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**SEC OFFSHORE PRESS CONFERENCE SAFE  
HARBORS: LACK OF OBJECTIVITY LEADS TO  
UNCERTAINTY AND INEFFECTIVE  
RULEMAKING**

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## I. INTRODUCTION

The varied evolution of each country's securities markets may explain the unique restrictions and regulations of corporate publicity.<sup>1</sup> These differences lead to uncertainty in a company's ability to raise capital in both the U.S. market and foreign markets. The differences also lead to uncertainty in dealing with the media that cross these borders. Yet, corporations regularly cross borders to conduct business and raise capital.<sup>2</sup> The problem for foreign issuers is that publicity regulations in foreign countries are often more liberal than U.S. requirements.<sup>3</sup>

### A. Focus and Structure

This note addresses the special problems that arise when a foreign company simultaneously conducts an offering within the U.S. and in a foreign market: by which standards should the foreign company act? If the foreign company falls under U.S. standards, the question is: what may or may not qualify as an "offer" of securities?<sup>4</sup> The lack of clear answers to these questions have led foreign companies to exclude U.S. press from offshore press conferences and, in theory, to denying U.S. investors information about foreign issuers.<sup>5</sup>

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<sup>1</sup> See Troy L. Harder, *Searching For a Level Playing Field: The Internationalization of U.S. Securities Disclosure Rules*, 24 HOUS. J. INT'L L. 345, 355 (Winter, 2002) (noting that "[c]ultural and historical influences played a large part in shaping each country's regulatory structure").

<sup>2</sup> See LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 228 (4th Edition, 2004) (recognizing the internationalization of the securities market).

<sup>3</sup> *Id.*; see also Securities Offering Reform, Notice of Proposed Rules, Release No. 33-8501, 69 Fed. Reg. 67,392-67,487, at 67,399 (November 17, 2004) (hereinafter "Securities Offering Reform") (recognizing the "continuing trends toward globalization of securities markets and multinationalization of issuers and offerings increas[ing] the need for a regulatory framework that accommodates more flexible communications").

<sup>4</sup> See 15 U.S.C. § 77b(a)(3) (2004) (defining "offer").

<sup>5</sup> See Offshore Press Conferences, Notice of Proposed Rules, Release No. 33-7356, 61 Fed. Reg. 54,518 (October 18, 1996) (hereinafter "Offshore Press Conferences, Notice") (stating corporations tend to deny journalists access to press activities where there may be a question of whether their coverage of the event would cause the company to violate U.S. securities laws).

As a matter of policy, the U.S. Securities and Exchange Commission (“SEC”) attempts to facilitate foreign participation in U.S. capital markets and to decrease barriers to entry.<sup>6</sup> In 1997, the SEC took aim at foreign media activities and adopted the offshore press conference safe harbors (“Offshore Press Conference Safe Harbors”),<sup>7</sup> in part, to decrease a barrier foreign issuers faced and to increase the quality of disclosure to investors.<sup>8</sup> In Part II, this note provides an overview of the history of press activities regulation, the underlying policies affecting foreign issuers, and the requirements of the Offshore Press Conference Safe Harbors. In Part III, this note charts the development of the safe harbors from a no-action letter requested by Reuters to the rules ultimately adopted in October 1997. Part IV frames the safe harbors within the policy objectives the SEC intended to achieve and analyzes whether the safe harbors accomplished these goals.

## B. Overview

Well before 1997, the U.S. began considering the effects of the media’s coverage of securities offerings. Specifically, the Great Depression contributed to the U.S. government’s indirect regulation of news media coverage of securities.<sup>9</sup> Following the 1929 market collapse, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 to

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<sup>6</sup> See Roel C. Campos, *SEC Commissioner: Embracing International Business in the Post-Enron Era*, Address Before the Centre for European Policy Studies (June 11, 2003) (reaffirming the policy goal of welcoming foreign participation in U.S. markets) at <http://www.sec.gov/news/speech/spch0200461103rcr.htm>; see also Loss & Seligman, *supra* note 2 at 209-10 (covering the SEC’s balancing of its primary goal, investor protection, and “facilitating the free flow of capital among nations”) (footnote omitted).

<sup>7</sup> See *infra* Appendix A.

<sup>8</sup> See Offshore Press Conferences, Meetings with Company Representatives Conducted Offshore and Press Related Materials Released Offshore, Release No. 33-7356, Final Rules, 61 Fed. Reg. 53,948-53,955 (October 10, 1997) (hereinafter “Offshore Press Conferences, Final Rules”) (providing background on the offshore press conference safe harbors).

<sup>9</sup> See JOHN C. COFFEE, JR. & JOEL SELIGMAN, *SECURITIES REGULATION 2* (2003) citing H.R. REP. NO. 73-85, at 2 (1933) (referencing Congress’ belief of a causal connection between the stock market crash in October 1929 and the depression).

Regulation of the news media is indirect. Current laws govern when a company may disclose to the media information related to a securities offering and what information may be disclosed to regulate the information gathering processes. While the First Amendment prohibits any law that would abridge the freedom of the press, observers do not view the ultimate effect of these restrictions on media coverage of securities issues as First Amendment problems. *Id.* at 112, note b (reviewing the emergence of First Amendment issues in security regulation discussions).

protect investors.<sup>10</sup> Among the many new rules the legislation introduced covering the sale of securities, new registration requirements restricted companies from publicizing security offerings.<sup>11</sup> The new regulations required companies to register their offerings with the SEC before notifying the public and to limit the manner in which offers could be made to investors.<sup>12</sup> Corporations could no longer publicize offerings with impunity. The effect of these restrictions grew as the importance of the U.S. securities markets expanded beyond the country's borders.<sup>13</sup> U.S. purchasers hold over \$5.1 trillion in foreign securities.<sup>14</sup> Foreign holdings in U.S. securities exceed \$4.8 trillion.<sup>15</sup> As a result, foreign companies and news media must deal with U.S. securities regulations and its publicity restrictions.

During the late 1980s and early 1990s, international news organizations began reporting that corporations denied their journalists access to offshore press conferences.<sup>16</sup> Management feared inviting journalists to the press conferences would trigger U.S. securities registration requirements.<sup>17</sup> In 1996, Congress asked the SEC to address the issue.<sup>18</sup> The SEC responded with the offshore press conference safe harbors.<sup>19</sup>

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<sup>10</sup> See H.R. Rep. No. 85, 73d Cong., 1st Sess., 1-5 (1933); see generally JOHN KENNETH GALBRAITH, *THE GREAT CRASH* (Mariner Books 1979) (surveying events leading up to the October 24, 1929 market crash).

<sup>11</sup> See Securities Act of 1933, § 5, 15 U.S.C. § 77e (2004).

<sup>12</sup> *Id.*

<sup>13</sup> See LOSS & SELIGMAN, *supra* note 2, at 209 (4th Edition, 2004) citing 2002 Securities Industry Fact Book 78-82 (detailing the billions of dollars at stake in foreign participation in the U.S. securities market); see also Peter Lee, *SEC Rules Not OK*, *EUROMONEY* at 64 (July 1997) ("Writers of the Securities Act of 1933 could never have predicted how, over the years, the U.S. capital markets and foreign capital markets would become so closely linked").

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Reuters Holding PLC, SEC No-Action Letter, 1990 SEC No—Act. LEXIS 399 (March 6, 1990) (stating that it had "recently encountered" denied access). While it is unclear when the practice started, it is fair to mark the 1990 no-action letter as a maturation point for the issue. As one of the world's largest news distribution organizations, Reuters serves as an accurate indicator. *Id.* It is fair to speculate that the practice most likely was not widespread prior to Reuters' letter to the SEC. See Lee at 64 (detailing access problems by U.S. press) *supra* note 13.

<sup>17</sup> See Offshore Press Conferences, Final Rules *supra* note 8, at 53,949.

<sup>18</sup> See 15 U.S.C. § 77e (2004); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 109, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.) (1996).

<sup>19</sup> See Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related materials released offshore, 17 C.F.R. 230.135e (2004); Rule 902 (c)(3)(vii), Directed selling efforts safe harbor, 17 C.F.R. 230.902 (2004); Scope of and definitions applicable to Regulations 14D and 14E, 17 C.F.R. § 240.14d-1, at 248-49 (2004); Appendix A; see also Offshore Press Conferences, Final Rules,

However, the purported safe harbors failed for several reasons. Most importantly, the safe harbors failed in their primary objective of bringing certainty to foreign issuers. To provide more certainty in the capital-raising process, the SEC intended to provide more objective standards to ease concerns.<sup>20</sup> Instead, the safe harbors call attention to the subjectivity of U.S. securities regulation. The SEC also invited abuse and uncertainty from its position regarding exclusive interviews with the press. For the foreign issuers, these factors, individually and collectively, continue to weigh against granting U.S. journalists access to corporate media events. Given the safe harbors' failure, the SEC would have to formulate broader regulatory changes, instead of attempting to bring about improvements through its administrative rule-making abilities. Broader regulatory changes would have to overcome the regulatory structure that has developed since Congress adopted the 1933 and 1934 securities acts.

## II. REGULATING CORPORATE PRESS ACTIVITIES

Understanding the effectiveness of the offshore press conference safe harbors depends on placing the rules within the context of U.S. regulation of corporate publicity and foreign securities offerings. In the next section, this note provides an overview of U.S. securities regulations affecting corporate dealings with the press, policies shaping regulation of foreign issuers, and the offshore press conference safe harbors adopted by the SEC.

### A. U.S. Securities Regulations and Publicity

#### 1. Registration and Prospectus Requirements

Federal regulation of securities<sup>21</sup> in the U.S. began after the 1929 stock market crash associated with the Great Depression.<sup>22</sup> Investors and the government attributed the crash to manipulation by insiders.<sup>23</sup> Federal regulators sought to re-invest public trust in the securities system by requiring the disclosure of corporate information.<sup>24</sup> Specifically, Section 5(b) ("prospectus requirement") of the Securities Act made it unlawful for any person to offer securities except through a prospectus.<sup>25</sup> Likewise, Section 5(c) ("registration requirement") made it unlawful for any

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*supra* note 8, at 53,950-53,953 (providing background on the offshore press conference safe harbors).

<sup>20</sup> See Offshore Press Conferences, Final Rules *supra* note 8, at 53, 950-51.

<sup>21</sup> For the definition of "securities" see 15 U.S.C. § 77b(a)(1) (2004) (defining "security").

<sup>22</sup> See COFFEE & SELIGMAN, *supra* note 9 and accompanying text.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2 (listing consumer protection as its first factor in justifying federal securities regulation).

<sup>25</sup> *Id.*

person to make an offer of securities without first filing a registration statement with the SEC.<sup>26</sup>

Unfortunately, the prospectus requirement conflicts with the registration requirement.<sup>27</sup> On one hand, a company must follow a complicated and costly process of disclosing information to the public about itself and the securities it offers.<sup>28</sup> In addition, the company may only disclose information through limited channels and may not use the media to stir up interest in the offering.<sup>29</sup> These opposing rules result in the SEC's contradicting policies: praising publicity as evidence of voluntary corporate disclosure and condemning publicity as evidence of attempts to take advantage of the investing public.<sup>30</sup>

## 2. Conditioning the Market

Market conditioning occurs by publicizing a planned stock offering before filing the registration statement.<sup>31</sup> Such publicity qualifies as an offer made in violation of the registration requirement.<sup>32</sup> Likewise, publicity efforts conducted by the company's underwriters or public relations firm would place the stock offering in peril.<sup>33</sup> Even after filing the registration statement, the SEC monitors a company's press activities to make sure it does not "hype" the offering or make improper offers through the press without the use of a prospectus.<sup>34</sup>

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<sup>26</sup> See Securities Act of 1933, Section 5, 15 U.S.C. § 77e (2004).

