

MEMO# 7370

October 25, 1995

SEC INTERPRETIVE RELEASE AND PROPOSED RULE AMENDMENTS CONCERNING ELECTRONIC DELIVERY OF INFORMATION TO INVESTORS

1 Release Nos. IC-21399; IC-21400 (October 6, 1995), respectively. October 25, 1995 TO: DIRECT MARKETING COMMITTEE No. 48-95 PUBLIC INFORMATION COMMITTEE No. 38-95 SALES FORCE MARKETING COMMITTEE No. 51-95 SHAREHOLDER COMMUNICATIONS COMMITTEE No. 40-95 RE: SEC INTERPRETIVE RELEASE AND PROPOSED RULE AMENDMENTS CONCERNING ELECTRONIC DELIVERY OF INFORMATION TO INVESTORS

The Securities and Exchange Commission issued an interpretive release and proposed rule amendments concerning the use of electronic media to deliver or transmit information under the federal securities laws.¹ The interpretive release is intended to provide guidance to issuers and other market participants (including broker-dealers and third-parties) who use electronic media in complying with the applicable delivery requirements of the federal securities laws. The proposed rule amendments are intended to codify some of the interpretations set forth in the interpretive release. The interpretative release is effective October 6, 1995. As discussed below, the SEC seeks comment on various issues raised by both the interpretive release and proposed rule amendments. Comments must be filed no later than 45 days after publication of the releases in the Federal Register.

I. Interpretive Release

The interpretive release is intended to provide guidance regarding the manner in which electronic delivery of various types of documents can be achieved. The release indicates that the SEC believes that the use of electronic media should be at least an equal alternative to the use of paper-based media. It addresses the use of a broad range of media, including audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, bulletin boards, Internet Web sites and computer networks. It covers a broad range of documents, including prospectuses, annual reports, semi-annual and quarterly reports, proxy and information statements, sales literature, advertisements, and tender offer documents. The release provides issuers and other market participants with specific principles and examples involving electronic media that can be followed in order to satisfy delivery

² See Brown & Wood (publicly available February 17, 1995). obligations under the federal securities laws. As a result, issuers no longer must follow the requirements specified in a recent no-action letter concerning electronic delivery of prospectuses (although they may continue to do so).² Specifically, issuers providing electronic delivery should consider the extent to which the electronic communication provides: (1) timely and adequate notice to investors that the information is available; (2) comparable access to the information as provided in the paper context (e.g., providing continuous accessibility or the opportunity for

retention and making paper versions available); and (3) evidence that the information was actually delivered to the investor (e.g., obtaining an informed consent from an investor or obtaining an electronic mail return-receipt or confirmation of accessing, downloading or printing). Issuers may develop methods of electronic delivery that differ from those discussed in the release but also satisfy delivery or transmission obligations, as long as they provide assurance, comparable to paper delivery, that the required information will be delivered. A series of examples are provided to illustrate various applications of these concepts and to provide guidance in applying them to specific facts and circumstances. A portion of the examples specifically addresses mutual funds (see pp. 24-30). Request for comment. Comment is requested on whether other examples might be appropriate for publication in a subsequent release. Comment is also requested on issues raised by the release and on any other approaches or issues that should be considered in connection with facilitating the use of electronic media under the federal securities laws.

II. Proposed Rule Amendments

The SEC also proposed for comment a number of technical amendments to the SEC's rules and forms that are intended to codify some of the interpretations set out in the interpretive release.

C General formatting requirements. Existing SEC rules that require legends to be printed in red ink or bold-face type, or using a different font size, would be amended to allow issuers to satisfy such requirements by presenting the legends in any manner reasonably calculated to draw attention to them. Request for comment. Comment is requested as to whether more specific standards relating to legibility of electronic documents should be required, or whether the more flexible approach as proposed is preferable.

C Graphic, image and audio information. Existing SEC rules would be amended to provide that if material graphic, image and audio information is included in one version of a disclosure document, but not in other versions, the issuer must include in the other versions a fair and accurate description or transcript of the omitted information. Rule 304 of Regulation S-T would be amended to provide that wherever a document delivered to investors or others includes graphic, image or audio information that cannot be reproduced in an electronic filing on EDGAR, the EDGAR filing should include a fair and accurate narrative description, tabular presentation or transcript of the omitted material. Request for comment. Comment is requested on whether there are alternatives to the proposed approach that could better minimize the impact of issuers using different versions of the same disclosure document.

C Rules where mailing is identified as a delivery method. SEC rules that provide that information may be distributed to investors by mail would be amended to provide that reasonably prompt alternative delivery methods may be used.

C Structure of electronic filing rules. The SEC solicits comments as to whether, rather than amending the existing rules as proposed, Regulation S-T should be amended to address not only EDGAR filings, but also all electronic issues. Finally, the SEC requests comment on any costs or benefits associated with the rule proposals relating to (1) bold-face type, font size, and red ink requirements, (2) graphic, image and audio information, and (3) alternatives to mailing as a distribution method. Comment is requested on what actions, beyond what is proposed in the release, the SEC should take to maximize the benefits of document delivery to shareholders, issuers and others, while eliminating any unnecessary costs. Comment is also requested on the kinds of documents that the SEC should be able to receive, process and make publicly available through the EDGAR system that are not currently eligible for that system. Finally, comment is requested on whether the SEC should allow the filing of documents in electronic media other than through EDGAR.

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should not be considered a substitute for, legal advice.