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Introduction

Michael A. Perino

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SYMPOSIUM SECURITIES LAW FOR THE NEXT MILLENNIUM: A FORWARD-LOOKING STATEMENT

INTRODUCTION

MICHAEL A. PERINO†

This symposium on the future of the securities markets and securities regulation is part of St. John's University School of Law's year-long 75th anniversary celebration. Before we look to the future, however, we need to look, as we have throughout our diamond anniversary year, to the past and present.

The capital markets of today would be virtually unrecognizable to those actively involved in the markets when the law school was founded in 1925. In 1925 the New York Stock Exchange (the "NYSE") was clearly the dominant market, while today it is subject to fierce competition from NASDAQ. Since 1925, there has been an explosion of trading frequency. Daily volume on the NYSE today regularly approaches or exceeds one billion shares, while in 1925 it averaged less than two million.[1] This rapid rise in trading frequency has been made possible by advances in information processing capabilities that could only

† Assistant Professor, St. John's University School of Law. I would like to thank John Barrett, John D'Alimonte, Francis Facciolo, Dave Harrington, Michael Simons, and Brian Tamanaha for their comments on an earlier draft of this introduction.

[1] *See* ROBERT SOBEL, THE BIG BOARD 264 (1965).

be dreamed of in 1925. Then stock trading was a paper-based industry that required physical delivery of stock certificates instead of the instantaneous shuffling of electronic bits and bytes.[2] At that time a rigid system of fixed commissions existed while today deregulation and competition have substantially reduced transaction costs.[3] Institutional investors dominate today's capital markets, but even the smallest investors have instantaneous access to a wealth of company and market information and can trade with the simple click of a mouse. Advances in finance theory have radically altered conceptions of risk and have given rise to a cornucopia of financial instruments and trading strategies.[4]

Despite their differences, 1925 and 2000, at least as far as the markets are concerned, bear some striking similarities. Both periods of course have been marked by enormous growth. In 1925 alone, the Dow Jones Average rose nearly 27%; it was by year-end more than double what it had been at the beginning of 1921, and it would continue to grow at a rapid pace until the crash.[5] The growth then and now was fueled in large part by investment in new and burgeoning industries—the automobile, electric utility, electronic, and chemical stocks in the 1920s, and the Internet and computer industries in the 1990s.[6] Now and then, after rapid market increases, commentary shifted to bursting market bubbles. In both time periods the market has occupied a very similar place in popular culture. As in the Roaring Twenties, a sizeable portion of the present-day population seems to be fixated on the daily gyrations of the markets. In both periods there appears to be a widespread

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[2] Even into the 1960s, a brokerage firm might need more than thirty separate documents to complete a stock transaction. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 489 (1982).

[3] *See id.*

[4] *See* PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK (1996); Roberta Romano, *A Thumbnail Sketch of Derivative Securities and Their Regulation*, 55 MD. L. REV. 1, 5 (1996) ("The relatively recent origins and the technical complexity of derivative instruments . . . make it difficult for the uninitiated to evaluate the risks, and hence the regulatory strategies . . . ."); Henry Hu, *Swaps: The Modern Process of Financial Innovation and the Vulnerability of the Regulatory Paradigm*, 138 U. PA. L. REV. 333, 334 (1989) (discussing the unprecedented rate at which financial institutions, fueled by advances in financial theory, have been introducing capital market instruments and techniques).

[5] *See* SOBEL, *supra* note 1, at 228.

[6] *See* SOBEL, *supra* note 1, at 235–92; Greg Ip, *Look at the Roaring '20s Finds Optimistic Parallels*, WALL ST. J., June 12, 2000, at C1.

popular perception that the markets can be the vehicle for overnight wealth.[7]

More importantly for purposes of this symposium, in 1925 a substantial change in the scheme of securities regulation was in sight. At that time the market was regulated almost entirely through state blue-sky laws. Proponents of those statutes, which existed in virtually every state by the mid-1920s, argued that they were necessary to combat pervasive fraud,[8] but it was becoming increasingly apparent that state statutes were inadequate to deal with burgeoning national businesses and problems that transcended state boundaries.[9] State laws were typically filled with exceptions and exemptions, and they could often be evaded just by making offerings across state lines or through the mails.[10] The federal securities laws were, in large part, an attempt to remedy these weaknesses in state securities laws.[11]

Similarly important changes to federal securities regulation may now also be in view. This time, however, the catalyst for change is not an increasingly national market; instead, the current system of securities regulation is coming under pressure from: (1) the startlingly rapid changes in information technology over the last decade; and (2) the shifts to an increasingly global capital market.