<sup>27</sup> See Eric A. Chiappinelli, *Gun Jumping: The Problem of Extraneous Offers of Securities*, 50 U. PITT. L. REV. 457, 469 (1989) (noting the fundamental conflict between disclosure and the restrictions on "extraneous offers"); *but see* Securities Act Release No. 5180, Guidelines for the Release of Information By Issuers Whose Securities Are In Registration, Securities and Exchange Commission 36 FR 16506 (August 16, 1971) (suggesting that the contradiction is "more apparent than real").

<sup>28</sup> See 15 U.S.C. § 77e (2004) (Section 5 registration requirement).

<sup>29</sup> See Publication of Information Prior to or After the Effective Date of a Registration Statement, Securities and Exchange Commission, Securities Act Release No. 33-3844, 22 FR 8359, 5-6 (October 8, 1957) (hereinafter "Securities Act Release No. 33-3844") (discussing publicity and securities regulation).

<sup>30</sup> Compare Securities Act Release No. 33-3844 (suggesting that the SEC should encourage the trend towards corporate voluntary disclosure of information to the public) *supra* note 29 with *In Re Carl M. Loeb, Rhodes & Co.*, 38 S.E.C. 843, 850 (1959) (stating that "publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities").

<sup>31</sup> See 15 U.S.C. § 77e(c) (2004) (making it unlawful for "any person" to make an offer of securities without registering it with the SEC).

<sup>32</sup> *Id.*

<sup>33</sup> See 15 U.S.C. § 77d(1) (2004) (extending the requirements of Section 5 to issuers, underwriters, and dealers).

<sup>34</sup> See 15 U.S.C. § 77e(b) (2004) (allowing only offers made through a prospectus, as defined in Section 10).

The securities policy aims to prevent companies from influencing investor decisions before the release of adequate information.<sup>35</sup> Curbing publicity before and after the company releases its registration statement<sup>36</sup> prevents investors from rushing to judgment on an investment decision.<sup>37</sup> The process of releasing information is separated into distinct periods. During the “pre-filing period,” companies often release only the barest amount of information. Then, during the “waiting period,” the SEC reviews the registration statement for several months until it deems the registration effective.<sup>38</sup> Companies retain more discretion as to the amount of publicity for the offering during the waiting period.<sup>39</sup> Consistent with the Securities Act, a company may make offers to sell its securities through a prospectus.<sup>40</sup> A company receives increased flexibility in how it may publicize its offering as it discloses more and more information at each step of the process.<sup>41</sup>

Publicizing a securities offering may carry costly penalties including administrative sanctions,<sup>42</sup> civil liabilities,<sup>43</sup> judicial remedies,<sup>44</sup> and criminal penalties.<sup>45</sup> If the publicity violates the registration and prospectus requirements, the SEC may delay a company’s offering or prohibit it alto-

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<sup>35</sup> See generally Chiappinelli, *supra* note 27.

<sup>36</sup> See 15 U.S.C. § 77g (2004) (detailing the information required in a registration statement).

<sup>37</sup> See *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2nd Cir. 1970) (citing the evils of premature offers).

<sup>38</sup> See 15 U.S.C. § 77f (2004) (registering securities).

<sup>39</sup> 15 U.S.C. § 77e(b) (2004) (the prospectus-offer requirement); see also Chiappinelli, *supra* note 27, at 466-67 (grouping gun jumping and prospectus delivery violations together as “extraneous offers”).

<sup>40</sup> *Id.*

<sup>41</sup> See Shelf Registration, Release Nos. 33-6499; 34-20384; 35-23122 (November 23, 1983) (easing disclosure requirements for companies subject to reporting requirements).

<sup>42</sup> See Securities Act Release No. 33-3844, *supra* note 29.

<sup>43</sup> See 15 U.S.C. § 77l(a)(1) (2004) (creating strict liability for violation of the Section 5 registration requirement).

<sup>44</sup> See 15 U.S.C. § 77t(a) (2004) (giving the SEC power to bring a cause of action against a company in violation of securities regulations).

<sup>45</sup> See 15 U.S.C. § 77x (2004) (maximum of \$10,000 and 5 years imprisonment for each violation).

gether.<sup>46</sup> Given the sensitive market timing element of raising capital, a delay in the offering may block the offering entirely.<sup>47</sup>

### 3. Defining “Publicity”

Publicity is a non-technical term. It is not defined in any of Congress’ securities acts or the SEC’s regulations. In addition, the SEC declines to issue a general policy defining the term “publicity.”<sup>48</sup> Instead, the SEC utilizes the definitions of “offer,” “prospectus,” and the limited safe harbors to explain the term “publicity.”<sup>49</sup> Using publicity as an analog to an “offer,” a general rule on publicity might state that publicity of an unregistered offering is prohibited unless it falls within one of the exemptions to registration.<sup>50</sup> Publicity not couched as an express offer may violate the Section 5 registration requirement.<sup>51</sup> Likewise, publicity

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<sup>46</sup> See 15 U.S.C. §§ 771(a)(2), 77q(a) (2004) (relating to both oral and written material misstatements and omissions in the offer and sale of securities). For example, in May, 2004 the SEC delayed the initial public offering of Salesforce.com following impermissible violations of the “quiet period.” See John Paczkowski, *Salesforce.com CEO to be released from basement following IPO*, THE SAN JOSE MERCURY NEWS’ SILICONVALLEY.COM (May 20, 2004) available at <http://www.siliconvalley.com/mld/siliconvalley/business/columnistgmsv/8714010.htm>.

<sup>47</sup> See generally David Champion, *Too Soon to IPO?*, HARVARD BUSINESS REVIEW (February 2001) (a case study emphasizing importance of timing a public offering).

<sup>48</sup> See Oil and Gas Investor, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2788 September 9, 1983) (pointing the requesting company to the definitions of “offer” and “prospectus”).

<sup>49</sup> *Id.*

<sup>50</sup> The general rule is that an offer or sale made for an unregistered security offering is a violation of Section 5 of the Securities Act, unless it falls within an exemption. See 15 U.S.C. § 77e (2004) (Section 5 registration requirement).

<sup>51</sup> See Statement of the Commission relating to publication of information prior to or after the effective date of a registration statement, Securities Act Release No. 33-3844, 22 Fed. Reg. 8359 (Oct. 24, 1957) *supra* note 29 (discussing publicity and securities regulation).

In 1957, the SEC stated in a release that, “It apparently is not generally understood, however, that the publication of information and statements, and publicity efforts, generally, made in advance of a proposed financing, although not *couched* in terms of an express offer, may in fact contribute to *conditioning* the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises a serious question together the publicity is not in fact part of the selling effort.” [emphasis added]. *Id.*; see also In Re Loeb, *supra* note 30, at 852 (stating that “publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities”).

In 1985, the SEC’s general counsel reaffirmed the statement about offers not “couched in terms of an express offer.” See J. Robert Brown, Jr., *Corporate Communications and the Federal Securities Law [Part 2 of 2]*, 53 GEO. WASH. L. REV.



conducted after filing the registration may be problematic.<sup>52</sup> As stated, the SEC provides little guidance on what publicity would qualify as an improper offer.<sup>53</sup> In fact, the only express mention of “publicity” in the Securities Act or the Exchange Act is in the Securities Act Section 17, an antifraud statute.<sup>54</sup>

The definitions of offer and prospectus are broad. An offer includes “every attempt or offer to dispose of, or solicitation of an offer to buy a security interest.”<sup>55</sup> An offer may include any attempt to stimulate investor interest in an offering.<sup>56</sup> A prospectus is “any notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale.”<sup>57</sup> For the purposes of Section 5(b)’s requirement that any offer be made through a prospectus during the waiting period, the prospectus must meet the requirements of Section 10 of the Securities Act.<sup>58</sup> The defining element of a prospectus under Section 10 is that it has been filed with the registration submitted to the SEC.<sup>59</sup> A communication could look like a prospectus but it may nonetheless violate Section 5(c) because a registration statement has not been filed or violate Section 5(b) because it does not meet the Section 10 prospectus requirements.<sup>60</sup>

The Securities Act’s broad definitions and Section 5’s strict requirements lead to a combined objective and intent-based subjective test to identify improper publicity.<sup>61</sup> Publicity may be an improper offer where the company intends to “stimulate the appetite for securities” – a subjec-

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741, 810 n. 321 (1985), *citing* SEC v. Arvida Corp., 169 F. Supp. 211, 215 (S.D.N.Y. 1958) *and* Securities Act Release No. 33-3844 at 5-6, *supra* note 29.

<sup>52</sup> See Securities Act Release No. 33-3844, *supra* note 29.

<sup>53</sup> *Id.*

<sup>54</sup> See 15 U.S.C. § 77q (2004) (stating that “It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof”).

<sup>55</sup> See 15 U.S.C. § 77b (2004).

<sup>56</sup> See Securities Act Release No. 5180, *supra* note 27, at 80,579 (“the publication of information and statements, and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer in violation of the Act”).

<sup>57</sup> See 15 U.S.C. § 77b (2004).

<sup>58</sup> 15 U.S.C. § 77j (2004).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *In Re Loeb*, *supra* note 30, at 854, n. 21 (denying a need to show specific intent by also requiring that defendant “to have known what they were doing” and that the publicity was intentional).

tive inquiry into the intent of the offeror.<sup>62</sup> At the same time, Sections 5(b) and (c) contain objective criteria.<sup>63</sup> Under 5(b), either a communication has been filed as a prospectus or it has not.<sup>64</sup> Under 5(c) either a registration has been filed or it has not.<sup>65</sup> It follows that if the SEC determines that a company intended to make an offer through publicity,<sup>66</sup> it would violate either Section 5(b) or (c), depending on whether a registration statement had been filed.<sup>67</sup> For the SEC to find a violation there is no requirement that the publicity mention the proposed or planned securities offering.<sup>68</sup>

#### 4. Safe Harbors

Despite the limits on corporate communications, the SEC encourages voluntary disclosure.<sup>69</sup> During the registration period, the SEC encourages companies to respond to inquiries from the press, but not to initiate publicity.<sup>70</sup> The SEC even allows a company to maintain its flow of normal news unrelated to the securities offering if it is "consistent with the objectives of disclosure to the public which underlies federal securities laws."<sup>71</sup>

The SEC's Rule 134 under the Securities Act of 1933 provides safe harbors for certain communications not deemed to be a prospectus.<sup>72</sup> It provides safe harbors for brief press releases announcing the planned offering, tombstone advertisements, and other informational statements.<sup>73</sup> The prospectus safe harbors relate more to advertising than to dealings with press publicity.<sup>74</sup>

Sections 3 and 4 of the Securities Act and the SEC rules promulgated under them provide other exemptions from registration. The exemptions cover areas in which there is less of a perceived need to protect investors.

<sup>62</sup> *Id.*

<sup>63</sup> *See* 15 U.S.C. § 77e (2004).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See*, Securities Act Release No. 33-3844 at 5-6 (discussing publicity and securities regulation) *supra* note 29.

