

**Boston University
Journal of Science & Technology Law**

Article

**SEC Disclosure Requirements and the 1998 Year 2000 Release:
A Continuation of Policy**

Jonathan M. Moulton & Joseph S. Rosen

Table of Contents

I.	Introduction.....	[1]
II.	The Y2K Release: Background and Disclosure Requirements	[6]
	A. Overview of the Year 2000 Problem	[6]
	B. When Disclosure Should Be Made.....	[7]
	C. What to Disclose About Year 2000 Issues.....	[8]
III.	The Y2K Release: Consistent SEC Policy.....	[14]
IV.	The Y2K Release and Future SEC Policy.....	[22]
V.	The Y2K Release and Attorney Responsibilities.....	[24]
VI.	Y2K Release Enforcement	[28]
VII.	Conclusion.....	[31]

SEC Disclosure Requirements and the 1998 Year 2000 Release: A Continuation of Policy*

Jonathan M. Moulton & Joseph S. Rosen†

I. INTRODUCTION

1. The Year 2000 problem has been a source of concern for the Securities and Exchange Commission (the "SEC") since at least 1996.¹ Since that time, the SEC has been looking for a way to require public companies making securities filings (each an "Issuer") to disclose how the Year 2000 has affected or could affect their financial condition or results of operations.² As a result, the SEC issued Staff Legal Bulletin No. 5 in October 1997, and revised the bulletin less than a year later in January 1998, to provide guidance on what Year 2000 information Issuers should disclose in their securities filings.³ After issuing this bulletin, the SEC Division of Corporate Finance formed a Year 2000 Disclosure Task Force ("Task Force") to review Issuer disclosure.⁴ Following its review of a broad cross-sampling of over 1,000 Issuers' related disclosures, the Task Force determined that most Issuers were not making adequate disclosures, despite the specific guidance that the Revised Staff Legal Bulletin No. 5 provided.⁵ The Task Force determined that ninety-two percent of Issuers surveyed had not disclosed the amount of money that

* © 1999 by the Trustees of Boston University. Cite to this Article as 5 B.U. J. SCI. & TECH. L. 1 (1999). Pin cite to the appropriate paragraph number. For example, cite to the first paragraph of this Article as 5 B.U. J. SCI. & TECH. L. 1 para. 1 (1999).

† Jonathan M. Moulton is a partner and Joseph S. Rosen is an associate in the Business Practice Group of Testa, Hurwitz & Thibault, LLP, Boston, Massachusetts. Both are members of the Firm's Year 2000 Task Force and advise public and private companies on issues related to the millennium date change. With appreciation to Michael Talmanson, a summer associate of the firm, for his assistance.

¹ See *Hearings on the Disclosure of Year 2000 Readiness Before the Senate Subcomm. on Fin. Service and Tech.*, 105th Cong. 134-35, n.8 (1998) [hereinafter *Hearings re: Year 2000 Disclosure*] (prepared statement of Laura S. Unger, SEC Commissioner).

² See *id.*

³ See *Staff Legal Bulletin No. 5* (last modified Aug. 11, 1998) <<http://www.sec.gov/rules/other/n/slbcf5.htm>>. The Y2K Release (discussed *infra*) has superseded Revised Staff Legal Bulletin No. 5.

⁴ See *Hearings re: Year 2000 Disclosure*, *supra* note 2 (prepared statement of Laura S. Unger, SEC Commissioner).

⁵ See *id.*

they had previously spent on Year 2000 issues,⁶ and that 64% of Issuers surveyed had not disclosed the time frame within which they expected to complete their Year 2000 assessment and/or its remediation plan.⁷

2. As a result of the Task Force's findings, the SEC increased its efforts to elicit Year 2000 disclosures. On July 29, 1998, the SEC released its Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences By Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers ("Y2K Release").⁸ In the Y2K Release, the SEC specified the information regarding the Year 2000 problem that Issuers⁹ must disclose in their securities filings, particularly in the Management's Discussion and Analysis of Financial Condition and Results of Operations section of such filings ("MD&A").¹⁰

3. The Y2K Release requires an Issuer to disclose a substantial amount of information regarding its Year 2000 issues.¹¹ For example, the Y2K Release requires disclosure of the anticipated costs of remediation of Year 2000 issues and of the business risks the Year 2000 problem poses to the Issuer.¹² This type of information is inherently "forward-looking"; it describes events in the future and their anticipated or possible, yet unknown, effects on the Issuer and its finances.

