The Roundtable on the Integration of the 1933 and 1934 Acts

Thursday, March 21, 2002
2:00 – 5:00 p.m.

William O. Douglas Open Meeting Room
U.S. Securities and Exchange Commission
Washington, D.C.

Introduction
Alan B. Levenson
Chair, Oral Histories Committee
Securities and Exchange Commission Historical Society

Welcome
David S. Ruder
Chairman
Securities and Exchange Commission Historical Society

Remarks
The Honorable Harvey L. Pitt
Chairman
U.S. Securities and Exchange Commission

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There will be a 15-minute intermission in the Roundtable at approximately 3:30 p.m.

The audience is asked to turn off all cell phones and beepers.

The unauthorized recording or transmission of the Roundtable in any form is prohibited.

Moderators and Participants in the Roundtable on the Integration of the 1933 and 1934 Acts

Alan L. Beller is the current Director of the Division of Corporation Finance. Prior to coming to the Commission, he was a partner at Cleary, Gottlieb, Steen & Hamilton. He also served as co-chair of the International Subcommittee of the American Bar Association.

Edward F. Greene served as Director of the Division of Corporation Finance from 1979 to 1981. He then served as General Counsel of the SEC from 1981 to 1982, and was given the Chairman's Award for Excellence in 1982. He is currently with Cleary, Gottlieb, Steen & Hamilton in London. He is a trustee of the Securities and Exchange Commission Historical Society.

John J. Huber was Director of the Division of Corporation Finance from 1983 to 1985. He worked in both Corporation Finance and in the Office of the General Counsel during his service at the SEC from 1975 to 1986. He is currently with Latham & Watkins in Washington, D.C.

Brian J. Lane served as Director of the Division of Corporation Finance from 1996 to 1999. He joined the Commission in 1983 as staff attorney in the Division of Market Regulation, and served as special counsel in the Division of Corporation Finance, as counsel to Commissioner Richard Roberts, and as counsel to Chairman Arthur Levitt prior to becoming Director. He is a recipient of the Capital Markets Award, the Plain English Award, and the Regulatory Simplification Award (twice). He is currently a partner with Gibson, Dunn & Crutcher in Washington, D.C.

Alan B. Levenson was Director of the Division of Corporation Finance from 1970 to 1976, and is a recipient of the SEC's Distinguished Service Award. He is currently with Fulbright & Jaworski in Washington, D.C. Mr. Levenson is a trustee of the Securities and Exchange Commission Historical Society, and chairs the Society's Audit and Oral Histories Committees. He is also on the Board of Directors of Transparency International-U.S.

David B.H. Martin, Jr. served as Director of the Division of Corporation Finance from 2000 to 2002. He began his service at the Commission in 1980 in Corporation Finance, and also served in the Chairman's Office from 1984-85. From 1985-2000, he was with Hogan & Hartson LLP in Washington, D.C.

Richard M. Phillips served at the Commission from 1960 to 1968, in the Office of the General Counsel, as legal assistant to Chairmen Cary and Cohen, and as staff director of the SEC Staff Investment Company Study and the SEC Staff Disclosure

Study that culminated with the "Wheat Report." He is currently with Kirkpatrick and Lockhart in San Francisco and Washington, D.C. He is a trustee of the Securities and Exchange Commission Historical Society, and chair of the Programs Committee.

Linda C. Quinn was Director of the Division of Corporation Finance from 1986 to 1996. She served at the Commission from 1980 to 1996 in both Corporation Finance and the Chairman's Office, and received the Presidential Award, the Distinguished Service Award and the Capital Markets Award. She is currently at Shearman & Sterling in New York. She is a trustee of the Securities and Exchange Commission Historical Society.

Richard H. Rowe was Director of the Division of Corporation Finance from 1976 to 1979. He served at the Commission from 1963 to 1979 in both Corporation Finance and on the Executive Staff. He is currently with Proskauer Rose LLP in Washington, D.C.

