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Wall Street? Where We're Going we Don't Need Wall Street: Do Securities Regulators Stand a Chance in Cyberspace?

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Cover Page Footnote

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WALL STREET? WHERE WE'RE GOING WE DON'T NEED WALL STREET: DO SECURITIES REGULATORS STAND A CHANCE IN CYBERSPACE?

NEIL D. SCHWARTZ*

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I. INTRODUCTION

The securities markets are experiencing historic international growth fueled by the rapid evolution of the technology used to manage them¹ as technological developments change virtually every aspect of the securities markets.² The securities industry, along with

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1. See Chairman Arthur Levitt, *The Risks and Rewards of Technology*, Address to the International Federation of Stock Exchanges (Oct. 13, 1997) (visited Oct. 12, 1997) <<http://www.sec.gov/news/speeches/spch181.txt>>.

2. See *id.* (commenting on the effect of technology upon the broker/customer relationship, the clearance and settlement of trades, and the definition of an "exchange"); see also Bradley D. Belt, *From the Industrial Age to the Information Age: Rethinking the Regulation of Securities Markets*, WASH. Q., June 1, 1996, at 107 (questioning whether the current legal and regulatory framework remains effective in light of the technological revolution in the securities markets).

individual and institutional investors, is adopting many uses of the latest technology.³

In 1996, over 30 million households owned a personal computer.⁴ According to a November 1997 survey, approximately 56 million United States adults use the Internet⁵ and as many sixteen million expressed the desire to go online in 1998.⁶ Estimates reflect that potentially 72 million Americans could be using the Internet by the end of 1998.⁷ Additional studies estimate that approximately 100 million people worldwide are accessing the Internet as of January 1998.⁸ Further studies estimate that approximately seventeen percent of the United States population over the age of sixteen subscribe to an on-line service which provides access to the Internet.⁹ These figures illustrate that the emergence of the Internet poses one of the greatest challenges confronting securities regulators worldwide.¹⁰

3. See United States Securities and Exchange Commission Report to Congress, *The Impact of Recent Technological Advances on the Securities Markets* (last modified Nov. 26, 1997) <<http://www.sec.gov/news/studies/techrp97.htm>> (providing a comprehensive analysis of the impact of technological advances on the securities industry, how these changes have profoundly affected basic industry functioning, and actions by the Securities and Exchange Commission (SEC or the Commission) to address these changes).

4. See Robert A. Robertson, *Personal Investing in Cyberspace and the Federal Securities Laws*, 23 SEC. REG. L.J. 347, 349 (1996).

5. The Internet is a "giant network which interconnects innumerable smaller groups of linked computer networks." *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 117 S.Ct. 2329 (1997). In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the court discussed the size and growth of the Internet:

[The Internet is a] super-network of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide . . . In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses . . . The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages.

952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (Citation omitted).

6. See Nua Internet Surveys (visited Oct. 7, 1998) <http://www.nua.ie/surveys/index.cgi?service=view_survey&survey_number=498&rel=no> [hereinafter *Internet Surveys*].

7. See *id.*

8. See *id.* According to the surveys, the world usage total is comprised of approximately 64 million Americans and Canadians, 20 million Europeans, 14 million Asian/Pacific Islanders, 1.25 million South Americans, 1 million Africans and 500,000 Middle Easterners. See *id.*; see also *A Framework for Global Electronic Commerce* (visited Oct. 4, 1998) <<http://www.whitehouse.gov/WH/New/Commerce/index.html>> (noting that the Internet, only in its infancy, is already reshaping virtually every aspect of daily life by linking remote populations into a global community).

9. See Alexander C. Davis, *Offering and Distribution of Securities in Cyberspace: A Review of Regulatory and Industry Initiatives*, 52 BUS. LAW. 319-20 (1996).

10. See *On-line Investing Could Hit U.S.\$680 Billion*, FIN. POST, Feb. 18, 1998, at 13 (predicting that Internet investing will reach U.S.\$680 billion by 2002 from U.S.\$120 billion today); see also Comm'r Steven Wallman, *Regulating in a World of Technological and Global*

Because of the globalization of securities trading¹¹ and technological innovations like the Internet, many of the fundamental tenets of effective securities regulation are becoming outdated.¹² Among the many new challenges¹³ created by the Internet is that people can interact online with virtual anonymity.¹⁴ Internet anonymity makes it difficult to locate criminals or potential defendants.¹⁵ Many believe, however, that as more people start using the Internet, it will become like the mainstream media, resulting in a decline in anonymous users.¹⁶

Another problem confronting regulators is that Internet content is often assumed to be credible.¹⁷ As a result, information posted online is quickly disseminated and believed, often without any foundation for the assertion.¹⁸ In addition, the cost associated with obtaining online access and creating and maintaining a web page are

Change, Address before the Institute of International Bankers (Mar. 4, 1996) in 1996 WL 102708 (asserting that regulators must adopt, remove, and modify existing rules and regulations even though the future framework of the securities industry is unclear) [hereinafter Wallman Speech]. See generally Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403 (1993). Katsh suggests the new information medium is both informal and unstructured, and therefore more flexible and unpredictable. See *id.* at 406.

11. See Belt, *supra* note 2, at 107 (citing an increase in U.S. investors' trading in foreign securities from \$30 billion in 1984 to \$815 billion in 1994).

12. See Wallman Speech, *supra* note 10, at 2 (noting that "today's cutting edge in sophistication is quickly made obsolete by tomorrow's innovation").

13. See Ian C. Ballon, *THE LAW OF THE INTERNET: DEVELOPING A FRAMEWORK FOR MAKING NEW LAW* 9, 11 (1997). Ballon identifies ten areas in which the Internet differs from the real world: (1) Interactions in cyberspace can be anonymous; (2) distinctions among class, race and gender are imperceptible; (3) the Internet is creating new methods of communication; (4) national boundaries are nonexistent; (5) timely dissemination of information is considered more valuable than content; (6) information travels more rapidly in cyberspace; (7) content can remain in cyberspace forever; (8) content is often deemed credible despite a lack of supporting evidence; (9) transformation and flux are a constant in cyberspace; and (10) the barriers of entry into cyberspace are low. See *id.*

14. See *id.* at 11-12 (noting that virtual identities remove all distinctions based on class, race, age, gender, etc.). Online anonymity also removes moderating societal cues that are commonplace in face-to-face interactions. See *id.* at 12. See generally Joseph J. Cella III & John Reed Stark, *SEC Enforcement and the Internet: Meeting the Challenge of the Next Millennium*, 52 BUS. LAW 837-44 (1997) [hereinafter *SEC and Next Millennium*].

15. See Ballon, *supra* note 13, at 13. (citing *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997)). The *Baker* case demonstrates how anonymity can be easier to perpetrate in international arenas over the Internet. See *id.*; see also Jane Martinson, *Nasdaq Device to Keep Track of Rumors on Internet*, FIN. TIMES, Sept. 5, 1997, at 1 (highlighting Nasdaq efforts to surveil Internet chat rooms following fraudulent attempts to inflate stock prices).

16. See Ballon, *supra* note 13, at 14.

17. See *id.* at 19.

18. See *Internet Crime, What a Tangled Web*, EUROMONEY, Oct. 15, 1996, at 85 (discussing the fraudulent Australian web page of Fortuna Alliance Corporation) [hereinafter *What a Tangled Web*]. Even though the company disclosed that its U.S. home page was shut down by the United States Federal Trade Commission for allegedly running a pyramid scheme, the Fortuna web page still experienced significant traffic. See *id.*

low.¹⁹ Because the barriers for entry are minimal, the Internet presents tremendous opportunities for entrepreneurs and fraudsters alike.²⁰

Commentators frequently question the ability of the Securities & Exchange Commission (SEC or the Commission) to regulate an offshore or foreign entity soliciting the purchase of stock through its worldwide web site to a resident of, for example, Montana.²¹ To date, there has been great debate over this question.²² The SEC must maintain the investors' ability to access foreign markets while ensuring investor protections such as full disclosure.²³ While the SEC has responded effectively to recent challenges,²⁴ the Internet is on the verge of completely revolutionizing the securities markets.²⁵ International securities regulators must take action.²⁶

19. In the United States today, one can purchase a personal computer for less than \$1,000, and join an Internet access provider for less than \$10 per month.

20. See Ballon, *supra* note 13, at 20. "Low barriers of entry also mean that web site owner's may be thinly capitalized, and unable to satisfy judgments." *Id.*

21. See Chairman Arthur Levitt, *The Risks and Rewards of Technology*, Address to the International Federation of Stock Exchanges (Oct. 13, 1997) (visited Oct. 12, 1998) <<http://www.sec.gov/news/speeches/spch181.txt>> (noting that technology is blurring the boundaries among securities markets); see also *Moneyline* (Cable News Network television broadcast, Oct. 15, 1997) (transcript on file with the author) (discussing securities market structures, Richard Syron, Chairman and Chief Executive Officer of the American Stock Exchange, noted that exchanges are not only competing with each other for new listings, but also with new trading networks. Syron is mostly concerned with where securities transactions will take place in the future. See *id.*

22. See discussion *infra* part III at notes 81-111 and accompanying text.

23. See Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a (1994)) (providing "full and fair disclosure of the character of the securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the sale thereof"). President Roosevelt, in a letter to Congress recommending the passage of the 1933 Act, stated that there is "an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public." 77 Cong. Rec. 937 (1933).