4. The policy at the basis of such disclosure requirements goes back a long way. When Congress enacted the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), one of Congress's primary goals was to require Issuers to provide complete and comprehensive disclosure of information to investors which is material to those investors' investment decision.¹³ One of the actions taken by the SEC to further this goal was to require the inclusion of a comprehensive MD&A section in periodic and certain other Issuer filings. The

⁶ *See id.*

⁷ *See SEC, Corporation Finance Year 2000 Disclosure Survey* (last modified June 11, 1998) <<http://www.sec.gov/news/extra/y2kcfty.htm>>.

⁸ *See* Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Securities Act Release No. 7558, Exchange Act Release No. 40,277 [1998 Transfer Binder], 67 SEC Docket (CCH) 1437 (July 29, 1998) [hereinafter Commission's Statement re: Year 2000 Issues].

⁹ *See id.* at 1439. In the Y2K Release, the SEC also discusses Year 2000 disclosure issues for investment companies and municipal issuers. *See id.* This column, however, focuses on public companies and their Year 2000 disclosure requirements.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See* Securities Act of 1933, 15 U.S.C. § 77 (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78 (1994).

MD&A section requires a discussion of both past performance and certain future expectations, since Congress intended to afford investors an opportunity to look at an Issuer “through the eyes” of the Issuer’s management.¹⁴ Item 303 of the SEC’s Regulation S-K addresses certain MD&A disclosure requirements, some of which concern certain types of forward-looking information. In a 1989 interpretive release (often referred to as the “MD&A Release”),¹⁵ the SEC provided Issuers with certain guidelines specifying under what circumstances Issuers must disclose forward-looking information. Essentially, Issuers must disclose forward-looking information when currently known trends or uncertainties exist which are reasonably likely to materially affect an Issuer’s financial condition or results of operations.¹⁶

5. The Y2K Release is an extension of existing SEC policy that is intended to address a new and specific type of forward-looking information which is likely to be material to most Issuers: the risk that both Issuers and the third parties on which Issuers rely might fail to remedy in a timely manner their computer systems’ date handling inadequacies.¹⁷ While its purpose is consistent with past SEC guidance, the Y2K Release stands apart from past SEC guidance because of the unusual level of detail it provides to Issuers about the extent of their disclosure obligations. The Y2K Release addresses a specific problem and identifies specific information regarding that problem that Issuers must disclose.¹⁸ This expansion on policy may also be helpful in ascertaining future SEC policy on issues similar to the Year 2000 problem.

¹⁴ See Management’s Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Fed. Sec. L. Rep. (CCH) ¶ 73,192 at 62,841 (May 18, 1989).

¹⁵ See *id.* ¶ 72,436 at 62,143.

¹⁶ See *id.* ¶ 73,193 at 62,842.

¹⁷ A recent quarterly survey of 110 United States corporations, 12 government agencies, and 12 industrial sectors, conducted by Cap Gemini America LLC (“Cap Gemini”), shows that more than half (55%) of the companies surveyed have already suffered Year 2000-related failures, and that 98% of the companies surveyed expect more such failures in 1999. See *Many Major Firms Have Already Experienced Year 2000-Related Computer Failures* (last modified Dec. 29, 1998) <<http://www.usa.capgemini.com/news/press/pr122998.html>>. According to Cap Gemini, the 55% figure is up from 44% in October 1998 and 40% in July 1998. See *Report of Y2K Failures on the Rise* (last modified Jan. 19, 1999) <<http://www.joc.com/issues/990119/i1nsur/e23991.htm>>.

¹⁸ Not only has the SEC issued an interpretive release addressing the Year 2000 problem, it has expanded on such guidance. For example, the SEC has issued an additional interpretive release answering frequently asked questions about the Y2K Release. See *Frequently Asked Questions About the Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies*, Securities Act Release No. 7609, Exchange Act Release No. 40,649, 68 SEC Docket (CCH) 1333 (Nov. 9, 1998) [hereinafter *Frequently Asked Questions About Commission’s Statement re: Year 2000 Issues*].