SEC Disclosure Requirements in 1960 –
A March Back in History

By Richard M. Phillips

I. Introduction

An important perspective can be obtained on the remaining obstacles to integration of the 1933 and 1934 Act disclosure requirements by looking at the historical disparities between the 1933 Act registration process for public offerings and the 1934 Act periodic and other disclosure requirements applicable to publicly held companies. In the early 1960s, these disparities were enormous. They existed with respect to the (1) scope of disclosure requirements, (2) content of required disclosures, (3) timeliness of disclosure, (4) dissemination of disclosure, (5) SEC staff review of disclosure, (6) limitations on communications, (7) restrictions on trading during distributions, and (8) liabilities for false and misleading statements in SEC filings.

II. The Coverage of Disclosure Requirements

A. 1933 Act Disclosure Coverage. In the early 1960s, the 1933 Act registration requirements were applicable as they are today to public offerings of securities that are not exempt from registration. The 1933 Act registration requirements, however, were applied with far less certainty than today. There were no Rule 144 exemptions, and in the absence of Regulation D the private offering exemption was fraught with uncertainty. The Regulation A exemption for small offerings was limited to $300,000.

B. 1934 Act Disclosure Coverage. The coverage of the 1934 Act disclosure requirements were relatively narrow until 1964. The reporting provisions of Section 13 applied only to exchange listed securities and to companies which had become public through an effective 1933 Act registration statement. Otherwise, there were no periodic disclosure requirements applicable to over the counter companies. Moreover, the proxy rules under Section 14 and the insider trading provisions of Section 16 did not apply at all to over the counter companies. Only exchange-listed companies were required to comply with these provisions of the 1934 Act.

III. The Contents of Disclosure

A. 1933 Act Disclosure Contents. In the early 1960s, the 1933 Act disclosure requirements were probably even more detailed than they are today and applied to every company making a non-exempt public offering. All companies, seasoned or not, generally had to comply with substantially

the same requirements regarding the contents of disclosure, with the exception of the more abbreviated disclosure required for companies issuing high-grade debt securities and ADRs.

B. Contents of the 1934 Act Disclosure. In contrast, the 1934 Act disclosure requirements in 1960 existed, to say the least, only in skeletal form and efforts to enhance that disclosure were inhibited by the need to avoid discouragement of exchange listings. There were no quarterly reporting requirements; only a semi-annual requirement for filing unaudited financial statements on Form 9-K and for more current reporting of a few highly significant events, such as a change of control, on Form 8-K. More importantly, the annual report on Form 10-K consisted mainly of requirements for certified financial statements. As former Commissioner and General Counsel Phil Loomis has been widely quoted as saying, "One could look at a Form 10K filing without being able to tell what business a company is in."

IV. The Timeliness of Disclosure

A. Timeliness of 1933 Act Disclosure. In the early 1960s, SEC rules under the 1933 Act required audited financials current as of a date within 90 days of the effective date of the registration statement. Equally important, all prospectus disclosure had to be current as of the offering date.

B. Timeliness of 1934 Act Disclosure. In the early 1960s, the 1934 Act rules required that a Form 10-K containing fiscal year-end audited financials be filed within 120 days of fiscal year end. The semi-annual report on Form 9-K had to be filed within 45 days of the end of the first two fiscal quarters.

V. The Dissemination of Disclosure

A. Dissemination of the 1933 Act Prospectus. In the early 1960s, the prospectus delivery requirements under the 1933 Act were rigorously applied. Commission rules required physical delivery of prospectus for securities purchased during the offering. In addition, except in unsolicited brokerage transactions, broker-dealers were required to physically deliver a prospectus for companies going public for a period of 90 days. The 90 day period was shortened to 40 days for companies which had previously made a 1933 Act offering.

