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SECURITIES DISCLOSURE

To Be or Not to Be "Filed"

The SEC has increasingly handled the tension in liability caused by the integration of the Securities Act of 1933 and the Securities Exchange Act of 1934 through the use of the "not filed" concept. Unfortunately, the SEC has used various methods to achieve this purpose raising questions as to its exact scope and legal effect.

by David B. H. Martin and Graham Robinson

Much of the development of federal securities disclosure regulation over the last 25 years has been marked by the gradual convergence of the disclosure regimes of the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). Drawing intellectual strands from the Wheat Report of 1969[1] and Louis Loss' proposed Federal Securities Code,[2] the Securities and Exchange Commission (SEC) has sought to permit documents filed under the periodic reporting system of the Exchange Act to be used in public offerings under the registration system of the Securities Act. Literally and legally, using "incorporation by reference" as its all-purpose stitch, the SEC has gradually woven the systems closer and closer together.

Underlying this regulatory development is a fundamental and complicating tension between the different liability structures of the two acts. It is significantly easier for a plaintiff to make a claim under the Securities Act than under the Exchange Act. Although the use of disclosure in periodic reports to fulfill prospectus disclosure in public offerings has practical appeal, increased emphasis on such incorporation is strained by these contrasting liability standards. The tension between these standards has intensified with the growing emphasis on greater, more frequent, and more current disclosure under the Exchange Act, most recently given momentum by the "real time" disclosure imperatives of the Sarbanes-Oxley Act of 2002.[3]

Over the years, the SEC has eased this tension with a handy device. It has treated certain information provided under the Exchange Act as "not filed" for various purposes, including inclusion in Securities Act registration statements, thereby precluding such information from being a basis for Securities Act liability.[4] The "not filed" device has not been consistently articulated, however, drawing questions as to its exact scope and legal effect. As the disclosure regimes under the Exchange and Securities Acts are likely to continue to converge, it may be the right time for the SEC to take stock of the various methods in which it has conferred "not filed" status on Exchange Act reporting and to settle on a consistent and clear formulation.

The Integrated Disclosure System Incorporation by Reference

While incorporation by reference of Exchange Act reporting into a Securities Act registration statement was first allowed in 1978 on Form S-16,[5] the disclosure systems of the Exchange and Securities Acts remained largely distinct until the adoption of integrated disclosure and shelf registration between 1979–1983. Rule

David B. H. Martin is a partner and head of the securities practice group, and Graham Robinson is an associate, at Covington & Burling in Washington, DC. The authors acknowledge with thanks the assistance provided by Ethan Jacobs, a summer associate at Covington & Burling. The information in this article is current as of August 19, 2003.

415, which was adopted in 1983,[6] allows public companies to offer securities from time to time for delayed or continuous offerings pursuant to a single registration statement. A critical component of this so-called shelf registration is Form S-3, which allows seasoned issuers to incorporate by reference to their past and future filings under the Exchange Act. Using this mechanism, a public company can file a Securities Act registration statement that is automatically updated by the company's filings under the Exchange Act.

Incorporation by reference into a Securities Act shelf registration statement of future filings under the Exchange Act is accomplished by including language in the registration statement stating that the issuer incorporates by reference any future "filings" made with the SEC under Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act. The issuer then further includes an undertaking stating that

> for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.[7]

As a result, documents "filed" under the Exchange Act after the date of filing a shelf registration statement become part of the registration statement and the prospectus included therein. Further, the filing each year of an annual report on Form 10-K (or Form 10-KSB) causes the registration statement to be deemed re-filed. Thus, disclosure under the Exchange Act becomes disclosure under the Securities Act. The disclosure regimes become integrated, with heightened Securities Act liability standards applied to Exchange Act disclosure.