It is, of course, not surprising that our securities markets have felt the impact of these forces—after all, they are altering

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7 These kinds of perceptions may be as old as the markets themselves. *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 36 (1998).

8 SELIGMAN, *supra* note 2, at 45. For differing accounts on the reasons for this proliferation of state statues compare, VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA—A HISTORY 162–63 (1970) (stating that statutes were a response to pervasive fraud) with Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 350–52 (1991) (stating that statutes were largely the product of chance, broader economic conditions, and local interest group pressure).

9 *See* Gerald D. Nash, *Government and Business: A Case Study of State Regulation of Corporate Securities: 1850–1933*, 38 BUS. HIST. REV. 144, 150 (1964).

10 *See* MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 28–29 (1970); Macey & Miller, *supra* note 8, at 387–88; LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 148–52 (1989).

11 *See* SELIGMAN, *supra* note 2, at 1–39, 42–45; ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 434–40 (1958); S. REP. NO. 792, 73d Cong., 2d Sess. 12 (1934); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30–32 (1959).

virtually every aspect of society today. But one could easily argue that radical changes are nothing new for the markets. The markets are always changing and adapting and securities regulation has changed along with them. With respect to information technology, the securities business has been and remains an information processing business and has often eagerly adopted the latest technological advances.[12] One can also take issue with whether the information technology revolution and globalization are in fact distinct phenomena. Globalization may simply be a by-product of advances in information technology. At the very least, advances in information technology may be a necessary condition for the kind of globalization we see today. Indeed, it was the communications and transportation advances of the early twentieth century that facilitated the national capital markets of that time.

Consequently, it is not so much the fact of change that has raised so many issues for securities regulation, but rather its pace and scope. It is clear that advances in information technology and globalization are radically altering the shape of our securities markets, that the pace of change has quickened, and that these forces will continue to have a considerable impact for the foreseeable future. Moreover, it seems that every facet of securities regulation and practice is in flux, and legislatures, regulators, practitioners, and academics have struggled to keep up with market developments.

Consider, for example, the offering process. Issuers (particularly those in high technology) have been testing the limits of the Securities Exchange Act of 1933. The Securities and Exchange Commission (the "SEC") has required cooling off periods and re-circulation of prospectuses in cases where Internet executives have used a variety of media to publicize their companies' securities offerings during the quiet period.[13] Electronic roadshows appear to be a permanent feature of the offering landscape.[14] The offering process has felt the effects of

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[12] Joseph A. Grundfest, *The Future of United States Securities Regulation in an Age of Technological Uncertainty*, 75 ST. JOHN'S L. REV. 83 (2001).

[13] *See, e.g.*, Suzanne McGee, *Net Incubator divine interVentures' IPO Floats in Limbo on Eve of Judgment Day*, WALL ST. J., July 7, 2000, at C16.

[14] *See, e.g.*, Net Roadshow, Inc., SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,367 (Sept. 8, 1997); Private Financial Network, SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,674 (Mar. 12, 1997).

the Internet in a number of important areas, ranging from the electronic delivery of the final prospectus to online offerings.[15]

So far the SEC has taken a cautious, incremental approach in adapting the offering process to the electronic age. Many of the SEC's initiatives in this area appear predominantly to be attempts to fit the current paper-based regulatory structure into the information age. For example, the SEC continues to advocate the so-called "envelope theory" under which hyperlinked documents or documents on the same web site may be considered as being delivered together in the same "virtual" envelope.[16] Under the envelope theory, an issuer has the potential for Securities Act liability for statements contained in these other sources, thereby creating disincentives for issuers to use information technology to provide more and better quality disclosure to potential purchasers.

