material or otherwise causes the offer to be listed on an investment-oriented Web site that has a significant number of U.S. clients or subscribers, or where U.S. investors could be expected to search for information about investment opportunities or services; or
- Arranges for direct or indirect hyperlinks from a third-party investment- oriented page to its own Web page containing the offering material.

IV. ADDITIONAL ISSUES UNDER THE SECURITIES ACT

Our Securities Act analysis assumes that the information posted on a Web site would, were we to deem it to occur in the United States, constitute an "offer" within the meaning of Section 5(c) of the Securities Act and Regulation S, a "public offering" prohibited under Section 4(2) of the Act, a "general solicitation or general advertising" prohibited under Rule 502(c) of Regulation D, [25] and a "directed selling effort" prohibited under Regulation S. [26] The focus of our analysis, then, is under what circumstances should we deem offshore Internet offers to which U.S. persons can gain access not to occur in the United States.

A. Offshore Offerings by Foreign Issuers

1. Regulation S

When a foreign issuer is making an unregistered offshore Internet offer and does not plan to sell securities in the United States as part of the offering, it should implement the general measures outlined in Section III.B. to avoid targeting the United States. Assuming that the offering is made pursuant to Regulation S, the offering must comply with all of the applicable requirements under that regulation, including the requirement that all offers and sales be made in "offshore transactions." [27]

2. U.S. Exempt Component

Foreign issuers commonly make offshore offerings concurrently with private offerings to U.S. institutional buyers. An offering exempt under Section 4(2) of the Securities Act may not involve "any public offering." Regulation D specifically prohibits the offer or sale of securities through a "general solicitation or general advertising." Publicly accessible Web site postings may not be used as a means to locate investors to participate in a pending or imminent U.S. offering relying on those provisions. If a Web site posting would be inappropriate for a U.S. private placement, an issuer should not attempt to accomplish the same result indirectly through the posting of an offshore Internet offer.

In addition to implementing the type of precautionary measures previously discussed, foreign issuers could implement other procedures to prevent their offshore Internet offers from being used to solicit participants for their U.S.-based exempt offerings, including:

- The Internet offeror could allow unrestricted access to its offshore Internet offering materials, but not permit persons responding to the offshore Internet offering to participate in its exempt U.S. offering, even if otherwise qualified to do so. In that situation, the offeror would keep a record of all persons responding over the Internet and all persons who otherwise indicate that they are responding to the offshore Internet offering; [28] or
- The Web site offeror could ensure that access to the posted offering materials is limited to those viewers who first provide their residence information and, in doing so, do not provide information such as a U.S. area code or address that indicates that they are a

U.S. person. [29] Thus, U.S. persons could obtain access only by misrepresenting their residence information. [30]

We believe that it would not be advisable for us to dictate the use of any one particular technology or screening method to protect against general solicitation in these instances. Any less costly, less intrusive method that is equally or more effective than those that we have suggested would be adequate as well.

In addition, the posted offering materials should relate only to the offshore offering. [31] The materials should contain only that information (if any) concerning the private U.S. offering that is required by foreign law to be provided to investors participating in the offshore public offering. [32]

B. Offshore Offerings by U.S. Issuers

Our approach to the use of Web sites to post offshore securities offerings distinguishes between domestic and foreign issuers. [33] For the following reasons, additional precautions are justified for Web sites operated by domestic issuers purporting not to make a public offering in the United States:

- The substantial contacts that a U.S. issuer has with the United States justifies our exercise of more extensive regulatory jurisdiction over its securities-related activities;
- There is a strong likelihood that securities of U.S. issuers initially offered and sold offshore will enter the U.S. trading markets; and
- U.S. issuers and investors have a much greater expectation that securities offerings by domestic issuers will be subject to the U.S. securities laws.

Our experience with abusive practices under Regulation S indicates that we should proceed cautiously when giving guidance to U.S. issuers in the area of unregistered offshore offerings. As a result, we would not consider a U.S. issuer using a Web site to make an unregistered offer to have implemented reasonable measures to prevent sales to U.S. persons unless, in addition to the general precautions discussed above in Section III.B., the U.S. issuer implements password-type procedures that are reasonably designed to ensure that only non-U.S. persons can obtain access to the offer. [34] Under this procedure, persons seeking access to the Internet offer would have to demonstrate to the issuer or intermediary that they are not U.S. persons before obtaining the password for the site. [35]

In the context of broader Securities Act reform, we have been considering whether the current general solicitation and other offering communications restrictions on issuers and other offering participants should be modified to create greater flexibility. [36] To the extent that we reform those restrictions on offering communications in the future, we also will consider the implications of those changes for unregistered offshore Internet offerings.