24. See Gregory C. Yadley, *The Challenges of Technology: The Regulators' Response to Securities Offerings on the Internet*, SB69 ALI-ABA 189, 197 (1997) [hereinafter *Challenges of Technology*]. But see Joseph McLaughlin, 'Booting' the Federal Securities Laws into the 21st Century, *INSIGHTS*, July 1997, at 21 (arguing that the SEC should respond more quickly to new regulatory challenges). McLaughlin understands the SEC's caution as investor watchdog but urges the SEC to loosen restrictions on the flow of electronic information relating to a variety of issues. See *id.*

25. See *Challenges of Technology*, *supra* note 24, at 193-94 (highlighting the securities industry's increased use of the Internet); Katharina Fehr, *The Interests of the Investor Come First*, FINANZ UND WIRTSCHAFT (Switz.), Aug. 10, 1997, at 7. In an interview, Alfred Berkley, President of the computer-based Nasdaq Stock Market (Nasdaq), specified that "the Internet provides the most amazing possibilities." *Id.* Berkley believes future securities markets will be completely electronic, borderless, and computerized. He also suggests that auction markets, like the New York Stock Exchange, are of little interest to Nasdaq due to their old-fashioned market structure. See *id.*; see also *How the Internet is Changing the Securities Industry* (visited Oct. 13, 1998) <<http://www.datamerge.com/news/archives/internetreport.html>> (citing

This article makes recommendations to resolve current gaps in the structure of international securities regulations raised by securities trading via the Internet. Part II of this Article reviews how new technology like the Internet, and the SEC's response to new issues raised by technological change, affects the regulation of domestic securities markets. Part III discusses how the inevitable arrival of Internet-based trading systems is forcing SEC reconsideration of the enforcement of antifraud laws on non-United States market participants. Part IV evaluates the SEC's Concept Release on the *Regulation of Exchanges*, which addresses how technological developments affect cross-border securities trading. Part IV also discusses suggestions and proposals by international regulators and market participants. Part V concludes by asserting that sovereign-based regulation of Internet securities transactions is ineffective, and that the International Organization of Securities Commissions (IOSCO) is well suited to become the primary regulator of Internet securities markets.

II. NEW TECHNOLOGY IS RESHAPING THE SECURITIES MARKETS

Change is difficult. Change can be disorienting. Yet change—if harnessed for constructive purposes—can present us with new opportunities to unleash our economic creativity.²⁷

Recent technological advances are making the SEC rethink the enforcement of the federal securities laws.²⁸ The evolutionary character of the securities markets in a digital age has forced the SEC to respond to new regulatory challenges quickly and decisively.²⁹ The

inexpensive worldwide access, anonymity, and sheer size as three characteristics making the Internet extremely difficult to control).

26. See *What a Tangled Web*, *supra* note 18, at 85 (suggesting the creation of a new legal order that mirrors the Internet's worldwide reach because "current legal structures are tied very closely to geographic territorial jurisdictions"); see also *Cybercops Snagged on Sluggish Net Laws*, AUSTRALIAN, Feb. 16, 1998, at 5. Tim Phillips, enforcement director of the Australian Securities Commission argues that the current jurisdictional framework fails to recognize that the rapid evolution in technology, coupled with numerous regulatory agencies, impedes enforcement of regulations. See *id.*

27. See Chairman Arthur Levitt, *A Renewed Precedent: The Securities Bar and the SEC*, Address to the Practicing Law Institute at the 29th Annual Institute on Securities Regulation (Nov. 6, 1997).

28. See McLaughlin, *supra* note 24, at 21 (commenting that the SEC has adapted a number of current securities laws to address new issues raised by electronic communication). See generally U.S. Securities and Exchange Commission report to Congress, *The Impact of Recent Technological Advances on the Securities Markets* (last modified Nov. 26, 1997) <<http://www.sec.gov/news/studies/techrp97.htm>>.

29. See Andrew Osterland, *IPOs in Cyberspace*, FIN. WORLD, Apr. 22, 1996, at 24. Osterland highlights how the Internet presents great opportunities for small companies to raise capital, but also creates an easy environment for unscrupulous actors to defraud investors. See *id.*; see

following is a discussion of new developments spawned by the widespread use of technology and the Internet and the resultant SEC efforts to encourage innovation while maintaining orderly markets and shareholder protections.³⁰

A. Electronic Data Gathering, Analysis and Retrieval System, or EDGAR

The EDGAR system is a database of all documents that issuers like Microsoft or IBM must file with the Commission.³¹ EDGAR represents the democratization of investment information.³² It has leveled the playing field between Wall Street professionals and retail investors by providing all SEC filings and related information in an electronic format.³³

The Commission has established guidelines for the use of electronic media to deliver filing information required under the Securities Act of 1933.³⁴ The SEC issued two interpretative releases providing four guidelines for the effective delivery of electronic information: notice of electronic delivery; access to electronic documents; evidence of electronic delivery; and consent.³⁵ On January 1, 1998, the Commission required issuers to submit all paper filings electronically, absent a hardship exemption.³⁶

also Monique Wise, *Arizona Charges Internet Securities Fraud* (visited Oct. 29, 1998) <http://computernewsdaily.com/live/Web/261_091796_112141_30673.html> (citing the Internet as a growing problem for regulators due to lack of control and sheer size of the medium).

30. See *SEC and Next Millennium*, *supra* note 14, at 815 (providing an overview of recent SEC Internet-related regulatory actions); see also John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 *BUS. LAW* 1195 (1997).

31. See *About Edgar* (visited Nov. 4, 1998) <<http://www.sec.gov/edaux/wedgar.htm>>. Recognizing the inherent benefits of electronic dissemination of information, the Commission made the EDGAR system available to the general public. At the website, one can access specific corporate information through a keyword searchable database. See *id.*

32. See Osterland, *supra* note 29, at 24.

33. See *id.*

34. See *Use of Electronic Media for Delivery Purposes*, Securities Act Release No. 33-7233, 17 *CFR* § 231.7233 at 3129 (Oct. 6, 1995). While the Commission considers electronic delivery and paper delivery relatively equal, issuers should continue to make paper delivery available until electronic delivery is more widespread. See *id.* The Commission considers the effective disclosure of information electronically paramount to the success of the electronic medium replacing the paper format. See *id.* at 3130.

35. See *Use of Electronic Media by Broker-Dealers, Transfer Agents, Investment Advisors for Delivery of Information*, SEC Release 33-7288 (May 9, 1996); *Use of Electronic Media for Delivery Purposes*, SEC Release 33-7233 (Oct. 6, 1996).

36. See *Regulation S-T - General Rules and Regulations for Electronic Filings*, Securities Act Release No. 33-7472, 17 *CFR* § 232.7472 (Oct. 24, 1997) (noting that the electronic filing system is a more economical and efficient means of disseminating market information than the paper format); see also Gloria Santona, *More Corporations Using 'Net to Reach Investors*, *NAT'L L.J.*, July 14, 1997, at B16 (citing EDGAR as one reason for the increased popularity of the Internet among investors).

B. Internet Initial Public Offerings (IPOs) and Bulletin Board Passive Trading Stock Systems

Federal securities laws offer exemptions and safe harbor provisions from complete federal registration requirements for public offerings that meet certain conditions.³⁷ In 1996, the first company to legally sell securities via the Internet was a New York-based microbrewery, Spring Street Brewing Company.³⁸ Since Spring Street Brewing was attempting to raise less than \$5 million, the company made the offer pursuant to Regulation A,³⁹ and was therefore exempt from SEC registration.⁴⁰ In conjunction with Wit-Trade (renamed Wit Capital),⁴¹ Spring Street Brewing also established a passive electronic bulletin board trading system for the company's stock. The Commission issued a no-action letter on March 22, 1996, addressing a variety of its concerns with Spring Street's activities.⁴²

In July 1996, the Commission issued a no-action letter⁴³ regarding IPOnet's capital-raising activities on the Internet.⁴⁴ This entity created a web site allowing investors to obtain information concerning initial public offerings.⁴⁵ To maintain compliance with applicable federal securities laws, IPOnet designed an electronic questionnaire

37. See Regulation A-Conditional Small Issues Exemption, 17 CFR §§ 230.251-263. Regulation A allows a safe-harbor exemption for securities offerings of \$5 million or less. It also requires less cumbersome and costly registration procedures. See *id.*; see also Rule 504 of the Securities Act, 17 CFR § 230.504, which allows an issuer to sell an aggregate of \$1 million of securities during any twelve-month period with no specific requirements for disclosing information to offerees or purchasers.

38. See *Spring Street Brewing Co. Homepage* (visited Oct. 17, 1998) <<http://plaza.interport.net/witbeer>>. See generally *Life on the Internet 2.0: Cyber Stocks* (Georgia Public Television and Cochran Entertainment Co. 1997) (videotape on file with the author).