B. Dissemination of the 1934 Act Filings. In contrast, physical delivery requirement for 1934 Act filings is not required, apart from proxy statements, and '33 Act registration forms that either rely on '34 Act filings or incorporate them by reference and provide for delivery on request. In the

early 1960s, these filings could be accessed only by a visit to either the Commission's headquarters in Washington, D.C., one of its regional offices, or an exchange on which the securities were listed for trading. In the mid 1960s, commercial services appeared on the scene which for a fee would visit the Commission's public reference rooms and copy filings for clients. The Wheat Report in 1969 characterized the development of a microfiche system for copies of SEC filings as a "breakthrough" in dissemination and predicted accurately that the heretofore "meager" use of Commission filings by financial analysts would be a thing of the past.

VI. The SEC Review Process

A. Review of 1933 Act Registration Statements. In 1960, substantially all 1933 Act registration statements, whether filed by seasoned or unseasoned companies, were reviewed by the staff of the Division of Corporation Finance. Moreover, the Commission itself would review registration statements for which acceleration was required – meaning virtually all registration statements. This review was not pro forma during my tenure as legal assistant (1961-1963), since the Commission included two ex-directors of Corporation Finance – Manny Cohen and Barney Woodside – and one highly sophisticated ex-private practitioner who was steeped in 1933 Act registration lore.

B. Commission Review of 1934 Act Filings. In contrast, Commission review of 1934 Act filings was extremely random, except when a filing raised substantial accounting or fraud issues.

VII. The Limitations on Communications

A. 1933 Act Limitations. In 1960, administration of the 1933 Act was premised on the notion that the prospectus should be the virtually exclusive source of information concerning securities in registration. The tombstone ad and other exceptions to non-prospectus disclosure during the registration period were narrowly construed, and gun-jumping violations were dealt with seriously, often resulting in a delay of acceleration. Moreover, corporate advertising and other communications were closely scrutinized for "selling material." I can well remember the reaction of the Director of the Division of Corporate Regulation when a major mutual fund complex ran a Christmas greeting ad showing a happy family beside a well decorated Christmas tree opening to a large amount of gifts. The advertisement was viewed as a not too subtle attempt to associate mutual fund investments with a prosperous holiday season.

B. 1934 Act Limitations on Communications. In contrast, in 1960 as today, there were essentially no limitations on corporate communications

outside of the 1933 Act registration process and the 1934 Act proxy solicitation requirements. The annual report to shareholders then as today was essentially a free riding document and not considered worthy of examination by the Commission except in context of a fraud inquiry.

VIII. The Restrictions on Trading

Regulation M applies, and its predecessor Rule 10b-6 applied, to "distributions" of securities, whether registered under the 1933 Act or not. There have been a number of changes with the adoption of Regulation M, including exclusions for certain actively traded securities, but for transactions subject to the regulation, the essential Rule 10b-6 limitation on participants purchasing or bidding for the securities being distributed during the pendancy of the distribution remains largely unchanged.

IX. The 1933 Act Liability Provisions

1933 Act registration statements are subject to liability under Sections 11 and 12(2) of the Securities Act for false and misleading statements. In the 1960s, fear of Section 11 liability was credited with the critical role in enhance the quality of disclosure under the 1933 Act. The Section 11 absolute liability of the issuer and the shifting of the burden to underwriters, directors and experts to show due diligence in guarding against false or misleading statements in a 1933 Act registration statement had been viewed as indispensable to assuring the integrity of the disclosures. The Barchris case reinforced the threat of Section 11 exposure and emphasized the need for rigorous due diligence Procedures in the context of '33 Act registration statements.

By 1960, the lower federal courts generally had recognized an implied right of action for damages under Section 10(b) and Rule 10b-5. While the courts were relaxing traditional common law fraud requirements in Rule 10b-5 actions, the plaintiff was still required to show some sort of scienter as well as reliance and causation – elements that either are removed from a Section 11 action or shifted from the plaintiff's to the defendant's burden of proof. Even more important, the class action for Rule 10b-5 securities fraud was in its beginning stages, and there was a common belief among securities lawyers that Rule 10b-5 was a weak substitute for Section 11 liability and even for Section 12(2) liability.