A Not So Integrated Liability Structure

The primary bases for issuer liability under the Securities Act are Sections 11 and 12(a)(2) of the Securities Act. Section 11 imposes liability on an issuer of securities for material misstatements or omissions in a registration statement at the time the registration statement becomes effective. If the plaintiff can demonstrate that there was a material misstatement or omission in the registration statement at the time of effectiveness, the issuer's only defenses are to attempt to prove either that the plaintiff knew of the misleading disclosure at the time the plaintiff acquired the issuer's securities or that the plaintiff's damages were not caused by the misleading disclosure.[8] So simple are the elements of the plaintiff's claim and so difficult the issuer's defenses that many commentators refer to Section 11 as imposing "strict liability" on issuers with respect to material misstatements or omissions in registration statements.

An issuer also may be liable under Section 12(a)(2) of the Securities Act if it offers or sells a security by means of a prospectus or oral communication containing a material misstatement or omission. Under Section 12(a)(2), however, the issuer has a "due diligence" defense if it can prove that it did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.[9]

The primary basis for disclosure liability under the Exchange Act is Rule 10b-5 promulgated under Section 10(b), which may apply both to original issuances of securities and to statements made by public companies, such as in press releases or Exchange Act reports. Rule 10b-5 applies to any materially misleading statement or omission made "in connection with the purchase or sale of any security." The SEC has interpreted the "in connection with" requirement broadly, so that virtually any public statement that may be imputed to the company may be a basis for liability under Rule 10b-5.[10]

A Rule 10b-5 plaintiff must prove causation, reliance on the materially misleading statement or omission (although reliance may be established by the "fraud on the market" theory) and that the defendant acted with "scienter," meaning that the defendant acted knowingly (although some courts have allowed proof of recklessness to suffice). As a result of these elements of proof, it is harder for a plaintiff to make out a Rule 10b-5 claim than a claim for liability under the Securities Act (particularly as compared with the strict liability of Section 11).

A public company may also be liable under Section 18 of the Exchange Act for material misstatements or omissions in documents filed with the SEC under the Exchange Act. A plaintiff under Section 18 must prove reliance (and cannot premise reliance on the "fraud on the market" theory) and that the price at which the plaintiff purchased or sold the issuer's security was affected by the alleged material misstatement or omission. Even if the plaintiff can meet that burden, the issuer has a defense if it can prove that it acted in good faith and had no knowledge that the statement was false or misleading. Between the difficult reliance and causation elements of the claim, and the statutory defense, Section 18 is not attractive to plaintiffs and is rarely used.

Securities Act liability therefore imposes a significantly greater litigation risk than Exchange Act liability, because the elements of proof for an Exchange Act claim are significantly greater. The most striking difference in these elements of proof is the required state of mind. If a company discloses information that turns out to have been materially inaccurate, the company will not be subject to liability under Rule 10b-5 unless the plaintiff can show that the company had "*scienter*," meaning that the company knew that the information was inaccurate (or, according to some courts, at least acted recklessly in failing to determine the accuracy of the information). However, if the disclosure is subject to Securities Act liability, then the company will be subject to liability under Section 11 even if the company could not possibly have known that the information was inaccurate.

What's the Rub?

The different standards for imposing liability under the Securities Act and the Exchange Act create tensions with respect to the integration of Securities Act and Exchange Act disclosure regimes. Public companies may be concerned about exposing themselves to Securities Act liability for statements that, while made in good faith, may have a greater likelihood of containing unintentional misstatements or omissions. Further, concerns are often raised that the risk of Securities Act liability may have a chilling effect on the content of particular disclosure, discouraging companies from an open discussion of issues that could be second-guessed in hindsight. These concerns may be particularly strong when the information in question is subjective or required to be prepared quickly.

For example, when the SEC proposed that public companies file earnings releases and similar announcements on Form 8-K,[11] many commenters objected to the application of Securities Act liability to such public statements.[12] One comment letter stated that the imposition of Securities Act liability on such disclosure "would leave companies with two choices, neither of which serves the public interest. Companies could decide to file everything with the Commission and take the risks of increased liability, or reduce the flow of information they provide to the public."[13]

The "Not Filed" Solution

The SEC has proven to be sympathetic to public companies' concerns about the fairness of imposing Securities Act liability on certain types of disclosure and the chilling effect that such liability might have on public companies' disclosure practices. For example, in enacting rules requiring proxy statement disclosure of the compensation committee report relating to executive compensation, the SEC stated that it "appreciates the concern registrants have expressed about litigation"[14] and went on to provide that such disclosure would be deemed "not filed."[15] The SEC's use of the "not filed" tool recognizes that in the case of disclosure initiatives aimed at producing free-flowing and potentially subjective disclosure, imposition of heightened Securities Act liability may produce concerns (or even incentives) that are counter to the SEC's objectives.