39. See Regulation A-Conditional Small Issues Exemption, 17 CFR §§ 230.251-263.

40. See *id.*

41. See *Wit Capital Homepage* (visited Nov. 3, 1998) <<http://www.witcapital.com/trad/home.html>>.

42. See Spring Street Brewing Co., SEC No-Action Letter [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,201 (Apr. 17, 1996) (indicating a variety of procedural modifications that were necessary before trading on the bulletin board system could be activated). The issues addressed included the handling of investor's funds, the disclosure of recent bid and ask prices, and the disclosure of information concerning the company. See *id.* at 3; see also Osterland, *supra* note 29, at 24 (noting that the SEC's willingness to allow a secondary market for unlisted securities makes Internet IPOs attractive to small investors); Real Goods Trading Corp., SEC No-Action Letter [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,226 (June 24, 1996) (allowing a passive bulletin board trading system without registration under the Securities or Investment Advisors acts).

43. See *IPOnet*, SEC No-Action Letter, 1996 WL 431821 (SEC) (July 26, 1996). The SEC's no-action letter addressed two concerns: first, whether electronic indications of interest are valid, and two, whether the posting of information relating to a securities offering on a private web site violates Regulation D (Rule 502(c) of the Securities Act of 1933 (17 C.F.R. § 230.502(c)). Section 502(c) limits the general solicitation or advertising of securities offered for sale. See *id.*

44. See *IPOnet Homepage* (visited Nov. 4, 1998) <<http://www.zanax.net/IPOnet.html>>.

45. See *id.*

that determined whether an investor met the requirements of either Regulation D,⁴⁶ Rule 501(a),⁴⁷ or Rule 506.⁴⁸ The Commission concluded the IPOnet system could continue operations if it adhered to three specific guidelines.⁴⁹

C. Annual Reports, Annual Meetings, Proxy Materials, Proxy Solicitation, and Internet Roadshows

Corporations and broker-dealers are increasingly using the Internet to reach investors.⁵⁰ Information that previously reached investors through traditional avenues like print media and television has been surpassed by instantaneous worldwide dissemination through the Internet.⁵¹ For example, annual reports,⁵² shareholder proposals,⁵³ proxy materials,⁵⁴ and proxy voting⁵⁵ are now widely

46. See 17 CFR §§ 230.501-508 (1996); see also *supra* note 37.

47. See 17 CFR §230.501(a) (1996); see also *supra* note 37.

48. See 17 CFR §230.506 (1996); see also *supra* note 37; IPOnet Membership Registration Form, <<http://www.zanax.net/IPOnet/forms/app.htm>>.

49. See IPOnet, SEC No-Action Letter, 1996 WL 431821 (SEC) (July 26, 1996). The SEC specified that a coupon or card through an electronic medium would satisfy the requirements of Rule 134(d), which permits prospective investors to respond to a prospectus by returning a coupon or card indicating their interest through the mail; and that pursuant to Securities Act Regulation D, Rule 502(c), qualifying an investor as accredited through private offerings posted in a password protected web page fails to constitute a general solicitation or advertising. See *id.*; see also Richard Raysman & Peter Brown, *Securities Offerings Over the Internet*, N.Y.L.J., June 10, 1997, at 3 (highlighting legal and regulatory issues raised by IPOs in cyberspace).

50. See Santona, *supra* note 36, at B16 (providing recommendations to corporate secretaries on effective utilization of the Internet for corporate communications); Gerard R. Boyce & Sarah Hewitt, *Proxy Season in an Electronic Environment*, N.Y.L.J., May 8, 1997, at 5; see also John R. Hewitt, *The ABCs of Cybercompliance*, N.Y.L.J., Jan. 23, 1997, at 5 (addressing regulatory requirements for various broker-dealer activities on the Internet) [hereinafter *Cybercompliance*].

51. See McLaughlin, *supra* note 24, at 21. McLaughlin recommends ten areas in which the SEC should loosen controls on electronic communication between corporations and investors: e-mail communications, electronic roadshows; research published before or during public or private offerings; asset-backed and foreign sovereign securities; screen-based information on restricted stock, and offshore offerings; and internet messages bearing on blue sky laws and secondary market transactions. See *id.* For explanation on comparing today's investor with that of a well-versed Wall Street insider due to the ease with which one can obtain information over the Internet, see *SEC and Next Millennium*, *supra* note 30, at 815).

52. See Santona, *supra* note 36, at B16. Companies with an international reach are translating their Internet annual reports into several languages. See *id.*; see also Boyce, *supra* note 50, at 5. See generally Securities and Exchange Act of 1934 § 14(a)-8, 15 U.S.C. § 78 (1994) (defining a shareholder proposal as allowing any shareholder owning at least \$1,000 or one percent of the company's stock to present a proposal for action at the company's annual meeting). Shareholders have the opportunity to vote on the issue in the management's proxy. See *id.*

53. See Boyce, *supra* note 50, at 5 (noting that the California Public Employees' Retirement System used the Internet to attract support for its shareholder proposals at the Archer Daniels Midland Company's 1996 annual meeting).

54. See *Challenges of Technology*, *supra* note 24, at 194. Rapid growth in ownership of personal computers has created a new environment that challenges the traditional foundations of solicitation and general advertising of securities. See *id.* Bennet LeBow, Carl Icahn, and the Brook Group took its fight to have RJR Nabisco divide its tobacco and food businesses to the

available on the Internet.⁵⁶ Some companies, such as Bell and Howell, have even started holding annual meetings via the Internet.⁵⁷ Prior to its IPO, Yahoo!, Inc., a leading Internet search engine provider, believed it was extremely important to post its prospectus in cyberspace.⁵⁸

Furthermore, roadshows,⁵⁹ once only available to the investment community elite, can now be directly transmitted into any investor's living room. In March 1997, Private Financial Network, a private subscriber network and subsidiary of a joint venture between NBC and Microsoft Corporation, received SEC approval to transmit roadshows for public offerings via the Internet to a limited number of viewers.⁶⁰

D. Internet Brokerage Accounts

Many domestic broker-dealers now provide account and trading access via the Internet.⁶¹ Approximately 1.3 million U.S. investors maintain on-line brokerage accounts⁶² and many expect that investor

Internet by posting materials on the web page of Georgeson & Company, a proxy solicitation firm. *See id.* at 194.

55. *See First Chicago Gets First Proxies Through the Net*, INV. REL. BUS., Mar. 10, 1997, at 12. McDonald's Corporation, First Chicago NBD Corporation, and Ameritech Corporation participated in the inaugural program. *See id.*

56. *See Electronic Delivery of Stock Plan Prospectuses, Proxy Statements and Annual Reports—What Companies are Doing*, CORP. EXECUTIVE, Nov./Dec. 1996, at 4 (noting that leading computer company Hewlett Packard electronically delivered its annual report at a potential cost savings of \$300,000).

57. *See Santona, supra* note 36, at B16; *see also Bell & Howell Adds Cyberoting*, INTERNET COMPLIANCE ALERT, Aug. 25, 1997, at 7.

58. *See D.M. Osbourne, The Netty Professor*, AM. L. TECH. MAG., Spring 1997, at 57.

59. *See Raysman, supra* note 49, at 3. A roadshow is a presentation by representatives of the investment community or issuers to potential underwriters, institutional investors, and the like, in order to generate interest in the potential investment vehicle. *See id.*; *see also SEC Gives Nod to Roadshows Over the Internet*, WALL ST. J., Sept. 9, 1997, at B4. *See generally* Linda C. Quinn & Otilie L. Jarmel, *The Road Less Traveled: The Advent of Electronic Roadshows*, INSIGHTS, July 1997, at 3.

60. *See Private Financial Network*, 1997 SEC No-Act., Lexis 406 (avail. Mar. 12, 1997) (recommending to abstain from enforcement action if PFN transmitted live or delayed data by electronic means to PFN subscribers' computer or television screens). At issue was the application of § 2(10) of the Securities Act (15 U.S.C. § 77b(10)), which contains the definition of a prospectus. The Commission concluded that PFN's electronic transmissions were not prospectuses as defined by the Act because prior to each transmission, each viewer of the roadshow would have already received "a filed prospectus from the issuer or underwriter." *See id.*

61. *See Rebecca Buckman, Despite Growing Competition, E*Trade Still Talks Revolution*, WALL ST. J., Dec. 24, 1997, at B1.

62. *See On-line Investing Could Hit U.S.\$680 Billion*, FIN. POST, Feb. 18, 1998, at 13. Online brokerage accounts will number 14.4 million by 2002. *See id.* Online investing has broad appeal with young computer-literate investors as well as retired persons interested in low brokerage commissions. *See id.*

interest in trading via the Internet will only grow,⁶³ perhaps to the point of surpassing all other electronic means of placing trades.