<sup>68</sup> *Id.*

<sup>69</sup> *See* Securities Act Release No. 33-3844 at 9 (suggesting that the SEC should encourage the trend towards corporate voluntary disclosure of information to the public) *supra* note 29.

<sup>70</sup> *Id.*; *see also* Securities Act Release No. 5180 *supra* note 27 (recommending no initiation of publicity during registration period).

<sup>71</sup> *See* Publication of Information Prior to or After the Filing and Effective Date of a Registration Statement Under the Securities Act of 1933, Securities Act Release No. 5009, 34 FR 16870 (October 7, 1969) *citing* In Re Carl M. Loeb, *supra* note 30.

<sup>72</sup> *See* 17 C.F.R. 230.134 (2004).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

For example, a private offering to sophisticated investors may not require registration.<sup>75</sup> The private offering may qualify for the limited private offering exemption of Regulation D. Likewise, under the assumption that state law provides adequate protection, an offering made only within a single state may not require the restrictions federal law requires.<sup>76</sup>

Publicity connected to business combinations and tender offers may also receive special safe harbor.<sup>77</sup> The SEC's Rules 165 and 166 enable an acquirer to release critical deal information before filing the registration statement.<sup>78</sup> The preliminary note to Rule 165, however, gives clear warning that publicity deemed to condition the market would not fall within the business combination safe harbor.<sup>79</sup>

The safe harbors from registration do not focus on whether a company has publicized the offering. Instead, the safe harbors focus on the public's need for information.<sup>80</sup> Under an inquiry focusing on the public's disclosure needs, publicity may take an offering outside of a possible safe harbor because the publicity may lead investors to an offering for which little, if any, of the information required by the SEC has been disclosed.<sup>81</sup> Additionally, publicity may disqualify the issuer from falling within an exemption or a safe harbor. For example, under the safe harbor, an issuer may only offer securities to qualified institutional investors. Publicizing the transaction would effectively extend the offer beyond the qualified investors to a media outlet's entire audience and bring the transaction outside of the safe harbor.<sup>82</sup> Publicizing the offering would, in effect, stir up interest in the offering among non-qualified institutional investors – the public – to whom information has not been disclosed.

##### 5. An Aggravating Element

The SEC finds impermissible certain publicity accompanied by aggravating factors. These aggravating factors may include publicity plus dis-

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<sup>75</sup> See 17 C.F.R. 230.501-508 (2004) (limited offering exemptions and accredited investors).

<sup>76</sup> See 15 U.S.C. § 77c(a)(12)(A)(vii) (2004) (exempting intrastate offerings from registration). See generally Exemption for Certain California Limited Issues, Release No. 33-7185 (July 10, 1995) (reasoning California state law provided adequate protection to investors).

<sup>77</sup> See 17 C.F.R. §§ 230.145, 230.165, 230.166 (2004).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See generally Regulation D - Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933, 17 C.F.R. 230.501-508 (2004).

<sup>81</sup> "Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio" qualifies as a general solicitation taking an offering outside of Regulation D's safe harbors. See 17 C.F.R. 230.502(c)(1) (2004).

<sup>82</sup> See 17 C.F.R. 230.144A (2004) (private reselling of securities to institutions).

closure of information not included in a prospectus, forward looking statements, failure to file a registration statement, or fraudulent statements, to name a few.

First, in the case of WebVan, a privately held online grocery store, the SEC delayed the company's offering.<sup>83</sup> The SEC punished WebVan for making an illegal offer by discussing a planned securities offering with institutional investors.<sup>84</sup> During a period of investor fixation on dot-com companies, WebVan held an institutional investor-only conference during its waiting period.<sup>85</sup> News stories appeared containing information discussed during the conference.<sup>86</sup> However, the prospectus filed by WebVan did not contain such information.<sup>87</sup> As a result, the SEC delayed the company's offering.<sup>88</sup>

In another example, the SEC delayed Salesforce.com's public offering after its chief executive, Marc Benioff, provided an interview to the New York Times.<sup>89</sup> Although Mr. Benioff did not comment on the pending public offering during the quiet period, his comments qualified as offers made to the public.<sup>90</sup> The SEC found impermissible even general comments about the company's business prospects and competitor.<sup>91</sup>

In another case, the SEC obtained an injunction against the Arvida Corporation for a press release issued in violation of the registration requirements.<sup>92</sup> Arvida's underwriter, Loeb, Rhodes & Co., distributed a press release to the media and wire services before the company filed a registration statement.<sup>93</sup> The release contained information about the underwriter, the amount of the capital to be raised, and a profile of Arvida's assets.<sup>94</sup> The press release also failed to disclose the extent to which Arvida's property had been mortgaged.<sup>95</sup>

Publicity accompanied by aggravating elements may also occur during tender offers.<sup>96</sup> If the acquiring company issues new shares to effect its

<sup>83</sup> See George Anders & Robert Berner, *WebVan to Delay IPO in Response to SEC Concerns*, WALL ST. J., Oct. 7, 1999, at C16 (disclosure during road-show presentations picked up by media, violation of prospectus requirement).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See Paczkowski, *supra* note 46.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See *In Re Loeb*, *supra* note 30, at 850; see also *SEC v. Arvida*, *supra* note 51 (obtaining a permanent injunction against the underwriters).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *Chris-Craft v. Bangor Punta*, *supra* note 37 (dealing with a registration violation in a stock-for-stock tender offer).

tender offer for the target company shareholder's shares, the offer must comply with the procedural requirements of the Williams Act.<sup>97</sup> For example, following completion of a tender offer negotiation, Piper Aircraft Corporation and Bangor Punta Corporation issued a press release.<sup>98</sup> The press release positioned the tender offer in positive light and stated that the two companies intended to file a registration statement with the SEC.<sup>99</sup> Chris-Craft, after failing in its bid for Piper, sought to enjoin the companies from executing the proposed offering, claiming it violated the registration requirements of Section 5(c).<sup>100</sup> The court agreed that the announcement qualified as an offer and, in the absence of a registration statement, violated Section 5(c)'s registration requirement.<sup>101</sup>

Publicity containing forward looking statements may also give the SEC reason to halt a company's offering. For example, if a company issues a series of press releases either before or after filing its registration statement that contain forecasts and other data which the SEC would not allow in a valid prospectus, the SEC will likely find a violation of the prospectus-delivery requirement.<sup>102</sup> The forward looking statements would qualify as offers made without a prospectus.<sup>103</sup>

Each of these examples contains an offer plus some other aggravating element. In WebVan's case, a permissible road show communication turned into an impermissible communication when the company provided select investors with information not in the prospectus and the media reported on it.<sup>104</sup> In the case of Arvida, distribution of the press release coincided with failure to file a registration statement and the absence of material information on the extent to which the company's property had been mortgaged. Piper Aircraft Corporation and Bangor Punta Corporation had good faith intentions of complying with registration requirements, but the court determined that the violation occurred because the companies placed values on their offerings that the investing

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<sup>97</sup> See Note, *Preregistration publicity in an Exchange Offer*, 119 U. PA. L. REV. 174 (1970).

<sup>98</sup> See *Chris-Craft v. Bangor Punta*, *supra* note 37 (citing the evils of premature offers).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Securities Act Release No. 3844, *supra* note 29, at 8360 (providing a hypothetical example); see also *Liability for Certain Statements by Issuers*, 17 C.F.R. 230.175(c) (2004) (defining "forward-looking statement").

<sup>103</sup> *Id.*

<sup>104</sup> See *Selective Disclosure and Insider Trading*, Release Nos. 33-7787, 34-42259, note 11 (December 20, 1999) (citing the need for a cooling period after WebVan's selective disclosure to analysts during the road show); see also Andres Rueda, *The Hot IPO Phenomenon and The Great Internet Bust*, *FORDHAM J. CORP. & FIN. L.* 21, 64, note 283 (2001) (emphasizing WebVan as an example of SEC's actions against selective disclosure).

public could not verify through information available on file with the SEC.

The aggravating element is more difficult to identify in the Salesforce.com situation. Benioff's history of outlandish publicity may have provided the aggravating element that tainted the publicity and put the SEC on notice.<sup>105</sup> It is reasonable to suspect that the SEC follows repeat offenders more closely than issuers without a colored record. The past publicity, however, did not pique the interest of the SEC. The better explanation is that Benioff failed in his attempt to satisfy the securities law in one breath while promoting the company in another breath. Salesforce.com may signal a move by the SEC to more vigorously police general corporate publicity preceding a public offering.

## 6. General Publicity

"General publicity"<sup>106</sup> causes concern for foreign issuers because of the difficulty in determining its consequences.<sup>107</sup> Publicity that merely generates general awareness of the company may technically qualify as an illegal offer.<sup>108</sup> Additionally, publicizing the release of new products or customer wins, even without direct reference to a planned stock offering, may affect an investor's disposition.<sup>109</sup> Uncertainty flows from standards

<sup>105</sup> *Id.*

<sup>106</sup> Offers may be grouped into four categories. The categories include: (i) offers discussing the securities to be offered; (ii) offers in which the company discusses its need for raising funds; (iii) offers expressing a company's intent to raise capital in the near future; and (iv) offers that increase general awareness of the company in the marketplace. The first three categories are most easily identified and, hopefully, avoided. "General publicity" falls within the fourth category. *See* Chiappinelli, *supra* note 27, at 468 (categorizing offers by content).

"General publicity" may also fall within the SEC's current definitions of "continuing ongoing business communications" and "regularly released factual business information." *See* Securities Offering Reform, *supra* note 3, at 67401 (discussing proposed safe harbors for this type of business communications). The author chooses a non-legal, almost colloquial, term so as to avoid any of the current debate surrounding the purported rules under the Securities Offering Reform release. *Id.*

<sup>107</sup> Foreign issuers are not the only issuers concerned with the uncertainty caused by business communications surrounding offerings. The uncertainty affects all issuers. Currently, the SEC has proposed safe harbors under review that may provide more certainty to issuers conducting normal business communications during time periods surrounding securities offerings. *See* Securities Offering Reform, *supra* note 3.

<sup>108</sup> *See* Securities Offering Reform, *supra* note 3, at 67401 (discussing the SEC's concern with "eliminat[ing] [Section 5] requirements that can interrupt unnecessarily an issuer's normal and routine communications into the market while an issuer is engaging in a securities offering").

<sup>109</sup> *See generally* Barbara Heffner, *IPO PR: Making the Most of a 'Quiet Period'*, ADWEEK MAGAZINE'S TECHNOLOGY MARKETING, May 1998 at 56, 57 (emphasizing the importance of releasing information about factual product developments).

that look to the effects of corporate communications, not their substance.<sup>110</sup>

Determining the effect of general publicity may require analysis of corporate motives for generating publicity.<sup>111</sup> Investor relations and public relations experts suggest that companies should create investor demand well before the start of the registration process.<sup>112</sup> Experts cite the importance of establishing a publicity track record to maintain a high level of communications post-registration after the quiet period begins.<sup>113</sup>

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<sup>110</sup> See *In Re Carl M. Loeb*, *supra* note 30, at 850 (stating that “publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities”).

<sup>111</sup> The author’s logic is that it is easier to see the uncertainty surrounding general publicity efforts if communications and investor relations practitioners suggest that there is a corporate motive to generate investor awareness through general publicity.