Inconsistency in the "Not Filed" Regime

Pre-Rule 415. Prior to the adoption of Rule 415 in 1983 and resulting concerns regarding the effect of incorporating Exchange Act disclosure by reference into Securities Act registration statements, the SEC had, in a few instances, used language providing that disclosure would be deemed "not filed." At the time, the purpose of deeming disclosure to be "not filed" was to eliminate liability under Section 18 of the Exchange Act (and, when applicable, under Section 14(a) of the Exchange Act and Rule 14a-9 thereunder).[16] The use of the "not filed" mechanism may have also mitigated concerns relating to interaction between disclosure and liability requirements, on the one hand, and the First Amendment to the US Constitution, on the other.

There were two formulations of this pre-Rule 415 "not filed" mechanism, one a limited formulation stating that the respective disclosure is "not filed" for purposes of Section 18, and one a broader formulation stating that the respective disclosure is "not filed," without qualification:

1. *Limited Formulation*. In Form 10-Q, the SEC provided that the financial statements, management's discussion and analysis of financial condition and results of operations (MD&A) and disclosure regarding market risk "shall not be deemed filed for purposes of Section 18 of the [Exchange] Act or otherwise subject to the liabilities of that section of the [Exchange] Act but shall be subject to the other provisions of the [Exchange] Act."[17] Similar language was used with respect to the "cover page" of Schedule 13D.
2. *Broad Formulation*. In the rules requiring public companies to provide the SEC with copies of the annual report to security holders, the SEC provided that "[t]he report is not deemed to be 'soliciting material' or to be 'filed' with the Commission or subject to [Regulation 14A] other than as provided in this Rule, or to the liabilities of Section 18 of the [Exchange] Act, except to the extent that the registrant specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement or other filed report by reference."[18] Similar language was used to grant "not filed" status to the information and documents filed by foreign private issuers exempt from Exchange Act registration requirements.[19]

Post-Rule 415. After the adoption of Rule 415, the effect of "filing" disclosure under the Exchange Act took on new significance, as it subjected the relevant disclosure to potential Securities Act liability. The SEC addressed public companies' concerns with respect to this issue by using the "not filed" mechanism, but with a new meaning. By deeming disclosure to be "not filed," the SEC provided that the disclosure would not become a "filing" under Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act and, therefore, not incorporated by reference into Securities Act registration statements.

The earliest example of post-Rule 415 use of the "not filed" mechanism appears to be the rules adopted by the SEC in 1992 requiring annual disclosure of a report of the compensation committee relating to executive compensation and a graph comparing the company's stock performance to the S&P 500 and a peer index.[20] In response to liability concerns raised by commenters, the SEC decided that these disclosure items would be deemed "not filed" and that "the 'remedy' for any shareholder who is not satisfied with the Committee's report [would] be to vote against re-election of committee members as directors, not to litigate claims in the courts."[21]

To implement the "not filed" mechanism in this case, the SEC copied the broad formulation discussed above, stating that the disclosure "shall not be deemed to be 'soliciting material' or 'filed' with the Commission or subject to Regulations 14A or 14C, other than as provided in this item, or to the liabilities of Section 18 of the Exchange Act . . ."[22] This is a clear articulation of "not filed" status. It states that the disclosure is not "filed" for any purpose. Thus, because the disclosure is not included among the "filings" made with the SEC under Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act, it is not incorporated by reference into Securities Act registration statements and is not subject to Securities Act liability.