This incremental approach is in many ways justified. The offering process works reasonably well, particularly with respect to companies that are engaging for the first time in a public offering, and so it makes sense for the SEC to be cautious in modifying it. Moreover, technological advances have not called into question the securities laws' basic disclosure philosophy, so radical alteration of our regulatory scheme seems unwarranted. To its credit, the SEC has expressed willingness to adopt more significant changes in the future.[17] When those changes will come and how aggressively the SEC will be willing to use its authority to alter the offering process is impossible to say now.

Beyond these regulatory concerns, the advent of online offerings has raised a host of questions about the role that the current intermediaries (underwriters, accountants and lawyers) will play in securities offerings. There have been some attempts to market securities directly to investors,[18] but these efforts have

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[15] *See, e.g.*, Use of Electronic Media, Exchange Act Release No. 42728, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,304, at 83,374 (Apr. 28, 2000).

[16] *Id.* at 83,376–81.

[17] For example, in one of the SEC's recent Internet releases, the SEC analyzed whether an issuer's or intermediary's delivery obligations could be satisfied by posting the document to a web site. The SEC concluded that such an "access-equals-delivery" model was inappropriate at this time because of concerns that electronic media was not "universally accessible and accepted" by investors. *Id.* at 83,388, 83,390. The implication of the release, however, is that such a day will come, and, indeed, the SEC requested data that would support an access-equals-delivery model. *Id.*

[18] *See* IPONET, SEC No-Action Letter, [1996–1997 Transfer Binder] Fed. Sec.

been almost entirely confined to fit within current registration exemptions.[19] Complete disintermediation for all offerings is unlikely because of the important reputational capital and other benefits that they provide to new, untested issuers.[20] Although we can recognize that intermediaries are likely to have a role in the offering of the future, we can perceive only dimly what the securities offering process will look like in ten or twenty years.

Advances in information technology have also renewed concerns about the relationship between the transactional disclosure philosophy of the Securities Act and the periodic disclosure philosophy of the Exchange Act. Commentators have regularly proposed company (as opposed to transactional) registration in one form or another since at least the mid-1960s.[21] The SEC has on occasion taken steps down this road, particularly with respect to the integrated disclosure system and the shelf-registration process.[22] The SEC's most recent and substantial attempts at innovation on company registration proposals—the one made in 1996 by the Advisory Committee on Capital Formation and Regulatory Processes[23] and the ensuing "Aircraft Carrier" Release[24]— have not been successful.

L. Rep. (CCH) ¶ 77,252 (July 26, 1996); Wit Capital Corp., SEC No-Action Letter, [1999 Transfer Binder] Fed. Sec .L. Rep. (CCH) ¶78,906 (July 14, 1999); Real Goods Trading Corp., Sec No-Action Letter, [1996–1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,226 (June 24, 1996).

[19] *See* 17 C.F.R. 230.501–230.506; Regulation D. Revisions, 53 Fed. Reg. 7866, 7866–68 (Mar. 10, 1988).

[20] *See* Paul G. Mahoney, *Technology, Property Rights in Information, and Securities Regulation*, 75 WASH. U. L.Q. 815, 823–35 (1997) (asserting that intermediaries facilitate exchanges between traders, provide liquidity to the markets, and play a major role in price-setting).

[21] *See* Donald C. Langevoort, *Toward More Effective Risk Disclosure for Technology Enhanced Investing*, 75 WASH. U. L.Q. 753, 770–77 (1997) (stating that in an electronic disclosure environment, the concept of 10-K and 10-Q should be eliminated in favor of a unitary company registration "file" which contains all material required under Reg. S-K and includes management's discussion and risk analysis); Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1341–42 (1966) (advocating for a coordinated disclosure system); AMER. LAW INST., FEDERAL SECURITIES CODE (1980) (discussing the fact that while the 1933 and 1934 Acts provided for the registration of securities, the Holding Company and Investment Company Acts contemplate registration of companies).

[22] *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 3.3 (1995).

