

# ROAD SHOWS ON THE INTERNET: TAKING INDIVIDUAL INVESTORS FOR A RIDE ON THE INFORMATION HIGHWAY

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## INTRODUCTION

The Internet has prompted an evolution (indeed, a revolution) within securities transactions that has markedly changed the face of securities regulation. The ubiquitous nature of this information network has caused deviations from and alterations within the traditional business model. These changes, many of which are ongoing, include a movement toward a different type of public offering as well as a reassessment and redistribution of risk for market players.

Consequently, the Securities and Exchange Commission (SEC or Commission) has been forced to reevaluate some of its rules and regulations. In particular, the SEC has had to learn how to utilize Internet resources without compromising either of its dual objectives of promoting market efficiency and protecting investors.<sup>1</sup> As a result, the SEC is now fighting a battle on two fronts. On the one hand, the Commission is battling broker-dealers, who feel that the SEC's attempts to "level the playing field" by imposing strict regulations on information disclosure is too stringent and is actually hampering market efficiency.<sup>2</sup> On the other hand, the SEC is at odds with investors, who feel that the SEC's paternalistic approach is suffocating them in

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1. Securities Act of 1933, Pub. L. No. 73-22, § 3(f), 48 Stat. 74, 74-75 (codified as amended at 15 U.S.C. § 77b (2000)) (stating that the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation).

2. See Elisse B. Walter, *Current Issues and Rulemaking Projects Division of Corporate Finance*, in 13TH ANNUAL INSTITUTE ON MUNICIPAL FINANCE 9, 179 (PLI Real Estate Law & Practice, Course Handbook Series No. N-408, 1995) ("It may not be cost-effective for broker-dealers to review information on all issues, especially small and less frequently traded ones, so they could not trade such securities.").

that it limits their ability to compete equally in the market.<sup>3</sup> Furthermore, the SEC must act quickly, as the electronic form of securities communications is quickly overtaking its paper-based predecessor.

Since Internet-based trading systems were introduced in 1995,<sup>4</sup> online trading has increased dramatically. According to a recent estimate, there are 7.8 million individuals trading online, completing a total of 807,000 trades per day.<sup>5</sup> Paralleling this rapid growth of electronic securities transactions is a large increase in the number of investor complaints.<sup>6</sup> In response, the Commission has issued releases providing recommendations for investors and issuers alike on how to manage some of the issues that have surfaced as a result of online trading.<sup>7</sup>

The vast majority of recommendations and responses by the SEC regarding the extent to which issuers and investors may take advantage of the Internet's fast and far-reaching capabilities have been through the SEC's "no-action letter" procedure.<sup>8</sup> Through no-action letters, the SEC has demonstrated a fairly novel flexibility that has

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3. Amey Stone, *IPO Roadshows on the Web: Let the Little Guys In*, Business Week Online, at <http://www.businessweek.com/bwdaily/dnflash/dec1999/sw91214.htm> (Dec. 14, 1999) (on file with the *Duke Law Journal*) (illustrating that the SEC has traditionally closed off roadshows to most individuals to protect the "widows and orphans who may not be sophisticated enough to sort out the hype in a new offering").

4. OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, SEC, EXAMINATIONS OF BROKER-DEALERS OFFERING ONLINE TRADING: SUMMARY OF FINDINGS AND RECOMMENDATIONS, <http://www.sec.gov/news/studies/online.htm> (Jan. 25, 2001) (on file with the *Duke Law Journal*).

5. STEPHEN C. FRANCO ET AL., U.S. BANCORP PIPER JAFFRAY EQUITY RESEARCH, ONLINE FINANCIAL SERVICES UPDATE 3-6 (Apr. 2000).

6. Since 1995, the complaints and questions received and responded to by the SEC have risen 88 percent. SEC, *Investor Complaints and Questions Continue to Rise*, at <http://www.sec.gov/news/data.htm> (last modified Mar. 20, 2001) (on file with the *Duke Law Journal*). More specifically, since 1997, online trading complaints have risen over 814 percent. *Id.* The most common types of complaints pertained to failures and delays in processing orders, difficulty in accessing accounts, and transfer of account problems. *Id.*

7. OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, *supra* note 4.

8. See JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 12 (3d ed. 2001) (stating that the SEC has provided much guidance through the no-action letter procedure). Ever since the SEC was first created, it has been willing to respond to inquiries made by individual issuers regarding how the SEC staff would apply the federal securities laws to a certain transaction. The SEC responses are termed "no-action letters" because the staff would "recommend *no action* to the Commission" if the transaction was completed in the manner stated in the inquiry. *Id.* The staff's response, however, does not represent the official views of the Commission. *Id.* Therefore, other issuers cannot rely on the no-action letter and cannot assume that, if they completed a transaction as contemplated by the inquirer, the SEC would not challenge such an action.

not been characteristic of the SEC's approach to regulations in the traditional business model. Rather than simply representing an outright policy move toward liberalization, however, the SEC's response to online trading is better viewed as being merely an adaptation to changes in a market environment that requires leniency. In the past, the SEC has demonstrated its willingness to be accommodating when an accommodation would promote efficiency, competition and capital formation.<sup>9</sup> The development of road shows<sup>10</sup> is a case in point.

This Note addresses important issues that arise when contemplating the very real possibility of opening road shows, particularly in electronic form, to individual investors.<sup>11</sup> To this end, Part I of this Note summarizes some of the necessary background relating to securities regulation in general. Part II then explores more deeply the issues that arise during the waiting period by discussing the evolution of the road show: its history and purpose, the regulatory issues involved, and its development into an electronic form. Part II also explains how the electronic road show has impacted the Commission's stance on securities regulations, particularly in the area of disclosure. Part III then analyzes how the advent of the Internet and the SEC's adaptation to it may lead to the next major step in securities transactions, which would be approval of individual investor access to pre-IPO electronic road shows.

Part IV, however, warns that opening electronic road shows to individual investors raises concerns because of: (1) the inability of the individual investors to adequately filter and process the information; (2) the chilling effect on the issuer's dissemination of material information; and (3) the termination of the utility of the road show, as one-on-one meetings become increasingly obsolete. In light of these concerns and given that the SEC is currently without a precise policy stance regarding Internet developments, this Note concludes by contending that the opening of road shows may not serve the goal of fair and efficient market operation at the present time.

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9. 15 U.S.C. § 77b (2000).

10. See *infra* Part II.A–B (describing the evolution of road shows).

11. This Note distinguishes between the individual and the institutional investor. The individual investors are the unsophisticated widows, widowers and orphans of the world. Throughout this Note, "investor" refers to an individual investor unless otherwise stated.

## I. THE REGISTRATION PROCESS

When an issuer embarks on the public offering process, compliance with the guidelines stipulated in the Securities Act of 1933 (Securities Act)<sup>12</sup> and the Securities and Exchange Act of 1934 (Exchange Act)<sup>13</sup> is essential. The restrictions on the behavior of market players, namely the issuer, underwriter, and broker-dealer, can best be understood if the offering process is separated into the registration's three distinct time periods: preregistration, waiting, and posteffective.

The preregistration period occurs before registration, and any communication during this period raises section 5(c) concerns.<sup>14</sup> That is, any contact by the issuer with the investor that may constitute an offer, written or oral, to buy or sell, is prohibited. However, issuers may contact brokers, and brokers are in turn allowed to contact one another in an effort to assess interest in the security.<sup>15</sup>

The next period, the waiting period, occurs after the securities are registered and before registration becomes effective.<sup>16</sup> During this time, section 5(b)(1) restricts any activity that either has the effect of preconditioning the market or that may constitute a sale of securities.<sup>17</sup> That is, any communications between the issuer and their underwriters and the investors must meet the requirements of a section 2(10) prospectus.<sup>18</sup> The Securities Act does allow information to be disclosed if the relayed information complies with one of the Act's stipulated safe harbors.<sup>19</sup>

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12. 15 U.S.C. §§ 77a–77mm. The Securities Act is primarily concerned with the initial distribution of securities, and is designed to provide adequate information about the issuer to allow buyers to make informed investment decisions. KENT D. STUCKEY, INTERNET AND ONLINE LAW § 11.02[2][a], at 11-11 (2002).

13. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 881–909 (codified as amended at 15 U.S.C. §§ 78a–78mm (2000)).

14. 15 U.S.C. § 77e(c).

15. See 15 U.S.C. § 77d(3) (listing the broker-dealer transaction exception to the section 77e prohibition of communications).