C. Concurrent U.S. Registered Offering

A registered offering in the United States that takes place concurrently with an unregistered offshore Internet offer presents concerns because of the Securities Act's restrictions on making offers prior to the filing of a registration statement or, in the case of written or published offers, outside of the statutory prospectus. Consistent with these requirements, therefore, premature posting of offering information must be avoided. Existing Commission rules that provide a safe harbor for announcements of anticipated offerings provide guidance in this respect. [37] The Commission is considering whether to provide further guidance or to make further changes concerning concurrent U.S. registered offerings and offshore Internet offers in the context of broader Securities Act reforms.

D. Underwriters

Just as an issuer must take reasonable steps to avoid offers of unregistered securities in the United States, so too must persons acting on behalf of the issuer, such as underwriters or distributors. These persons, for purposes of the Securities Act, stand in the place of the issuer. Thus, regardless of whether the underwriter is foreign or domestic, what constitutes measures reasonably designed to prevent sales to U.S. persons will depend on the status of the issuer. For example, if the issuer is domestic and precautionary measures would call for its Web site containing offshore offering information to be password-protected, so too should the information be protected on the underwriter's Web site. [38]

V. ADDITIONAL ISSUES UNDER THE INVESTMENT COMPANY ACT

This portion of the release addresses certain issues that arise under the Investment Company Act when a foreign fund (that is, an investment company that is organized under the laws of a jurisdiction other than the United States) makes an offshore Internet offer of its securities. In general, as with other types of securities offerings, we would not consider an Internet offer by a foreign fund to cause the fund to be subject to regulation or registration under the Investment Company Act if the foreign fund implements measures reasonably designed to guard against sales to U.S. persons.

The issue raised by the use of the Internet is whether a foreign fund's Internet offer that can be accessed by U.S. persons should be considered a public offer in the United States. [39] Consistent with our position under the Securities Act, if a foreign fund implements measures reasonably designed to guard against sales to U.S. persons, we would not consider the foreign fund's Internet offer to be targeted to U.S. persons, and therefore would not consider the Internet offer to constitute a public offer in the United States subjecting the foreign fund to regulation and registration under the Investment Company Act.

An Internet offer by a foreign fund may arise in a number of situations. For example, a foreign fund could conduct an Internet offer that is targeted exclusively offshore. A foreign fund also could conduct an offshore Internet offer in addition to a private U.S. offer. [40] We discuss these situations separately below. We also address the use of the Internet by unregistered

U.S. funds making private offshore offers, and the use of other forms of Internet marketing of investment company securities.

A. Internet Offers by a Foreign Fund

1. Offers Targeted Exclusively Offshore

When a foreign fund is making an unregistered offshore Internet offer and does not intend to sell securities in the United States as part of the offering, our general statements in Section III.B. outlining the need for precautionary measures to avoid targeting the United States apply here as well. We may view an Internet offer as being targeted to U.S. persons, however, if the foreign fund is engaged in activities, either as a part of or in addition to its Internet offer, that are designed to attract U.S. persons to the Internet offer, such as advertising the existence of the foreign fund's Web site in a U.S. publication.

2. Foreign Funds Conducting Offshore and Private U.S. Offers

Next, we address offshore Internet offers by foreign funds that also are conducting private U.S. offers. [41] We would not consider a foreign fund that is concurrently conducting both a private U.S. offer and an offshore Internet offer to be making a public offer of its securities in the United States if the foreign fund implements measures reasonably designed to guard against public sales of its securities to U.S. persons, and the Internet offer is not indirectly used as a general solicitation for participants in the private U.S. offer. As stated above, what constitutes adequate measures will depend on all of the facts and circumstances. In addition to implementing the type of precautionary measures discussed in Section III.B. (with one modification noted below), a foreign fund could use any procedures reasonably designed to guard against use of its Internet offer to generally solicit participants in the U.S. private offer. [42]

If a foreign fund that is concurrently conducting a private U.S. offer and an Internet offer uses a disclaimer that reflects the existence of two separate offers and indicates that the Internet offer is not being made in the United States, we would view this action as an indication that the fund has taken measures reasonably designed to guard against publicly selling its securities to U.S. persons. The disclaimer could state, for example, that this offer (the offshore Internet offer) is not being made in the United States (or identify the jurisdictions in which the Internet offer is being made) and that the offer and sale of securities in the United States is not permitted except pursuant to an exemption from registration.