In November 1997, International Business Machines (IBM) Chairman and Chief Executive Officer (CEO) Louis Gerstner boldly stated to executives at a Securities Industry Association conference that "your entire industry will move to the Net. Not just the discounters; all of you."⁶⁴ Most executives tacitly agreed with Gerstner's statement.⁶⁵ Some of the large, well-established brokerage houses have begun purchasing smaller Internet trading firms.⁶⁶ In addition, some on-line trading firms are expanding internationally⁶⁷ and some are also planning to establish after-hours trading networks that would enable an electronic brokerage firm to cross trades with itself, thereby reducing costs for its investors.⁶⁸ Despite the rapid growth and potential of Internet trading, traditional exchanges are not yet overly concerned.⁶⁹

E. *Optimark™ Technologies*

A precursor to Internet-based trading systems is OptiMark™ Technologies,⁷⁰ a supercomputer-based equity matching system that has already secured agreements with fifty of the United States' two

63. See Vanessa O'Connell & E.S. Browning, *Stock Orders on Internet Poised to Soar*, WALL ST. J., June 25, 1996, at C1. One electronic brokerage firm predicts that the rapid growth rate of Internet trading versus other forms of computerized order handling, will likely result in the Internet dominating the business in the future. See *id.*

64. Patrick McGeehan, *High-End Brokers will Shift to the Net, IBM's Gerstner says*, WALL ST. J., Nov. 7, 1997, at C1 (noting the president of E*Trade Group, Inc., the upstart online trading firm, as audaciously suggesting that parents not push their children into the stock brokerage profession due to the explosive potential growth of online Internet trading); see also Christina K. McGlossom, *Who Needs Wall Street? The Dilemma of Regulating Securities Trading in Cyberspace*, 5 COMMLAW CONSPECTUS 305 (1997). McGlossom argues that the ease with which investors can trade online will make the securities industry reevaluate the broker-client relationship. See *id.*

65. See McGeehan, *supra* note 64, at C1. Underlying the industry's slow move to the Internet is a general fear of alienating the firms existing sales force. See *id.*

66. See *id.* Many industry watchers and Wall Street insiders expect significant cross-border and cross-industry mergers in the next few years. See *id.*

67. See Buckman, *supra* note 61, at B1 (citing E*Trade as having customers in Canada and Australia investing in U.S. equities). E*Trade is hoping to establish similar arrangements in approximately 15 countries. See *id.* "We look at the electronic world as having no borders," according to Christos Cotsakos, the company's CEO. *Id.*

68. See *id.*

69. See O'Connell, *supra* note 62, at C1. A New York Stock Exchange (NYSE) regulator stated that "it will be a long time before there will be enough liquidity for that market to be a threat to our core market." *Id.* But see Steve Bailey & Steven Syre, *Net Changes Face of Investing at Fidelity—Brokerage Shifts Focus to Handle Burst of On-line Trading*, BOSTON GLOBE, Feb. 20, 1998, at E1. Fidelity experienced a marked increase in its online business, indeed Internet orders comprised approximately 49 percent of commission trades at its discount brokerage. See *id.*

70. See *OptiMark-tech Homepage* (visited Oct. 13, 1998) <<http://www.OptiMark.com>>.

hundred largest institutional investors.⁷¹ The system allows investors to trade at any size-price combination, without other market players learning anything about them or their order until the order is filled.⁷²

OptiMark™ executives believe it is only a matter of time before investment managers accept electronic networks as a viable trading medium.⁷³ Richard Lindsey, Director of Market Regulation at the SEC, specified that one reason the SEC approved OptiMark's™ system was its unique price discovery technique, and stated OptiMark™ was on the leading edge of technology and "the type of innovation where the markets may lie in the future."⁷⁴ In January 1998, the National Association of Securities Dealers (NASD)⁷⁵ announced an agreement in principle between the Nasdaq Stock Market and OptiMark™ Technologies to integrate Optimark's technology into the Nasdaq Stock Market.⁷⁶

In light of the above, it is evident that securities professionals and investors alike are making use of the latest technology. While Part II was a brief review of technological changes reshaping the securities markets⁷⁷ and the SEC's regulatory response, Part III examines the more complex issues that technological change raises.⁷⁸ With the inevitable arrival of Internet-based trading systems,⁷⁹ who will regulate a foreign entity trading securities through its website?⁸⁰

71. See Deborah Lohse & Greg Ip, *SEC Authorizes New System That Will Handle Big Trades*, WALL ST. J., Sept. 19, 1997, at C1.

72. See *id.* Often times an institution has difficulty selling or buying large blocks of shares without moving the price of the stock, and thereby hurting its own performance. See *id.*

73. See *Trading on the Frontier*, PLAN SPONSOR, Oct. 1996. An OptiMark™ executive stated that "instantaneous, electronic transmission means that markets truly become borderless Network trading will have a big impact on Wall Street and other financial centers around the world." *Id.*

74. See Lohse, *supra* note 71, at C1.

75. See *NASD Homepage* (visited Oct. 18, 1998) <<http://www.nasd.com>>. NASD develops rules and regulations, conducts regulatory reviews of members' business activities, disciplines violators, and designs, operates, and regulates securities markets. See *id.*

76. See Press Release, *NASD Announces Proposed New Nasdaq System Innovation for Investor Benefit* (visited Oct. 13, 1998) <<http://www.nasdaqnews.com>>. The benefits of the OptiMark™ system for investors are enhanced liquidity of Nasdaq, lower market impact costs caused by allowing investors to trade anonymously, and an increased opportunity for price improvement due to the anonymous expression of trading interest. See *id.*; but see Lohse, *supra* note 71, at C1, wherein the NYSE urged the SEC to deny Optimark™ approval on the basis that secretly trading large blocks of stock will cause investors to lose access to important market information.

77. See generally U.S. Securities and Exchange Commission Report to Congress, *The Impact of Recent Technological Advances on the Securities Markets* (last modified Nov. 26, 1997) <<http://www.sec.gov/news/studies/techrp97.htm>>.

78. See, e.g., Michael D. Mann, *Cross Border Cyberspace: Jurisdiction in Cyberspace: International Implications of Electronic Markets*, WALLSTREETLAWYER.COM, June 1997, at 24-26.

79. See Karen L. Tippett, *Internet Entrepreneurs are Aiming to Bypass Traditional Exchanges*, WALL ST. J., June 4, 1997, at F2; see also Osterland, *supra* note 29, at 24; Wit Capital Homepage

III. WHO HAS JURISDICTION OVER INTERNET SECURITIES TRANSACTIONS?

Strength is not the absence of weakness, but how we wrestle with our weaknesses.⁸¹

Currently there are few ways the SEC can enforce antifraud laws against criminals who target United States investors over the Internet from outside the United States.⁸² For a U.S. court to apply federal securities laws to cross-border securities transactions,⁸³ two requirements must be met: first, a transaction must have sufficient minimum contacts with the United States to justify the exercise of subject matter jurisdiction,⁸⁴ and second, each party must have sufficient minimum ties to the United States to permit the exercise of personal

(visited Oct. 3, 1998) <<http://www.witcapital.com/trad/home.html>>; Buckman, *supra* note 61, at B1; *SEC and Next Millennium*, *supra* note 14, at 828.

80. See discussion *infra* part III at notes 81-111 and accompanying text.

81. Quotation attributed to Noah Ben Shea, religious scholar.

82. See Securities and Exchange Act of 1934 10(b), 15 U.S.C. § 78j(b)(1994). This provision specifies that it shall be unlawful "to use or employ, in connection with the sale or purchase of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." *Id.* Rule 10b-5 is the regulation promulgated by the SEC under this statutory authority, and makes it unlawful for any person:

(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made . . . not misleading, or (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1996); see also *Chat Room: Isaac Hunt*, INSTITUTIONAL INVESTOR, Mar. 24, 1997, at 8. Hunt highlights the SEC's concern with the activities of international investment advisors who may be beyond the reach of the Commission, but can still solicit United States investors through the Internet. See *id.*

83. See *Dep't of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings on Appropriations Before the Subcomm. of the House of Comm. on Appropriations*, 102d Cong., 2d Sess., pt. 6, at 683-85 (1992). From 1980 to 1990, the overall value of foreign transactions in U.S. stocks grew 456%, from \$75 billion annually to approximately \$417 billion. See *id.* In 1992 alone, estimates reflect that U.S. investors purchased and sold approximately \$271 billion of foreign securities. See *id.*

84. See *Calder v. Jones*, 465 U.S. 783 (1984). The plaintiff, a California resident, sued the Florida-based editor and writer of the *National Enquirer*, for libel. The Supreme Court found that there were sufficient minimum contacts to assert personal jurisdiction, and specified that the editor should have reasonably anticipated that litigation might have been initiated where the harm occurred. See *id.*; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The plaintiff, a New York resident, sued the defendant, an Ohio corporation headquartered in California, for libel in United States District Court in New Hampshire. The defendant's only connection with New Hampshire was the monthly sale of 10-15,000 magazines. The Supreme Court held that the regular sale of magazines in the forum state subjected the defendant to in personam jurisdiction because the defendant should have reasonably anticipated its activities could give rise to the cause of action there. See *id.*

jurisdiction.⁸⁵ Because domestic regulators have primary control over entities within their jurisdiction, the principle regulatory weaknesses now lie in cyberspace cross-border trading activities.⁸⁶ To date, there are a small number cases interpreting Internet jurisdiction,⁸⁷ and none related to the securities laws.⁸⁸

A. Conflicting Jurisdictional Approaches

Not surprisingly, the existing legal debate over jurisdiction and individual rights in cyberspace involves a number of different theories.⁸⁹ Arguably, one of the simplest forms of avoiding conflict on the Internet,⁹⁰ and thereby escaping complicated jurisdictional

85. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see generally Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tenders Offers*, 45 NW. U. L. REV. 523, 549 (1993) (discussing the SEC's broad regulatory reach, and suggesting a legislative approach based on a choice of law analysis); Michael J. Wagner & Matthew G. Allison, *Internet Law*, NAT'L L.J., July 7, 1997, at B5.