16. See COX ET AL., *supra* note 8, at 278–84 (describing the requirements of market players during the waiting period).

17. *Id.* at 261, 278–79.

18. 15 U.S.C. § 77b(10) (“‘[P]rospectus’ means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security . . .”).

19. See COX ET AL., *supra* note 8, at 278–83 (describing the various safe harbors available during the waiting period).

During the posteffective period, which begins subsequent to the effective date of the registration statement, any and all materials regarding the securities may be sent to investors.<sup>20</sup> However, any communications must be accompanied or preceded by a final 10(a) prospectus.<sup>21</sup>

When speaking in terms of information disclosure, it is important to understand the guidelines pertaining to the registration process set forth by the Securities Act<sup>22</sup> and Exchange Act,<sup>23</sup> for much of how issuers, underwriters, and investors interact with one another in the market is governed by these very principles. Indeed, it is within this regulatory framework that investors can structure innovations, such as the road show.

## II. ROAD SHOWS: A CLOSER LOOK

### A. A Road Show Description

Developed approximately thirty years ago, road shows today have become commonplace in the early stages of market transactions.<sup>24</sup> “Road show” is a term that describes meetings that take place during the waiting period, where institutional investors, portfolio managers, and others are given an opportunity to meet the issuer’s management.<sup>25</sup> These meetings are restricted to sophisticated investors, for if the road shows were accessible to the individual investors,

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20. “Free writing” is also allowed during this period. Free writing refers to the delivery of supplementary selling materials, and is permitted only in the posteffective period, as long as it is accompanied by a final prospectus. 15 U.S.C. 77b(10); COX ET AL., *supra* note 8, at 288–90.

21. Section 5(b)(2) prohibits delivering a security for the purpose of a sale unless such security is sent concurrently with or is preceded by a prospectus that meets the requirements of section 10(a) of the Securities Act. 15 U.S.C. 77e(b).

22. 15 U.S.C. §§ 77a–77mm.

23. *Id.* §§ 78a–78mm.

24. Tom Pratt, *On the Road Again . . .*, INVESTMENT DEALERS’ DIG., Sept. 20, 1993, at 14, 14–15.

25. As road shows frequently are used in Rule 144A offerings, the key concern is to comply with section 4(2) of the Securities Act, which prohibits general solicitation and general advertising. This is why it is important that those who are invited (and who attend) the road shows are sophisticated investors. Rule 144A sets forth a nonexclusive safe harbor from the registration requirements of section 5 of the Securities Act for the resale of restricted securities to specified institutions by persons *other than* the issuer of such securities. Resale of Restricted Securities, Securities Act Release No. 6862, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,637, at 80,639 (Apr. 23, 1990).

the issuers would run afoul of restrictions set forth in the Securities Act that prohibit general solicitation and advertising.<sup>26</sup>

Road shows are well attended by both issuers and investors,<sup>27</sup> as strong incentives have developed so that both parties may benefit from the experience. For issuers, road shows provide a venue to further marketing efforts of their securities and allow for the more general objective of developing a positive rapport with market players, establishing a long-term, mutually beneficial connection to facilitate future dealings.<sup>28</sup> The managing underwriters use feedback from the road show to better assess the demand for the offering, allowing them to price the securities more accurately.<sup>29</sup>

### B. *The Evolving Road Show*

Interestingly enough, road shows initially were issuers' solutions to limited resources. Because issuers lacked a sufficient sales force to adequately advertise the existence of the security being offered, the original road show developed to generate demand for securities.<sup>30</sup> The road show today, however, most likely requires much more in the way of resources than raising an entire army of sales representatives. With the development of technology, the presentations given during road shows are now highly advanced and utilize an impressive array of multimedia devices.<sup>31</sup>

Road shows have also evolved structurally. The traditional road shows usually lasted for no more than a week and were held in limited locations.<sup>32</sup> In contrast, modern road shows might last for several weeks and take place in cities all over the world.<sup>33</sup>

In addition, the traditional road show merely consisted of a single group meeting.<sup>34</sup> Today, along with a general meeting, which oc-

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26. *See supra* Part I.

27. Pratt, *supra* note 24, at 16-17.

28. *Id.* at 17-18.

29. Stephen J. Schulte, *IPO Road Shows Today: A Primer For the Practitioner*, in SECURITIES LAW & THE INTERNET: DOING BUSINESS IN A RAPIDLY CHANGING MARKETPLACE 201, 205 (PLI Corporate Law & Practice, Course Handbook Series No. B-1127, 1999).

30. *See id.* at 206 (describing the evolution of road shows for initial public offerings).

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* Linda C. Quinn & Otilie L. Jarmel, *The Road Less Traveled: The Advent of Electronic Roadshows*, reprinted in SECURITIES LAW & THE INTERNET: DOING BUSINESS IN A

curs with the issuer's management and with all of the institutional investors present, a substantial number of the investors insist on one-on-one meetings with the issuer's representative as well.<sup>35</sup> Indeed, these one-on-one meetings have become the primary incentive for investors to attend road shows.<sup>36</sup> There are several reasons why such meetings have become so popular. First of all, the investor, by conversing with the management, will be able to ask questions that will explore an area of concern particular to that investor.<sup>37</sup> Moreover, if the investor comes up with an insightful question, free-rider issues may well abound. That is, the investor would much rather ask the question and hear the answer in a private setting, than to share the rewards of his or her insightful question with a room full of competitors.<sup>38</sup>

Furthermore, the one-on-one meeting option is favored due to the human element. A face-to-face meeting should not be underestimated, for it forms a more personal relationship between the issuer and investor. Investors feel reassured in making large investment decisions after having gauged the credibility and veracity of the issuer's representatives.<sup>39</sup> Although some consider the one-on-one meetings a waste of time or a mere formality,<sup>40</sup> institutional investors are more comfortable when able to take advantage of such meetings, and have found them an indispensable part of the road show.<sup>41</sup>

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RAPIDLY CHANGING MARKETPLACE 233, 235 (PLI Corporate Law & Practice, Course Handbook Series No. B-1046, 1998).

35. Pratt, *supra* note 24, at 17–18.

36. *See id.* at 18 (“[N]ot only is it essential to see management in person, but a private audience is virtually required by the largest institutions . . .”).

37. *Id.*

38. *Id.*

39. *See id.* (“Not to be underestimated . . . is the human element in a face-to-face meeting.”).

40. *See id.* (reporting that one banker opined that “[s]omewhere between 80% and 100% of the questions in any one-on-one come from a common pool of concerns that are shared by everyone looking at the deal . . . [a]nd most of the questions that don’t come from that pool are not brilliant, but dumb”).

41. *See id.* (quoting one portfolio manager who stated, “It’s a rare case that I buy a company that I didn’t have a one-on-one”); *see also* Cory Johnson, *SEC Still Disses Net Investors*, INDUS. STANDARD, Dec. 6, 1999, <http://www.thestandard.com/article/display/0,1151,8040,00.html> (on file with the *Duke Law Journal*) (quoting the comment of the manager of the Jacob Internet Fund, who stated that “[r]oad shows give the opportunity for management to make their case and give me a level of comfort [so] that I can have confidence in their abilities”).

C. *Regulatory Issues in Road Shows*

Throughout the past thirty years, the rise of road shows has gone relatively unscathed by the Commission's strict vigilance and comprehensive regulations. Road shows, in fact, are subject to a separate type of liability than other communications that occur during the waiting period<sup>42</sup> in that road shows do not have to comply with the requirements of section 10 of the Securities Act. Because road shows are nothing more than oral and visual communications, they are not considered prospectuses under section 2(10).<sup>43</sup> Road shows, however, do not go completely untouched by the SEC's far-reaching regulatory control. Underwriters are prohibited from distributing additional materials that may be considered illegal prospectuses.<sup>44</sup> Furthermore, underwriters and issuers must be wary that oral communications at road shows are still subject to the antifraud provisions of both the Securities Act<sup>45</sup> and the Exchange Act.<sup>46</sup>

Liability, however, is not an overriding concern for the road show players. Whether initiated by SEC action or through private citizens, claims regarding activity that occurs during the road show rarely are carried far in litigation.<sup>47</sup> In fact, very little case law and few formal SEC rulings address statements made during road shows.<sup>48</sup>

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42. 15 U.S.C. § 77h(d) (2000). If the issuer, underwriters, and broker-dealers fail to comply with section 5 during the waiting period, the Commission has the power to delay the effective date of registration. *Id.* Section 8(d) of the Securities Act states:

If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may . . . issue a stop order suspending the effectiveness of the registration statement.