If, however, a foreign fund directly or indirectly provides any additional information on its Web site about the types of persons to whom offers and sales can be made pursuant to an exemption under U.S. law, or provides guidance on how U.S. persons may obtain this or other purchasing information, we would view this action as an indication that the foreign fund is using its Internet offer to target the United States, except to the extent that foreign law requires that the information be disclosed. [43] Moreover, if the foreign fund provides a hyperlink, or otherwise directs U.S. persons, to another source that provides information

about the private offering, we would view this action as an indication that the foreign fund is targeting the United States. In our view, either of these actions could result in the foreign fund making a public offer in the United States.

A foreign fund also may be making a public offer in the United States if it provides any other information about the private U.S. offer on its Web site, except to the extent that foreign law requires that the information be disclosed. [44] If the foreign fund wishes to provide information on its Web site relating to its private U.S. offer (other than information required by foreign law), it generally may do so without registering under the Investment Company Act if it adopts and implements password-type procedures with respect to that information. [45]

As with our position under the Securities Act, we are concerned that our guidance with respect to the Investment Company Act may be used by some foreign funds that are conducting Internet offers to engage in activities that are part of a plan or scheme to make public offers in the United States. None of our statements in this release is intended to suggest that any foreign fund could do indirectly what it could not lawfully do directly. [46]

B. Offshore Offers by U.S. Funds

As previously noted, the Commission's position on the use of the Internet for unregistered offshore offers generally distinguishes between U.S. and foreign issuers, based upon the Commission's greater interest in regulating the conduct of U.S. issuers in the United States. As noted in Section IV.B., we will not require a U.S. issuer making an offshore offer over the Internet to register the offer under the Securities Act if it uses procedures reasonably designed to ensure that only non-U.S. persons may view the offer. We conclude that the same approach should apply under the Investment Company Act to U.S. funds making offshore Internet offers. Thus, we would not consider a U.S. fund making a private offshore offer in reliance on one of the exclusions from the definition of "investment company" in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act to be making a public offer in the United States if the fund uses procedures, such as password-protected web sites, reasonably designed to ensure the private nature of the offer. [47]

As noted above, we are considering whether the current restrictions on general solicitations in connection with private offers under the Securities Act should be modified. [48] In the event that we revise current Securities Act restrictions on exempt private offers and unregistered offshore offers, we anticipate that we would consider parallel revisions under the Investment Company Act.

C. Other Forms of Internet Marketing of Investment Company Securities

We analyze Internet offers made by or on behalf of a foreign fund in generally the same manner as offers by other types of issuers. [49] If a foreign fund or persons acting on its behalf seek to use a third-party Web site to generate interest in an offshore offer, the implementation of more

stringent restrictions on the offshore Internet offer may be necessary to ensure that the offer is not being directed into the United States, including limiting access to the Internet offering materials to persons who can demonstrate that they are not U.S. persons. [50]

VI. OFFERS OF ADVISORY SERVICES UNDER THE ADVISERS ACT

This portion of the release addresses issues that arise under the Advisers Act when a foreign adviser (that is, an investment adviser that is organized under the laws of a jurisdiction other than the United States) offers its advisory services over the Internet. In general, a foreign adviser may be able to rely on an exemption from registration under the Advisers Act if it has fewer than fifteen U.S. clients and implements measures reasonably designed to ensure that, based on its Internet activities, the adviser is not holding itself out as an investment adviser in the United States. [51]

The issue raised by a foreign investment adviser's use of the Internet is whether and, if so, under what circumstances, the foreign adviser may provide information about its advisory services over the Internet without being considered to be holding itself out as an investment adviser in the United States. We conclude that a foreign adviser providing advisory services over the Internet generally would be holding itself out as an investment adviser. Specifically, we have stated that we generally will consider an adviser who uses a publicly available electronic medium, such as the Internet, to provide information about its services to be holding itself out to the public as an adviser, and to not qualify for the exemption from registration contained in Section 203(b)(3) of the Advisers Act. [52] If, however, the adviser implements measures reasonably designed to guard against directing information provided on the Internet about its advisory services to U.S. persons, we would not consider the foreign adviser to be holding itself out as an investment adviser in the United States for purposes of Section 203(b)(3).

What constitutes measures reasonably designed to guard against an adviser holding itself out as an investment adviser in the United States will depend on all of the facts and circumstances. We generally would consider an adviser to have implemented measures reasonably designed to guard against holding itself out as an investment adviser in the United States if:

- The Web site includes a prominent disclaimer making it clear to whom the site materials are (or are not) directed. [53]
- The adviser implements procedures reasonably designed to guard against directing information about its advisory services to U.S. persons (e.g., obtaining sufficient residency information such as mailing addresses or telephone numbers prior to sending further information), other than to its fourteen or fewer U.S. clients. [54]

Other measures also may provide adequate assurance that a foreign adviser is not holding itself out as an investment adviser in the United States.