X. The Effect of 40 Years of Creeping Regulatory Change

A. Coverage of Disclosure Requirements. With the passage of the Frear-Fulbright legislation in 1964, 1934 Act reporting, proxy and insider trading provisions apply to all significant publicly held companies, whether their securities are listed on an exchange.

B. Contents of Disclosure. With the adoption of Regulation S-K, there is no significant difference in the contents of 1933 and 1934 Act disclosure, except for information relating to the offering.

C. Timeliness of Disclosure. While disparities in the timeliness of 1933 and 1934 disclosure still exist, Chairman Pitt's program of "real time disclosure" contemplates a substantial narrowing of these disparities.

D. SEC Review. Over the past 40 years, the expansion of the markets and budget constraints have largely eliminated the disparity in staff review of 1933 and 1934 disclosures. Today, Commission review of individual 1933 Act filings is non-existent and only 1933 Act registration statements for IPOs routinely receive intensive staff review. Otherwise, staff review of 1933 filings is not dissimilar to review of 1934 Act. Review generally is limited to specific problem filings or areas.

E. Dissemination of Disclosure. Commission rules under the 1933 Act have substantially limited physical delivery requirements for 1933 Act prospectuses, except those relating to IPOs. Meanwhile, the dissemination of 1934 filings has substantially increased. Further, liberalization of electronic delivery for 1933 Act prospectuses promises to erase further the disparity between the dissemination of 1933 Act prospectuses and 1934 Act filings.

F. Civil Liability. The civil liability issues remain as an important disparity in the treatment of 1933 and 1934 Act disclosures. The universal acceptance of Rule 10b-5 class actions, the development of the "fraud on the market" doctrine and the expansion of primary liability concepts have made Rule 10b-5 exposure a meaningful deterrent to fraud. On the other hand, litigation reform legislation and the elimination of aiding and abetting, among other things, have served to increase the utility of Section 11 liability to plaintiffs seeking redress for securities fraud. Interestingly, however, the number of Section 11 actions relative to Rule 10b-5 actions is small perhaps because of the Section 11 offering price ceiling on recoveries.

Integration of the Disclosure and Other Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934
A Chronological History

By Richard H. Rowe

This chronology highlights some of the steps in the integration of the disclosure provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 from the primordial beginnings in the 1950s, through the explosive acceleration in the early 1980s to the present. Throughout this evolution, issues have been raised about liability, means of communicating information, restrictions in communicating information, and the role of SEC staff in reviewing the disclosures provided under both Acts.

Some of the more important events in this chronology are:

- The 1964 amendments to the Exchange Act, which subjected companies with securities traded over-the-counter to periodic reporting under that Act.
- The 1970 adoption of quarterly reporting on Form 10-Q.
- The 1972 adoption of Rule 144.
- The adoption of Form S-3 and Rule 415 in the early 1980s.
- The adoption of universal shelf registration in the 1990s.
- The grant of broad exemptive authority to the SEC under NSMIA in 1996.
- The SEC's "use of electronic media" releases in the 1990s and in 2000.

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The 1950s-
The Halting Beginnings of Integration of The Securities Act And Exchange Act Disclosure Requirements

1953	Form S-8	Simplified registration form made available for offerings to employees by issuers subject to reporting under Section 13(a) or 15(d) of the Exchange Act (reporting companies).
1954	Form S-9	Short form registration statement for reporting companies offering high grade debt securities.
1954	Rule 153	Permits delivery of prospectuses of reporting companies to the national securities exchange on which their securities are listed.
1959	Form S-14	Relied on Exchange Act Regulation 14A for information other than the terms of the transaction.