43. *See supra* note 18 and accompanying text.

44. *See* Schulte, *supra* note 29, at 208 (defining an illegal prospectus as one that does not meet the requirements of section 2(10) of the Securities Act, including but not limited to hard copies of speeches, slides, or graphs used in presentations).

45. More specifically, section 12(a)(2) of the Securities Act imposes civil liability on any person who offers or sells a security by means of a prospectus or oral communication "which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77(1)(a)(2).

46. *See* 15 U.S.C. § 78j (2000) (establishing liability for the use of manipulative and deceptive devices).

47. Herbert S. Wander, *Developments in Securities Law Disclosure*, in PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS 2001, 1223 PLI/Corp 9, 176 (PLI Corporate Law & Practice, Course Handbook Series Order No. B0-00UN, 2001).

48. *Id.* In fact,

[l]awyers generally play a small or non-existent part in the preparation or execution

When such actions are brought before a court, the claims usually allege that the road show was used as a “vehicle to create demand for the securities by painting an extremely positive picture of the issuer and by having the issuer and underwriter both make forecasts that the issuer would enjoy continued profit growth.”<sup>49</sup> In response to such a claim, the court analyzes the total mix of information available, and then applies the “Bespeaks Caution” Doctrine.<sup>50</sup> For example, in *In re Hyperion Securities Litigation*,<sup>51</sup> the plaintiffs brought suit for securities fraud, claiming that the information they had received in the road show was misleading. The court conceded the fact that the scripts and slides from the road show were more optimistic than the prospectuses,<sup>52</sup> but the court also held that the plaintiffs could not base their claims on inferences drawn from statements made at the road show.<sup>53</sup>

Recently though, there is evidence that the SEC has deviated from its generally laissez-faire approach to road shows. With the onset of the Internet, regulatory bodies have been forced to reassess their policies, and the SEC’s adaptation to the new environment focuses on a continued pursuit of one of the SEC’s primary objectives—a fully informed investor.<sup>54</sup> This objective has influenced and will no doubt continue to influence the Commission’s regulation of the evolving electronic road show.

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of the road show. Cautious issuer counsel frequently advises the client to confine its presentations at the road show to material included in the registration statement, to refrain from making predictions, and not to distribute other materials.

*Id.* (citation omitted).

49. *Id.*

50. The “Bespeaks Caution” Doctrine holds that although statements may be made predicting an exaggerated positive trend, if words are surrounded by cautionary language as to the possible unreliability of such words, then, it is for the reader to beware. *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371–73 (3d Cir. 1993).

51. [1995–1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,906 (S.D.N.Y. Aug. 22, 1995); *see also* Resale of Restricted Securities, Securities Act Release No. 6862, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,637, at 80,639 (Apr. 23, 1990).

52. *Id.* at 93,362.

53. *Id.*

54. *See* Laura S. Unger, SEC Commissioner, Empowering Investors in an Electronic Age, Address at the IOSCO Annual Conference, <http://www.sec.gov/news/speech/spch380.html> (May 17, 2000) (on file with the *Duke Law Journal*) (stating that security regulators must “educate investors about investing . . . and investors must become better able to evaluate the information they receive over the Internet . . . to make informed decisions to meet their investment goals”).

### III. THE DEVELOPMENT OF ROAD SHOWS ON THE INTERNET: THE SEC'S ADAPTIVE RESPONSE

As stated previously, allowing road shows runs counter to the SEC's generally conservative approach to securities regulation.<sup>55</sup> Since the SEC has refused to disturb the road show dynamic and has not made concerted efforts to police what occurs during the meetings, the question of whether road shows act as mere formalities, or whether institutional investors truly are gaining an overwhelming advantage, is kept within the confines of the road show meetings. Not only has the SEC's potential for leniency been demonstrated through the acceptance of traditional road shows, but it also appears that this flexibility will continue to be demonstrated through the road show in its electronic form as well.<sup>56</sup>

With the SEC's reexamination of its policy regarding securities regulation, there is a general trend toward allowing new business models, albeit one no-action letter at a time, but progressing nonetheless.<sup>57</sup> Whether this trend is the product of a fully contemplated plan of action, or whether the SEC, uncertain of how to handle the great Internet beast, is taking a policy stance as a wary observer, the SEC has allowed numerous developments to occur in securities transactions over the Internet that it would not have allowed in paper form.<sup>58</sup> The following Sections trace the development of the electronic road show, using no-action letters as a guide.

#### A. *Emergence of the Electronic Road Show*

Section 5 forbids issuance of written communications from issuers to investors during the waiting period, unless such communica-

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55. See *supra* notes 1–10 and accompanying text.

56. See Laura S. Unger, SEC Commissioner, Technology and Regulation: The Road Ahead, Address at the San Diego Securities Institute, <http://www.sec.gov/news/speech/spch343.htm> (Jan. 27, 2000) (on file with the *Duke Law Journal*) (recognizing that online developments have caused the Commission to examine the efficacy of utilizing Internet websites for trading functions without violating investor protection provisions of the Securities Act).

57. See *infra* notes 62–88 and accompanying text.

58. See, e.g., Bruce Dallas & Heather Stack, *Securities Law & the Internet: Doing Business in a Rapidly Changing Marketplace*, in *SECURITIES LAW & THE INTERNET: DOING BUSINESS IN A RAPIDLY CHANGING ENVIRONMENT* 233, 239–40 (PLI Corporate Law & Practice, Course Handbook Series No. B-1188, 2000) (discussing how the SEC has approved proposals to conduct electronic road shows despite the fact that such presentations include written materials that are similar to a prospectus).

tions fall under one of the safe harbors.<sup>59</sup> Since the SEC refused to clarify whether Internet webpages would be considered written communications, fear of enforcement action precluded the use of electronic communications to display road shows.<sup>60</sup> This sentiment dominated the market until 1997, when the SEC responded positively to Private Financial Network (PFN)'s no-action letter requesting relief to broadcast road shows electronically.<sup>61</sup>

*B. Private Financial Network*

PFN is a private information network that provides business and financial data in multimedia format.<sup>62</sup> In March 1997, PFN requested no-action relief from the SEC to electronically broadcast road shows.<sup>63</sup>

PFN's proposal laid out in detail how that entity would structure electronic road shows so as to conform to the SEC's objectives.<sup>64</sup> That is, PFN posited that road shows would only be made available to its small number of subscribers, who were principally broker-dealers and investment advisers, and more significantly, to those who agreed to not distribute the broadcast.<sup>65</sup> Also, any communication would be supplemented with a copy of the prospectus that was filed with the SEC, and issuers and underwriters would be precluded from disclosing information that deviated from that prospectus.<sup>66</sup> Furthermore, all road show transmissions would include information that directed viewers to the actual prospectus for more information regarding the offering.<sup>67</sup>

The SEC granted relief to PFN,<sup>68</sup> but other companies have not been able to extract reliably any standard for relief from PFN's no-action letter. First, PFN finely tailored the no-action letter to its own

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59. See *supra* note 19 and accompanying text.

60. Linda C. Quinn & Otilie C. Jarmel, *Securities Regulations and the Use of Electronic Media—Year 2001*, in INTERNATIONAL SECURITIES MARKETS: THE IMPACT OF GLOBALIZATION & TECHNOLOGY 397, 416 (PLI Corporate Law & Practice, Course Handbook Series No. B-1254, 2001).

61. *Id.* at 417.

62. Private Financial Network, SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,332, at 77,674–75 (Mar. 12, 1997).

63. *Id.* at 77,674.

64. *Id.* at 77,675.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 77,678.

specific situation in an effort to increase its chances for being granted relief.<sup>69</sup> In addition, the SEC, in responding to PFN, gave no indication as to which factors constituted the basis for its response.<sup>70</sup> Therefore, others looking to the PFN no-action letter for guidance received none.

### C. *Net Roadshow*

In September 1997, Net Roadshow was granted no-action relief to conduct electronic road shows over the Internet.<sup>71</sup> This action added to the PFN no-action letter in that it designated the Internet as an acceptable medium by which to transmit road shows.<sup>72</sup> Also, the Net Roadshow letter indicated that the availability of the road show need not be limited to subscribers.<sup>73</sup>

Net Roadshow proposed establishing a website that would provide a list of road shows to be viewed by anyone from a group of pre-qualified investors and underwriters.<sup>74</sup> To view the road show, an investor would first have to contact the underwriting investment bank.<sup>75</sup> The bank would then determine whether the investor qualified for an access code.<sup>76</sup> The access code for the road show would then be changed daily, which meant that the investor would be allowed to view the road show for one day only.<sup>77</sup>

Like PFN, Net Roadshow proposed rules that would appease the SEC, and that would most likely result in a granting of relief. For example, Net Roadshow would only transmit via Internet “the *exact* same road show that qualified investors see live, as the live road show will be filmed in its entirety. . . The live road shows will not be edited

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69. *See id.* at 77,675–77 (proposing the transmittal of road shows that, among other things, would be sent no more than two times and that could be accessed only by subscribers of PFN).