VII. EXCHANGE ACT REGISTRATION ISSUES

The Internet activities of broker-dealers and markets (including exchanges) also raise issues under the Exchange Act. Foreign entities that perform these functions should consider whether their Internet activities would subject them to registration under the Exchange Act.

A. Broker-Dealer Activities

Broker-dealers must register with the Commission if they are physically present in the United States, or if, regardless of their location, they effect, induce, or attempt to induce securities transactions with investors in the United States. The issue, therefore, is whether the Commission would deem a broker-dealer's Web site to be an attempt to induce securities transactions with U.S. persons. Broker-dealer Web sites may offer market information and investment tools, real-time or delayed quote information, market summaries, research, portfolio management tools, and analytic programs. Some sites also include information on commissions and other fees, branch office locations, and instructions on how to contact the broker-dealer. In essence, Web sites advertise the broker-dealers' services to potential investors with the intent of attracting securities business.

In keeping with the general principles outlined above (Section III.B.), the Commission will not consider a foreign broker-dealer's advertising on an Internet Web site to constitute an attempt to induce a securities transaction with U.S. persons if the foreign broker-dealer takes measures reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of its Internet activities. Under our general principles, as applied in the broker-dealer context, a foreign broker-dealer generally would be considered to have taken measures reasonably designed to ensure it does not effect securities transactions with U.S. persons as a result of its Internet activities if it:

- Posts a prominent disclaimer on the Web site either affirmatively delineating the countries in which the broker-dealer's services are available, or stating that the services are not available to U.S. persons;

  and

- Refuses to provide brokerage services to any potential customer that the broker-dealer has reason to believe is, or that indicates that it is, a U.S. person, based on residence, mailing address, payment method, or other grounds.

As a means to implement the latter procedure, the broker-dealer should require potential customers to provide sufficient residence information.

These procedures are not exclusive. Adoption of other equally or more effective precautions can also suffice to demonstrate that the broker-dealer does not effect securities transactions with U.S. persons as a result of its Internet activities.

The Commission has exempted foreign broker-dealers that effect transactions with U.S. customers from registering in the United States if

these customers initiated transactions with the foreign broker-dealers outside of the United States without solicitation. Specifically, Exchange Act Rule 15a-6 currently provides an exemption from U.S. broker-dealer registration for foreign broker-dealers that effect transactions in securities with or for persons that they have not solicited. [55] Foreign broker-dealers that solicit transactions with U.S. persons, however, are required to register as broker-dealers in the United States.

Foreign broker-dealers that have Internet Web sites and that intend to rely on Rule 15a-6's "unsolicited" exemption should ensure that the "unsolicited" customer's transactions are not in fact solicited, either directly or indirectly, through customers accessing their Web sites. [56] In particular, these broker-dealers could obtain, as a precaution reasonably designed to prevent that result, affirmative representations from potential U.S. customers that they deem unsolicited that those customers have not previously accessed their Web sites. Alternatively, a broker-dealer could maintain records that are sufficiently detailed and verifiable to reliably determine that such U.S. customers had not obtained access to its Web site.

B. Exchange Activities

Until recently, in order to obtain current market information about, and to purchase or sell securities on, a foreign market, a U.S. investor typically contacted a U.S. broker-dealer by telephone or facsimile. Alternatively, the U.S. investor could directly contact a foreign broker-dealer that is a member of the foreign market. Today, however, the technology exists for investors to obtain real-time information about trading on foreign markets from a number of different sources, and to enter and execute orders on those markets electronically from the United States. Many exchanges, for example, offer Web sites through which they provide real-time quotes and other market information, e-mail addresses for questions, general contact and membership information (including the names and addresses of members), and other investing tools.