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The 1960s –
The Foundation is Laid for Disclosure Integration

1963	The Special Study of the Securities Markets	Led to the Frear/Fulbright bill.
1964	Frear/Fulbright	The 1964 amendments to the Exchange Act imposed periodic reporting requirements on companies whose securities trade in the O-T-C markets.
1966	"Truth in Securities Revisited"	Visionary article in 79 Harvard Law Review 1340 by Milton Cohen, Director of the Special Study, which presaged many of the developments in disclosure integration.
1967 (and beyond)	American Law Institute Codification Project	This project, under Professor Louis Loss of the Harvard Law School, would have integrated disclosure under a "company registration" concept.
1967	Form S-7	Shorter form registration statement for "seasoned" reporting companies.
1969	"Disclosure to Investors, A Reappraisal of Administrative Policies under the '33 and '34 Securities" (the "Wheat Report")	The report and recommendations of the Commission's Disclosure Policy Study, led by Commissioner Francis M. Wheat, led to, among other things, "short form Securities Act registration statements; Rule 144, an exemption for secondary transactions based, in part, on the current public information available from Exchange Act reports; quarterly reporting by all registrants on Form 10-Q, rather than semi-annual reporting only by companies with securities listed on national securities exchanges.

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The 1970s –
The Pace of the Integration of the Disclosure Provisions of the Securities Act and the Exchange Act Accelerates

1970	Form 10-Q	Quarterly financial reporting; due to liability concerns, financial statements and MD&A are not "filed" documents for Exchange Act liability purposes.
1972	Rule 144	Relies in part on current public information in the Exchange Act reports.
1972	December 22, 1972 Report of the Industrial Issuers Advisory Committee	Chaired by former Commissioner Jack Whitney, the Committee was appointed by SEC Chairman William J. Casey. Its recommendations, among other things, were intended to "enhance the process of integration of disclosure information for use in a variety of contexts.." and to "contribute to effective dissemination of information to the investing public…" Recommendations included applying Securities Act Disclosure Guides to Exchange Act Reports.
1977 (and beyond)	Report of the Advisory Committee on Corporate Disclosure, Committee Print 95-29, House Committee on Interstate and Foreign Commerce	This committee, chaired by former Commissioner Al Sommer, laid the groundwork for the explosion of disclosure integration in the early 1980s.
1978	Form S-16, as amended	Expanded to cover certain primary offerings; relied on incorporation by reference of Exchange Act reports to satisfy Securities Act disclosure requirements
1978	Staff Guides for Disclosure of Projections of Future Economic Performance (later adopted as a Commission Policy Statement)	
1979	Regulation S-K	Beginnings of uniform and integrated Securities Act and Exchange Act disclosure requirements.

1979	Rule 3b-6 Rule 175	Liability safe harbors for projections.
1979	Commission Policy on projections adopted; following public hearings	Encouraged; not mandatory; due to liability concerns.

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The 1980s –
The early 1980s Witnessed an Explosion in Disclosure Integration

1980	MD& A first adopted	
1980	New Form 10-K	Formed basis for continuing disclosure integration.
1980	Form S-15 (Rel. 33-6232)	Integrated disclosure form for small acquisitions (superseded by Form S-14); relied, in part, on delivery of periodic disclosure documents.
1980	Rule 176	Provides factors for a court to consider when trying a case involving disclosure in Exchange Act reports.
1982	Form S-3	Relies on incorporation by reference of Exchange Act reports to satisfy Securities Act disclosure requirements. (Note: Throughout, the SEC also adopted corresponding short form "registration statements for foreign issuers.")
1982	Form S-2	Relies on delivery of Exchange Act reports to satisfy Securities Act disclosure requirements.
1982	Rule 415	Permits continuous and delayed "shelf offerings;" raises liability concerns due to difficulty of performing "due diligence" on Exchange Act reports.
1982	Rule 412	To assuage liability concerns, permits documents incorporated by reference in Securities Act registration statements to be modified or superseded by subsequent filings.
1982	Regulation D, Rules 505 and 506	Exemptions from registration for primary offerings which rely, in part, on Exchange Act reports to satisfy disclosure.

1984	EDGAR Pilot (September)	The beginnings of the SEC's EDGAR system, which provides for instantaneous availability, electronically, of SEC filings.
1984	September revisions to the "130 Series" adopted	Rule 139 relaxed restrictions on brokers' reports on reporting companies.
1985	Form S-4 (May 9, 1984)	Registration form for mergers, acquisitions and exchange offers which relies, in part, on incorporation by reference of Exchange Act reports (supplemented Form S-14).