<sup>112</sup> See RICHARD M. ALTMAN, *CREATING INVESTOR DEMAND FOR COMPANY STOCK: A GUIDE FOR FINANCIAL MANAGERS* 67, 109 (1988) (suggesting that the successful fundraising efforts in the early 1980s depended on corporate success in the 1970s); *see also id.* at 109 (stating that “pre-valuation spadework lays the foundation for a valuation network and market sponsorship in the aftermarket”); *id.* at 109 (framing an initial public offering as “an ideal public relations opportunity”).

From a communications perspective, some investor relations experts suggest that stock is akin to a company’s new product. See Kay S. Breakstone, *Communications: Linking World Financial Markets*, printed in RICHARD JAY COYLE (EDITOR), *THE MCGRAW-HILL HANDBOOK OF AMERICAN DEPOSITORY RECEIPTS* 314 (New York, 1995). The process of preparing the market for product availability is analog to preparing the market for a securities offering. *Id.* If an offering comes under scrutiny such an analogy may present fodder for finding improper market conditioning.

Even a company’s name may by itself trigger investor interest. *Id.* at 349 (citing certain suffixes that developed as symbols of explosive growth during the “hot market” in the early 1970s). Other experts are less theoretical about the intended effects of a company’s communications, however generic, with potential investors. See James B. Arkebauer, *GOING PUBLIC* 93 (Dearborn Financial Publishing, Inc., 1998) (stating the goal of financial public relations is to influence the investor to buy the company’s stock). Many experts suggest establishing and executing a publicity strategy well before the registration process begins. *Id.* at 98 (suggesting the importance of an early relationship with an investor relations firm); *see also* Edward O. Raynolds, *Going Public*, Issue 4, volume 37 *THE PUBLIC RELATIONS JOURNAL* 19, 21 (April, 1981) (advising emerging companies with the prospects of an initial public offering to initiate a public relations program immediately).

<sup>113</sup> See Carol A. Ruth & Robert C. Hubbel, *Communicating in the New-Issue Market*, Issue 40 *PUB. REL. J.* 33, 33-34 (1984) (emphasizing the need to establish a level of communications before registration that the company may continue through the registration process so that it can continue to get its messages out to investors); *see also* Edward O. Raynolds, *Going Public*, Issue 4, volume 37 *THE PUBLIC RELATIONS JOURNAL* 19, 21 (April, 1981) (citing the need to have a track record of publicity before entering the initial public offering process); *see also* William Braznell, *A Guide to Investor Relations for Emerging Companies*, Issue 6, volume 50 *THE PUBLIC RELATIONS JOURNAL* 26 (June, 1994) (referring to the executive who organizes an

In an offer-based regulatory structure, the problem is that this publicity aims to generate credibility and provide a foundation for a future offering.<sup>114</sup> The communications could fit within the broad definition of an offer as any communication or attempt to offer or sell stock.<sup>115</sup>

In practice, general publicity only provides regulators and judges slight reason for alarm. General publicity without more usually lacks evidence of intent to stir-up interest in an offering.<sup>116</sup> General publicity focused on product marketing usually provides investors with no fraudulent information.<sup>117</sup> Such communications lack the aggravating elements found in the WebVan, Arvida, and Piper Aircraft cases. The simple view is that general publicity is a product of the corporation's efforts to build its brand and educate its customers on product offerings, not the result of a systematic approach to promoting a current or future offering.<sup>118</sup>

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investor relations plan months before going public as "fortunate"); *but see* Barbara Heffner, *IPO PR: Making the Most of a 'Quiet Period'*, *ADWEEK MAGAZINE*' TECHNOLOGY MARKETING 56, 57 (May 1998) (distinguishing between publicity during the pre-filing period of corporate executives as potentially impermissible attempts to stimulate investor interest and press releases about factual product developments).

<sup>114</sup> Corporate publicity may fall within the umbrella of "propaganda." However, in a technical sense, it is questionable if it would. Assuming corporate publicity falls within the realm of propaganda, its goal, by definition, would be to drive persons to take action – both the customer to buy the product and the investor to buy the securities. *See* JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES* at xiii (1973 ed. Random House, Inc. & Random House of Can. Ltd. 1973) (1968) (stating the goal of propaganda is to cause individuals to take action). If corporate publicity's main goal were to induce action, any issuer's non-product-related publicity could qualify as an attempt to induce purchasers to buy securities.

<sup>115</sup> *See* 15 U.S.C. § 77b(a)(3) (2004).

<sup>116</sup> *Compare* the concept of "general publicity" with the actions action taken by WebVan, Arvida, and Loeb discussed above.

<sup>117</sup> *See* Publication of Information Prior to or After the Filing and Effective Date of a Registration Statement Under the Securities Act of 1933, *supra* note 71. In the ordinary course of business, an enterprise must primarily communicate its product offerings to potential customers before reaching out to the public capital markets. Business communications may depart from such reasoning during bubble periods when observers speculate that investors need only a reason to invest. *See* JOHN KENNETH GALBRAITH, *THE GREAT CRASH* xvii (50th Anniversary Edition, 1979) (warning that "[n]either regulation nor memory is a perfect protection against the will to delude one's self or others").

<sup>118</sup> *See supra* note 112 and accompanying text.



## B. U.S. Regulation of Foreign Securities Offerings

### 1. Territoriality

The SEC's regulation of foreign corporate publicity falls under a territoriality policy.<sup>119</sup> When a foreign company makes an offering within the U.S., the foreign company must follow the U.S. securities laws.<sup>120</sup> Even if the foreign company conducts an offering solely in non-U.S. markets, antifraud and other provisions of U.S. securities laws may apply.<sup>121</sup> The courts and SEC use an "effects test"—namely, whether the acts conducted in non-U.S. markets will affect U.S. investors—to determine whether a fraudulent act falls under the U.S. securities laws.<sup>122</sup>

### 2. Lowering Barriers to Entry

A foreign company's publicity activities receive different treatment from the SEC than publicity by a domestic company.<sup>123</sup> The SEC justifies

<sup>119</sup> See Regulation S - Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933, 17 C.F.R. 230.901-908 (2004) (codifying territorial application of registration provisions); see also *Offshore Offers and Sales*, Securities Act Release No. 33-6863, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,665 (Apr. 24, 1990) (continuing a territorial application of antifraud provisions); *Id.* (including comity and the territorial approach to the application of Section 5); see also *Facilitation of Multinational Securities Offerings*, Securities Act Release No. 6568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743, at 87,319 (Feb. 28, 1985).

"Territoriality is a fundamental basis for jurisdiction under both international law [. . .] and the foreign relations law of the United States." *Id.*, note 19 (citing D. Greig, *INTERNATIONAL LAW* 210, 214 (2d ed. 1976)); see also 3RD RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); RESTATEMENT FOREIGN RELATIONS LAW OF THE UNITED STATES § 10 (1965); ALI FED. SEC. CODE § 905, Comments 3(b), 4 (1980); see also W. BISHOP, *INTERNATIONAL LAW* 535 (1962).

<sup>120</sup> Requiring foreign companies to comply with U.S. standards when making an offering within the U.S. falls under a policy of "national treatment." See Robert S. Karmel & Mary S. Head, *Barriers to Foreign Issuer Entry into U.S. Markets: Symposium on Managing Economic Interdependence*, 24 *LAW & POL'Y INT'L BUS.* 1207 at 1207-1209 (June 22, 1993) (outlining the various approaches to regulating cross-border transactions).

<sup>121</sup> See Preliminary Note 1 and 3, Regulation S, 17 C.F.R. 230.901-904 (2004); see also *Offshore Offers and Sales*, *supra* note 119 (Regulation S "does not limit the scope or extraterritorial application of the antifraud or other provisions of the federal securities laws or provisions of state law relating to the offer and sale of securities").

<sup>122</sup> See *Offshore Offers and Sales*, *supra* note 119 (writing that "[t]he antifraud provisions have been broadly applied by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs within the United States [. . .] or the conduct occurs outside the United States but has a significant effect within the United States or on the interests of U.S. investors[.]").

<sup>123</sup> See Robert S. Karmel & Mary S. Head, *Barriers to Foreign Issuer Entry into U.S. Markets: Symposium on Managing Economic Interdependence*, 24 *LAW & POL'Y*

the difference because of the need to lower barriers to foreign companies accessing the U.S. markets.<sup>124</sup> Increasing foreign participation in domestic markets is a recognized policy initiative.<sup>125</sup> Safe harbors provide fallback positions for foreign issuers when one of the general safe harbors also provided to U.S. companies are either not available or desirable.<sup>126</sup>

Regulation S, for example, provides that an offering conducted outside the U.S. need not file a registration statement with the SEC.<sup>127</sup> In its preface notes, Regulation S gives assurances that nothing “precludes access by journalists for publications with general circulation in the U.S. to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed.”<sup>128</sup> The note presumptively removes such press conferences from the definition of direct selling efforts.<sup>129</sup> A qualifier in the note, however, limits the presumption to activities not intended to induce the purchase of securities by persons in the United States.<sup>130</sup> In limited circumstances, U.S. investors may participate in an offshore offering without triggering registration requirements.<sup>131</sup> The concept of direct selling efforts follows an analysis of whether an issuer intended to stir up interest among U.S. residents.<sup>132</sup> Furthermore, the safe harbor may not be available for an offer made offshore to U.S. citizens or members of the armed forces.<sup>133</sup>

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INT’L BUS. 1207 at 1207-1209 (June 22, 1993) (covering the different treatment foreign issuers receive in the U.S.).

<sup>124</sup> See LOSS & SELIGMAN, *supra* note 2, and accompanying text.

<sup>125</sup> *Id.*

<sup>126</sup> See Julie L. Kaplan, “Pushing the Envelope” of the Regulation S Safe Harbors, 44 AM. U.L. REV. 2495, 2525-26 (Summer, 1995) (recognizing the residual nature of the issuer-distributor safe harbor).

<sup>127</sup> See 17 C.F.R. 230.901 (2004).

<sup>128</sup> See Preliminary Note 7, Regulation S (offshore press conferences), *supra* note 119.

<sup>129</sup> See 17 C.F.R. 230.902(c) (2004) (defining “direct selling efforts” as “any activity undertaken for the purpose of, or that could be reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S[.] [. . .] Such activity includes placing an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S”).

<sup>130</sup> See Regulation S (offshore press conferences), *supra* note 119

<sup>131</sup> A foreign company may fall under the safe harbor from registration even if U.S. investors participate, except if the U.S. investor participation results from directed selling efforts. See 17 C.F.R. § 230.902(c) (2004) (defining “directed selling efforts” as “any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered”).

<sup>132</sup> See 17 C.F.R. 902(c) (2004).

<sup>133</sup> See Rule 902(h)(2), Regulation S, 17 C.F.R. 230.902(h)(2) (1990) (removing “identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces” from the definition of “offshore transaction”).

Foreign companies offering securities within in the U.S. may receive safe harbor from the registration requirements under the resale exemption of Rule 144A.<sup>134</sup> The rule allows for resale of securities to qualified institutional investors.<sup>135</sup> The theory is that because of their sophistication and power, the institutional investors do not need the same protection that the registration requirement offers the public.<sup>136</sup>

### 3. Broad Regulatory Power

The SEC retains broad discretionary power.<sup>137</sup> It may grant exemptions case-by-case or comprehensively.<sup>138</sup> Congress conferred to the SEC the broad power to create exemptions from the provisions of the securities acts.<sup>139</sup> The SEC's choice of expression ranges from creating new rules and editing existing rules to issuing no-action letters. For example, in 1995 and 1996 the SEC prospectively granted Deutsche Telekom safe harbor from the Section 5 registration requirement in two no-action letters.<sup>140</sup> Deutsche Telekom and its underwriters expected a high volume of press coverage and analyst research of the telecommunications carrier's privatization.<sup>141</sup> Some observers compared the media attention on Deutsche Telekom to the level of interest the U.S. Post Office would receive if it were privatized.<sup>142</sup> The SEC reasoned that coverage of one of Europe's largest telephone companies would be unavoidable.<sup>143</sup> In

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<sup>134</sup> See Private Resales of Securities to Institutions, 17 C.F.R. 230.144A (2004).