The U.S. securities laws require exchanges to register with the Commission if they (or any broker or dealer) "make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction." [57] The Commission currently is considering the question of under what circumstances a foreign market that provides the ability in the United States for U.S. persons to trade directly in the market must register as a U.S. exchange. [58]

At this time, however, the Commission will not apply the exchange registration requirements to a foreign market that sponsors a Web site generally advertising the foreign exchange, disseminating quotes (including real-time quotes with counterparty identification), or allowing orders to be directed to the market through its Web site, so long as the exchange takes steps reasonably designed to prevent U.S. persons from directing orders to the market through its Web site. In our view, an exchange generally would be considered to have taken steps reasonably

designed to prevent U.S. persons from accessing the market through its Web site if it:

- Posts a disclaimer on the Web site affirmatively stating either the countries in which the exchange's services are directly available, or that the exchange's services are not directly available to U.S. persons;
- Requires potential members or direct participants in the exchange to state their residence and mailing address;
- Refuses to allow trading on the exchange through the Web site by any person that the exchange has reason to believe, or that indicates it, is a U.S. person; and
- Refrains from making arrangements to provide U.S. persons with access to the exchange over the Internet indirectly through its members. [59]

LIST OF SUBJECTS

17 CFR Parts 231, 241 and 276

Securities.

17 CFR Part 271

Investment companies, Securities.

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

For the reasons set forth in the preamble, the Commission is amending Title 17, Chapter II of the Code of Federal Regulations as follows:

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

1. Part 231 is amended by adding Release No. 33-7516 and the release date of March 23, 1998, to the list of interpretative releases.

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

2. Part 241 is amended by adding Release No. 34-39779 and the release date of March 23, 1998, to the list of interpretative releases.

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

3. Part 271 is amended by adding Release No. IC-23071 and the release date of March 23, 1998, to the list of interpretative releases.

PART 276 - INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

4. Part 276 is amended by adding Release No. IA-1710 and the release date of March 23, 1998, to the list of interpretative releases.

By the Commission.

Jonathan G. Katz

Secretary

Dated: March 23, 1998

1. FOOTNOTES

-[1]- 15 U.S.C. 77a, et seq . (the "Securities Act").

-[2]- 15 U.S.C. 80a-1, et seq . (the "Investment Company Act").

-[3]- 15 U.S.C. 80b-1, et seq . (the "Advisers Act").

-[4]- 15 U.S.C. 78a, et seq . (the "Exchange Act").

-[5]- The courts have recognized U.S. jurisdiction over fraudulent conduct where substantial conduct or effects occur in the United States. See generally Itoba Ltd. v. LEP Group PLC , 54 F.3d 118 (2d Cir. 1995), cert. denied , 516 U.S. 1044 (1996) and Robinson v. TCI/US West Communications Inc. , 117 F.3d 900 (5th Cir. 1997) (citing Schoenbaum v. Firstbrook , 405 F.2d 200 (2d Cir.), rev'd on other grounds on rehrg . en banc , 405 F.2d 215 (2d Cir. 1968), cert. denied , 395 U.S. 906 (1969) (effects test)); Bersch v. Drexel Firestone Inc. , 519 F.2d 974 (2d Cir.), cert. denied , 423 U.S. 1018 (1975) (conduct test); Leasco Data Processing Equipment Corp. v. Maxwell , 468 F.2d 1326 (2d Cir. 1972) (conduct test).

-[6]- See President William J. Clinton and Vice President Albert Gore, Jr., A Framework for Global Electronic Commerce (1997), http://www.iitf.nist.gov/eleccomm/ecomm.htm; European Ministerial Conference, "Global Information Networks: Realizing the Potential," July 6-8, 1997, Ministerial Declaration, Global Informational Networks, .

-[7]- For a discussion of recent Commission actions addressing the Internet, see The Impact of Recent Technological Advances on the Securities Markets , Report prepared by the Staff of the U.S. Securities and Exchange Commission pursuant to Section 510(a) of the National Securities Markets Improvements Act of 1996 (Oct. 1997) http://www.sec.gov/news/studies/techrp97.htm.

-[8]- Wilske and Schiller, International Jurisdiction in Cyberspace: Which States May Regulate the Internet?

, http://www.law.indiana.edu/fclj/pubs/v50/no1/wilske.html, Section II.A.2.(c).

-[9]- The Web site sponsor can aid Internet searches by adding "tags" to its Web site that facilitate a search engine identifying the site as containing information relating to targeted topics. Generally, we will not view the use of tags relating to securities or investments as transforming the Web site into a targeted communication that would require additional measures to assure against sales to U.S. persons, such as blocking access by U.S. persons to the offering materials.

-[10]- Section 5 of the Securities Act, 15 U.S.C. 77e.

-[11]- See , e.g. , Section 4(2) of the Securities Act, 15 U.S.C. 77d(2); Regulation D (17 CFR 230.501-508).

-[12]- Section 7(d) of the Investment Company Act, 15 U.S.C. 80a-7(d).

-[13]- See Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act, 15 U.S.C. 80a-3(c)(1), 15 U.S.C. 80a-3(c)(7). See also Staff no-action letter, Goodwin, Procter & Hoar (available Feb. 28, 1997) ("Goodwin Procter").