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The 1990s –
The Beat Goes On; Information Technology Becomes an Ever Important Factor in Disclosure Integration

1990	Rule 144A	Coupled with the "A/B" exchange offers permitted under "Exxon Capital," permits issuers of debt securities and foreign issuers to raise capital promptly and avoid SEC staff review and Securities Act liability.
1992	Universal Shelf Registration	Permits registration of an undifferentiated amount of securities.
1993	Mandatory EDGAR filings begin	
1994	Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)	No aiding and abetting liability under Rule 10b-5.
1995	Use of Electronic Media for Delivery Purposes, Rel. 33-7333, (October 6, 1995)	First, albeit somewhat limited, recognition of the effects of information technology on the disclosure process. See also, Rel. 33-7234 (October 13, 1995); Rel. 33-7288 (May 15, 1996); Rel. 33-7289 (June 14, 1996), and Rel. 33-7516 (March 2, 1998)
1995	Gustfason v. Alloyd Co., Inc.	U.S. Supreme Court holds that there is no liability for negligent misrepresentation under Section 12(a)(2) of the Securities Act in connection with private offerings.

1995	Private Securities Litigation Reform Act	Provides safe harbor for certain "forward-looking statements."
1996	Report of the Advisory Committee on the Capital Formation and Regulatory Process (July 24, 1996) (the "Wallman Report")	This committee, chaired by former Commissioner Steven M. Wallman, recommended further disclosure integration under a "company registration" concept.
1996	Securities Act Concepts and Their Effects on Capital Formation, Rel. 33-7314 (July 25, 1996)	The SEC's response to the Wallman Report and precursor of the "Aircraft Carrier."
1996	National Securities Markets Improvement Act	Provided the SEC with broad exemptive authority under the Securities Act and the Exchange Act.
1996	Regulation M, Rel. 33-7375 (December 18, 1996), as amended by Rel. 33-7400	Relaxed prophylatic antimanipulative rules for actively traded issues.
1998	The "Aircraft Carrier," Rel. 33-7606A (November 13, 1998)	These proposals, which would have further integrated Securities Act and Exchange Act disclosure and provided for freer communication, foundered on liability and "speed bump" concerns.
1998 (and beyond)	Efforts by the Federal Regulation of Securities Committee of the American Bar Association and others, most notably, William J. Williams of Sullivan and Cromwell, to advance alternatives to the current disclosure regime	See, for example, letter dated August 22, 2001 to David B.H. Martin from Committee on Federal Regulation of Securities.

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The Millennium –
Will the Pitt Commission Resolve Disclosure Integration Issues?

2000	Regulation FD	"Fair Disclosure" regulation adopted to counter a perceived informational advantage of market professionals; FD disclosure in Item 9 of Form 8-K not "filed" for liability purposes.
2001-2002	New SEC Chairman Harvey Pitt, in various speeches, advances the concept of prompt disclosure of "unquestionably material" information	Chairman Pitt does not believe that periodic disclosure adequately serves the needs of investors under current circumstances.

The Roundtable on the Integration of the 1933 and 1934 Acts

A transcript of the Roundtable will be placed on the Securities and Exchange Commission Historical Society's Web site – www.sechistorical.org.

Videotapes of the Roundtable will be available from the Society's lending library; please check the Web site for borrowing information.

The transcript and videotape will be available free of charge to all members of the Society, to the staff of the U.S. Securities and Exchange Commission, to practitioners in the securities field, to academics and scholars of the securities markets, and to people interested in the history of the securities markets in the United States and the world.

The Society's oral histories program is supported by grants from the Securities Committee, Federal Bar Association and the contributions of its members.

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The Securities and Exchange Commission Historical Society works to preserve the history of the SEC, to sponsor research and educational programs regarding the SEC, and to enhance understanding of the development of the U.S. and the world's capital markets.

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