II. THE Y2K RELEASE: BACKGROUND AND DISCLOSURE REQUIREMENTS

A. Overview of the Year 2000 Problem

6. The Year 2000 problem is the aggregate of at least three separate date-recognition problems.¹⁹ First, many existing computer programs use only the last two digits to identify a year.²⁰ Unless programmers correct these programs, the programs will not be able to recognize accurately a year that begins with “20” instead of “19” and will, as a result, fail or falter.²¹ Second, computer systems often use a variety of 1999 dates to mean something other than the date.²² For example, 9999 is often used as a file termination code.²³ As computer systems start receiving the date “9/9/99” as a date entry, the systems may produce erroneous results or stop functioning altogether.²⁴ Third, since the year 2000 is a leap year and the year 1900 was not, a computer’s standard date algorithm may cause failures by providing the wrong calendar or day count.²⁵ Centuries divisible only by 100 (like 1900) are not leap years while centuries divisible by 400 (like 2000) are leap years.²⁶ Some computer programmers were not aware of the 100-year rule when they designed their systems, and resulting computer systems may not work correctly in the Year 2000.²⁷ Other programmers who knew about the 100-year rule did not know about the 400-year rule, and their systems may also fail (possibly on December 31, 2000, the unexpected 366th day of the year).²⁸ Although the extent of these problems are unknown, the potential ramifications on the global economy could be significant. For example, the blackout which hit New Zealand’s biggest

¹⁹ See Michael E. Tindall, *Year 2000 - The “Millennium Bug”; A Bonanza or Time Bomb for the Accountant* (visited Apr. 3, 1999) <<http://www.year2000.com/archive/NFaccountant.html>>.

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See Capers Jones, *Dangerous Dates For Software Applications* (last modified Mar. 24, 1998) <<http://www.year2000.com/archive/NFdangers.html>>.

²⁴ See Tindall, *supra* note 20.

²⁵ See Jay Golter and Paloma Hawry, *Circles of Risk* (visited Mar. 15, 1999) <<http://www.year2000.com/archive/circlesrisk.html>>.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

commercial district in Auckland for more than two weeks in 1998 signifies the potential ramifications caused by date malfunctions.²⁹

B. When Disclosure Should Be Made

7. In the Y2K Release, the SEC addresses under what circumstances an Issuer should make Year 2000 disclosures.³⁰ First, an Issuer should make disclosure if the Issuer's assessment of its Year 2000 issues is not complete.³¹ This assessment should take into account whether third parties with whom the Issuer has a material relationship are Year 2000 compliant.³² Second, an Issuer should make Year 2000 disclosure if the Issuer determines, without taking into account the Issuer's Year 2000 related remediation efforts, that the "consequences of its Year 2000 issues would have a material effect on the Issuer's business, results of operations, or financial condition."³³ Under this test, the Issuer should assume, in the absence of clear evidence to the contrary, that it is not Year 2000 compliant and then evaluate the consequences in the event that it is not prepared.³⁴ Thus, the amount of money that the Issuer has spent or will spend to make the Issuer Year 2000 compliant does not determine the outcome of the test, instead the extent to which the Year 2000 problem will affect the Issuer if it does not become Year 2000 compliant determines the outcome of the test.³⁵ The SEC expects that Year 2000 issues will be material for the vast majority of Issuers, and, therefore, that in most instances the Issuer must disclose.³⁶

²⁹ See Chris Ott, *Leap Year Complicates the Year 2000 Problem* (last modified June 22, 1998) <<http://www.amcity.com/denver/stories/062298/smallb7.html>>.

³⁰ See Commission's Statement re: Year 2000 Issues, *supra* note 9, at 1437-1452.

³¹ See *id.* at 1439.

³² A third party relationship is material if there would be a material impact on the Issuer's business if the third party did not become Year 2000 compliant in a timely manner. See *id.* at 1445 (providing as an example a telecommunications company that predicts a business interruption prompting other companies that rely on the telecommunications products or services to also predict such a disruption).

³³ *Id.* at 1439.

³⁴ See *id.* at 1444.

³⁵ See *id.*

³⁶ See *id.* at 1439.

C. What to Disclose About Year 2000 Issues

“A company should describe its Year 2000 issues in sufficient detail to allow investors to fully understand the challenge that it faces.”³⁷

8. Where the Issuer must disclose Year 2000 issues, that Issuer will have to address at least four categories of information in their MD&A.³⁸ However, the Y2K Release does not constitute a comprehensive checklist.³⁹ The level of detail that an Issuer provides under each category depends on each Issuer’s facts and circumstances.⁴⁰

9. First, the Issuer must disclose the Issuer’s state of readiness for the Year 2000.⁴¹ For example, the Issuer should state whether or not it will be ready for the Year 2000 and how far along it is in the process of addressing its Year 2000 issues.⁴² The description should include a discussion of information technology and non-information technology systems, and address how Year 2000 issues related to third parties with whom the Issuer has a material relationship are likely to impact the Issuer.⁴³

10. Second, the Issuer must disclose the costs of addressing Year 2000 issues.⁴⁴ The types of Year 2000 costs will vary for each Issuer.⁴⁵ Typical costs include external consultants and professional advisors, software and hardware purchases, and internal costs of employees working on Year 2000 projects.⁴⁶ The Issuer need not include replacement costs in this discussion if Year 2000 issues did not accelerate the replacement.⁴⁷

³⁷ *Id.* at 1445.