Use of the "not filed" mechanism to eliminate Securities Act liability for Exchange Act disclosure became significantly more frequent after the SEC's so-called aircraft carrier release in 1998, proposing a comprehensive revision of federal securities regulation.[23] While the "aircraft carrier" release essentially eliminated the current shelf registration system, it did not propose relieving Securities Act liability for Exchange Act disclosure—indeed, it proposed clarifying that Securities Act liability would apply to Exchange Act disclosure that is incorporated by reference into registration statements.[24] The "aircraft carrier" release was ultimately abandoned amid significant criticism from public companies and the private bar. But after the demise of the "aircraft carrier," with much light having been shed on the issue of application of Securities Act liability to routine public company disclosure, the SEC's use of the "not filed" tool expanded dramatically.

In October 1999, the SEC proposed requiring inclusion in the proxy statement of enhanced disclosure relating to the audit committee, including a report of the audit committee.[25] The SEC's final rules responded to concerns that had been expressed about liability for audit committee members by providing that the disclosure would be deemed "not filed." As with the compensation committee report, the SEC used the broad formulation of the "not filed" instruction, providing flatly that the disclosure would "not be deemed . . . to be 'filed' with the Commission . . . ."[26]

In December 1999, the SEC proposed Regulation FD, prohibiting selective disclosure practices by public companies.[27] Because Regulation FD would lead many companies to disclose information on Form 8-K that they previously would not have disclosed as quickly (if ever), comment letters once again raised concerns about the prospect of Securities Act liability for such disclosure. The SEC responded to these concerns by once again implementing the "not filed" tool. In this case, however, the implementing language was the narrow formulation. Instead of stating flatly that the disclosure would be deemed "not filed," the instruction implementing the "not filed" mechanism states:

> The information in a report furnished pursuant to Item 9 [of Form 8-K] shall not be deemed to be "filed" for the purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section, except if the registrant specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act.[28]

Although the SEC clearly indicated in the adopting release that information provided under Item 9 of Form 8-K would not be incorporated by reference into Securities Act registration statements,[29] the use of the narrow formulation of the "not filed" tool to reach this result is troubling. Most lawyers, following principles of statutory construction in which no phrase is rendered meaningless, would interpret the phrase "shall not be deemed to be 'filed' for purposes of Section 18 of the Exchange Act" to mean that the information shall be deemed "not filed" only for purposes of Section 18 of the Exchange Act, but that for all other purposes it would be considered "filed." Reaching the SEC's intended interpretation of this instruction (to mean that the disclosure is not incorporated by reference into Securities Act registration statements) requires ignoring the phrase "for purposes of Section 18 of the Exchange Act" in the instructions to Form 8-K, so that information disclosed under Item 9 is meant to be considered "not filed" for any purpose.

After the adoption of Regulation FD, it has become popular among practitioners to refer to information that would receive "not filed" treatment under Item 9 of Form 8-K as "furnished." One might assume that the "not filed" status of information disclosed under Item 9 is actually implemented through the SEC's use of the word "furnish" throughout Form 8-K with respect to that Item (*e.g.*, "A registrant either furnishing a report on this form under Item 9 or electing to file a report on this form under Item 5 . . .").[30] It is clear, however, that the word "furnish" cannot be SEC code for "not filed." If it were, virtually every item in Forms 10-K and 10-Q would not be incorporated by reference into Securities Act registration statements, as such items request disclosure of information by asking the registrant to "furnish" it.

Since the adoption of Regulation FD, each time the SEC has granted "not filed" status to disclosure, it has done so using the narrow formulation discussed previously with respect to Item 9 of Form 8-K, rather than the clearer broad formulation it had used with respect to the compensation committee and audit committee reports and related disclosure. In January 2003, the SEC adopted rules requiring public companies to file earnings releases and similar announcements on Form 8-K under a new Item 12.[31] Once again, in response to comment letters expressing concerns about subjecting this disclosure to Securities Act liability,[32] the SEC deemed the disclosure "not filed," using a narrow formulation instruction.[33] Then in March 2003, the SEC proposed clarification of the proper way to file the certification required by Section 906 of the Sarbanes-Oxley Act, and in that context the SEC proposed in the first instance (and included in the final rules) that the certification be deemed "not filed," using a narrow formulation instruction.[34]