<sup>135</sup> *Id.*

<sup>136</sup> See generally Securities Act Concepts and Their Effects on Capital Formation, Release Nos. 33-7314, 61 Fed. Reg. 40,044, 40,050-51 (July 31, 1996) (considering liberalizing the Rule 144A resale of unregistered securities because it would decrease transaction costs without corresponding investor protection loss).

<sup>137</sup> See Trade and Commerce, 15 U.S.C. §§ 77s, 77z-3 (2004) (broad and special regulatory powers).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; see also Saikrishna Bangalore Prakash *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1 at 26 (November, 1998) (discussing constitutionality of cancellation and modification authority).

<sup>140</sup> See Deutsche Telekom AG, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 545 (June 13, 1995) (no action for excessive coverage of its privatization); see also Deutsche Telekom AG, SEC No-Action Letter, 1996 SEC No-Act. LEXIS 553 (June 14, 1996) (no action against issuer for research reports generated as a result of issuer's size, prominence, and attraction).

<sup>141</sup> *Id.*

<sup>142</sup> See Lee, *supra* note 13, at 64 (comparing the privatization of Deutsche Telekom in Germany to a hypothetical where the U.S. Postal Service became privatized).

<sup>143</sup> See Deutsche Telekom AG, SEC No-Action Letter, [1995 Transfer Binder] Fed. Sec. Lp Rep. (CCH) (June 13, 1995).

fact, press coverage of Deutsche Telecom started several years before its actual offering and had already proven to be unavoidable.<sup>144</sup>

### C. Offshore Press Conference Safe Harbors

The offshore press conference safe harbors provide exemptions from the registration requirements and the tender offer procedural requirements of the Williams Act.<sup>145</sup> Rule 135(e), Rule 902(c)(3)(vii), and Rule 14d-1(e) aim to provide U.S. journalists with access to news conferences, meetings, and press materials outside of the country.<sup>146</sup> Under the safe harbors, foreign companies may grant access to U.S. journalists to press conferences or meetings at which the foreign issuer, its underwriter, or public relations firm discusses an unregistered offering.<sup>147</sup>

#### 1. Rule 135(e) – Section 5 Safe Harbor

Rule 135(e) provides a safe harbor from the Section 5 registration requirements.<sup>148</sup> It covers the journalist's access to the press conference, one-on-one interviews, and extends to materials, such as press releases, distributed to the attending press.<sup>149</sup> However, the materials must contain a cautionary legend that the materials are not an attempt to offer or sell securities.<sup>150</sup> The offshore press conference safe harbor applies where there is (i) a foreign issuer (ii) making an offering not solely within the U.S. and (iii) a press conference held outside the U.S. (iv) with access offered to U.S. and foreign journalists.<sup>151</sup>

#### 2. Rule 902(c)(3)(vii) – Direct Selling Safe Harbor

Rule 902(c)(3)(vii) clarifies that offshore press conferences are not direct selling efforts under Regulation S.<sup>152</sup> The safe harbor depends on compliance with Rule 135(e) and mirrors its scope.<sup>153</sup> The safe harbor expressly excludes providing access to journalists to press conferences, to meetings held with the issuer and its representatives, and to written press

<sup>144</sup> See Letter from Sherman & Sterling to Jonathan G. Katz, Secretary, SEC (January 17, 1997) at <http://www.sec.gov/rules/proposed/s72696/shearma1.txt> (recounting the SEC's action in Deutsche Telecom's case).

<sup>145</sup> See 17 C.F.R. §§ 230.135e, 230.902 Rule 14d-1(e), 17 C.F.R. 240.14d-1 (2004).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* Why not state that the safe harbor exempts discussion of unregistered offerings from the registration and tender offer requirements? The problem is simply that the safe harbor focuses on granting "access" to journalists. It does not expressly provide the foreign issuer with safe harbor for the resulting press coverage.

<sup>148</sup> See 17 C.F.R. § 230.135(e) (2004).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See 17 C.F.R. 230.902(c)(3)(vii) (2004).

<sup>153</sup> *Id.*

materials from direct selling efforts.<sup>154</sup> While Regulation S deals primarily with offerings made completely offshore and the offshore press conference safe harbors focus on offerings made not solely within the U.S., excluding the press conferences from the definition of direct selling efforts attempts to afford foreign issuers confidence in combining a foreign offering and other safe harbors, such as safe harbor given to private offerings made within the U.S.<sup>155</sup>

### 3. Rule 14d-1(e) – Williams Act Safe Harbor

The offshore press conference safe harbors extend to tender offers.<sup>156</sup> Unlike the Rule 135(e) safe harbor, the tender offer safe harbor extends to both foreign and U.S. issuers, provided that the tender offer has been made for the securities of a foreign target company.<sup>157</sup> The safe harbor may excuse a bidding company from the procedural requirements of the Williams Act that an offshore press conference, meetings with journalists, or distribution of press materials might trigger if a tender offer has been discussed.<sup>158</sup>

## III. DEVELOPING THE OFFSHORE PRESS CONFERENCE SAFE HARBORS

### A. Reuters No-Action Letter and Regulation S – 1990

In March 1990 the SEC responded to Reuters'<sup>159</sup> concern about its journalists' access to offshore press conferences.<sup>160</sup> Reuters requested a no-action ruling on whether granting U.S. press for publications distributing news within the U.S. access to offshore press conferences violated securities regulations, specifically the disclosure and procedural requirements of the Williams Act.<sup>161</sup> Reuters sought to gain access to these press conferences by easing corporate concerns through an SEC opinion letter.<sup>162</sup> The SEC obliged and set out an early framework for what would evolve into the offshore press conference safe harbors.<sup>163</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *See* Private Resales of Securities to Institutions, 17 C.F.R. § 230.144A (2004).

<sup>156</sup> *See* 17 C.F.R. § 240.14d-1(2004).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* For example, if the target company in *Chris-Craft v. Bangor Punta* were a foreign company, the impermissible press release issued by Piper Aircraft Corporation and Bangor Punta Corporation could qualify for safe harbor. *See* *Chris-Craft v. Bangor Punta*, *supra* note 37.

<sup>159</sup> *See* Reuters at <http://about.reuters.com/aboutus/overview> (touting itself as “the world’s largest international multimedia news agency”).

<sup>160</sup> *See* Reuters, *supra* note 16.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Compare* Reuters, *supra* note 16 with 17 C.F.R. §§ 230.135e., 230.902, 240.14d-1, (2004).

A month later, in April, Congress included mention of offshore press conferences in Regulation S.<sup>164</sup> Regulation S provides that an issuer conducting an offering outside the U.S. need not file a registration statement with the SEC.<sup>165</sup> The Congress also presumptively removed offshore press conferences from Regulation S' "direct selling efforts."<sup>166</sup> A qualifier in the preliminary notes limits the presumption to activities not intended to induce purchase of securities by persons in the U.S.<sup>167</sup>

### B. *The National Securities Improvement Act of 1996*

In the National Securities Market Improvement Act of 1996 Congress directed the SEC to address concerns about increasing access to foreign business information.<sup>168</sup> The directive evolved as it passed through the Senate and the House of Representatives.<sup>169</sup> The Senate's versions would have provided the SEC with more legislative intent and a narrower focus.<sup>170</sup> The draft proposed to directly amend the Securities Act of 1933. The Amendment would exclude offshore-press conferences and other related activities from the definition of the term "offer."<sup>171</sup> The draft also proposed to amend Section 14 of the Securities Exchange Act of 1934 to allow foreign issuers engaged in tender offers to grant U.S. journalists access to offshore press conferences.<sup>172</sup> Finally, the draft removed press activity connected to tender offers from the antifraud provisions.<sup>173</sup>

However, the terse legislative mandate ultimately adopted gave little direction and provided no definitional scope of what offshore press activities it expected the SEC to address.<sup>174</sup> It simply gave the SEC 12 months to adopt rules concerning offshore press conferences.<sup>175</sup> The SEC took

<sup>164</sup> See Preliminary Note 7, Regulation S, *supra* note 119.

<sup>165</sup> *Id.* Regulation S gives assurances that "[n]othing [. . .] precludes access by journalists for publications with general circulation in the U.S. to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed."

<sup>166</sup> See 17 C.F.R. 230.902(c) (2004) (defining "direct selling efforts").

<sup>167</sup> See Preliminary Note 7, Regulation S, *supra* note 119.

<sup>168</sup> See 15 U.S.C. § 77e (2004).

<sup>169</sup> Compare The Securities Investment Promotion Act of 1996, § 313, S. REP. NO. 104-293, at 29 (1996) with 15 U.S.C. § 77e (2004).

<sup>170</sup> See S. REP. NO. 104-293 (sponsored by Senator D'Amato); see also Letter from The House of Representatives Commerce Committee Democrats to Arthur Levitt, Jr., Chairman, SEC (September 24, 1996) (a letter on current issues regarding Regulation S) at [http://www.house.gov/commerce\\_democrats/comdem/press/104ltr6.htm](http://www.house.gov/commerce_democrats/comdem/press/104ltr6.htm)

<sup>171</sup> See S. REP. NO. 104-293.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See 15 U.S.C. § 77e (2004).

<sup>175</sup> *Id.*

its cue. In October 1996, the SEC issued a notice of proposed rulemaking for the offshore press conference safe harbors.<sup>176</sup>

### C. *Issues Cited: A Notice of Proposed Rulemaking*

The National Securities Act of 1996 formalized the SEC's focus on the offshore press conference issue, but it did not initiate the SEC's inquiry. The SEC worked of its own accord before the Act came into force.<sup>177</sup> The SEC's notice of proposed rulemaking pre-dated the Congressional mandate by one day.<sup>178</sup> The SEC released its notice on October 10, 1996 and Congress enacted the National Securities Improvement Act on October 11, 1997.<sup>179</sup>

The SEC's notice incorporated the basic elements of the Senate proposal edited from the final Act.<sup>180</sup> The similarity is not surprising considering the same forces, whether lobbying or market reality, likely affected both the SEC and Congress. The Senate's version of the offshore press conference proposal had been available for four months.<sup>181</sup> On September 24, 1996, a letter from the House of Representative Commerce Committee Democrats gave the SEC additional notice of the plans and advised the SEC to consider the Senate proposal as it finished drafting its proposed offshore press conference rules.<sup>182</sup>

The SEC's inquiry into the offshore press conferences issues deferred to the journalist's difficulties.<sup>183</sup> Congress mandated the inquiry (and the ultimate rulemaking), but the U.S. journalist's experience framed the matter.<sup>184</sup> The SEC cited that it "*had been made aware*" that for a number of years journalists had been denied access to press conferences at

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<sup>176</sup> *Id.*

<sup>177</sup> See Letter from The House of Representatives Commerce Committee Democrats to Arthur Levitt, Jr., Chairman, SEC (September 24, 1996) (noting the SEC's progress in drafting proposed rules) at [http://www.house.gov/commerce\\_democrats/comdem/press/104ltr6.htm](http://www.house.gov/commerce_democrats/comdem/press/104ltr6.htm).