86. See Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 651 (1995). Federal securities regulators are likely to be focused on resolving boundary and jurisdictional issues for the foreseeable future. See *id.* Seligman further believes changes in the investor community, the internationalization of securities markets and new technology are the driving elements in changing the federal securities regulation landscape. See *id.*

87. See *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997). Three classes of Internet contacts determine Internet jurisdiction. The first class specifies that defendants who maintain continuous and substantial contacts through interstate commerce over the Internet can be summoned to court in another state. The second class asserts that the mere exchange of information over the Internet would require the court to determine the frequency and quality of the communication in order to establish jurisdiction. The final class asserts that a passive web site would be insufficient to establish jurisdiction, and therefore a violation of due process. See *id.*; see also *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996) (holding an Italian publisher in violation of an existing permanent injunction due to company's creation of an Internet web site that directed selling efforts toward United States' residents); Arun Natarajan, *Net Catches Regulators' Attention*, BUS. LINE (HINDU), Sept. 16, 1997, at 4. The Securities Investment Board of the United Kingdom has established a stringent standard for establishing personal jurisdiction via the Internet by specifying that any website, even one without selling efforts directed to United Kingdom residents, may establish jurisdiction in the forum state. See *id.* But see *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1996).

88. See generally Roberta S. Karmel, *Changing Concepts of Extraterritoriality*, N.Y.L.J., Jan. 30, 1998, at 3. Karmel provides a historical analysis of the SEC's efforts to assert jurisdiction over foreign-based securities transactions. In light of the currently evolving international securities markets, Karmel argues that the SEC should avoid overreaching its authority, or face retaliatory measures from foreign markets. See *id.*

89. See Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1993) (discussing various methods in which existing laws and new rules can be implemented to regulate behavior on the Internet including self-help, law merchant, customs in public international law, and contractual agreements).

90. See James P. Donohue, *Litigating in Cyberspace: Jurisdiction and Choice of Law—A United States Perspective* (visited January 5, 1998) <<http://www.abanet.org/buslaw/cyber/jiusjuris.html>> (asserting that unless the user stays off the Internet, it is extremely difficult to avoid contact with a specific jurisdiction in cyberspace).

issues, is self-help.⁹¹ Another approach would be for the parties to a securities transaction to form a contract before engaging in Internet activity.⁹²

Some argue that choice of law provisions could resolve jurisdictional conflicts that arise in cyberspace.⁹³ Others suggest that the doctrine of comity,⁹⁴ coupled with the delegation of authority to self-regulatory organizations, could provide a new framework towards reconciling international jurisdictional disputes among Internet users.⁹⁵

Still others argue that the extraterritorial application of the anti-fraud provisions of the federal securities laws should adopt a domestic-traded test.⁹⁶ The domestic-traded test analyzes the jurisdictional question based on where the trading occurred, not the fraudulent act.⁹⁷ Accordingly, all trading which occurs in U.S. markets would fall under the federal securities laws and all trading outside the United States would fall under the respective country's securities laws.⁹⁸ Most parties agree, however, that "the most

91. See Hardy, *supra* note 89, at 1016-22. Hardy explains self-help as the equivalent of "if you don't like it, don't do it." *Id.* at 1016.

92. See *id.* at 1028-33.

93. See Matthew R. Burnstein, *Conflicts in the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 112 (1996). Burnstein argues for a multilateral choice of law treaty for transnational cyberspace transactions but warns that the choice of law approach could be abused if defendants consistently immunize their illegal conduct by choosing a forum that is inherently unfair to a plaintiff. See *id.* at 115; see also Richard S. Zembeck, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996) (arguing that, even though Internet conflicts are redefining traditional notions of geographic sovereignty, existing jurisdictional jurisprudence provides courts with sufficient guidance). See generally Donohue, *supra* note 90.

94. See Restatement (Third) of Foreign Relations Law of the United States §§ 403(1)-(3) (1987). Restatement section 403(1) provides that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement section 403(3) provides that when a conflict arises between two states, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction . . . [and] should defer to the other state if that state's interest is clearly greater."

95. See David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1392 (1996). The authors argue that "in applying both the doctrine of "comity" and the idea of "delegation" to cyberspace, a local sovereign is called upon to defer to the selfregulatory judgments of a population partly, but not wholly, composed of its own subjects." *Id.* at 1393.

96. See John D. Kelly, *Let There Be Fraud (Abroad): A Proposal For a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL'Y INT'L BUS. 477 (1997); see also Dan L. Burk, *Transborder Intellectual Property Issues on the Electronic Frontier*, 6 STAN. L. & POL'Y REV. 9, 15 (1994). Burk asserts that the Internet's effect of blurring territorial boundaries makes actions rather than situs a more effective criteria for defining jurisdiction. See *id.* However, asserting U.S. jurisdiction through statutory grounds will likely invoke protests from foreign regulators. See *id.*; see also *infra* n.146 and accompanying text.

97. See Kelly, *supra* note 96, at 498.

98. See *id.*

flexible, least intrusive rule-making process is best because communications technology is changing so rapidly."⁹⁹

B. SEC Reliance on Memoranda of Understanding

In order to combat regulatory gaps, the SEC has entered into more than twenty-nine Memoranda of Understanding (MOUs)¹⁰⁰ with foreign regulatory bodies.¹⁰¹ The Commission's MOUs allow it to gather important information of potentially violative conduct necessary to take enforcement action where evidence is located in a foreign country.¹⁰² Prior to the broader acceptance of MOUs the Commission and its foreign counterparts had limited success in their efforts to use international cooperation as a means to gather foreign-based regulatory information.¹⁰³ In 1988, after lobbying efforts by the Commission, Congress passed legislation authorizing the Commission to conduct an investigation on behalf of a foreign regulatory body as long as the Commission can obtain assurances of confidentiality and reciprocal assistance.¹⁰⁴ Over the past decade, MOUs have become the vehicle for enforcement cooperation among international securities regulators.¹⁰⁵

99. Hardy, *supra* note 89, at 1054. Hardy asserts that there should be a legal presumption of minimal regulation when attempting to solve cyberspace problems. See *id.* at 1054.

100. See THE SEC SPEAKS IN 1997 747, 754 (1997) (defining MOUs as formal information sharing arrangements with foreign regulatory authorities) [hereinafter SEC SPEAKS].

101. See *Testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission, Concerning Appropriations for Fiscal Year 1998 Before the Subcommittee on Commerce, Justice, and State, the Judiciary, and Related Agencies of the Senate Committee on Appropriation*, 1997 WL 124189 (SEC), Mar. 19, 1997. In 1996, the Commission sought foreign enforcement assistance on 230 occasions, and received 342 requests for assistance from foreign authorities in connection with these MOUs. See *id.* at n.3. As of January 16, 1997, the SEC has formal information sharing arrangements with Argentina, Australia, Brazil, Canada, Chile, China, Costa Rica, Egypt, European Community, France, Germany, Hong Kong, Hungary, Indonesia, IADB/UNECLAC, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Russia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. See SEC SPEAKS, *supra* note 100, at 79. See generally William Lash, *International Legal Developments in Review: 1996 Business Transactions and Disputes*, 31 INT'L LAW. 361 (1997).

102. See SEC SPEAKS, *supra* note 100, at 753 (discussing the background and role of the SEC's information sharing arrangements with foreign regulators); see also SEC *Trains Foreign Regulators*, FIN. NET NEWS, Mar. 17, 1997 at 7. The SEC expects the number of prime bank schemes to increase as offshore Internet sites proliferate. See *id.* But see Peter Waldman & Jay Solomon, *Busang Probe is as Tough as Finding Gold*, ASIAN WALL ST. J., May 23, 1997, at 1. Jurisdictional questions create difficulties in enforcement. For example, in investigating the Bre-X Minerals, Ltd. Busang Gold mine for fraud, one investigator stated that "no one really has jurisdiction. The salting . . . took place in Indonesia, but what laws were . . . broken in that country? Can a prosecutor in Canada [or the U.S.] get a warrant for those guys in the Philippines for what they did in Indonesia? Very tricky." *Id.*

103. See SEC SPEAKS, *supra* note 100, at 754.

104. See Securities Exchange Act of 1934, § 21(a)(2). The Commission believes this legislation will demonstrate to foreign regulators the benefits of cooperation and foster new channels of international assistance. See SEC SPEAKS, *supra* note 100, at 755.

105. See SEC SPEAKS, *supra* note 100, at 755.

In a recent international enforcement action, the Commission alleged that certain foreign institutions purchased Duracell call options¹⁰⁶ while in possession of material nonpublic information prior to the September 12, 1996, merger announcement between Duracell and The Gillette Company.¹⁰⁷ Accounts held by Nominees (Bahamas) Ltd. of Nassau, Bahamas, and Banca della Svizzera Italiana of Lugano, Switzerland, executed the trades.¹⁰⁸ The profit potential from the violative option trading by the foreign entities was approximately \$1 million, which the Commission froze in the United States.¹⁰⁹

Though the SEC's actions in the Duracell case were successful, U.S. investors electronically access quotes from and place orders in foreign markets thousands of times a day.¹¹⁰ The ease with which investors access foreign markets exerts new pressures upon the SEC's existing regulatory framework.¹¹¹ With geographic boundaries vanishing, and distinctions between foreign and domestic markets fading, coordination among international regulatory bodies must increase.¹¹² As such, it is not clear at this time who has jurisdiction over Internet securities transactions.¹¹³

106. See 2 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* §§ 1064-80 (3d ed. 1998) (providing a detailed definition of a call option as a contract wherein one party provides another party the right to buy an underlying financial instrument at a specified price by a certain time).