The SEC has not explained the rationale behind its shift to a narrow formulation in implementing the "not filed" regime. Perhaps there have been concerns that the broad formulation is too broad. But, if so, the narrow formulation seems to go too far in the other direction.[35] In using the "not filed" tool recently, the SEC's clear intent has been to exempt the respective disclosure from incorporation by reference into Securities Act registration statements. While the broad formulation of the "not filed" tool leads clearly to this result, the narrow formulation does not accomplish the same objective unless the qualifying phrase "for purposes of Section 18 of the Exchange Act" is ignored.

Form 10-Q Confusion

The use of the narrow formulation of "not filed" status also creates an unsettling result in light of the use of similar language in Form 10-Q. If one were to accept that the narrow formulation instruction should be read broadly, *i.e.* as applying "not filed" status beyond Section 18 of the Exchange Act so that covered disclosure is not incorporated by reference into Securities Act registration statements, then it is hard to understand why that same result would not be reached with respect to the use of similar language in Form 10-Q. The "not filed" language in Form 10-Q states that

> the information presented in satisfaction of Items 1, 2 and 3 of Part I of this form . . . shall not be deemed filed for the purpose of Section 18 of the [Exchange] Act or otherwise subject to the liabilities of that section of the [Exchange] Act but shall be subject to the other provisions of the [Exchange] Act.[36]

The items from Form 10-Q that are covered by the above instruction are the financial statements, MD&A and disclosure regarding market risk. There can be no question that these disclosure items are intended to be incorporated by reference into Securities Act registration statements (indeed, the shelf registration system depends on it). So, why would a substantively identical instruction lead to no incorporation by reference in Form 8-K but not under Form 10-Q? Perhaps one must conclude that, notwithstanding the text of the rules, based on statements in SEC releases, informal confirmation by the SEC Staff and a common sense understanding of what the SEC must have intended, all of Form 10-Q is incorporated by reference into Securities Act registration statements while information disclosed under Items 9 and 12 of Form 8-K is not.

Consequences of Confusion

The inconsistent language used to invoke "not filed" status is problematic for three reasons. First, although it may seem picayune, the SEC in its rulemaking should develop clear formulations that are used consistently throughout its rules and forms. There is value in this consistency for its own sake, although, importantly, inconsistency and ambiguity of language will generally lead to the second and third concerns discussed subsequently.

Second, the use of different formulations can lead to legitimate confusion as to the legal effect of deeming disclosure "not filed." Indeed, even after several decades of use of the "not filed" tool, in a recent SEC open meeting there was a somewhat animated discussion between the Commission and the Staff evidencing less than obvious understanding, much less consensus, as to the exact legal effect of providing that certain disclosure would be "not filed."[37]

Third, this inconsistent language has the potential to undercut one of the key policies underlying the invocation of the "not filed" regime. The "not filed" tool is used, at least in part, to address concerns that imposition of heightened Securities Act liability will chill disclosure practices by public companies. To the extent that the legal effect of deeming disclosure "not filed" in unclear, however, public companies will not be confident that Securities Act liability is out of the question with respect to "not filed" disclosure, thus reducing the usefulness of the regulatory tool.

Conclusion

It seems likely that, going forward, the SEC will use the "not filed" tool with increasing regularity. In particular, implementation of a "real time disclosure" regime will call for quickly-prepared and potentially subjective disclosure that is precisely of the type that raises concerns regarding the application of Securities Act liability. As the SEC uses the "not filed" tool in the future, we suggest that the SEC consider the following:

- Avoid confusion regarding the legal effect of deeming disclosure "not filed" by using the language found in Rule 14a-3(c) to invoke the "not filed" regime, rather than the language used with respect to Items 9 and 12 of Form 8-K.
- Eliminate any confusion as to the legal effect of the "not filed" instructions in Forms 8-K and 10-Q, by clarifying the Form 8-K instruction to be consistent with the Rule 14a-3(c) instruction, and by clarifying the Form 10-Q instruction to state directly that the Parts 1-3 of Item I of the form will

be deemed "filed" for purposes of Sections 13(a) and 15(d) and therefore incorporated by reference into Securities Act registration statements.