³⁸ *See id.* at 1445-46.

³⁹ *See* Frequently Asked Questions About Commission’s Statement re: Year 2000 Issues, *supra* note 19, at 1334.

⁴⁰ *See id.*

⁴¹ *See* Commission’s Statement re: Year 2000 Issues, *supra* note 9, at 1445.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.* at 1446.

⁴⁵ *See* Frequently Asked Questions About Commission’s Statement re: Year 2000 Issues, *supra* note 19, at 1334.

⁴⁶ *See id.*

⁴⁷ *See* Commission’s Statement re: Year 2000 Issues, *supra* note 9, at 1446.

11. Third, the Issuer must disclose the risks associated with Year 2000 issues.⁴⁸ Issuers need to include their most reasonably likely worst case scenarios related to Year 2000 crises.⁴⁹ However, an Issuer need not address all possible devastating events unless the Issuer becomes aware that a material disruption is reasonably likely to occur.⁵⁰ Rather, this disclosure requirement is “intended to elicit disclosure of the impact on a company if its systems, both information technology and non-information technology, do not function and it has to implement its contingency plan.”⁵¹ An Issuer must duly note in the MD&A any uncertainty in making this assessment, including its inability to obtain assurances as to whether the Year 2000 will impact a material and significant relationship with a third party.⁵²

12. Fourth, the Issuer must disclose any contingency plans it has developed that it would implement in the event the Year 2000 causes the Issuer any problems.⁵³ If no such plans currently exist, the Issuer should disclose this fact. If an Issuer lacks a plan, the Issuer should further disclose the timetable for developing a contingency plan, or disclose that the Issuer does not plan to create one.

13. In the Y2K Release, the SEC also suggests further disclosures that an Issuer should consider when making its Year 2000 disclosures.⁵⁴ These suggested disclosures include; (i) historical and estimated future costs related to Year 2000 issues; (ii) costs incurred at the end of each period; (iii) the sources of the Year 2000 funds; (iv) any delays to other information technology projects as a result of Year 2000 efforts; and (v) independent techniques used to verify estimated costs and predictions.⁵⁵ The SEC also suggests that Issuers produce charts and graphs to assist the Issuer in recording progress and in breaking down costs related to Year 2000 issues for shareholders.⁵⁶

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See* Frequently Asked Questions About Commission’s Statement re: Year 2000 Issues, *supra* note 19, at 1334.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See* Commission’s Statement re: Year 2000 Issues, *supra* note 9, at 1446.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.* at 1447 (mentioning that charts are effective because they make Year 2000 disclosure information concise).

III. THE Y2K RELEASE: CONSISTENT SEC POLICY

14. The Y2K Release is not the first time the SEC has spoken on the issue of disclosure of forward-looking information.⁵⁷ In the MD&A Release, which gave general guidance to Issuers concerning MD&A disclosure, the SEC suggested that Issuers need to make two assessments when determining whether to disclose forward-looking information.⁵⁸ First, an Issuer must determine whether a known trend, demand, commitment, event, or uncertainty is reasonably likely to come to fruition.⁵⁹ If the Issuer determines that it is not likely, no disclosure is required.⁶⁰ Second, if the Issuer cannot make the above determination, it must objectively evaluate the consequences of the trend or event on the assumption that it will come to fruition.⁶¹ Disclosure is required unless the Issuer determines that, as a result of the event, it is unlikely to suffer a material effect.⁶²

15. The Y2K Release is an extension of SEC policy proffered in the MD&A Release to address a new and pressing issue. The similarities between the two releases are evident. Both the MD&A Release and the Y2K Release require disclosure of certain forward-looking information when the information involves a known trend or event that could affect the Issuer in the future.⁶³ Therefore, even if the SEC had not issued the Y2K Release, Issuers would still be required to make significant disclosure of Year 2000 issues to comply with the MD&A Release. The Y2K Release merely expands upon the MD&A Release's disclosure requirements by highlighting for Issuers the importance of the Year 2000 problem as a potential uncertainty. Furthermore, both the Y2K Release and the MD&A Release appear to specifically require disclosure of the risks that the particular known event or trend poses to the Issuer.⁶⁴ This risk disclosure directly conforms with the legislative and

⁵⁷ See Management's Discussion and Analysis of Financial Condition and Results of Operation, Codification of Financial Reporting Policies § 501, [Vol. 7] Fed. Sec. L. Rep. (CCH) ¶ 72,436 at 62,143 (specifying requirements that should be considered by registrants preparing MD&As).