[23] Report of the Advisory Committee on the Capital Formation and Regulatory Processes, [1996–1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,834, at 88,403–04 (July 24, 1996) (advocating that SEC adopt a company-based registration system).

[24] The Regulation of Securities Offerings, Exchange Act Release No. 33–7606,

Our current federal regulatory structure is also under strain from the increasing globalization of the capital markets, just as the state structure of 1925 was under strain from the increasingly national capital markets of that time. Globalization of the capital markets raises a host of issues, ranging from the ability of market participants to engage in regulatory arbitrage[25] to the harmonization of international accounting standards.[26] Market participants may also seek to evade the U.S. regulatory regime improperly. For example, there is substantial evidence that issuers misused the Regulation S exemption for offshore offerings to issue securities that ultimately were intended for distribution in the United States, and the SEC has taken substantial steps to limit those practices.[27] Globalization has also resulted in more frequent cross-border transactions, thereby raising important issues about the interplay between differing corporate and securities regimes.[28]

Our primary equity markets, the NYSE and NASDAQ, have been subject to increasing competition from rival markets, both abroad and at home. European stock markets are in a period of consolidation and a true pan-European market does not seem far

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63 SEC Docket (CCH) 835 (Nov. 3, 1998) (proposing integrating private and public offerings and seeking to apply the private issuer advantage of flexibility in disclosure to the public market).

[25] Joseph A. Grundfest, *Internationalization of the World's Securities Markets: Economic Causes and Regulatory Consequences*, 4 J. FIN. SERVICES RES. 349, 350 (1990) (noting that in global capital markets "sophisticated investors have . . . latitude to structure their transactions to take advantage of international differences in regulatory regimes").

[26] *See, e.g.*, International Accounting Standards, Exchange Act Release No. 33-7801, 34-42430, 71 SEC Docket (CCH) 1551 (Feb. 16, 2000) (noting that the increasing amount of global financial transactions necessitates the development of high-quality, transparent and readily comparable international accounting standards).

[27] *See* Offshore Offers and Sales, Exchange Act Release No. 33-7505, 34-39668, 66 SEC Docket (CCH) 1069 (Feb. 17, 1998) (noting that the Regulation S exemption has been "used as a means of perpetrating fraudulent and manipulative schemes, especially schemes involving the securities of thinly capitalized or 'microcap' companies").

[28] *See* Joseph A. Flom, *Mergers and Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753, 763 (2000) (stating that the nineties saw liberalization of government restrictions facilitating the ability to effect major international and domestic transactions). The SEC recently modified its regulatory framework for certain international transactions. *See* Exemptions for Cross-Border Rights Offerings, Exchange Offers and Business Combinations, 17 C.F.R. 230.800-02 (2000).

off.[29] In the United States, the traditional stock markets have lost significant volume to electronic communications networks (ECNs)[30] and other alternative trading systems. Some of the ECNs, which were originally regulated as broker-dealers,[31] are filing to become registered exchanges. Others remain broker-dealers, and are, therefore, subject to oversight by the National Association of Securities Dealers ("NASD"). The NYSE and NASDAQ have responded to these developments by seeking global alliances with other exchanges[32] and by proposing to "de-mutualize," e.g., to become for profit, privately owned entities.[33] These developments raise a host of questions about the basic self-regulatory structure of the securities markets. Will for-profit entities focused on the bottom line devote sufficient resources to compliance and enforcement? Does it make sense for competing markets to maintain overlapping or duplicative regulatory arms, or should this function be consolidated in a single regulator? If a single regulator model is chosen, will we be simply creating another, pseudo-private SEC? Can or should the NASD be in a position to regulate its market competitors?

The success and proliferation of alternative trading systems has raised other structural issues as well. These systems are not fully integrated into the National Market System and trading among institutions that are not required to report the price and volume of transactions may adversely affect market

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[29] *See* Jack Ewing, *Bourse on the Prowl*, BUS. WK., Sept. 25, 2000, at 74; Silvia Ascarelli & John Carreyrou, *Merger Creates 3rd Bloc to Woo Smaller Markets Within Europe*, WALL ST. J., Mar. 21, 2000, at A18.