Postscript: Reconsidering the Use of the "Not Filed" Tool

It should be noted that "not filed" status for Exchange Act disclosure, which would otherwise be incorporated by reference into Securities Act registration statements, may be short-changing investors. Investors purchasing securities under a shelf registration statement are relying in large part on a company's public disclosure under the Exchange Act in lieu of a form of prospectus in which all information is presented in a single document. If some of the information is given "not filed" treatment, information that an investor would view as material to the investment decision, then isn't that investor denied a Securities Act remedy with respect to information that might otherwise have been required to be included in the prospectus?

One response to this concern is that the relief of certain disclosure from Securities Act liability reflects a valid policy determination that, in fashioning an integrated disclosure system, this is a worthwhile tradeoff. Limiting investors' Securities Act remedies with respect to certain information may be the *quid pro quo* for encouraging more complete and open disclosure and corporate communications practices by public companies. Another possible response to this concern, however, is that Section 11 "strict liability" may simply be inappropriate with respect to a public company's on-going disclosure and periodic reporting obligations (setting aside the value of a "strict liability" remedy in the context of an IPO).

In either case, it may be worth considering whether the use of the "not filed" tool is really just a stop-gap measure to address, rather than a solution to, the problem of a mismatch of liability systems in the Securities Act and the Exchange Act. As the SEC continues to integrate the disclosure systems of these two acts, it may also find it useful to encourage Congress to rationalize the liability structure.