-[14]- Section 203(a) of the Advisers Act, 15 U.S.C. 80b-3(a).

-[15]- Section 15(a) of the Exchange Act, 15 U.S.C. 78o(a).

-[16]- Section 6 of the Exchange Act, 15 U.S.C. 78f.

-[17]- See , e.g. , Securities Act Release No. 7233, Question 20 (Oct. 6, 1995) (60 FR 53458) ("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.").

-[18]- We also assume that the Internet is an instrument of interstate commerce and that its use satisfies the "jurisdictional means" requirements of the federal securities laws. See American Library Ass'n v. Pataki , 969 F. Supp. 160, 161 (S.D.N.Y. 1997).

-[19]- Under a resolution adopted by the North American Securities Administrators Association ("NASAA"), states are encouraged to take appropriate steps to exempt Internet offers from the registration provisions of their securities laws when the offers indicate that the securities are not being offered to residents of their state and the offers are not otherwise specifically made to any persons in their state. Sales of the securities that were the subject of the Internet offer could be made in that state after the offering has been registered and the final prospectus has been delivered to investors, or where the sales are exempt from registration. NASAA, Resolution Regarding Securities Offered on the Internet (adopted Jan. 7, 1996), 1996 CCH Par. 7040 (Jan. 1996). According to NASAA, 32 states have implemented the resolution and 15 states have indicated an intent to do so. Several foreign authorities have

provided guidance on Internet and securities related issues. See , e.g. , Policy Statement 107 on Electronic Prospectuses (Sept. 1996) http://www.asc.gov.au (Australia); Notice and Interpretation Note, Trading Securities and Providing Advice Respecting Securities on the Internet (Mar. 3, 1997), NIN #97/9 (British Columbia, Canada).

-[20]- We use the term "U.S. person" as it is defined in Rule 902(k) of Regulation S under the Securities Act (17 CFR 230.902(k)), which is premised on residence in the United States, regardless of any temporary presence outside the United States. See Securities Act Release No. 7505 (Feb. 18, 1998) (63 FR 9632 (Feb. 25, 1998)) (renumbering CFR sections). "U.S. person" generally has the same meaning for purposes of Section 7(d) of the Investment Company Act as under Rule 902(k) of Regulation S under the Securities Act. See Goodwin Procter, supra note 13. For purposes of this release, we deem Internet offers "targeted at the United States" to include Internet offers targeted to U.S. persons. Cf . Rule 902(h)(2) of Regulation S (17 CFR 230.902(h)(2)) (offers targeting identifiable groups of U.S. persons offshore are not offshore transactions).

-[21]- The disclaimer would have to be meaningful. For example, the disclaimer could state, "This offering is intended only to be available to residents of countries within the European Union." Because of the global reach of the Internet, a disclaimer that simply states, "The offer is not being made in any jurisdiction in which the offer would or could be illegal," however, would not be meaningful. In addition, if the disclaimer is not on the same screen as the offering material, or is not on a screen that must be viewed before a person can view the offering materials, it would not be meaningful.

-[22]- In our view, while a relevant factor, the fact that an Internet offeror posts offering materials in English even though it is based in a non-English speaking country will not, by itself, demonstrate that the offer is targeted at the United States.

-[23]- These additional steps could include a request for further evidence (e.g. , a copy of a passport or driver’s license).

-[24]- Governmental authorities or securities exchanges could post issuer information that is required by law to be filed with them, including prospectuses, on their Web sites without restriction. Securities exchanges, however, should consider the U.S. registration implications of their Web sites as a whole. See infra Section VII.B.

-[25]- Rule 502(c) under the Securities Act (17 CFR 240.502(c)).

-[26]- Rule 902(c) (17 CFR 230.902(c)).

-[27]- Rule 902(h) and Rule 903 of Regulation S (17 CFR 230.902(h) and 230.903). The issuer’s or underwriter’s use of an Internet Web site to offer securities will not, by itself, prevent bona fide offshore purchasers in a Regulation S offering from reselling into the United States pursuant to registration or an exemption, such as Rule 144A (17 CFR 230.144A), provided that: (1) those purchasers are not part of the selling group; (2)

those purchasers are not affiliated with the issuer or any member of the selling group; and (3) the issuer's or underwriter's use of the Web site was not undertaken as part of an arrangement with, or on behalf of, such offshore purchasers.