<sup>178</sup> See 15 U.S.C. § 77e (2004); Offshore Press Conferences, Final Rules, at 53,950-53,953, *supra* note 8.

<sup>179</sup> *Id.*

<sup>180</sup> See The Securities Investment Promotion Act (Senate version edited from final act), *supra* note 170. The basic elements included the safe harbor from Section 5 and the procedural requirements of the Williams Act. Most notably, the SEC's notice did not embrace the safe harbor from anti-fraud provisions of the Securities and Exchange Act.

<sup>181</sup> *Id.*

<sup>182</sup> See Letter from The House of Representatives Commerce Committee Democrats to Arthur Levitt, Jr., Chairman, SEC (September 24, 1996) (a letter on current issues regarding Regulation S) at [http://www.house.gov/commerce\\_democrats/comdem/press/104ltr6.htm](http://www.house.gov/commerce_democrats/comdem/press/104ltr6.htm).

<sup>183</sup> See Offshore Press Conferences, Notice, *supra* note 5.

<sup>184</sup> *Id.*

which offerings or tender offers might be discussed [emphasis added].<sup>185</sup> Its awareness of the issue led to “sensitivit[y] to the concerns of journalists” and the SEC affirmed that it did not intend to “unnecessarily competitively disadvantage” journalists.<sup>186</sup>

The notice of proposed rulemaking recognized the differences between the publicity levels allowed in foreign markets and the U.S. market.<sup>187</sup> These differences resulted in uncertainty as to how to act when issuing securities outside the U.S. and, especially, when a U.S. offering would accompany an offshore offering.<sup>188</sup> These differences led to questions about whether the SEC or the U.S. courts would view granting U.S. journalists access to offshore press conferences as improper offers, general solicitations, direct selling efforts, or improper tender offers.<sup>189</sup> The SEC noted the steps it took in the past to answer these concerns, citing the Reuters No-Action Letter and Preliminary Note 7 of Regulation S.<sup>190</sup> Sources, however, informed the SEC that concern remained among foreign issuers that contact with U.S. journalists would lead to problems with the U.S. securities laws.<sup>191</sup>

Subjectivity was also an important issue. The SEC questioned whether an objective or subjective test should be used, giving favor to an objective test.<sup>192</sup> It noted the concern among issuers about the subjectivity of the “intent to induce” test.<sup>193</sup> Such an intent-based standard gave little com-

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<sup>185</sup> *Id.* The awkward phrasing that the SEC “had been made aware” may seem insignificant. Query: by whom were they made aware? The question itself may suggest that the offshore press conference issue lacked importance with the SEC. The phrasing may underscore a point of contention: the SEC (and possibly Congress) gave priority to journalistic concerns in issuing the offshore press conference safe harbors. Priority given to the press detracted from the SEC’s statutory mandate to protect investor’s interests. Given Reuters’ prior request for a No-Action Letter and that the offshore press conference mandate from Congress surfaced from a proposal presented by New York Senator D’Amato, whose constituents include the media elite, there may be a suggestive link between the media industry’s interests and the SEC’s sources. The first SEC record of the offshore press conference issue surfaced in a letter from the one of the world’s largest media concerns. The earliest Congressional record of the issue came from the representative of the city some consider the news media capital of the U.S., if not the world. See *City Guide New York*, ECONOMIST.COM (March 31, 2004) at [http://www.economist.com/cities/findStory.cfm?city\\_id=NY&folder=facts-Figures](http://www.economist.com/cities/findStory.cfm?city_id=NY&folder=facts-Figures) (citing New York City as “the new-media capital of America”).

<sup>186</sup> See *Offshore Press Conferences*, Notice, *supra* note 5.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at note 9-10 (citing the Reuters SEC No-Action Letter and Regulation S Note 7).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*



fort to the foreign issuer balancing the need and benefit of raising capital against the benefit and risk of communicating with journalists.<sup>194</sup>

Objectivity could curb abuse.<sup>195</sup> The SEC focused on the potential for abuse and how the objective requirements of the safe harbors could provide guidance.<sup>196</sup> The requirements included: (i) a dual U.S.-offshore offering requirement, (ii) the press activity to take place offshore, (iii) open access to both foreign and U.S. journalists, and (iv) a cautionary legend on press materials.<sup>197</sup> The SEC asked for comment on whether these requirements would, in fact, check potential abuse.<sup>198</sup>

Inhibiting information flow into the U.S. seemed pointless. The SEC recognized that inaccessible foreign business information would end up in the U.S. after the U.S. journalists picked up and reported on the foreign journalists' news accounts.<sup>199</sup> The new safe harbors would cut out the middle-men and benefit investors by providing earlier access to information.<sup>200</sup>

The SEC sought comment on many issues. The highest-level policy question was whether providing both foreign and U.S. journalists access to these press conferences protected investors.<sup>201</sup> Another high-level question related to the policy goals of U.S. securities regulation was presented: would a departure from the intent-to-induce requirement be inconsistent with the purposes of the Securities Act?<sup>202</sup> Questions of scope included: Should the safe harbor extend to both U.S. and foreign issuers?<sup>203</sup> Should the press contact occur only offshore?<sup>204</sup> Technical media relations questions included: Could the company respond to follow-up questions once the journalist returned to the U.S.?<sup>205</sup> Are one-on-one meetings between journalists and the foreign issuer permissible?<sup>206</sup> Could the issuer forward press materials to journalists in the U.S.

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* The person in the best position to relate the process and effect of foreign-to-U.S. information flow is, perhaps, a journalist. Peter Lee, reporter for Euromoney, illustrates the scenario as follows: “[an] Italian company issue[s] a press release in Italian in Milan which is picked up by Bloomberg, translated into English and appears on the wires in America within minutes.” See Lee *supra* note 13, at 64 (illustrating steps in information flow from foreign to U.S. markets).

<sup>200</sup> See Offshore Press Conferences, Notice, *supra* note 5.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

who could not attend the press conference?<sup>207</sup> Must the issuer insert a cautionary legend in the press materials?<sup>208</sup>

#### D. *Points of Opposition*

Commentators argued for broader change than the SEC proposal. The Securities Industry Association (SIA) responded to the offshore press conference proposed rules and argued for general reform.<sup>209</sup> Arguing that the exclusion of journalists stemmed from the general structure of U.S. securities regulation, the association encouraged the SEC to broaden the scope of the safe harbors.<sup>210</sup> Specifically, the SIA urged the SEC to apply the safe harbors to all foreign and domestic offerings (including tender offers) made exclusively in the U.S. and offshore.<sup>211</sup> In effect, the SIA asked the SEC to redefine all permissible activities within the pre-registration and post-effective period.<sup>212</sup> The group also concurred with the SEC's preference for an objective test.<sup>213</sup>

The law firm of Shearman & Sterling,<sup>214</sup> an established New York law firm with expertise in securities law, agreed in part. Shearman & Sterling submitted comments on behalf of itself without reference to its client.<sup>215</sup> The firm suggested that securities regulation required broader changes than an offshore press conference could provide.<sup>216</sup> Calling into question the U.S.'s territoriality policy, the firm cited technology advances and the financial markets' internationalization as change agents.<sup>217</sup> Its position: the safe harbor should not include an offshore requirement.<sup>218</sup> The location of the journalist, the argument suggested, did not affect the content or dissemination of information or the legitimacy of the journalistic activ-

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Letter from Ralph Pellecchio, Chairman, Capital Markets Committee, Securities Industry Association to Jonathan G. Katz, Secretary, Securities and Exchange Commission (February 13, 1997) at [http://www.sia.com/1997\\_comment\\_letters/pdf/sec97-7.pdf](http://www.sia.com/1997_comment_letters/pdf/sec97-7.pdf).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See Sherman & Sterling LLP at <http://www.shearman.com> (last visited on April 12, 2005).

<sup>215</sup> See Letter from *Shearman & Sterling to Jonathan G. Katz, Secretary, SEC* (January 17, 1997) (responding to the offshore press conference rulemaking notice) at <http://www.sec.gov/rules/proposed/s72696/shearma1.txt>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

ity.<sup>219</sup> Accepting such a position would require greater efforts than issuing new safe harbors.<sup>220</sup>

### E. Priority Given – Final Rule

The final rules promulgated by the SEC provided none of the called-for broader policy changes. The adopted rules focus on the cautionary legends companies include in written materials provided to members of the press, the objective test by which the SEC would judge compliance with the safe harbor, and the circumstances during which companies could provide press with exclusive interviews.

#### 1. No Broad Policy Changes

The final safe harbors adopted nearly mirror the SEC's preferences as stated in the notice of proposed rulemaking.<sup>221</sup> The most significant exception remains that the safe harbor from registration applies only to foreign issuers.<sup>222</sup> More accurately, the safe harbor extends to offerings by foreign private issuers and foreign government issuers.<sup>223</sup> The tender offer safe harbor extends to both foreign and U.S. bidders for target companies.<sup>224</sup> Commentators such as the SIA and Shearman & Sterling did not get the hoped-for broader step toward change.

#### 2. Written Material Requirements

Press materials must contain a cautionary legend.<sup>225</sup> The legend must state that the materials make no offer to sell securities.<sup>226</sup> The issuer also

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<sup>219</sup> *Id.*

<sup>220</sup> An administrative rule should not overcome Congress' mandate to protect investors. *See* Section 2(b), Consideration of Promotion of Efficiency, Competition, and Capital Formation, Securities Act of 1933, 15 U.S.C. § 77b (2004) (emphasizing protection of investors as a primary policy goal, with secondary consideration given to efficiency, competition, and capital formation). If Congress permitted fundamental restructuring of securities regulation via rulemaking, it is arguable that such a rule could qualify as an impermissible delegation of Congressional power. It would effectively give the SEC Article I, Section 8 Constitutional power to regulate commerce between the states and foreign nations. In the absence of a broader legislative mandate granting broader power, Section 109 of the National Securities Improvement Act arguably would fall short of accomplishing the broad reform commentators sought.

<sup>221</sup> *See* Offshore Press Conferences, Final Rules *supra* note 8, at 53,949

<sup>222</sup> *Id.* at 9.

<sup>223</sup> *Id.*; *see also* 17 C.F.R. § 230.405 (2004); 17 C.F.R. § 240.3b-4(c) (2004) (defining "foreign private issuer" and "foreign government").

<sup>224</sup> *See* Offshore Press Conferences, Final Rules *supra* note 8, at 53,949.

<sup>225</sup> *Id.* at 53,952.