70. *See id.* at 77,678 (stating that the SEC staff will not recommend any enforcement action “based on the representations made to the Division” without any further explanation as to which representations were the most important in granting such relief).

71. Net Roadshow, Inc., SEC No-Action Letter, [1997 Decisions Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,367, at 77,851–52 (Sept. 8, 1997).

72. *Id.* at 77,849.

73. *See id.* (recognizing that unlike PFN, Net Roadshow is not a subscription service, and its website therefore provides any qualified investor or underwriting investment bank with access to roadshows that can be viewed on the Internet).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

for content. . .”<sup>78</sup> Much like PFN, the viewers of the road show would also have easy access to the information contained in the prospectus that was filed with the Commission.<sup>79</sup>

*D. Bloomberg, L.P.*

In December 1997, the SEC staff issued another electronic road show no-action letter.<sup>80</sup> Though many of the same issues arose in this letter as did in the two previous ones, the *Bloomberg* no-action letter indicated that the road show need not be viewed in its entirety, and may even be organized into various segments, viewed separately, if a viewer wished.<sup>81</sup> In addition, the number of Bloomberg subscribers who were allowed access to the road show<sup>82</sup> suggests that the number of viewers is not a main concern for the SEC. The only stipulation regarding the viewers is that they be either institutional investors or others who would ordinarily be invited to attend a road show.<sup>83</sup>

*E. Further Developments*

In September 1998, the SEC issued a no-action letter to Thompson Financial Services, Inc.<sup>84</sup> The letter permitted Thompson to provide on the website a listing of upcoming securities offerings that could potentially offer access to road shows, as long as the registration statement of the company was on file with the SEC.<sup>85</sup>

The latest electronic road show no-action letter was issued to Charles Schwab in November 1999 and had the effect of broadening investor accessibility to electronic road shows.<sup>86</sup> This no-action letter eliminated the “dual track” disclosure scheme in the road show context by allowing retail investors who meet certain prequalifications to

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78. *Id.*

79. *Id.* at 77,849–50.

80. Bloomberg L.P., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 1023, \*1 (Dec. 1, 1997).

81. *Id.* at \*4–5 (“It is anticipated that, generally, viewers will view road shows in their entirety, but they will be able to interrupt their viewing, and view less than the entire road show, if they wish.”).

82. *See id.* at \*8 (stating that the audience will be limited to the subscribers of THE BLOOMBERG service).

83. *Id.*

84. Thompson Financial Services, Inc., SEC No-Action Letter, 1998 SEC No-Act. LEXIS 837, \*1 (Sept. 4, 1998).

85. *Id.* at \*5 & n.5.

86. Charles Schwab & Co., Inc., SEC No-Action Letter, 1999 SEC No-Act. LEXIS 903, \*1 (Nov. 15, 1999).

participate in electronic road show presentations.<sup>87</sup> In *Schwab*, to be prequalified for road show access, investors needed to have traded twenty-four times a year or be in a household equity position of at least \$500,000.<sup>88</sup> By allowing this minimal criterion for prequalification, the SEC lowered the bar for investor access.

As evidenced by the way in which it has dealt with electronic road shows, the SEC has demonstrated that it will be accommodating when it comes to Internet innovations. Indeed, these allowances indicate that the SEC is leaning toward allowing individual investor access to the pre-IPO road shows. In fact, the Commission admits that “as the staff of the SEC has gained more experience with electronic roadshows, it has loosened the restrictions by expanding the number of qualified viewers, and imposing less restrictive conditions concerning broadcasts.”<sup>89</sup> The SEC believes that addressing the evolution of the Internet in this way has served the Commission well.<sup>90</sup> Indeed, Commissioner Laura Unger has publicly stated that “[o]pening up roadshows to all investors would be a very positive development for investors.”<sup>91</sup> In the speech, however, she reserved the discussion of such a move for consideration at a later time.<sup>92</sup> Such hesitation demonstrates a recognition that opening electronic road shows to the individual investor warrants greater discussion. The following Part analyzes some of the concerns that the Commission should take into consideration when deciding how to proceed.

#### IV. OPENING THE ELECTRONIC ROAD SHOW RAISES NUMEROUS CONCERNS FOR MARKET PLAYERS

Relying on the Internet as a medium for disclosure presents concerns for the Commission. Because the effects of the Internet on market players are still being evaluated, the Commissioners have

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87. *Id.* at \*14–16.

88. *Id.*

89. Paul R. Carey, SEC Commissioner, Technology, Capital Markets and the Digital Divide, Address at the Hellenic Republic Capital Market Commission Capital Market Training Program, <http://www.sec.gov/news/speech/spch446.htm> (Dec. 6, 2000) (on file with the *Duke Law Journal*).

90. *Id.*

91. Unger, *supra* note 56.

92. *See id.* (“Because the staff seems to be at the outer bounds of what we can do about roadshows through the no-action letter process, we may consider these issues in an upcoming release.”).

been reluctant to commit themselves to any one position.<sup>93</sup> They remain in a process of assessing how best to deal with the Internet and its ramifications. And as such, the Commission should be wary of opening up road shows (a traditionally closed entity) to the widows, widowers, and orphans of the world.

This Note posits three additional concerns as to why individual investors at the present time should not be given access to electronic road shows. First, the SEC's stance has traditionally been to protect investors; opening the road shows would create an overload of information indigestible by unsophisticated investors and ultimately adverse to the SEC's objective. Second, companies, knowing that road shows would be viewed by all investors, unsophisticated and sophisticated alike, would most likely react negatively. Fearing liability, they might grow wary of relaying information of any significance, and they might instead tend to release highly insignificant, boilerplate information. Therefore, not only would investors have more information to filter, but most of it would be useless. Third, as discussed earlier, one of the primary incentives of attending road shows was the existence of one-on-one meetings. With electronic road shows, such practices would most likely become obsolete, and without this strong incentive, the value of road shows, as a market tool, would be quite diminished and rather limited.

A. *The Unsophisticated Investor's Dilemma: Too Much Information, Too Many Choices*

The emergence of the Internet investor has spurred changes, as the SEC is now allowing more information to be disseminated to the individual investor at critical stages during the public offering process.<sup>94</sup> In fact, according to one recent estimate, "every on-line investor has access to over three billion pieces of financial data," and "those

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93. See, e.g., Beth Kwon, *SEC is Moving Toward Opening Pre-IPO Roadshows*, TheStreet.com, at <http://www.thestreet.com/stocks/ipos/880900.html> (Feb. 10, 2000) (on file with the *Duke Law Journal*) (observing that electronic roadshows have presented a difficult issue for the SEC).

94. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,676 (Aug. 15, 2000) [hereinafter FD Release] (laying out Regulation FD, which states that "when an issuer . . . discloses material non-public information to certain enumerated persons . . . it must make public disclosure of that information").

who are willing to pay have access to over 280 billion pieces.”<sup>95</sup> A policy of unrestricted disclosure may be effective in dealing with sophisticated investors who are capable of evaluating and assessing the information efficiently to determine the financial risks applicable to them. However, are individual investors capable of handling such massive amounts of information?<sup>96</sup> There is some concern that they are not; that is, investors who may be technologically savvy enough to use the Internet may still be unsophisticated in making investment decisions, and the increase in the amount of information (“information overload”)<sup>97</sup> may turn out to be more of a hindrance than a benefit.<sup>98</sup>

Irrationality in investor behavior is not uncommon; in fact, the term “noise” was coined by Fischer Black<sup>99</sup> for the very purpose of making it easier for theorists to speak of investor irrationality, as “noise” is more palatable than “irrationality.”<sup>100</sup> It demonstrates that economic theorists are painfully aware that this irrationality does exist.<sup>101</sup> Although investors may have an abundance of information readily available to them, it does not ensure that they will be able to effectively digest such information.<sup>102</sup>

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95. Brad M. Barber & Terrance Odean, *The Internet and Investor*, J. ECON. PERSP., Winter 2001, at 41, 46. Barber and Odean quote estimates that were provided by Inna Okounkova at Scudder Kemper. The estimates are based on financial information that is readily available on the Internet, including “daily high, low, closing prices, volume, and returns data from Microsoft’s investor website <<http://moneycentral.msn.com>> . . . Assuming 10,000 publicly traded stocks with an average history of five years, these data alone represent 63 million bits of information.” *Id.* at 46 n.7.

96. OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, *supra* note 4 (reporting that “the SEC has received a significant number of investor complaints that appear to indicate a lack of knowledge about trading and investing”).

97. For a view that considers the consumer’s response to “information overload” a non-issue and advocates more disclosure to enhance market efficiency, see David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986) (concluding that information overload is a myth that should not be a consideration in disclosure regulation).

98. Use of Electronic Media For Delivery Purposes, Securities Act Release No. 33-7233, 60 Fed. Reg. 53,458, 53,458 (Oct. 13, 1995); *see also* Barber & Odean, *supra* note 95, at 46–47 (arguing that the greater volume of information that has been a consequence of the Internet can lead to an illusion of knowledge in the investor, which ultimately contributes to increased market volatility).

99. Fischer Black, *Noise*, 41 J. FIN. 529, 533 (1986).

100. COX ET AL., *supra* note 8, at 35 n.7.

101. *Id.* at 34–38 (discussing competing theories for departures from the efficient market hypothesis).

102. *See* Barber & Odean, *supra* note 95, at 44 (recognizing that online investors rarely receive investment recommendations from brokers, and instead must distinguish high-quality ad-

Theorists and psychologists have assessed the decisionmaking processes of individuals, and have found that there is a “tendency of persons to make probabilistic decisions based on salient or easily recalled information, rather than on base rates and other more complete data sets. Therefore, recent or vivid information receives a predictable overreaction from investors.”<sup>103</sup> Indeed, many investors become “trend-chasers,” following waves of other investors rather than using the information that is available to them.<sup>104</sup>

Not only are investors prone to overreaction, but they are also found to be overconfident in their predictive abilities. They substantially overstate their ability to foresee future trends, and they also underestimate the levels of risk they assume.<sup>105</sup> Studies have shown that when people are given more information, the confidence in the accuracy of their forecasts tends to increase at a faster rate than the accuracy of those forecasts.<sup>106</sup> Furthermore, studies have shown that at some point, the actual predictive skill may decline with more information, due to the “illusion of knowledge.”<sup>107</sup> Indeed, theoretical models have found that “overconfident individual investors trade more actively and more speculatively than they otherwise would, hold underdiversified portfolios, have lower expected utilities, and contribute to increased market volatility.”<sup>108</sup>

One must wonder what factors lead the investor to such irrational behavior. Is it an irreparable characteristic of the investor or is

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vice from low-quality advice when turning to “sources of fundamental and technical market information, to chatroom gossip, to on-line journalists, and to sophisticated advice engines”).

103. Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 859 (1992).

104. *Id.*

105. *Id.*; see also Brad M. Barber & Terrance Odean, *Online Investors: Do the Slow Die First?*, 15 REV. FIN. STUD. 455, 481 (2002) (“Once online, investors have access to vast quantities of investment data; these data can foster an illusion of knowledge, which increases overconfidence.”).

106. Barber & Odean, *supra* note 95, at 46; Robert D. Hoge, *Confidence in Decision as an Index of Perceived Accuracy of Information Processing*, 18 PSYCHONOMIC SCI. 351, 351–53 (1970); Stuart Oskamp, *Overconfidence in Case-Study Judgments*, 29 J. CONSULTING PSYCHOL. 261, 261–65 (1965); Dane K. Peterson & Gordon F. Pitz, *Confidence, Uncertainty, and the Use of Information*, 14 J. EXPERIMENTAL PSYCHOL. 85, 85–92 (1988).

107. Barber & Odean, *supra* note 95, at 46. See generally Thomas R. Stewart et al., *Effects of Improved Information on the Components of Skill in Weather Forecasting*, 53 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 107, 107–34 (1992) (demonstrating how one’s ability to predict and make choices declines when one is given a lot of information).

108. Barber & Odean, *supra* note 95, at 47. See generally Terrance Odean, *Volume, Volatility, Price, and Profit When All Trades Are Above Average*, 53 J. FIN. 1887, 1887–1934 (1998) (discussing investor behavior and its effects on market volatility).

it due to some other external variable? According to Nobel Prize-winning economist Herbert Simon, such irrationality can be attributed to an individual's coping mechanism.<sup>109</sup> That is, in the face of uncertainty, individuals do not search for the optimal solution but instead do the best they can given the costs associated with gathering and processing information.<sup>110</sup> In essence, the irrational behavior displayed by investors is a product of "a stressful world with too much information and too many choices."<sup>111</sup>

How much information is too much? The reason for opening up road shows would be to aid investor decisionmaking, but would providing investors with more information serve that purpose?<sup>112</sup>

To further complicate the issue, the dissemination of mass quantities of information is occurring simultaneously with the steady dissolution of the advisory role of the broker-dealer.<sup>113</sup> The broker-dealer has always acted as a filter between issuer and investor. Now, the Internet is providing the means to increase communications between issuers and investors without broker-dealers.<sup>114</sup>

Those who have already become resigned to the fact that the Internet has signaled a replacement of the traditional broker argue that eliminating the advisory role of the broker-dealer could be highly destabilizing.<sup>115</sup> The dissolution of the role of the broker-dealer may

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109. Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 114 (1955).

110. *Id.* at 111.

111. Langevoort, *supra* note 103, at 860.

112. See News Release, University of Arkansas, Noise, Not Knowledge, Drives the Stock Market, [http://waltoncollege.uark.edu/news/newsreleases/PR-NOISE\\_TRADING.pdf](http://waltoncollege.uark.edu/news/newsreleases/PR-NOISE_TRADING.pdf) (Nov. 29, 2000) (on file with the *Duke Law Journal*) (asserting that while "[n]oise traders tend to overreact to good and bad news," it is still advantageous for more sophisticated investors to acquire knowledge in the current market).

113. Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERGING BUS. L. 57, 78 (1998).

114. This Note does not discuss this argument further. However, for more information concerning this topic, see COX ET AL., *supra* note 8, at 213 (observing that, in 1999, "the city of Pittsburgh auctioned \$55 million of its municipal securities to financial institutions without using the services of an investment banker but rather an online software concern"); Donald C. Langevoort, *Angels on the Internet: The Elusive Promise of "Technological Disintermediation" for Unregistered Offerings of Securities*, 2 J. SMALL & EMERGING BUS. L. 1, 8-9 (1998) (discussing the probability that some issuers will be acting without the involvement of registered securities dealers) [hereinafter Langevoort, *Angels on the Internet*]; Donald C. Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 HARV. L. REV. 747, 776-78 (1985) (predicting that technological changes in the market will eliminate investment bankers' traditional gatekeeping function).

115. Langevoort, *Angels on the Internet*, *supra* note 114, at 20-21.

save immediate costs,<sup>116</sup> but will ultimately result in detrimental consequences.<sup>117</sup> That is, broker-dealers have historically acted as intermediaries, the traditional sources of financing and advice, and as translators for the unsophisticated laypersons.<sup>118</sup> Therefore, where the quality of advice is arguably better, the lack of the broker-dealer filter eliminates one more safety net for the individual investor.

The Commission deems investor protection to be one of its primary objectives.<sup>119</sup> Adverse to this objective is inundating investors with large quantities of information beyond their filtering capacity. As such, in determining whether to open road shows to the individual investor, information overload coupled with the elimination of the broker-dealer safety net should be key concerns.

### *B. A Chilling Effect on the Dissemination of Investor Information*

1. *The Internet Challenge: A Proposal for Fair Disclosure.* The development of a regulatory regime that incorporates the many benefits of the Internet is a unique challenge for the Commission. In fact, in direct response to technological advancements, the SEC in 1998 solicited public comment on the Aircraft Carrier Release proposal, which would have allowed free and open offering communication prior to registration, and written as well as oral solicitations throughout the offering anytime after the filing of the registration statement.<sup>120</sup> However, the supposedly “free and open” communications

116. See Barber & Odean, *supra* note 95, at 44 (listing the types of sources, including “cha-  
troom gossip, . . . on-line journalists, and . . . sophisticated advice engines,” that investors turn to  
obtain advice in order to save costs).