107. See *Certain Purchasers of the Call Options of Duracell Int'l, Inc.*, No. 96 Civ. 7017, (S.D.N.Y. Oct. 2, 1996) Lit. Rel. Nos. 15045 (Sept. 16, 1996) and 15072 (Sept. 26, 1996).

108. See *id.*

109. See *id.*

110. See Belt, *supra* note 2, at 107.

111. See Securities and Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a (1994)). The Act's purpose is to "provid[e] for the regulation of securities exchanges and over-the-counter markets operating in interstate and foreign commerce through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." *Id.*; see also Belt, *supra* note 2, at 107. Belt argues that the current regulatory framework, designed during the Great Depression, needs significant reworking to meet the challenges of the next century because it inhibits the regulators while market participants grow more astute and technologically advanced. See *id.* Belt points out that the Commission's resources are constrained by budgetary limitations while the private sector's resources are expansive. See *id.*

112. See Wallman Speech, *supra* note 10, at 4. The notion of international regulatory cooperation and information exchange is widely accepted as an effective means of combating cross-border fraud. See *id.*; see also Jane Martinson, *U.S. Calls for Internet Funds Police*, *FIN. TIMES*, Oct. 3, 1997, at 5 (calling for international coordination in surveilling for cross-border Internet solicitations of mutual funds); *SEC Speaks*, *supra* note 100, at 755.

113. See Kenneth W. Brakebill, *The Application of Securities Laws in Cyberspace: Jurisdictional and Regulatory Problems Posed by Internet Securities Transactions*, 18 *HASTINGS COMM. & ENT. L.J.* 901 (1996). Brakebill argues that the "conventional jurisdictional rules are ambiguous in their application to cyberspace . . . [A] quick legislative response would provide more legal certainty for Internet transactions. Nevertheless, definitive statements as to what constitutes "conduct" and "purposeful availment" along the Internet are necessary in order to restrain American courts from overextending their extraterritorial power." *Id.* at 943.

IV. THE SECURITIES & EXCHANGE COMMISSION CONCEPT RELEASE ON THE REGULATION OF EXCHANGES

The door of success is marked "push" and "pull." Achieving success is knowing when to do what.¹¹⁴

Prior to the SEC's Concept Release on the Regulation of Exchanges in 1997,¹¹⁵ many observers urged regulators to rethink securities market structures due to the impact of technological change.¹¹⁶ While the SEC's 1988 Concept Release on International Securities Markets did not mention the Internet, it suggested technology was bringing international securities markets closer together.¹¹⁷ That Concept Release urged for international cooperation among regulators.¹¹⁸

Securities regulators lacked formal structure for cooperation in the early 1980's.¹¹⁹ With fraudulent activities increasing in international complexity, the need for international coordination grew.¹²⁰ As a result, the IOSCO was founded to combat cross-border fraud.¹²¹ As the significance of the Internet and technology expanded in the early 1990's, the IOSCO directed more attention to the competitive limitations of the United States' existing regulatory structure at the

114. Quotation attributed to Yiddish folk saying.

115. See *Regulation of Exchanges*, 62 Fed. Reg. 30,485 (1997) (to be codified at 17 C.F.R. pt. 240) (proposed May 23, 1997) [hereinafter *Regulation of Exchanges*].

116. See discussion *infra* part IV at notes 123-147 and accompanying text.

117. See *Regulation of International Securities Markets*, Exchange Act Release No. 33-6807, 1988 WL 268030 (F.R.). The SEC suggested that an international securities market system should include the following features:

1. Efficient structures for quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards;
2. Sound disclosure systems, including accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants; and
3. Fair and honest markets, achieved through regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation.

Id.

118. See *id.* The SEC mentioned the IOSCO as an effective forum for the exchange of ideas. See *id.*

119. See HAROLD S. BLOOMENTHAL, *SECURITIES AND FEDERAL CORPORATE LAW* § 15.11 (3d ed. 1997). Bloomenthal discusses how fraudulent operators would select a particular domicile due to its lack of regulation. See *id.* Bloomenthal further explains how operators would move their organizations to new countries once regulators became aware of their activities. See *id.* Bloomenthal highlights the fraudulent International Investment Trust as an example of the ad hoc nature of securities regulation during this period. See *id.*

120. See *id.*

121. See *id.* For additional information on the IOSCO, see discussion *infra* part V at notes 148-184 and accompanying text.

forefront of an ever-expanding global market.¹²² Increased cross-border trading activity sparked more calls for the harmonization of securities laws.¹²³

A. Analysis of the Concept Release

In May 1997, the SEC issued the Concept Release on the *Regulation of Exchanges* in an attempt to address the technological developments discussed in Part II of this article and the increased opportunities for cross-border securities trading.¹²⁴ The Concept Release elicited the views of the general public on how to update existing federal securities regulations.¹²⁵ Commenting on the Concept Release, Chairman Arthur Levitt stated that "[t]echnology has . . . given U.S. investors efficient new ways of [electronically] trading stocks on foreign markets This seamless access to foreign markets has strained our existing regulatory apparatus."¹²⁶ Commissioner Richard Lindsey, focusing on one aspect of the Concept Release—electronic cross-border trading—stated that "only those entities that provide U.S. investors with direct access to a foreign market . . . would be subject to Commission oversight."¹²⁷

Three Approaches for Regulating Foreign Market Activity

The Concept Release proposes three methods of regulating foreign market activities in the United States: (1) reliance on the foreign markets' home country regulation;¹²⁸ (2) requiring foreign

122. See Belt, *supra* note 2, at 107 (calling for significant revisions of the U.S. securities markets in order to remain competitive in a global marketplace).

123. See *id.*; see also Karsten Biloft, *A Revolution in Securities Markets' Structures?*, FIN. MKT. TRENDS, Nov. 1, 1996, at 15 (calling for a more uniform approach in the regulation of cross-border trading). The author suggests a broad utilization and application of MOUs would provide important avenues through which to regulate Internet-related securities transactions. See *id.* The author also notes that the growth of cross-border trading systems increases the need for international uniformity, and might necessitate "a more precise allocation of regulatory responsibilities and powers." *Id.*

124. See *Regulation of Exchanges*, *supra* note 115, at 30,521-29.

125. See *id.*

126. Chairman Arthur Levitt, *Statement to the Open Meeting to Consider the Concept Release on Exchange Regulation and Foreign Market Access to the United States*, Washington, D.C. (May 23, 1997).

127. Comm'r Richard R. Lindsey, *Statement to the Open Meeting to Consider the Concept Release on Exchange Regulation and Foreign Market Access to the United States*, Washington, D.C. (May 23, 1997).

128. See *Regulation of Exchanges*, *supra* note 115, at 30,522-26. The SEC notes that this method may pose significant drawbacks for U.S. investors because foreign markets may have different or nonexistent laws relating to insider trading, market manipulation, fraud, disclosure, and other market integrity issues. See *id.* But see *American Bar Association Response to Regulation of Exchanges Concept Release* (visited January 5, 1998) <<http://www.sec.gov.rules/>

markets to register as exchanges;¹²⁹ and (3) regulating the access providers to foreign markets.¹³⁰ This approach specifies that domestic activities of foreign entities which provide investors direct access to an overseas market would be subject to SEC oversight.¹³¹ As such, it would require non-registered access providers to register with the SEC as a securities information processor (SIP), except only certain highly sophisticated customers (namely institutional investors).¹³² These entities would be required to comply not only with record-keeping, disclosure, and reporting requirements, but also with the anti-fraud provisions of U.S. securities laws.¹³³ Registered broker-dealers already providing U.S. investors access to foreign markets would be required to comply with similar basic regulations.¹³⁴ A question remains as to whether e-mail and other major commercial Internet services fall within the above two categories.¹³⁵

The SEC believes the regulation of access providers may provide the most workable method for surveilling public networks like the Internet.¹³⁶ The SEC suggests that limiting regulation to the United States activities of foreign markets may reduce potential conflicts with foreign markets' home-country regulation.¹³⁷ Creating a regulatory framework may also clarify the status of foreign markets with limited activities in the United States.¹³⁸ Moreover, by focusing on domestic activities, the Commission may not exceed its

concept/s71697/liftin4.htm>. The ABA suggests that the Commission take a limited jurisdictional approach to international transactions. *See id.*

129. *See Regulation of Exchanges, supra* note 115, at 30,524. A significant drawback of this approach is that direct regulation of foreign markets exceeds the SEC's jurisdiction. *See id.*

130. *See id.* at 30,525.

131. *See id.* at 30,525. The SEC loosely defined a foreign market as a stock exchange, broker-dealer, or service bureau. *See id.*

132. *See* 15 U.S.C. § 78k-1(b). SIPs are required to register with the SEC and comply with Section 11A of the 1934 Exchange Act. *See id.* Section 11A, enacted by Congress to create a regulatory framework for the integration of technological developments into the securities market, extended SEC authority to

any person engaged in the business of (1) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security . . . or (2) distributing or publishing . . . on a current or continuing basis, information with respect to such transactions or quotations.