-[28]- To identify those persons who are responding to the Internet offer, the Web site could provide telephone numbers, contact persons, or addresses that differ from those used in the offeror's other, more traditional offering materials. Under an approach suggested in staff no-action letters, the offeror could communicate with U.S. persons on the list to determine whether they are accredited investors with a view towards permitting their participation in separate, future exempt U.S. offerings by the issuer or, where the Web site offeror is an intermediary, other issuers. See Staff no-action letters, Royce Exchange Fund (available Aug. 28, 1996); Bateman Eichler (available Dec. 3, 1985); E.F. Hutton & Co. (available Dec. 3, 1985); Woodtrails-Seattle (available Aug. 9, 1982). Likewise, any investor solicited by the issuer or underwriter prior to or independent of the Web site posting could participate in the private offer, regardless of whether the investor may have viewed the posted offshore offering materials.

-[29]- This step could be accomplished in multiple ways. For example, when a person reaches the Web site and then attempts to move to a section that includes offering information, a screen could ask for the required residence information. After the user enters the information, the area code and address could be automatically and immediately screened to eliminate further access to those who match a U.S. area code or address. Alternatively, the offeror could require a password and not assign a password until it verifies that address information, or it could block access by using technology that recognizes the country from which the Web site is being accessed.

-[30]- Web site offerors must act in good faith to screen U.S. persons from viewing offering information. A screening mechanism that suggests ways of easy bypass would not be evidence of good faith.

-[31]- A foreign issuer that wishes to use an Internet Web site to conduct the concurrent private placement in the United States could follow the general procedures developed in the domestic context for private placements on the Internet. See , e.g. , Staff no-action letters, IPONET (available July 26, 1996); Lamp Technologies, Inc. (available May 29, 1997). Under these procedures, the public offer posted on the Web site may not provide a hyperlink or otherwise alert the viewer to any Web site containing private placement offering materials.

-[32]- Rule 135c under the Securities Act (17 CFR 230.135c) provides useful guidance on what limited information could be included on the Web site under these circumstances.

-[33]- We use the term "foreign issuer" as it is defined in Rule 902(e) of Regulation S (17 CFR 230.902(e)). See Securities Act Release No. 7505.

-[34]- See , e.g. , IPONET and Lamp Technologies, Inc., supra note 31. Our interpretation therefore would allow for the creation of limited-access systems. Eventually, closed systems may develop that target only non-U.S. persons and qualified U.S. investors.

-[35]- See Securities Act Release No. 7392 at n.31 (Feb. 28, 1997) (62 FR 9258) (issuer cannot accept at face value representations by investors regarding their residence). See also IPONET, supra note 31(IPONET's activities were supervised by an entity that verified information provided to IPONET by people who filled out IPONET's on-line questionnaire. Information from the questionnaires was used to determine whether respondents qualified as accredited investors and therefore were eligible to obtain password to access password-protected Web pages where IPONET posted private offerings).

-[36]- Securities Act Release No. 7314 (July 25, 1996) (61 FR 40044); Securities Act Release No. 7187 (July 10, 1995) (60 FR 35645).

-[37]- See , e.g. , Rule 135 under the Securities Act (17 CFR 230.135).

-[38]- This, however, would not include bona fide research that complies with the Commission's safe harbor rules for research reports. See Rules 137 - 139 under the Securities Act (17 CFR 230.137 - 230.139). Cf. Exchange Act Rule 15a-6(a)(2) (17 CFR 240.15a-6(a)(2))(conditional exemption from U.S. broker-dealer registration for foreign broker-dealers that furnish research reports to "major institutional investors" as defined in the rule).

-[39]- Section 7(d) of the Investment Company Act generally prohibits a foreign fund from using U.S. jurisdictional means to make a public offer of its securities in the United States or to U.S. persons, unless the fund receives an order from the Commission permitting it to register under the Investment Company Act. The Commission may issue such an order only if it finds that it is legally and practically feasible to enforce the provisions of the Investment Company Act effectively against the foreign fund, and that the issuance of the order is consistent with the public interest and the protection of investors. For purposes of Section V, references to offers and sales to U.S. persons include offers or sales in the United States. Similarly, references to offers or sales in the United States include offers or sales to U.S. persons.

-[40]- In addition, a foreign fund also may use the Internet exclusively to conduct a private U.S. offer. This release does not address the ability of a foreign fund to conduct a private U.S. offer over the Internet, except to the extent that it is relevant to the foreign fund's ability to simultaneously conduct an offshore Internet offer. See infra note 45 and accompanying text. As discussed above in Section I, the statements made in this release do not alter the requirement that all offers and sales in the United States must be pursuant to registration under the U.S. securities laws or an applicable exemption.