117. Fisch, *supra* note 113, at 78:

Internet Web sites are efficient ways of providing information, but the Internet  
may be less effective at selling securities because of consumer perception of risk, be-  
cause of the absence of personalized marketing, and because it is difficult for con-  
sumers to evaluate and verify the quality of the information provided. . . .

. . . In contrast, one of the services that an investment bank provides in con-  
nection with an IPO is its ability both to identify potential investors and to convince  
these investors to participate in the offering. . . .

. . . [Additionally,] the absence of underwriter participation may increase infor-  
mation costs for the potential investor.

118. *Id.*

119. See *supra* note 54 and accompanying text.

120. Linda C. Quinn & Otilie L. Jarmel, *Publicity Consideration for Corporate Issuers: Get-  
ting the Message Across Under the Fair Disclosure Regime*, in NUTS & BOLTS OF FINANCIAL  
PRODUCTS 2002: UNDERSTANDING THE EVOLVING WORLD OF CAPITAL MARKET &  
INVESTMENT MANAGEMENT PRODUCTS, 1293 PLI/Corp 537, 541 & n.2 (PLI Corporate Law &  
Practice, Course Handbook Series Order No. B0-01AP, 2002).

would still be subject to filing requirements under the Exchange Act.<sup>121</sup> Evoking much criticism, the proposal was summarily dismissed by the Commission; the SEC instead indicated a plan to adopt a regulation of smaller scale.<sup>122</sup> This proposal later came to be known as Regulation FD.<sup>123</sup>

Under Regulation FD, U.S. public companies intentionally making selective, nonconfidential disclosures of material, nonpublic information are required to contemporaneously announce such information publicly.<sup>124</sup> Taking into account the potential for a chilling effect on issuers and their underwriters, the Commission limited the reach of Regulation FD by exempting most registered offerings.<sup>125</sup> The effect of Regulation FD is more far-reaching than one may initially believe. Aside from affecting communication practices in connection with the offerings implicated by Regulation FD (such as Rule 144A offerings), companies and their advisers making *any* offering are developing policies to comply with the new rule.<sup>126</sup> As such, the Regulation is affecting the ongoing day-to-day activities of a company as much as it is the offering process of specific securities.

The SEC is fully cognizant of the possible impact that such regulations may have on the quantity and quality of information disclosed by the issuers and their representatives. For example, in the SEC Release on Regulation FD, the Commission stated,

One frequently expressed concern was that Regulation FD would not lead to broader dissemination of information, but would in fact have a “chilling effect” on the disclosure of information by issuers. . . .

. . . [W]e are mindful of the concerns about chilling issuer disclosure; we agree that the market is best served by more, not less, disclosure of information by issuers. Because any potential “chill” is most likely to arise—if at all—from the fear of legal liability, we in-

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121. *Id.* at 542.

122. *Id.*

123. FD Release, *supra* note 94 at 83,676.

124. *Id.*

125. *See id.* at 83,682–84 (setting out exclusions to the coverage of Regulation FD). It is undoubtedly clear that the SEC was aware of the potential for detrimental consequences resulting from the passage of Regulation FD. *See infra* note 129 and accompanying text.

126. Quinn & Jarmel, *supra* note 120, at 545–46.

cluded in proposed Regulation FD significant safeguards against inappropriate liability.<sup>127</sup>

As discussed in the next Section, the Commission's concerns were well warranted, as the SEC's own study demonstrated that the fear of liability was so overwhelming that it well surpassed any of the numerous safeguards provided by Regulation FD.<sup>128</sup>

2. *A Fear of Liability: Chilling Information Disclosure.* When considering the implications of allowing individual investor access to road shows, it is important to keep in mind the effects of Regulation FD for guidance. All things being equal, and assuming that the individual investor is capable of processing and filtering the information that is disseminated by issuers, the fear of liability in response to compliance with disclosure requirements acts to hinder market efficiency.<sup>129</sup> More specifically, the concern among analysts is that the effect of broadening disclosure to include the individual investor will have a chilling effect on the information that issuers disseminate.<sup>130</sup>

In response to concerns that the requirement of fair disclosure would have a detrimental effect on the availability of market information, the Commission undertook a study analyzing how issuers have

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127. FD Release, *supra* note 94, at 83,679–80.

128. Regulation FD included the following safeguards: (1) it narrowed the scope of the regulations so as to “apply only to communications to securities market professionals and to any holder of the issuer’s securities under circumstances in which it is reasonably foreseeable that the security holder will trade on the basis of the information”; (2) it narrowed “the types of issuer personnel covered by the regulation to senior officials and those persons who regularly communicate with securities market professionals or with security holders”; (3) it specified that FD “does not establish a duty for purposes of Rule 10b-5 under the Securities Exchange Act of 1934”; (4) it held that “liability will arise only when an issuer’s personnel knows or is reckless in not knowing that the information selectively disclosed is both material and nonpublic”; (5) it held that “violation of Regulation FD will not lead to an issuer’s loss of eligibility to use short-form registration”; (6) it excluded registered offerings; (7) it eliminated “foreign governments and foreign private issuers from the coverage of the regulation.” *Id.* at 83,630.

129. See *SEC Imposes Fair Disclosure*, VIRTUAL WALL STREET, Sept. 2000, at <wysiwyg://139/http://www.virtualwallstr...olume\_4\_Issue\_9\_Sep\_2000/04\_9\_105.sht> (last visited Dec. 20, 2001) (on file with the *Duke Law Journal*) (forecasting that companies may take a cautious approach in reaction to Regulation FD by issuing less information overall, forcing analysts to “derive material information from nonmaterial facts”).

130. LAURA S. UNGER, SPECIAL STUDY: REGULATION FAIR DISCLOSURE REVISITED, <http://www.sec.gov/news/studies/regfdstudy.htm> (Dec. 2001) (on file with the *Duke Law Journal*). For a more in-depth look at the notion that issuers’ desires to keep information secret and to avoid liability constrain the mandatory disclosure system, see Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 840–48 (1995).

responded to Regulation FD.<sup>131</sup> A group of panelists was assembled to discuss the results of several surveys and to offer recommendations to the SEC on the efficacy of Regulation FD.<sup>132</sup> Some of these panelists believed that issuers, due to Regulation FD, refused to disclose any information, or at least any useful information, to investors.<sup>133</sup> One disappointed panelist remarked that he was not happy to “learn how companies hid behind the umbrella of Reg FD. At a time when [he] thought the industry should be leading the information flow, the default was: ‘Let’s stay protected. Let’s say less.’”<sup>134</sup> Regulation FD also appears to have had a chilling effect on the dissemination of *any* general information. For example, one panelist described how his firm sends out questionnaires to issuers asking for general background information.<sup>135</sup> Recently, the response rate has diminished; issuers are refusing to return the questionnaires, citing Regulation FD as the primary reason for their reluctance.<sup>136</sup>

Comparing the sheer quantity of information disseminated by companies before and after Regulation FD, a number of studies reported that the amount of information provided has decreased. The surveys demonstrate, however, that analysts generally believed that companies now disclose less information to investors, whereas issuers felt Regulation FD has prompted them to give more information.<sup>137</sup> For example, the Thompson Financial group surveyed eighty-one public companies, and found that nearly 33 percent reported that Regulation FD had limited the flow of information they provide to

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131. UNGER, *supra* note 130. Though Regulation FD is limited in scope to certain types of offerings (144A and other exempt offerings), many companies are developing policies that comply with the Regulation FD in order to avoid an inadvertent violation of the securities laws. “Rule 144A provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act of 1933 . . . for specified resales of restricted securities to ‘qualified institutional buyers . . . .’” Staff Report on Rule 144A, New SEC Rulings, [1994–1995 Decisions Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,428, at 85,686 (Aug. 18, 1994).

132. UNGER, *supra* note 130.

133. *Id.*

134. *Id.* (quoting Kipp Bedard, Micron Technology, Comments at Roundtable Discussion of Regulation FD 40–41, <http://www.sec.gov/news/studies/regfdconf.txt> (Apr. 24, 2001) (on file with the Duke Law Journal)).

135. *Id.* (quoting David Berry, Keefe Bruyette & Woods, Comments at Roundtable Discussion of Regulation FD 167–68, <http://www.sec.gov/news/studies/regfdconf.txt> (Apr. 24, 2001) (on file with the Duke Law Journal)).