⁵⁸ See *id.* at ¶ 73,193 at 62,843.

⁵⁹ Known trends or events need to be distinguished from other types of forward-looking information. Instruction 7 to Item 303 of Regulation S-K states that presently known data which will impact upon future operating results may be required to be disclosed (and is, in certain situations, through the MD&A Release), while disclosure of other forward-looking information (based on data which is not presently known) is merely optional. See *id.* at n.14.

⁶⁰ See *id.* at ¶ 73,193 at 62, 843.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See Commission's Statement re: Year 2000 Issues, *supra* note 9, at 1443-44.

⁶⁴ See *id.* at 1446.

SEC policy of providing comprehensive disclosure to investors, so an investor can accurately evaluate an Issuer.⁶⁵ Unlike the MD&A Release, however, the Y2K Release specifically requires disclosure of Year 2000 risks.⁶⁶ In fact, the Y2K Release goes even further, requiring disclosure of the Issuer's most reasonably likely worst case scenario regarding the Year 2000.⁶⁷ While the MD&A Release does not go so far as to require disclosure of an Issuer's worst case scenario in any particular scenario, it does mandate disclosure of certain risks posed to the Issuer and the anticipated results to the Issuer, its results of operations, and its financial condition.⁶⁸

16. Although the two releases are similar, the Y2K Release goes further than the MD&A Release in the forward-looking disclosure it mandates. While the MD&A Release addresses the disclosure of forward-looking information in general, the Y2K Release focuses on a specific problem; namely, the Year 2000 computer problem. In the MD&A Release, the SEC took a general outlook towards disclosure of forward looking information and set forth a very generalized "formula" that deals with the issue. The Y2K Release offers a fine-tuning of the MD&A Release formula to deal with a very specific, and potentially major, problem.

17. However, if, as discussed above, the MD&A Release requires Year 2000 disclosure, even in the absence of the Y2K Release, why did the SEC spend time writing a release to deal with the Year 2000 problem? There are three possible answers to that question. First, the SEC may have been concerned with the potentially disastrous effects of the Year 2000, which are already starting to develop.⁶⁹ Many organizations have already suffered Year 2000 failures.⁷⁰ In addition, spending to remedy the Year 2000 crisis has reached significant levels. AT&T alone stated that "[our] 1998 Year 2000 bill totaled \$375 million, with 1999's bill projected to come in at \$225 million."⁷¹ Thomas D. Oleson and Luisa Bordoni, both of the International Data Corporation, estimate total Year 2000 spending for the United States at \$121.96 billion, and total worldwide spending at \$296.74

⁶⁵ *See id.* at 1438.

⁶⁶ *See id.* at 1446.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See, e.g., Many Major Firms Have Already Experienced Year 2000-Related Computer Failures, supra* note 18.

⁷⁰ *See id.*

⁷¹ Paul Gentile, *1999 Opens with a Plethora of Year 2000-related stories* (last visited Apr. 5, 1999) <<http://www.cutimes.com/y2k/1999/yr012099-1.html>>.

billion.⁷² The Gartner Group has made an even higher estimate, calculating the complete costs of Year 2000 remediation at \$300-600 billion.⁷³ Furthermore, most small businesses continue to pay little or no attention to Year 2000 issues.⁷⁴ This apathy could cause disastrous effects on bigger businesses, since big businesses often rely on small businesses for goods and services.⁷⁵

18. As the SEC asserts in the Y2K Release, the extent of the Year 2000 problem's impact is not yet known, and if not corrected in a timely manner, the problem could affect the global economy.⁷⁶ Edward Yardeni, the Chief Economist at Deutsche Bank Securities in New York, thinks there is a seventy percent chance that the Year 2000 will lead to a global recession as severe as that in 1973-74, and that such a recession will last for at least a year.⁷⁷ Not only could the Year 2000 disrupt the global economy, it could have a potentially devastating effect on a single Issuer; the Year 2000 could potentially cause an Issuer to shut down completely.⁷⁸ Most likely, the SEC wanted to make absolutely certain that Issuers disclose information about the Year 2000 issues, in order to make investors aware of these potentially devastating effects.

19. Second, the SEC's concern over the Year 2000 crisis coincides with, or maybe results from, a broader federal governmental interest on the issue. The Congressional Subcommittee on Government Management, Information and Technology ("Subcommittee") held a hearing on April 16, 1996 to determine the

⁷² See *Year 2000: The International Y2K Repair Bill* (last modified Jan. 25, 1999) <<http://year2000.dci.com/Articles/990120idcworld.htm>>.