[30] An ECN is a computer-based trading system that permits primarily institutional investors to trade directly with each other. *See* RICHARD W. JENNINGS ET AL., SECURITIES REGULATION CASES AND MATERIALS 28 (8th ed. 2000). For a general discussion of ECNs, see SECURITIES EXCHANGE COMMISSION, DIVISION OF MARKET REGULATION, ELECTRONIC COMMUNICATIONS NETWORKS AND AFTER-HOURS TRADING (June 2000) *at* http://www.sec.gov/news/studies/ecnafter.htm (last visited Oct. 30, 2001)

[31] Regulation ATS permits ECNs to choose whether to register as broker-dealers or exchanges. *See* 17 CFR § 242.301 (2000).

[32] *See* Greg Ip, Mark Heinzel & John Carreyrou, *NYSE Talks to Markets in Latin America, Europe, Canada About Possible Alliances*, WALL ST. J., May 10, 2000, at C1.

[33] *See* Robert McGough, *Money Managers Need Convincing on Big Board IPO*, WALL ST. J., July 27, 1999, at C1; Greg Ip, *Trading Places: The Stock Exchanges, Long Static, Suddenly Are Roiled by Change*, WALL ST. J., July 27, 1999, at A1; John C. Coffee, Jr., *Privatization and Self-Regulation of Stock Exchanges*, N.Y. L.J., May 20, 1999, at 5.

transparency.[34] While competition among trading markets promises reduced transaction costs, it has also raised the specter of fragmentation that might limit the ability of market participants to obtain best execution. The SEC has implied that the answer to the fragmentation problem may be a Central Limit Order Book, or CLOB.[35] The CLOB proposal has met with criticism, which primarily suggests that a CLOB would inhibit competition, particularly with respect to speed of execution or liquidity.[36] Others, including NASDAQ, have floated their own market structure proposals.[37] At the same time the markets are addressing these issues, they are also implementing decimalization, which is expected to increase price competition and reduce spreads.[38]

Technological change and globalization also raise important issues for securities enforcement and litigation. From teenagers accused of using the Internet to manipulate stocks[39] to phony electronic press releases that temporarily carve billions in market capitalization from public issuers,[40] the Internet seems

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[34] *See* JENNINGS ET AL., *supra* note 30, at 29.

[35] *See* Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange to Rescind Exchange Rule 390; Commission Request for Comment on Issues Relating to Market Fragmentation, Exchange Act Release No. 42450, [1999–2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,238 (Feb. 23, 2000) [hereinafter Exchange Act Release No. 42450]. A CLOB links together all market centers in order to compile the limit orders and price quotes from the different markets and trading systems. *See* Julie Kosterlitz, *Market Forces*, NAT'L J., Feb. 19, 2000, at 533. A CLOB would also accord a strict price/time priority to order execution. *See* Exchange Act Release No. 42450, at 83,017.

[36] *See* JENNINGS, MARSH, COFFEE, & SELIGMAN, *supra* note 30, at 41.

[37] *See* Gretchen Morgenson, *A New Plan Recalls the Old Nasdaq*, N.Y. TIMES, Sept. 17, 2000, Sec. 3, at 1 (discussing NASDAQ Supermontage proposal). For an overview of these proposals, see Roberta S. Karmel, *Confronting Market Structure—Déjà vu All Over Again*, N.Y. L.J., Aug. 17, 2000, at 3.

[38] *See* John C. Coffee, *Mysteries of the National Market System*, N.Y. L.J., Jan. 23, 1992, at 5 (describing the benefits of decimilization as a form of price competition). *But see*, Greg Ip, *Stock Prices Switch to Decimals From Fractions, Raising Concerns About 'Front-Running' by Pros,* WALL ST. J., Aug. 28, 2000 at C1 (discussing anticipated problems associated with the switch to decimal stock prices in the United States).

[39] *See* Gretchen Morgenson, *S.E.C. Says Teenager Had After-School Hobby: Online Stock Fraud,* N.Y. TIMES, Sept. 21, 2000, at A1 (SEC accused teenager of developing a scheme to increase prices of nine obscure, low-price stocks he purchased by sending optimistic message to investing chat rooms on the internet).