136. *Id.*

137. *Id.*

analysts.<sup>138</sup> Also, the Association for Investment Management and Research (AIMR #1) surveyed 423 investment analysts and portfolio managers, 57 percent of whom believed that the volume of substantive information released by public companies has decreased in the wake of Regulation FD; only 14 percent said the volume of information had increased.<sup>139</sup>

On the other hand, there were also numerous studies finding that a greater percentage of respondents were reporting that the amount of information disclosed had increased in the wake of Regulation FD. An explanation for such conflicting results lies in the respondents. The respondents for the studies reporting that there had been more information disclosure were the issuing companies. For example, according to the ABA Task Force, which surveyed sixty-two members of the securities bar, 45.2 percent said their clients are providing more information, whereas 25.8 percent report that their clients are providing less information.<sup>140</sup> Also, according to a survey of 123 large issuer executives and 41 smaller issuer executives, 31 percent responded that they are disclosing more information, while 23 percent reported that they are disclosing less.<sup>141</sup>

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138. *Id.* (citing THOMSON FINANCIAL at [http://www.carsongroup.com/carson/reg\\_fd.html](http://www.carsongroup.com/carson/reg_fd.html) (Jan. 17, 2001)).

139. ASS'N FOR INV. MGMT. & RES., REGULATION FD E-SURVEY SUMMARY, at [http://www.aimr.org/pressroom/01releases/regFD\\_surveysum.htm](http://www.aimr.org/pressroom/01releases/regFD_surveysum.htm) (Mar. 19, 2001) (on file with the *Duke Law Journal*) [hereinafter AIMR SURVEY #1]. Additional studies found comparable results: The Securities Industry Association (SIA) surveyed 30 analysts, 505 investors, 94 SIA member firms, and 25 issuer general counsels; 25 percent of issuers felt they were communicating less to the public, and two-thirds of the analysts felt that the issuers were communicating less to them. SEC. INDUS. ASS'N, COSTS AND BENEFITS OF REGULATION FAIR DISCLOSURE 8, [http://www.sia.com/reg\\_fd/pdf/RegFD.pdf](http://www.sia.com/reg_fd/pdf/RegFD.pdf) (May 18, 2001) (on file with the *Duke Law Journal*) [hereinafter SIA SURVEY]. A second study conducted by the Association for Investment Management and Research surveyed 303 investment analysts and portfolio managers, where 51 percent believed that companies were disclosing less substantive information. ASS'N FOR INV. MGMT. & RES., REGULATION FD E-SURVEY SUMMARY 7, at <http://www.aimr.org/pdf/01RegFDTable.pdf> (last visited Jan. 17, 2002) (on file with the *Duke Law Journal*) [hereinafter AIMR SURVEY #2]. The National Investor Relations Institute, which surveyed 577 investor relation professionals, found that 28 percent of these professionals report that they are providing more information, and 24 percent say they are providing less information. NAT'L INV. RELATIONS INST., CORPORATE DISCLOSURE PRACTICES SURVEY 2001, at 1, <http://www.niri.org/publications/cdps2001.pdf> (July 2, 2001) (on file with the *Duke Law Journal*) [hereinafter NIRI SURVEY].

140. ABA TASK FORCE ON REGULATION FD, PRELIMINARY SURVEY RESULTS 1, <http://www.abanet.org/buslaw/fedsec/materials/20010404surveyresults.pdf> (last visited Jan. 17, 2002) (on file with the *Duke Law Journal*) [hereinafter ABA TASK FORCE SURVEY].

141. PricewaterhouseCoopers, *Leaders of Technology Businesses See Benefits from Regulation FD, PricewaterhouseCoopers Finds*, at <http://www.barometersurveys.com/pr/te010423.html>

The existence of a discrepancy in information disclosure is not the most salient conclusion that can be extracted from the studies. In fact, the surveys of issuers reporting that a large number of companies are now disclosing more information do not offset the significance that a substantial number of issuers state that after Regulation FD, they are now providing less information.<sup>142</sup> Therefore, regardless of whether all issuers have been affected, it can be concluded that a sizeable number have been affected, and a chilling effect has indeed resulted.

Along the same lines, there is some concern about the quality of information that is being disclosed, and whether much of the nuanced information is being sacrificed for more of the “boilerplate” language and a “greater orchestration and greater scripting” of issuer responses to investor questions.<sup>143</sup> A general wariness on the part of companies has resulted in the release of “too few facts in too many words . . . . Clearly an example of information overload, the press releases have produced a watershed of useless information.”<sup>144</sup> Because it is so difficult to distinguish what is truly important in these releases, the feeling is that analysts’ work now involves “[m]ore guess work, less real information, [and a] greater propensity for mispricing securities.”<sup>145</sup> If this is true for the sophisticated analyst, one must wonder how the information is being processed by the individual investor.

As to the actual substance of the information that is being disseminated, analysts generally believe that Regulation FD has dimin-

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(Apr. 23, 2001) (on file with the *Duke Law Journal*) [hereinafter PWC Survey #1]. Another survey of 201 public companies executives revealed that 37 percent are disclosing more information, while 11 percent are disclosing less. PricewaterhouseCoopers, *Regulation FD Significantly Improves Disclosure, PricewaterhouseCoopers Survey Finds*, at <http://www.barometersurveys.com/pr/mg011017.html> (Oct. 17, 2001) (on file with the *Duke Law Journal*) [hereinafter PWC Survey #2].

142. Although issuers generally deny that they are disclosing less information, they provide an explanation as to why less information may be publicly available. After the adoption of Regulation FD, companies are recommended to shift the oversight of disclosure from the investor relations department to the legal department. The legal department, for fear of running afoul of Regulation FD, should take a stance whereby issuers would err on the side of caution and say little. Marissa P. Viccaro, Note, *Can Regulation Fair Disclosure Survive the Aftermath of Enron?*, 40 *Duq. L. Rev.* 695, 707 (Summer 2002).

143. UNGER, *supra* note 130 (quoting Eric Roiter, Fidelity Management & Research, Comments at Roundtable Discussion of Regulation FD 224, <http://www.sec.gov/news/studies/regfdconf.txt> (Apr. 24, 2001) (on file with the *Duke Law Journal*)).

144. *Id.*

145. *Id.* (quoting David Berry, Keefe Bruyette & Woods, Comments at Roundtable Discussion of Regulation FD 155, <http://www.sec.gov/news/studies/regfdconf.txt> (Apr. 24, 2001) (on file with the *Duke Law Journal*)).

ished the quality of company information that is being disclosed, whereas issuers believe that the quality of information has remained the same or has improved.<sup>146</sup> According to Thomson Financial, 50.7 percent of respondents reported that FD has changed their communications practices.<sup>147</sup> Of this number, 29.4 percent reported that they have less frequent contact with analysts and investors, and 27.5 percent report that they now give less detailed information.<sup>148</sup> According to the NIRI Survey, 80 percent of issuers reported conveying less information to investors during the one-on-one meetings; in addition, there was almost a 30 percent decrease in the number of issuers who were willing to analyze analyst-earning models.<sup>149</sup>

On the other hand, the issuers and their attorneys report that issuing companies are providing better-quality information after Regulation FD. According to the ABA FD Task Force Survey, 30.6 percent of the members of the securities bar who were surveyed responded that their clients were providing better-quality information.<sup>150</sup> When surveying public companies' executives, 29 percent felt that the quality of their disclosures have increased due to Regulation FD.<sup>151</sup>

Therefore, though Regulation FD would undoubtedly provide relatively equal access to information, this does not signify that FD would encourage the dissemination of either more information or better-quality information. Indeed, the data from the studies suggests quite the opposite. And, even if Regulation FD provides investors with more information, such information will not ameliorate the in-

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146. *Id.*

147. *Id.* (citing THOMSON FINANCIAL at [http://www.carsongroup.com/carson/reg\\_fd.html](http://www.carsongroup.com/carson/reg_fd.html) (Jan. 17, 2001)).

148. *Id.* (citing THOMSON FINANCIAL at [http://www.carsongroup.com/carson/reg\\_fd.html](http://www.carsongroup.com/carson/reg_fd.html) (Jan. 17, 2001)).

149. See NIRI SURVEY, *supra* note 139 (noting that issuers are convening fewer one-on-ones to provide information to investors). Additional studies found comparable results. For example, the AIMR surveys report a significant deterioration in the quality of both oral and written communications by the issuer. Sixty-two percent of respondents say that candor in oral communications has deteriorated. AIMR SURVEY #1, *supra* note 139. Thirty-five percent believe that the usefulness of written communications has deteriorated. AIMR SURVEY #2, *supra* note 139, at 9. The SIA Survey reported that 72 percent of analysts felt that information communicated by issuers to the public is of low quality after Regulation FD. SIA SURVEY, *supra* note 139, at 9.