⁷³ See Larry Shoup, *Managing the Risk of Year 2000: How to Protect Your Organization from Over Spending, Failure and Litigation* (last visited Apr. 5, 1999) <<http://www.year2000.com/archive/NFjanis.html>> (stating that litigation costs are expected to reach one trillion dollars).

⁷⁴ According to a recent survey of 500 small businesses, "only 41% had addressed or intended to address the Year 2000 problem, and 18% said they were not or barely aware of the Year 2000 problem." Crista Walker, *Big Business Baffled: When Are Small Businesses Going to Wake Up and Smell the Millennium* (last visited Apr. 5, 1999) <http://www.year2000.com/releases/belinda01_21_1999.html>.

⁷⁵ See *id.*

⁷⁶ Commission's Statement re: Year 2000 Issues, *supra* note 9, at 1438.

⁷⁷ See *A Survey from the Economist: The Millennium Bug - Time Runs Out* (last visited Apr. 5, 1999) <<http://www.year2000.com/archive/economist.html>> (discussing impact of change of millennium on the economy).

⁷⁸ In fact, many "industry pundits are predicting that nearly one-third of all companies will fail to become fully Year 2000 compliant and suffer severe financial consequences, with 1-3% of them declaring bankruptcy." Shoup, *supra* note 74.

extent of the Year 2000 problem.⁷⁹ This hearing revealed a serious lack of awareness of the Year 2000 problem on the part of Issuers and government.⁸⁰ In response to these findings, two members of the Subcommittee developed a survey specifically inquiring into federal agency awareness and readiness.⁸¹ This federal focus on governmental agency readiness may have caused the higher SEC anxiety over Issuer compliance.⁸²

20. Third, the SEC was worried that without specific Year 2000 disclosure requirements, Issuer disclosure pursuant to the MD&A Release would be inadequate. As discussed above, the SEC first attempted to allay this concern with the issuance and revision of Staff Legal Bulletin No. 5. When even this guidance proved inadequate, the SEC issued the more detailed Y2K Release.

21. A specific problem like the Year 2000 problem, which has potentially significant effects on all Issuers and which sparks federal interest, is rare. When such a problem does exist, however, the SEC wants and needs to make sure investors can obtain comprehensive disclosures about the issue. Thus, despite the fact that the MD&A may have already required significant Year 2000 disclosure, the SEC decided to issue the Y2K Release.

IV. THE Y2K RELEASE AND FUTURE SEC POLICY

22. As the SEC begins to address additional issues, the SEC policy on forward-looking disclosure, typified by the MD&A Release, and the Y2K Release's expansion upon such policy are likely to continue. With the issuance of the Y2K Release, the SEC's long-standing policy of forward-looking disclosure, as exemplified in the MD&A Release, retains pivotal importance. The SEC will likely utilize this policy as a starting point when addressing potential future concerns.

23. The SEC's expansion of past policy will likely continue as more specific and particular issues come to the forefront. Potential problems other than Year 2000 have already emerged which, if not remedied in a timely manner, could negatively affect Issuers. The Euro⁸³ conversion problem is one such example. The Euro conversion problem is the result of eleven of the fifteen member countries of

⁷⁹ See *U.S. Federal Government Year 2000 Survey Before the Comm. on Gov't Reform and Oversight*, 104th Cong. (1996) (statement of Stephen Horn, Chairman, Subcomm. of Gov't Management, Info. and Tech.).

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² For the securities industry itself, federal regulators are relying at least in part on industry-wide testing which the Securities Industry Association is conducting. See Jeff Jinnett, *Legal Issues Concerning the Year 2000 Computer Problem: An Awareness Article for the Private Sector* (last visited Apr. 21, 1999) <<http://www.year2000.com/archive/NFlegalissues.html>>.