Exchange Act of 1934 § 3(a)(22), 15 U.S.C. § 78c(a)(22).

133. *See Regulation of Exchanges, supra* note 115, at 30,526.

134. *See id.*

135. *See Coffee, supra* note 30, at 1230. Coffee notes that Internet communication companies that only provide data, and have "no direct link" to an exchange member do not fall within the SIP category and obviously are not registered broker-dealers. *See id.* Arguably, a U.S. investor could still place trades with a foreign broker-dealer via e-mail or an Internet service provider. *See id.*

136. *See Regulation of Exchanges, supra* note 115, at 30,524-26.

137. *See id.*

138. *See id.*

jurisdictional authority as promulgated under the federal securities laws.¹³⁹ Lastly, this approach casts a wide net upon most services that provide United States investors with access to foreign securities markets.¹⁴⁰

B. Analysis of Responses to the Concept Release

The Concept Release clearly reflects the SEC's willingness to move the securities market toward a more creative, flexible, and innovative regulatory structure.¹⁴¹ As intended, the Concept Release creates significant dialogue among regulators, market participants, and the general public.¹⁴²

Among the responses to the Concept Release, many argue that the SEC will face grave difficulties keeping control over access points because doing so will require a significant amount of human and technological effort.¹⁴³ The National Association of Securities Dealers, Inc. (NASD), the parent corporation of the Nasdaq Stock Market and NASD Regulation, Inc., encouraged the SEC to move quickly because the technological entry barriers to foreign markets have fallen dramatically.¹⁴⁴ While the removal of remaining barriers to foreign markets is important, the NASD suggested the SEC should maintain its enforcement role over U.S. investor activity abroad which may occur through the Internet or other electronic medium.¹⁴⁵ The NASD argued that regulators must have access to basic information concerning trade, quote, and order entry activity in any computer system accessible in the United States, as well as the ability to take enforcement action.¹⁴⁶ As such, the NASD suggested that the Commission limit foreign market access to only those countries that

139. See *id.*

140. See *id.*

141. See Levitt, *supra* note 126; see also Dominic Bencivenga, *Electronic Trading: SEC Weighs Tighter Control of Alternative System*, N.Y.L.J., June 5, 1997, at 5 (noting that the SEC's approach to rethinking the regulation of the markets suggests that "everything is up for grabs").

142. See Levitt, *supra* note 126.

143. See Bencivenga, *supra* note 141, at 5.

144. See *NASD Response to Regulation of Exchanges Concept Release* (last visited Oct. 5, 1998) <<http://www.sec.gov.rules/concept/s71697/x.html>> (noting the undeveloped regulatory structure of foreign markets accessible to U.S. investors) [hereinafter *NASD Response*].

145. See *id.* The NASD's concern here is investor protection. See *id.*

146. See *id.* The NASD's regulatory arm, NASD Regulation, Inc., is charged with enforcing NASD Rules and regulations, and regulating the Nasdaq Stock Market. See *NASD Regulation, Inc. Homepage* (visited Oct. 19, 1998) <<http://www.nasdr.com>>. On the subject of the NASD lack of regulatory authority to obtain names of alias who post fraudulent statements on Internet access provider systems, see *What a Tangled Web*, *supra* note 18, at 85. But see *Pacific Exchange Response to Regulation of Exchanges Concept Release* (visited Oct. 5, 1998) <<http://www.sec.gov.rules/concept/s71697/langley1.htm>> (suggesting the SEC assign to existing self-regulatory organizations responsibility for overseeing newly registered SIPs).

maintain formal information sharing arrangements with United States regulatory agencies.¹⁴⁷ Lastly, the NASD warned that inequities in disclosure regulation could raise costs for United States issuers, and investors.¹⁴⁸

Because the Concept Release is simply that—a concept—the SEC will likely sharpen its focus through incorporation of new ideas and suggestions into future rules or guidelines.¹⁴⁹ One organization, the IOSCO, is uniquely positioned to provide significant input to these complex issues.

C. Discussion of the IOSCO

Founded in 1974, the IOSCO serves as the premier international forum for multilateral exchange and cooperation on securities issues.¹⁵⁰ The IOSCO membership is divided into three different classes depending on the type of organization: regular, associate, and affiliate.¹⁵¹ The IOSCO is financed by membership dues and income generated at annual conferences.¹⁵² It functions through three committees: an Executive Committee that oversees the organization's operation; a Technical Committee that studies technology issues; and

147. See *NASD Response*, *supra* note 144; see also *Wallman Speech*, *supra* note 10, at 2.

148. See *NASD Response*, *supra* note 144; see also *Tokyo Stock Exchange Response to Regulation of Exchanges Concept Release* (visited Oct. 5, 1998) <<http://www.sec.gov/rules/concept/s71697/yamaguchi.txt>>. The NASD asserted that if "the SEC requires foreign exchanges or issuers to follow certain procedures to register or be exempted from such registration, there is a strong possibility of hindering the cross-border transactions of U.S. investors." *Id.* Yamaguchi believes the introduction of this new regulatory structure will result in increased costs for U.S. investors in search of foreign investment markets and vehicles. See *id.* Other interested parties assert that the SEC's approach would probably increase the regulatory burdens and costs associated with providing U.S. investors access to foreign markets. See *Orrick, Herrington & Sutcliffe LLP Response to Regulation of Exchanges Concept Release* (visited Oct. 5, 1998) <<http://www.orrick.com/news/sec/970625.htm>>.

149. See *Coffee*, *supra* note 30, at 1195; see also Ed Meyer, *SEC Lacks Unified Voice on Internet Trades*, *TRIANGLE BUS. J.*, Feb. 13, 1998, at 17. Meyer asserts that Internet securities regulations will be in a state of flux over the next few years while the SEC evaluates the impact of the Internet on securities trading. See *id.*

150. See INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO), 1995 ANNUAL REPORT 1 (1996) [hereinafter *IOSCO Annual Report*]; *IOSCO Homepage* (visited Oct. 22, 1998) <<http://www.iosco.org/text01.html>>. See generally A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 *NW. J. INT'L L. & BUS.* 15 (1996).

151. See *IOSCO Annual Report*, *supra* note 150, at 41-48. Regular members are mostly comprised of either governmental regulators or stock exchanges. Associate members are comprised of associations of public regulatory bodies that have jurisdiction in parts of a country when the national regulator is already a member. Affiliate members are other international organizations whose mission is the formation or regulation of an international securities market. See *id.*

152. See *id.* at 32.

an Emerging Markets Committee comprised of regulatory bodies from developing securities markets.¹⁵³

The 152 members of the IOSCO, through resolution, have established the following objectives:

1. To cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets;
2. To exchange information on their respective experiences in order to promote the development of domestic markets;
3. To unite in their efforts to establish standards and an effective surveillance of international securities transactions;
4. To provide mutual assistance to promote the integrity of the markets by rigorous application of the standards and by effective enforcement against offenses.¹⁵⁴

The IOSCO is noted for forging MOUs among its membership to cooperate in enforcing their respective national securities laws.¹⁵⁵ In May 1996, the IOSCO membership agreed to establish the following five common securities offenses under the criminal laws of their respective countries: insider trading, inaccurate disclosure, divulging professional secrets, misleading clients, and market manipulation.¹⁵⁶

Recognizing the growing use of the Internet in the securities markets, the IOSCO's Technical Committee formed an Internet Task Force to address enforcement and regulatory issues arising from the medium.¹⁵⁷ Prior to the creation of the Internet Task Force, the IOSCO had not established a task force to study a distinct issue.¹⁵⁸ Apparently, the IOSCO recognizes the complex regulatory challenges the Internet raises.

The IOSCO Studies Issues Arising out of Internet Securities Trading

In September 1997, the Technical Committee released a report specifying that the IOSCO planned to identify enforcement

153. See *SEC Speaks*, *supra* note 100, at 770. The Technical Committee has Working Parties which are charged with studying important new technological developments. See *id.*

154. See *IOSCO Annual Report*, *supra* note 168, at 28; *Objectives of IOSCO* (visited Oct. 22, 1987) <<http://www.iosco.org/text01.html>>.

155. See *IOSCO Annual Report*, *supra* note 150, at 3.

156. See *Warsaw Meeting Focuses on "Common Offenses," Increasing Police Powers*, 9 Int'l Sec. Reg. Rep. (Buraff) 14 (June 17, 1996).

157. See TECHNICAL COMMITTEE, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO), REPORT ON THE ENFORCEMENT ISSUES RAISED BY THE INCREASING USE OF ELECTRONIC NETWORKS IN THE SECURITIES AND FUTURES FIELD (1997) [hereinafter *IOSCO TECHNICAL REPORT*].