<sup>226</sup> *Id.* at 22. The release suggests stating that the "materials are not an offer of securities for sale in the United States; that the securities may not be offered or sold in the United States unless they are registered or exempt from registration; and that

may not attach coupons to the materials.<sup>227</sup> Requiring a cautionary legend on all press materials distributed is not unlike the safe harbor requirements for a tombstone ad.<sup>228</sup>

### 3. Objective Test

The SEC positioned the final safe harbor rules as containing “purely objective test.”<sup>229</sup> The objective requirements: (i) foreign issuer; (ii) off-shore press contact; (iii) foreign and U.S. elements of the offering; and (iv) written materials containing cautionary legends.<sup>230</sup> Every commentator addressing the question of the subjective versus objective tests preferred an objective test.<sup>231</sup> The release made no mention of whether an objective test could actually remove activity from the subjectivity of the “intent to induce” and “conditioning the market” analyses. It does not address the question posed in the notice of proposed rulemaking as to whether absence of an intent requirement would be inconsistent with the purposes of the Securities Act.<sup>232</sup> The release concluded that a subjective test would continue the practice of denying journalists access to press conferences.<sup>233</sup>

### 4. One-on-One Interviews

One-on-one press meetings fall within the safe harbor. The SEC noted in its notice of proposed rulemaking that it did not intend to block access to one-on-one meetings, even exclusive meetings, between the journalist and the foreign issuer.<sup>234</sup> The SEC did not intend the safe harbor to prevent U.S. journalists from competing for exclusive one-on-one interviews.<sup>235</sup> The SEC, however, suggested that exclusive interviews might

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any public offering of securities to be made in the United States will be made by means of a prospectus that will contain detailed information about the company and management, as well as financial statements.” *Id.*

<sup>227</sup> See Offshore Press Conferences, Final Rules, *supra* note 8, at 53,952 (stating that “[t]he issuer or selling security holder cannot attach to, or otherwise make a part of, the written materials any form of purchase order or coupon that could be returned indicating interest in the offering”).

<sup>228</sup> *Id.* (explaining the written requirements); see also Rule 902(c)(3)(iii), Regulation S - Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933, 17 C.F.R. 230.902(c) (2004) (defining “tombstone”).

<sup>229</sup> See Offshore Press Conferences, Final Rules, *supra* note 8, at 53,950 (adopting an objective test).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 13.

<sup>232</sup> See Offshore Press Conferences, Notice, *supra* note 5 (questioning whether policy allows for absence of an intent requirement).

<sup>233</sup> See Offshore Press Conferences, Final Rules, *supra* note 8, at 53,950.

<sup>234</sup> See Offshore Press Conferences, Notice, *supra* note 5.

<sup>235</sup> *Id.*

be indicative of an attempt to channel publicity into the U.S.<sup>236</sup> It suggested that the foreign issuer, underwriter, or public relations firm should offer exclusive one-on-one interviews to all journalists in order to qualify for the safe harbor.<sup>237</sup> Commentators such as criticized the condition as unduly restrictive and unnecessary.<sup>238</sup>

The concern over exclusive one-on-one interviews remained in the final release.<sup>239</sup> The final release conditions safe harbor for exclusive one-on-one meetings on compliance with the safe harbor.<sup>240</sup> Where a foreign issuer offers a one-on-one interview to one journalist, it must offer similar interviews to foreign and U.S. press alike.<sup>241</sup> The foreign issuer may grant an exclusive one-on-one interview and then bring it within the safe harbor by conducting a press conference or granting other journalists one-on-one interviews at a later date. No time restriction limited the foreign issuer's ability to bring an exclusive one-on-one interview within the safe harbor.<sup>242</sup>

#### IV. UNSAFE SAFE HARBOR

The offshore press conference safe harbors failed at inception and are unsupported by the need for investor protection.<sup>243</sup> Further, the objectivity sought by the SEC remains out of reach. In practice, the foreign issuer stands in the same, if not a more, uncertain position. In addition, uncertainty is ever-present because the SEC's antifraud provisions present a layer of subjectivity that these safe harbors do not remove.<sup>244</sup> Finally, the SEC's position on one-on-one interviews invites abuse and uncertainty. To the foreign issuers, these factors, individually and collectively, may weigh against granting U.S. journalists access to foreign press conferences.

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (citing comment letters from Bloomberg L.P. of 12/17/96, at p. 8, and Sullivan & Cromwell of 12/20/96, at p. 13).

<sup>239</sup> See Offshore Press Conferences, Notice, *supra* note 5.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 19, n. 34. The author assumes that the lack of a time limit within which to bring an exclusive one-on-one interview within the safe harbor invites abuse.

<sup>243</sup> See Section 2(b), Consideration of Promotion of Efficiency, Competition, and Capital Formation, Securities Act of 1933, 15 U.S.C. § 77b (2004) (placing protection of investors as a primary policy goal, with secondary consideration given to "efficiency, competition, and capital formation").

<sup>244</sup> See LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATIONS § 9-B-6 (3d Ed. 2001) ("Moreover, intent (or scienter) being subjective, it must often "be inferred from a series of seemingly isolated acts and instances which have been [. . .] aptly designated as badges of fraud").

A. *Lack of an Investor Protection Justification*

## 1. Speed Does Not Justify Safe Harbor

The safe harbor does not protect investors. The SEC recognizes the ineffectiveness of trying to prevent information from reaching U.S. journalists.<sup>245</sup> Information that reaches U.S. journalists ultimately reaches U.S. investors. Still, the SEC points to the ineffectiveness of information barriers as a justification for granting companies safe harbor to invite U.S. press to offshore press conferences.<sup>246</sup> The only real benefit to investor protection highlighted by the SEC is the fact that investors will gain information at an increased rate if foreign issuers more regularly invite U.S. press to press conferences.<sup>247</sup>

However, speed cannot justify creating safe harbors. U.S. securities regulation aims to protect investors by channeling offerings into a system of disclosure, starting with a mandatory registration statement.<sup>248</sup> Speeding delivery of potentially harmful information to U.S. investors contravenes the SEC's protection principle.<sup>249</sup>

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<sup>245</sup> See *Offshore Press Conferences*, Notice, *supra* note 5 (noting information flows from foreign press to domestic press). The American Bar Association views Rule 135(e) as a rule that "no longer makes sense in the context of a global media market. Information released offshore does find its way into the United States, with no discernible harmful effects on U.S. investors. An ongoing distinction that allows offshore releases but does not permit them onshore is formalistic and antiquated, and provided no clear protection to investors." See Edward F. Green & Linda C. Quinn, *Building on the International Convergence of the Global Markets: A Model of the Global Markets: A Model For Securities Law Reform*, A MAJOR CONFERENCE: SECURITIES REGULATION IN THE GLOBAL INTERNET ECONOMY at 29, not 80 (Washington, DC, November 14-15, 2001) available at [http://www.law1.northwestern.edu/depts/contextec/cle/srgie/sections/Greene\\_Quinn\\_paper.pdf](http://www.law1.northwestern.edu/depts/contextec/cle/srgie/sections/Greene_Quinn_paper.pdf) citing Letter of the Committee on Federal Regulation of Securities of the American Bar Association's Business Law Section to Director of Corporation Finance, SEC at 4 (August 22, 2002) (drafted by Linda C. Quinn).

<sup>246</sup> See *supra* note 227.

<sup>247</sup> *Id.*

<sup>248</sup> See *supra* note 243.

<sup>249</sup> Some commentators view the belief that the mass of retail investors need protection as a myth. See generally Donald C. Langevoort, *Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation*, 97 Nw. U.L. REV. 135 at 173 (speculating that the retail investor myth is an awkward story without credibility).

Journalists are not proxies for the SEC's protection.<sup>250</sup> Some argue that the press is not a passive medium.<sup>251</sup> Therefore, the media's selectivity serves a protective function.<sup>252</sup> However, the media's objectives differ from the SEC's mandate to protect investors.<sup>253</sup> The SEC's protection may deny investors from desired information while the media provides it for a delivery charge.<sup>254</sup> The media operates on economic principles;<sup>255</sup> the SEC operates on policy principles.<sup>256</sup> If the protection principles on which the SEC operates lack credibility, change requires legislative mandate. Market reality, however compelling, is not enough to justify creation of a safe harbor contradicting an administrative agency's Congressional mandates. The underlying regulatory structure must change before such a safe harbor could take effect.<sup>257</sup>

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<sup>250</sup> Compare R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (December, 1993) (reviewing public interest and broadcast regulation) with Natalie Cortes, *Panelists Question News Media's Rule in Stock Market Rise, Fall* at <http://www.freedomforum.org> (September 24, 2002) (placing blame on the media for participating in the market hype and failure to report on warning signs of pending collapse).

See LEO BOGART, *COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST* 289 (1995) (asking, "Can one trust the professional pride of individuals who lack any common training and meet no official requirements in order to practice their craft? Accepting the primacy of the public interest is the essence of professionalism, and represents a reasonably simple basis for the pursuit of integrity in interpretive journalism").

<sup>251</sup> Peter Lee argues that the SEC's publicity rules stems from a "myth of a compliant press that will be suckered into touting every new issue of securities that comes along." See Lee, *supra* note 13, at 64.

<sup>252</sup> *Id.*

<sup>253</sup> See generally Leo Bogart, *COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST* 11, 54, 262 (1995) (noting the media's goal of responding to audience preference).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 54.

<sup>256</sup> See *supra* note 243.

<sup>257</sup> The author pauses at choosing the phrase "regulatory structure" rather than "legislative structure." If legislation created a flawed regulatory structure, arguably the legislature should fix it. In the SEC's case, the broad grant of power in Section 28 calls into question whether the SEC needs to return to Congress to rebuild the regulatory framework built on a legislative foundation. Section 28 provides a clear mandate for the SEC to use its broad powers in the public interest and for investor protection. Accordingly, a safe harbor made without a view to investor protection or in conflict with the principle of investor protection would be outside the SEC's Section 28 powers.

## 2. Clumsy Cautionary Legends and Coupon Bans

Cautionary legends and coupon bans on press materials do not protect investors. The investor protection rationale for the writing requirements comes from the SEC's rules against advertising.<sup>258</sup> The practical need for cautionary statements in advertising does not translate to press materials.<sup>259</sup> The issuer has control over the placement and presentation of a tombstone ad – the advertisement an issuer uses to provide notice of a public offering. For advertisement purposes, the issuer targets an audience, chooses the publication, and delivers the copy (and possibly the layout) for publication. This is not so with press materials. In contrast, the press materials never reach the investing public in the form in which the press receive the materials, i.e. in a press kit. The information contained in a press kit includes press releases, research reports, case studies, and customer testimonials. As a whole, the press kit gives journalists information to write an article. The journalist will not transcribe a cautionary legend<sup>260</sup> into a news article. Once the journalist receives the press kit, the issuer has no control over what information the journalist will include in a story, what speculation might accompany the information, or if the journalist will write a story at all.

Moreover, the SEC's ban on attaching coupons to the press materials serves no protection purpose. The coupons, like the cautionary statement, would never reach the public investor. Broad mandates from the Society of Professional Journalism require independent action by its members<sup>261</sup> and conflict-of-interest intolerance within the media system.<sup>262</sup> Ethical standards set by individual publications place barriers on a journalist's stock ownership abilities.<sup>263</sup> There is little threat that a coupon included in a press kit would lead to any abuse or harm. It would simply be a waste of paper for the foreign issuer.

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<sup>258</sup> See 17 C.F.R. 230.902(c)(3)(iii) (2004).

<sup>259</sup> In the following analysis, the author draws on several years as a practicing corporate communications professional and working knowledge of the media.

<sup>260</sup> The cautionary legend is required to appear in the press release the issuer gives the journalist, but the investor – the journalist's audience – does not read the press release. The investor reads the ultimate story in which information taken from the press release appears.

<sup>261</sup> See The Society of Professional Journalism, Code of Ethics (September, 1996) (adopting the duty to “act independently”) at <http://www.spj.org/ethics.pdf>.

<sup>262</sup> See Mark Glaser, *For Business Journalists, Credibility Is Never More than A Trade Away* USC ANNENBERG ONLINE JOURNALISM REVIEW (August 26, 2003) (reporting that “the media acts as its own police force”) at <http://www.ojr.org/ojr/glaser/1061942243.php>.