150. ABA TASK FORCE SURVEY, *supra* note 140, at 1.

151. PWC Survey #2, *supra* note 141.

vestor's decisionmaking, if it is not filtered in such a way that the investor will be able to process the information.<sup>152</sup>

The analysis of how issuers responded to Regulation FD can be quite indicative of how issuers will also react (or rather, retract) if the SEC opened pre-IPO road shows to the individual investor, as both actions by the SEC provide a means of reinforcing full disclosure. Therefore, the effects of opening up road shows and requiring equal disclosure to both individual and institutional investors is another factor for the SEC to consider in defining whether to allow individual investors access to road shows.<sup>153</sup>

*C. Eradicating One-on-One Meetings: The Road Show as a Mere Formality*

Giving the individual investor access to the pre-IPO road shows may potentially backfire. The main advantage of the traditional road show was not the general presentation to the analysts and institutional investors. Arguably, what had become the most influential practice of the road show is the one-on-one meeting.<sup>154</sup> The electronic road show, which involves a general twenty-five-minute statement made to sophisticated investors, may be more efficient in saving time and money, but precludes the scheduling of one-on-one meetings.<sup>155</sup>

If the SEC opened up the electronic road shows to the general public, would the SEC bar one-on-one meetings as well? Would individual investors then be given the right to call such meetings with the issuer's management? It seems highly unlikely. If one-on-one meetings continue to remain available to the institutional investor, then this will create the same issues as opening road shows was attempting to address. That is, two levels of information would be disseminated: the road show for institutional investors and the road show "lite" for individual investors.<sup>156</sup>

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152. See *supra* Part IV.A.

153. See UNGER, *supra* note 130 (expressing concern that Regulation FD has decreased disclosure of forward-looking information privately, as insiders may then be forced to make projections public and face unintended consequences).

154. See *supra* notes 35–41 and accompanying text.

155. See, e.g., YAHOO! NetRoadshow, NetRoadshow.com, at [http://www.netroadshow.com/2001/services\\_roadshows.html](http://www.netroadshow.com/2001/services_roadshows.html) (last visited Dec. 22, 2001) (on file with the *Duke Law Journal*) (listing a benefit of the electronic road show as allowing "institutional investors to review the online road show prior to the live road show and one-on-ones").

156. See Kwon, *supra* note 93, at 2 (presenting the possibility of dual road shows).

Regulation FD can illuminate how opening road shows to individual investors will impact the evolving road shows, and more specifically, one-on-one meetings. However, the effect on one-on-one meetings ultimately may not be such a pressing concern, as the Special Study promulgated by the Commission has revealed that Regulation FD has caused at least some issuers to refuse holding either one-on-one meetings or private meetings with analysts and investors.<sup>157</sup> A survey of securities attorneys reported that before Regulation FD, 77 percent claimed that most of their clients had conducted one-on-one meetings; post-FD, the percentage dropped to 27 percent.<sup>158</sup> From the analysts' point of view, 69 percent on the "buy side" saw a decrease in their ability to have these meetings, while 70 percent of "sell-side" analysts had the same experience.<sup>159</sup>

When Regulation FD was initially proposed, the SEC staff specifically stated its intent not to interfere with one-on-one discussions.<sup>160</sup> With the passing of the regulation, however, it became clear that the issuers were being put on notice to be wary of claiming that no material, nonpublic information was relayed in one-on-ones and other "private" discussions with analysts. The SEC warned that an issuer likely will be unsuccessful in proving that no material, nonpublic information was communicated explicitly or implicitly during the meeting, particularly if the analyst adjusts his or her view with respect to the issuer following the private conversations.<sup>161</sup>

Although Regulation FD would appear to have a banning effect on one-on-one meetings, the individual meetings may and do occur post-Regulation FD.<sup>162</sup> As one might expect, however, a great deal of pressure on issuers limits what is disclosed. After all, the only defense

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157. See UNGER, *supra* note 130 ("Some [investor relations professionals] have stopped meeting one-on-one with investors, even if earnings are not discussed." (quoting Bina Thompson, Colgate-Palmolive Co., Comments at Roundtable Discussion of Regulation FD 30, <http://www.sec.gov/news/studies/regfdconf.txt> (Apr. 24, 2001) (on file with the Duke Law Journal))). *But see* NIRI SURVEY, *supra* note 139, at 4 (stating that issuer representatives, who report that approximately 80 percent of issuers continue to hold one-on-one meetings, noted that concerns about Regulation FD were raised in some of these meetings).

158. ABA TASK FORCE SURVEY, *supra* note 140, at 7.

159. AIMR SURVEY #2, *supra* note 139, at 4.

160. Linda C. Quinn, *Learning to Live With Regulation FD*, in 32ND ANNUAL INSTITUTE ON SECURITIES REGULATION 9, 41-42 (PLI Corporate Law & Practice, Course Handbook Series No. B-1212, 2000).

161. *Id.* at 42.

162. *Id.* at 41-42.

to a possible violation rests on an immateriality argument,<sup>163</sup> and with the SEC's lack of insight into the true meaning of materiality, the risk of violation runs high.

Therefore, the SEC should consider whether rendering road shows without purpose is an acceptable byproduct of adapting to the new Internet model. As evidenced by the surveys, one-on-one meetings, which have been crucial to the prevalence and continued practice of road shows, are being eradicated. In this way, road shows would then exist only as empty formalities, containing only the twenty-five-minute requisite presentation, orchestrated from a script that reveals no additional information.

### CONCLUSION

The Internet is the perfect vehicle through which the SEC may advance its policies of ensuring a fair and efficient market system. The SEC has acknowledged the need to develop a regulatory system that maximizes the benefits of the Internet<sup>164</sup> but has been wary of acting too quickly. Indeed, the SEC has taken only small steps, by issuing no-action letters.<sup>165</sup> These have been limited in number and are by their very nature limited in scope. That is, the no-action letters do not represent the official views of the Commission, and they only require SEC compliance for those particular requests.<sup>166</sup> Because of its lack of authoritative value, this method of regulation is hardly the uniform, industry-wide system that is needed to give market players an understanding of the boundaries to which they must adhere.

While the SEC can be criticized for not designating adequate guidelines for transactions via the Internet, it also should be noted that the Internet has raised issues that have never before been contemplated in securities regulation. Therefore, being cautious is not an

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163. *Id.* at 39.

164. See Arthur Levitt, SEC Commissioner, Corporate Finance in the Information Age, Remarks at the Securities Regulation Institute, <http://www.sec.gov/news/speech/speecharchive/1997/spch135.txt> (Jan. 23, 1997) (on file with the *Duke Law Journal*) (claiming that, "[c]hange has always been the hallmark of our markets, and the SEC has succeeded by recognizing that fact and responding to it").

165. See, e.g., Net Roadshow, Inc., SEC No-Action Letter, [1997 Decisions Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,367, at 77,851-52 (Sept. 8, 1997); IPOnet, SEC No-Action Letter, 1996 SEC No-Act. LEXIS 642, \*1 (July 26, 1996); Spring Street Brewing Co., SEC No-Action Letter, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,201, at 77,005-06 (Apr. 17, 1996).

166. See *supra* note 8 and accompanying text.

unwise approach for the SEC, as it is learning how market players are reacting to the developments that have occurred over the past several years.

The push for more and more disclosure is not having the effect originally sought by the Commission. Instead of benefiting the individual investor by providing salient information for making a fully informed decision, it is overwhelming the investor with a large quantity of boilerplate statements in which it is difficult to separate the material from the nonmaterial information.<sup>167</sup> In addition to an increase in investor complaints, the disclosure requirements have also had a chilling effect on the issuer's dissemination of information—both in quality and quantity.<sup>168</sup> Now, the material statements may not even be disclosed, as companies are presently opting for a cautious approach in fear of running afoul of Regulation FD. Moreover, the SEC's move towards increased disclosure is paralyzing the efficacy of road shows by taking away its most sought-after attraction: one-on-one meetings.

A move toward opening pre-IPO road shows to individual investors could be a step in the wrong direction. Until both the Commission and the market players are ready to handle the Internet's vast and far-reaching potential, putting more information into a venue that is already replete with excess information (and a great deal of misinformation) would probably not be prudent. Although individual investors believe that access to road shows would be beneficial to them, the SEC should recognize that the best means of providing investor protection would be to limit such advancements at least until the wrinkles in current disclosure regulation have been ironed out and a more efficient Internet model has been created.

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167. *See supra* Part IV.A.

168. *See supra* Part IV.B.