NOTES

1. Disclosure to Investors, A Reappraisal of Administrative Policies Under the 1933 and 1934 Acts, Report and Recommendations to the SEC from the Disclosure Policy Study (Mar. 27, 1969).
2. Federal Securities Code (Am. Law Inst.) (1980).
3. *See* Section 409 of Sarbanes-Oxley Act of 2002, creating Section 13(l) of the Exchange Act.
4. For purposes of this article, the phrase "Securities Act liability" refers only to liability under Sections 11 and 12(a)(2) of the Securities Act.
5. *See* Louis Loss and Joel Seligman, Fundamentals of Securities Regulation at 76 (2001).
6. *See* SEC Release No. 33-6499 (Nov. 23, 1983).
7. *See* Item 512(b) of Regulation S-K.
8. *See* Section 11(e) of the Securities Act. It should also be noted that only purchasers who can "trace" their purchases to the relevant registration statement are eligible plaintiffs under Section 11. *See*, *e.g.*, *Demaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003). Some courts have even found that after-market purchasers, whether or not they can trace their purchases to the relevant registration statement, are not eligible plaintiffs under Section 11. *See*, *e.g.*, *Stack v. Lobo*, 903 F. Supp. 1361,1375–1376 (N.D. Cal. 1995).
9. Also, liability under Section 12(a)(2) only applies to those who made offers or sales, so if the issuer is not sufficiently involved in the selling process, it may be able to avoid liability under Section 12(a)(2). For example, in *Akerman v. Oryx Communications*, 810 F.2d 336 (2d Cir. 1987), the Second Circuit found an issuer in a firm commitment underwriting not liable under Section 12(a)(2) because it lacked privity with the purchasers in the offering.
10. *See SEC v. Texas Gas Sulphur*, 401 F.2d 833 (2d Cir. 1968) (*en banc*).
11. *See* SEC Release No. 33-8145 (Nov. 5, 2002).
12. *See*, *e.g.*, Comment Letter of Committee on Federal Regulation of Securities and Committee on Law and Accounting of the American Bar Association's Business Law Section, Dec. 24, 2002 at III(F).
13. Comment Letter of The Committee on Securities Regulation of the Business Law Section of the New York State Bar Association, Dec. 23, 2002 at A.
14. SEC Release No. 33-6962 (Oct. 16, 1992).
15. *See* Item 402(a)(9) of Regulation S-K.
16. While Section 18 is now rarely used, in the early days of the Exchange Act, before the adoption of Rule 10b-5 in 1942, Section 18 liability seemed a significantly greater threat to public companies. *See* J. Robert Brown, Jr. and Stephen M. DeTore, "Rationalizing the Disclosure Process: The Summary Annual Report," 39 *Case W. Res.* 39, 49 (1989). Concerns regarding Section 18 liability were particularly acute with respect to financial statements, so from the SEC's earliest requirements that public companies provide copies of reports including financial statements, the SEC exempted those financial statements from Section 18 liability by deeming them "not filed." *Id.* at 50. When disclosure is made under Section 14(a) and the proxy rules, elimination of liability is important because, in at least some circuits, liability under such provisions can be based on negligence, which is easier for a plaintiff to prove than the *scienter* required for a Rule 10b-5 claim. *See*, *e.g.*, *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300–1301 (2d Cir. 1973).
17. General Instruction F.1 to Form 10-Q. *See also* Rules 13a-13(d) and 15d-13(d) under the Exchange Act.
18. The SEC also created parallel rules for Section 15(d) registrants who have not registered securities under Section 12 of the Exchange Act and are therefore not subject to Rule 14a-3(c). These provisions, set forth at the end of Forms 10-K and 10-KSB, require that such registrants "furnish to the Commission, for its information," copies of any annual report to security holders and provide that such materials are to be deemed "not filed."
19. *See* SEC Release No. 33-6493 (Oct 6., 1983) and Rule 12g3-2(b)(4) under the Exchange Act.
20. SEC Release No. 33-6962 (Oct. 16, 1992) and Items 402(k) and (l) of Regulation S-K.
21. *Id.*
22. Item 402(a)(9) of Regulation S-K.
23. *See* SEC Release No. 33-7606A (Nov. 13, 1998).
24. *See id.* at notes 75–76 and accompanying text.
25. *See* SEC Release No. 34-41987 (Oct. 8, 1999).
26. *See* SEC Release No. 34-42266 (Dec. 22, 1999), Item 306(c) of Regulation S-K and Item 7(d)(3)(v) of Schedule 14A.
27. *See* Sec Release No. 34-42259 (Dec. 20, 1999).

28. General Instruction B.2 to Form 8-K. Form 6-K includes virtually identical language in General Instruction B to that form.
29. *See* SEC Release No. 33-7881 (Aug. 15, 2000) at II(b)(4)(a).
30. General Instruction B.1 to Form 8-K. *See also* General Instructions B.2 and B.6 to Form 8-K.
31. *See* SEC Release No. 33-8176 (Jan. 22, 2003).
32. *See*, *e.g.*, Comment Letter of Committee on Federal Regulation of Securities and Committee on Law and Accounting of the American Bar Association's Business Law Section, Dec. 24, 2002 at III(F).
33. *See* SEC Release No. 34-47225 (Jan. 22, 2003) and General Instruction B.6 to Form 8-K.
34. *See* SEC Release No. 33-8212 (Mar. 21, 2003) and Item 601(b)(32)(ii) of Regulation S-K. In this case, the SEC offered to provide "not filed" status to the disclosure in its proposing release, because the respective mandate from the Sarbanes-Oxley Act provided that the certification should "accompany" the respective report, rather than be filed "in" the report. *See id.* at I.B and Section 906 of Sarbanes-Oxley Act of 2002.
35. It is also not clear what liability provision the SEC might be concerned is being eliminated by the broad formulation. Disclosure subject to either formulation should still be subject to Rule 10b-5, which applies to "statements" without regard to whether they are filed.
36. General Instruction F.1 to Form 10-Q. Form 10-QSB includes a similar instruction at General Instruction E.1.
37. *See* SEC Open Meeting, January 15, 2003. A Web cast of this open meeting can be found at *http://www.connectlive.com/events/secopenmeetings/sec-011503-archive.ram*.

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