⁸³ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 180 (5th ed. 1998).

the European Union electing to adopt the Euro as their common legal currency effective January 1, 1999.⁸⁴ At that time, the participating countries established fixed Euro conversion rates between their respective existing currencies and the Euro. After the conversion rates were fixed, the Euro began trading on currency exchanges and was available for non-cash transactions.⁸⁵ It is expected that on January 1, 2002, the European Union will issue new Euro-denominated bills and coins, and that by July 1, 2002, the participating countries will withdraw their legacy currencies from circulation.⁸⁶ The conversion to the Euro will affect many Issuers, especially those with significant overseas operations.⁸⁷ For example, Issuers may need to upgrade or alter their information technology systems to ensure that they are "Euro-ready."⁸⁸ While the issuance of a release concerning other issues such as the Euro conversion problem is far from certain, many Issuers with significant overseas operations have already anticipated the need for disclosure on the issue and have made significant disclosure concerning their Euro conversion issues in their recently filed 10-Ks and 10-Qs.⁸⁹

V. THE Y2K RELEASE AND ATTORNEY RESPONSIBILITIES

24. In light of the Year 2000 and other problems facing Issuers and requiring forward-looking disclosure, corporate attorneys must take an increased role when counseling and advising Issuers. First, attorneys should advise their clients of the enactment of the Y2K Release, its purpose, and the disclosure requirements that the Y2K Release mandates. Many law firms have provided memorandum to clients discussing the Y2K Release and its requirements. What is contained in each memoranda may and will, of course, vary from client to client.

25. Second, corporate attorneys should be vigilant in making sure their clients comply with Y2K Release requirements. Clients must make the requisite

⁸⁴ See *id.*; LOOMIS GROUP, *Euro Information: Welcome* (visited May 20, 1999) <<http://www2.euroinformation.com/eu/welcome.html>>.

⁸⁵ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 180 (5th ed. 1998); LOOMIS GROUP, *Euro Information: What is the Euro?* (visited May 20, 1999) <<http://www2.euroinformation.com/eu/whatiseuro.html>>.

⁸⁶ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 180 (5th ed. 1998); LOOMIS GROUP, *Euro Information: What is the Euro?* (visited May 20, 1999) <<http://www2.euroinformation.com/eu/whatiseuro.html>>.

⁸⁷ See Jan Meyers & Damien Levie, *Legal Framework: The Introduction of the Euro: Overview of the Legal Framework and Selected Legal Issues*, 4 COLUM. J. EUR. L. 321, 324 (1998).

⁸⁸ See *id.* at 324.

⁸⁹ See, e.g., COMPAQ COMPUTER CORP. 10-Q FOR QUARTER ENDING SEPTEMBER 30, 1998 (1998); DYNATECH CORP. 10-Q FOR QUARTER ENDING SEPTEMBER 30, 1998 (1998); SUN MICROSYSTEMS, INC. 10-K FOR FISCAL YEAR ENDING JUNE 30, 1998 (1998).

disclosures and update such disclosures when new Year 2000 information becomes known to them. In order to ensure Y2K Release compliance, counsel will often have to inquire into their clients' Y2K Release disclosures and their Year 2000 preparations. As of January 1998, although seventy percent of corporations' annual reports contained the phrase "Year 2000," the SEC remains concerned that much of the disclosure regarding the Year 2000 is not meaningful.⁹⁰ Counsel should therefore be aware and advise their clients that major developments with respect to an Issuer's Year 2000 readiness may rise to a level of importance, and, in certain circumstances, the Issuer should consider filing a Form 8-K to discuss Year 2000 development.⁹¹

26. Third, attorneys may want to present their clients with examples of what other Issuers, especially those in their clients' industries, have disclosed regarding the Year 2000 in their securities filings. These examples may assist clients in assessing their risks and making their own disclosures. As an example, there are a number of Year 2000 databases which collect Year 2000 disclosures made in Issuers' securities filings.⁹² However, attorneys should make sure that they advise their clients to use the examples *only* as a starting point for making disclosures since each Issuer must consider its own circumstances in drafting its MD&A.⁹³

27. Fourth, attorneys should help their clients think about the potential future problems which could affect the client's operations and/or which could cause the SEC to issue a release requiring disclosure of such issues. Attorneys should advise their clients regarding the disclosure of such issues and remind them that the current law may already mandate the disclosure of such issues, even without an SEC release covering the specifics of such issues, through SEC general disclosure policy implemented in the MD&A Release.

VI. Y2K RELEASE ENFORCEMENT

28. The SEC will likely enforce Issuer compliance in selected situations. There are two reasons to expect such enforcement. First, the SEC enforced its general disclosure requirements, implemented through the MD&A Release, in the

⁹⁰ See SEC, *Second Report on the Readiness of the U.S. Securities Industry and Public Companies to Meet the Information-Processing Challenges of the Year 2000* (last modified June 1998) <<http://www.sec.gov/news/studies/yr2000-2.htm>>.

⁹¹ See *id.*

⁹² Along with these databases, the SEC states that in the future it may provide sample Year 2000 disclosures to illustrate how Issuers should comply with SEC guidance. See Frequently Asked Questions About Commission's Statement re: Year 2000 Issues, *supra* note 19, at 1335.