-[41]- The staff previously took the position that under certain circumstances a foreign fund that is conducting an offshore offer also may

make a private U.S. offer in reliance on the exclusion from the definition of "investment company" in Section 3(c)(1) of the Investment Company Act consistent with the public offering prohibition contained in Section 7(d). See Staff no-action letter, Touche Remnant & Co. (available Aug. 27, 1984) ("Touche Remnant"). In Goodwin Procter, supra note 13, the staff similarly took the position that under certain circumstances a foreign fund that is conducting an offshore offer also may make a private U.S. offer in reliance on the exclusion from the definition of "investment company" in Section 3(c)(7) of the Investment Company Act consistent with the public offering prohibition contained in Section 7(d). The staff also has stated that if U.S. persons become shareholders of a foreign fund for reasons beyond the control of the fund or persons acting on its behalf, the fund would not be required to count those shareholders as U.S. persons for purposes of determining whether the fund may rely on the exception from the definition of "investment company" in Section 3(c)(1) of the Investment Company Act. See Staff no-action letter, Investment Funds Institute of Canada (available Mar. 4, 1996). The same position applies to foreign funds relying on Section 3(c)(7) of the Investment Company Act. See generally Goodwin Procter, supra note 13. We take the position that Touche Remnant is superseded to the extent that it is inconsistent with these positions.

-[42]- See notes 28-32 supra and accompanying text.

-[43]- Although Rule 135c by its terms applies only to Section 5 of the Securities Act, we would take a similar approach with respect to the type of information that a foreign fund may, if required by foreign law, provide on its Internet site about a U.S. private offer without violating the public offering prohibition contained in Section 7(d) of the Investment Company Act. See supra note 32 and accompanying text.

-[44]- An adviser to a foreign fund conducting an offshore Internet offer that also sponsors a U.S.-registered investment company with the same investment objectives and policies as the foreign fund may provide information about, or direct the viewer to, the registered U.S. offer without the Internet offer being considered to be a public offer of the foreign fund’s securities in the United States.

-[45]- See Lamp Technologies, Inc. and IPONET, supra note 31. Prequalification and password-type procedures are intended to ensure that only persons eligible to privately purchase the securities can obtain access to a Web site used in connection with a private offer and that the dissemination of information through the Internet site does not constitute a "general solicitation" under Rule 502(c) of Regulation D under the Securities Act. In addition to the procedures discussed in Lamp Technologies, there may be other, equally effective procedures designed to restrict access to information on the Internet to those persons who are eligible to purchase securities in a private U.S. offer.

-[46]- See Section 48(a) of the Investment Company Act.

-[47]- See supra notes 34-35 and accompanying text.

-[48]- See supra note 36 and accompanying text.

-[49]- See Section III.D., supra .

-[50]- Id .

-[51]- Section 203(a) of the Advisers Act generally prohibits any investment adviser from using U.S. jurisdictional means in connection with its business as an investment adviser, unless the adviser is registered with the Commission, or is exempted or excluded from the requirement to register. Section 203(b)(3) of the Advisers Act provides for an exemption from registration for any adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds itself out generally to the public as an investment adviser nor acts as an adviser to a U.S.-registered investment company or business development company. The staff has taken the position that foreign advisers are required to count only their U.S. clients for purposes of determining whether they are exempt from registration under Section 203(b)(3). See Protecting Investors: A Half Century of Investment Company Regulation , at 223 n.6 (1992); Staff no-action letter, Murray Johnstone Ltd. (available Oct. 7, 1994).

-[52]- See Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Securities Act Release No. 7288 (May 9, 1996) at text accompanying n. 32. But see Lamp Technologies, Inc., supra note 31.

-[53]- See supra note 21 and accompanying text.

-[54]- See text following supra note 21.

-[55]- Exchange Act Rule 15a-6(a)(1) (17 CFR 240.15a-6(a)(1)).

-[56]- Because a securities firm’s Web site itself typically is a solicitation, orders routed through the Web site would not be considered "unsolicited."

-[57]- Section 5 of the Exchange Act, 15 U.S.C. 78e.

-[58]- Exchange Act Release No. 38672 (May 23, 1997).

-[59]- This last step would preclude an exchange from relying on this release if it, for example, sets the terms under which exchange members provide Internet access to the exchange, or makes arrangements for U.S. persons to directly clear and settle trades conducted on the exchange through the Internet. Foreign exchanges that knowingly provide U.S. persons with access to their trading facilities through the Internet would not be able to rely on this interpretation, and may be required to register with the Commission.

http://www.sec.gov/rules/interp/33-7516.htm

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2. Modified:03/24/1998