158. See *Regulatory Chat: Georg Wittich*, INTERNET COMPLIANCE ALERT, Nov. 3, 1997, at 10 [hereinafter *Regulatory Chat: Georg Wittich*].

challenges raised by the Internet, to make recommendations to international regulators for combating common securities violations, and to identify methods for regulators to use the Internet in the furtherance of enforcement efforts.¹⁵⁹ The Internet Task Force will further consider the issues and recommendations discussed in the report.¹⁶⁰ The report reflects the IOSCO's growing leadership and expertise in understanding the regulatory issues raised by Internet securities transactions.¹⁶¹

One of the chief criticisms of the IOSCO, however, has been its lack of binding regulatory authority over its members.¹⁶² This lack of consensus among members has stunted the IOSCO's emergence into the driving force behind the development of international securities regulations.¹⁶³ But, with the Internet's global reach, many are beginning to consider the IOSCO now primed for the role of international regulator.¹⁶⁴

V. WORKING TOWARD A SOLUTION

Competing pressures tempt one to believe that an issue deferred is a problem avoided—more often it is a crisis invented.¹⁶⁵

Given these emerging trends in the global marketplace, a question remains: does sovereign-based Internet securities regulation

159. See IOSCO TECHNICAL REPORT, *supra* note 157. Among the Internet enforcement issues identified in the report were (1) the methods by which information is disseminated; (2) the characteristics of the disseminated information; (3) the ease that traditional fraud and manipulation can be perpetuated; and (4) the difficulties of conducting surveillance, gathering evidence and identifying the violators. See *id.* The report suggests that regulators (1) improve investigative techniques by sharing information on the best methods for surveilling the markets; (2) enhance investor education and self-regulation; and (3) create jurisdictional standards for identifying what is sufficient admissible evidence to establish a prima facie case for Internet securities violations. See *id.* Lastly, the report advises international regulators establish their own websites to assist in their enforcement efforts. See *id.*

160. See *id.*

161. See *Regulatory Chat: Georg Wittich*, *supra* note 158, at 10. Georg Wittich, president of the Bundesaufsichtsamt für den Wertpapierhandel (BAWe), the German Federal Securities Supervisory Office, and Chairman of the Internet Task Force stated that the goal of the task force is to create a detailed report in 1998 that presents solutions and guidance useful to securities regulators. See *id.*

162. See Sommer, *supra* note 150, at 17 (highlighting the IOSCO's early difficulties in reaching consensus among members since it couldn't impose rules).

163. See HAROLD S. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 15.08A (3d ed. 1997); see also IOSCO Panel Drops Compromise Effort Regarding Global Standards, 25 Sec. Reg. & L. Rep. (BNA) 216 (Feb. 12, 1993) (discussing the IOSCO's abandonment of reaching a compromise on the minimum capital adequacy standards for broker-dealers).

164. See Biltoft, *supra* note 123, at 15; see also Natarajan, *supra* note 87, at 7; *Regulatory Chat: Georg Wittich*, *supra* note 158, at 10.

165. Quotation attributed to Henry Kissinger, former Secretary of State, Nixon Administration.

work?¹⁶⁶ In the short term, increased coordination among international regulators will help maintain a somewhat orderly stock market.¹⁶⁷ International cooperation makes sense in light of existing jurisdictional questions and overlapping regulation.¹⁶⁸ At issue is the international, borderless quality of the Internet.¹⁶⁹ Everyday, the Internet attracts more users, thereby creating complex jurisdictional issues.¹⁷⁰ For example, discussions on an electronic bulletin board¹⁷¹ could involve parties in the same state, on opposite coasts, or on other sides of the world.¹⁷² Some argue that these jurisdictional problems can best be resolved through international accords.¹⁷³

One author has suggested that an international convention on electronic crime could provide a broad-based solution to regulate the complexities of the Internet.¹⁷⁴ According to the Jonathan Edelstein:

An international convention, accompanied by a multilateral treaty, would be well within the accepted bounds of international law and would be a powerful tool to combat Internet crime. An international convention on computer crime would require signatory nations to take certain measures to combat criminal activity on the Internet. These might include . . . a provision requiring signatory nations to order disclosure of the sources of messages . . . upon a prima facie showing that a crime has been committed in the requesting nation.¹⁷⁵

166. See Wallman Speech, *supra* note 10, at 6; see also Roscoe B. Starek III & Lynda M. Ronzell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. MARSHALL J. COMPUTER INFO. L. 679 Within their assertion that national regulation of the Internet could inhibit the flow of electronic commerce among countries, Starek and Ronzell urge that consumer education, industry self-regulation, and the application of existing laws can be successful in combating fraud in cyberspace. See *id.* at 702; Ballon, *supra* note 13, at 23 (specifying that local attempts to assert jurisdiction over foreign entities can have an adverse impact on electronic commerce by discouraging companies from establishing websites).

167. See discussion *supra* part IV; Wallman Speech, *supra* note 10, at 6.

168. See Ballon, *supra* note 13, at 23 (noting that international agreements have been an effective enforcement vehicle for the SEC and the IRS).

169. See *id.* at 16; see also Johnson, *supra* note 95, at 1399. The authors point out that on-line travel subjects participants to far greater conflicting rules and regulations when compared to travel in the everyday world. See *id.*

170. See Ballon, *supra* note 13, at 16.

171. See *Silicon Investor Website* (visited Oct. 18, 1998) <<http://www.techstocks.com>>. Silicon Investor, a highly-popular website, posts individual messages about hundreds of different publicly traded securities in various chat rooms. See *id.*

172. See Ballon, *supra* note 13, at 16.

173. See *id.* at 16; see also Coffee, *supra* note 30, at 1230.

174. See Jonathan I. Edelstein, *Anonymity and International Law Enforcement in Cyberspace*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 231, 286 (1996). The author suggests a treaty similar to the United Nations treaty to combat drug trafficking and money laundering could prove effective. See *id.* at 286.

175. *Id.* at 286-87 (citations omitted).

In the securities and financial services arena, various technology experts, legal scholars, and the signatory members of the IOSCO could draft a multilateral treaty.¹⁷⁶ Other scholars call for the creation of an international criminal court for cyber-based crimes.¹⁷⁷ An international court could adequately address the jurisdictional problems inherent in criminal Internet activities though it would presumably require a fundamental change in the enforcement of international crimes.¹⁷⁸

An international court for Internet crime could provide significant benefits for international securities regulators.¹⁷⁹ Some of the advantages of the proposal is the establishment of a neutral forum, the consolidation of the criminal hearing in one location rather than subjecting the defendant to multiple jurisdictions, and the facilitation of the free flow of evidence between nations.¹⁸⁰ Naturally, there are problems with the idea as well, which include the possible lack of broad-based acceptance of the court among nations, the "politicization" of the court, and the lack of confidence in its ability to punish criminals.¹⁸¹ Critical to the authority of the court would be the exclusive jurisdiction of any international crime committed on the Internet.¹⁸² In addition, the court must have the authority to limit Internet access.¹⁸³ Limiting access could act as a punishment for offending parties, and could also be used to deny access to countries who refuse to accept the court's sovereignty.¹⁸⁴

As investors use the Internet more effectively throughout the world, a single international regulator specifically addressing fraudulent Internet securities transactions may best serve everyone's interests.¹⁸⁵ In particular, the IOSCO may provide the best forum for these international adjudications.

176. *See id.* at 288.

177. *See* Howard L. Steele, Jr., *The Web that Binds Us All: The Future Legal Environment of the Internet*, 19 HOUS. J. INT'L L. 495, 512 (1997).

178. *See id.* at 512.

179. *See id.* at 513.

180. *See id.*

181. *See id.* at 513-14.

182. *See id.* at 515 (citing Sandra L. Jamison, *A Permanent International Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 435 (1995)).

183. *See* Steele, *supra* note 177, at 516; *see also* Rebecca Quick, *Private Web Sites Keep Out Those Who Don't Belong*, WALL ST. J., Dec. 22, 1997, at 7 (explaining that groups are building private web sites that screen visitors, monitor chat rooms, and terminate the contracts of members who violate a certain code of conduct). These private networks require a password to enter, and members provide a credit card number which allows the system administrator to track unruly activity. *See id.*

184. *See* Steele, *supra* note 177, at 516.

185. *See* Wallman Speech, *supra* note 10, at 6.

An international court for Internet securities violations under the auspices of the IOSCO could serve the needs of the international regulatory community. The IOSCO's broad membership, existing organizational framework, and intellectual resources would provide a solid foundation upon which to build a new regulatory structure devoted specifically to Internet-related securities crime. An international court for Internet securities violations would eliminate jurisdictional questions as well as establish a neutral forum. The IOSCO would also have broad evidence-gathering power.¹⁸⁶ Regulatory information would flow more freely between the IOSCO's signatory members. Internet sites certified under the umbrella of IOSCO would carry an electronic kitemark¹⁸⁷ or symbol, thereby enhancing investor confidence in the web site. In addition, worldwide efforts in investor education will foster greater understanding of those web-sites meeting regulatory approval.¹⁸⁸ In order to maintain fair and orderly markets, regulators need to take action. Failure to address the problems which Internet securities trading raises will result in adverse outcomes for investors from Montana to Moscow.

186. See *Fraud Touting Stocks Hide Behind Internet Mask*, SEATTLE POST-INTELLIGENCER, Feb. 19, 1998, at D6 (highlighting NASD's lack of subpoena authority to force on-line service providers to reveal the names of individuals suspected of illegally promoting stock). Mary Shapiro, President of NASD Regulation, Inc., specified that new Internet surveillance technology will not be able to locate all messages fraudulently touting stock because of on-line anonymity. See *id.*

187. See *Finance on the Internet: Beware the Cyber-Regulator*, ECONOMIST, Aug. 23, 1997, at 56-57.

188. See *First-Ever Hemisphere-Wide Investor Education Campaign Planned* (visited Oct. 2, 1998) <<http://www.sec.gov/news/cosra1.htm>>.