<sup>263</sup> See Joe Stump, ‘NY Times’ Revises Employee Ethics Policy, EDITOR & PUBLISHER (January 13, 2003) (reporting on *The New York Times*' stock ownership policy).



### 3. One-on-One Interviews Invite Abuse and Uncertainty

The SEC's position on one-on-one interviews contravenes investor protection by inviting abuse and uncertainty. The foreign issuer may provide exclusive one-on-one interviews to U.S. press and bring the interview within the safe harbor by conducting a press conference or other one-on-one interviews with other foreign and U.S. journalists at a later date.<sup>264</sup> Failure to provide a strict time period within which to bring the exclusive interview within the safe harbor provides foreign issuers with the tools for channeling information into the U.S.

Information has a time-value component.<sup>265</sup> Information of high value given to a journalist one day may have zero value the next day once it becomes public knowledge. Providing an interview to a U.S. journalist before granting access to other journalists gives the U.S. journalist a monopoly on the information. The safe harbor's concept of access does not apply because access offered at a later date is qualitatively dissimilar. It follows that the SEC's notion that access to the information cures the exclusivity problem fails to consider the time-value of information.

The issuer has little control over what a journalist does with corporate information. The foreign issuer may enter some formal or informal embargo agreement with the journalist to hold the news until the day of the press conference, essentially giving the journalist first rights to publication.<sup>266</sup> If the journalist publishes the information immediately and the offshore press conference does not take place until several days or weeks later, it may appear to the SEC that the foreign issuer intentionally channeled information into the U.S. without granting equal access to other journalists. The subjective intent of the foreign issuer will come under scrutiny. Contrary to the SEC's policy objectives, foreign issuers may decide to avoid the risk of uncertainty and decline any one-on-one interviews.<sup>267</sup>

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<sup>264</sup> See Offshore Press Conferences, Notice, *supra* note 5.

<sup>265</sup> See generally *Technology Leveling Brokerage Industry's Playing Field*, Securities Week 3 (November 11, 1996) (noting competitive pressures between brokerage firms and internet news portals).

<sup>266</sup> See PRSA Member Code of Ethics 2000, Case Study #4, available at [http://www.prsa.org/\\_Chapters/resources/ethics.asp](http://www.prsa.org/_Chapters/resources/ethics.asp) (raising the question of whether to ask an editor to hold news); see also Mary Lou Wendell, *When do you hold the news (or delay it)?* THE AMERICAN EDITOR (May 20, 1999), available at <http://www.asne.org/index.fm?ID=2127> (discussing holds put on news).

<sup>267</sup> See Offshore Press Conferences, Final Rules, *supra* note 8, at 53,951 (stating "if the 'one-on-one' meeting was conducted on an 'exclusive' basis with a purely 'U.S. publication' and no other 'one-on-one' interviews with other foreign publications were given, the Commission expressed its concern that the exclusive 'one-on-one' presentation might signal a scheme to channel publicity regarding the offering into the United States").

## B. *Uncertainty Outweighs Journalist's Benefits*

### 1. Objectivity Out of Reach

Objectivity is outside the safe harbor's reach. The safe harbor has objective elements that present the appearance of a binary, either/or checklist: foreign issuer or U.S. issuer; combined U.S.-foreign offering or U.S. offering; offshore or domestic; with or without cautionary legend. These objective elements fail to overcome the inherent subjectivity in the safe harbor and the long-standing intent-based analysis of offers. First, courts are unlikely to abandon the intent standard. The absolute statement that the safe harbor is "purely objective" has little weight against the precedent recognizing publicity efforts as offers, even though not couched in the terms of an express offer.<sup>268</sup> Second, the SEC falls back on the intent-based test when suggesting that exclusive one-on-one interviews may "signal a scheme to channel" publicity into the U.S.<sup>269</sup> Attempting to divine a scheme based on signals gleaned from behavior requires analysis of subjective intent. If the safe harbor requires the foreign issuer to consider whether behavior "signals a scheme" to evade U.S. securities regulation, the safe harbor can not release the foreign issuer from the uncertainty underpinning a policy to deny U.S. journalists access to offshore press conferences. The SEC can not exorcise subjectivity by fiat.

The "access" limitation leads to uncertainty about the safe harbor's objectivity. The offshore press conference safe harbors provide registration and Williams Act exemptions only to granting journalists "access" to press conferences, one-on-one interviews, and press materials.<sup>270</sup> The SEC does not address how it might review the level of publicity resulting from the press conference or interviews. The foreign issuer has no control over what happens to the information once it is released. The press conference may yield high returns (read: lots of publicity); it may yield none. The SEC provides no assurance that the safe harbor reaches the resulting coverage. Foreign issuers may have concerns that the SEC will measure the results of the press conferences to determine whether there has been an improper offer, general solicitation, or direct selling effort. While an objective standard applies to granting journalists access to the press conference, analysis of press coverage requires subjective speculation on the issuer's intent.

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<sup>268</sup> See *In Re Loeb*, *supra* note 30, at 852 (stating that "publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities").

<sup>269</sup> See *Offshore Press Conferences, Final Rules*, *supra* note 8 and accompanying text.

<sup>270</sup> See C.F.R. 230.135e., 17 C.F.R. 230.902, 17 C.F.R. 240.14d-1 (2004).

## 2. Antifraud and Civil Liability

Even if the safe harbor provided an objective standard, the antifraud provisions supply enough intent-based uncertainty to counterbalance the safe harbor's objectivity. As with many safe harbors, the offshore press conference safe harbors do not extend to the antifraud or civil liability provisions.<sup>271</sup> In fact, the SEC embraces the antifraud provisions as a failsafe for providing protection to investors in the same paragraph that it embraces the objective standard.<sup>272</sup> As with the SEC's inquiry into a foreign issuer's intent to channel publicity into the U.S., an inquiry into fraudulent acts would look into the foreign issuer's intent.<sup>273</sup> When calculating risk, a foreign issuer will not likely separate the uncertainty of the antifraud provision's subjective intent from the safe harbor's objectivity. Each is part of the same transaction and regulatory scheme.

## 3. Timing and Uncertain Status

The SEC did not address how the safe harbor deals with timing and changed circumstances. At the time the foreign issuer announces its fundraising plans, its final plans may not be certain. Feedback the issuer and underwriters receive after making the initial announcement may suggest changing the manner and geographical reach of the offering. How should the SEC deal with a foreign issuer who announces plans to conduct a multi-jurisdictional U.S.-foreign offering but later pares back its plan only to make a U.S. offering? The change would arguably take the press conference out of the safe harbor. Possibly the SEC would conduct an inquiry into the issuer's good faith and bona fide intentions. Such a fall-back position would evidence further subjective analysis surrounding the safe harbor's objective test.

## 4. Risks and Benefits

Corporations raise funds for a variety of issues, none of them trivial. A foreign issuer tapping into the U.S. capital markets for the first time may hope to establish a good reputation so that future offerings pass by the SEC without undue attention. First impressions are important. With future capital raising events at stake, the foreign issuer may take irrational precautions that no safe harbor could prevent. Any foreign issuers reaching into the U.S. market may take extra care when conducting cross-border fundraising because of the immediate stakes. It is unclear under what circumstances the benefit of granting U.S. journalists access to for-

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<sup>271</sup> See Preliminary Note 1, 17 C.F.R. 230.901-904 (2004) (limiting safe harbor, including the offshore press conference safe harbor from "direct selling efforts," to Section 5); see also *Offshore Press Conferences, Final Rules*, *supra* note 8, at 53,950 (noting the safety function the antifraud provisions perform).

<sup>272</sup> See *Offshore Press Conferences, Final Rules*, at 53,950, *supra* note 8.

<sup>273</sup> See 15 U.S.C. § 77q(a)(1) (2004).

eign press conferences would outweigh the risk of jeopardizing reaching needed capital.

## VI. CONCLUSION

The SEC makes unrealistic promises to deliver objectivity and certainty to the offshore press conference issue. Regardless of the SEC's stated intentions, regulations surrounding foreign corporate publicity include subjective elements that may trigger restricting access to press conferences. The safe harbors also contain inconsistencies that prevented the SEC from achieving its goals. Additionally, the lack of an investor-protection rationale makes the offshore press conference safe harbors both ineffective and potentially harmful. Rather than dedicating resources to drafting rules that lack effectiveness and committing future judicial resources to unraveling a subjective-objective knot, the SEC should instead focus its efforts on choosing a course of action: broad reform to reach the desired level of objectivity or defense of the subjective requirements of U.S. securities regulation.<sup>274</sup>

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<sup>274</sup> The SEC is currently wrestling with these issues through the proposed rules of its Securities Offering Reform release. See Securities Offering Reform, *supra* note 3. It is unclear whether the uncertainty and internal conflict inherent in the current regulatory structure will dissipate as a result of the proposed rules.

## APPENDIX A

RULE 135(E): OFFSHORE PRESS CONFERENCES, MEETINGS WITH ISSUER REPRESENTATIVES CONDUCTED OFFSHORE, AND PRESS—RELATED MATERIALS RELEASED OFFSHORE.

(a) For the purposes only of Section 5 of the Act [15 U.S.C. 77e], an issuer that is a foreign private issuer (as defined in § 230.405) or a foreign government issuer, a selling security holder of the securities of such issuers, or their representatives will not be deemed to offer any security for sale by virtue of providing any journalist with access to its press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press—related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:

(1) The present or proposed offering is not being, or to be, conducted solely in the United States; Note to Paragraph (a)(1): An offering will be considered not to be made solely in the United States under this paragraph(a)(1) only if there is an intent to make a bona fide offering offshore.

(2) Access is provided to both U.S. and foreign journalists; and

(3) Any written press—related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of paragraph (b) of this section.

(b) Any written press—related materials specified in paragraph (a)(3) of this section must:

(1) State that the written press—related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in the United States absent registration or an exemption from registration, that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or the selling security holder and that will contain detailed information about the company and management, as well as financial statements;

(2) If the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and

(3) Not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press—related materials.

(c) For the purposes of this section, “United States” means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

*See* 17 CFR 230.135e.

RULE 902 (C)(3)(VII): DIRECTED SELLING EFFORTS SAFE HARBOR.

The following are not “directed selling efforts”: [. . .] Providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press—related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if the requirements of § 230.135e are satisfied.

*See* 17 CFR 230.902.

**RULE 14D-1(E). TENDER OFFER REGISTRATION SAFE HARBOR.**

[The notice restrictions on tender offers] shall not apply by virtue of the fact that a bidder for the securities of a foreign private issuer, [. . .] the subject company of such a tender offer, their representatives, or any other person specified in § 240.14d-9(d), provides any journalist with access to its press conferences held outside of the United States, to meetings with its representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed tender offer is discussed, if:

- (1) Access is provided to both U.S. and foreign journalists; and
- (2) With respect to any written press-related materials released by the bidder or its representatives that discuss a present or proposed tender offer for equity securities registered under Section 12 of the Act [15 U.S.C. 781], the written press-related materials must state that these written press-related materials are not an extension of a tender offer in the United States for a class of equity securities of the subject company. If the bidder intends to extend the tender offer in the United States at some future time, a statement regarding this intention, and that the procedural and filing requirements of the Williams Act will be satisfied at that time, also must be included in these written press-related materials. No means to tender securities, or coupons that could be returned to indicate interest in the tender offer, may be provided as part of, or attached to, these written press-related materials.

*See* 17 CFR 240.14d-1.