⁹³ See *id.*

landmark case of *In re Caterpillar, Inc.*⁹⁴ In *Caterpillar*, the SEC first concluded that Caterpillar's MD&A failed to discuss the future impact of a known uncertainty, and then decided that such failure to make adequate MD&A disclosures constituted an independent violation of the periodic reporting requirements under Section 13(a) of the Exchange Act.⁹⁵ The SEC has continued to enforce the disclosure requirements of the MD&A Release in cases subsequent to *Caterpillar*.⁹⁶ Because the SEC has enforced the MD&A Release's disclosure requirements, it should be expected that, in appropriate situations, the SEC will enforce the Y2K Release's disclosure requirements as well.

29. Second, the SEC has already begun enforcement and policing of Year 2000 disclosure requirements. On October 20, 1998, the SEC charged 37 brokerage firms for failing to make required Year 2000 disclosures.⁹⁷ SEC rules required brokerage firms to file form BD-Y2K with both the SEC and the firms' self-regulatory organizations by August 31, 1998.⁹⁸ The SEC brought these actions against broker-dealers that failed to file all or part of this form.⁹⁹ Regarding these charges, SEC Enforcement Director Richard H. Walker stated that: "These are the first cases the Enforcement Division has brought concerning Year 2000 disclosure. We will continue to be vigilant in policing Year 2000-related disclosure and will not wait until the new millennium to bring additional enforcement actions."¹⁰⁰ Since the SEC has already begun such enforcement against broker-dealers, the possibility of similar enforcement against Issuers exists especially where disclosure violations are material and serious.

30. Even more likely than substantial SEC enforcement, however, are shareholder suits directed at Issuers and their directors and officers. If an Issuer fails to adequately disclose its Year 2000 problems in its securities filings, and subsequently experiences substantial operational difficulties resulting in damage to

⁹⁴ See *In re Caterpillar, Inc.*, Exchange Act Release No. 34-30532, 51 SEC Docket (CCH) 147 (Mar. 31, 1992).

⁹⁵ See *id.* at 153.

⁹⁶ See Quinton F. Seamons, Robert W. Rouse, & Linda M. Plunkett, *Requirements and Pitfalls of MD&A Disclosure*, INSIGHTS, August 1997, at 11, 12.

⁹⁷ See SEC, *SEC Press Releases* (last visited Oct. 21, 1999) <<http://www.sec.gov/news/press/98-110.txt>>.

⁹⁸ See *id.*

⁹⁹ Firms that were required to file Part I of the form and failed to do so pay a \$5,000 penalty. See *id.* Firms that were required to file both Parts I and II of the form and failed to file Part II (a narrative) pay \$15,000. See *id.* Firms that were required to file both Parts I and II of the form and filed neither part pay \$25,000. 19 of the 37 firms charged agreed to settlements offers, which consist of a cease-and-desist order, a censure, and a civil penalty. Fines from the settled cases total \$235,000. See *id.*

¹⁰⁰ *Id.*

its business, Issuer stock prices are likely to suffer.¹⁰¹ Shareholder suits are likely to follow, utilizing the Y2K Release in support of such suits by highlighting the discrepancies between Issuer statements in securities filings and actual Issuer preparations.¹⁰²

VII. CONCLUSION

31. The Y2K Release is not the first time the SEC has mandated the disclosure of forward-looking information. Prior to the Y2K Release, SEC implemented its policy regarding forward-looking information through the MD&A Release. In the Y2K Release, however, the SEC expands upon past SEC policy by requiring, in certain instances, disclosure of very specific information concerning a very specific problem; the Year 2000 computer problem. Thus, the SEC's policy of mandating forward-looking disclosure looks to continue into the next millennium. As more specific problems such as the Euro conversion problem begin to emerge, further SEC disclosure mandates will likely be forthcoming.

¹⁰¹ See Jinnett, *supra* note 83.

¹⁰² The Year 2000 Information and Readiness Disclosure Act (IRDA) protections for Year 2000 statements (as defined in IRDA) will not apply to such shareholder suits since such IRDA protections do not apply, for purposes of any action brought under the securities laws, to statements contained in any documents or materials filed with the SEC. See Year 2000 Information and Readiness Disclosure Act, Pub. L. No. 105-271, 112 Stat. 2388 (1998). IRDA, passed into law by Congress on October 19, 1998, establishes certain evidentiary safeguards for the disclosure and exchange of information relating to Year 2000 readiness. See *id.*