[40] *See* Terzah Ewing, Peter Waldman & Matthew Rose, *Bogus Report Sends Emulex on a Wild Ride,* WALL ST. J., Aug. 28, 2000, at C1 (discussing the "lightening quick" way that word spreads online and in the media and the effect this can have on the stock market); Mark Maremont, *Extra! Extra!: Internet Hoax, Get*

to be the vehicle of choice for a variety of securities scams. While many of these scams appear to be traditional frauds effectuated through a new medium,[41] that new medium allows perpetrators to have a much wider impact for a much lower cost than was possible in traditional boiler room schemes.[42] In a global securities market, it is also reasonable to expect more frequent questions to arise with respect to the extraterritorial application of the federal securities laws,[43] as well as an increased need for cooperation among securities regulators.

Debate continues to rage over the utility of private enforcement of the federal securities laws, despite passage of the Private Securities Litigation Reform Act of 1995 (the "PSLRA")[44] and the Securities Litigation Uniform Standards Act of 1998 (the "SLUSA").[45] Indeed, a host of unintended consequences have arisen as attorneys have adapted strategically to the procedural and substantive changes those acts wrought.[46] On the technology front, one of the most important developments in the last five years is the increased importance of the Internet as a tool to disseminate information about securities class action lawsuits.[47] Entrepreneurial plaintiff's attorneys have also used the Internet to attract potential lead plaintiffs in order to

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the Details, WALL ST. J., Apr. 8, 1999, at C1 (discussing the impact of the internet on the stock market).

[41] *See, e.g.*, SOBEL, *supra* note 1, at 248–49 (describing a number of manipulation schemes in the 1920s).

[42] *See generally* Michael Schroeder, *Growth in Internet Securities Fraud Will Be Difficult to Combat, GAO Says*, WALL ST. J., Mar. 22, 1999, at C15 (stating that rapid growth of online securities scams create a significant problem and regulators will have difficulty coordinating internet policing activities because of insufficient human and technical resources).

[43] *See, e.g.*, SEC v. Banner Fund Int'l, 211 F.3d 602 (D.C. Cir. 2000) (involving an SEC investigation of an off-shore trust); Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118 (2d Cir. 1998) (foreign entity entitled to some protection under anti-fraud provision of the federal securities laws); Kauther SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (allowing foreign shareholder to sue based, inter alia, on the federal securities laws).

[44] Pub.L. 104–67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77k, 77l, 77z-1, 77z-2, 78j-1, 78t, 78u, 78u-4, 78u-5).

[45] Pub.L. 105–353, 112 Stat. 3227 (codified at 15 U.S.C. §§ 78a, 77p, 77z-1, 77v, 78bb).

[46] *See generally* MICHAEL A. PERINO, SECURITIES LITIGATION AFTER THE REFORM ACT (2000).

[47] One of the more significant developments has been the creation of the Securities Class Action Clearinghouse at Stanford Law School (http://securities.stanford.edu), which provides online access to complaints and other pleadings in securities class actions filed since passage of the PSLRA.

compete for the lucrative lead counsel position.[48] Private securities litigation remains in an evolutionary phase, and it is unclear precisely where that process will lead.

And so in 2000 as in 1925, we appear to be on the cusp of change. What will the capital markets of tomorrow look like and how can securities regulation change to meet them? It is anybody's guess where these changes will take us. Prediction is a hazardous business, and we have not given our symposium participants the impossible task of divining the future. Instead, this symposium has a more modest goal. Even if we cannot predict the future, we can identify the significant policy issues we will have to grapple with in this brave new world. Having identified those issues, we can then establish a framework for helping to resolve them. At the very least, we can identify the principles that should guide us in addressing those issues.

In this publication, we are fortunate to have articles from a distinguished group of academics, regulators, and practitioners that explore these issues. Professor Joseph A. Grundfest of Stanford Law School begins this exploration by broadly examining the principles that should guide the SEC's approach to technology issues. He argues that the success and quality of the United States regulatory regime hinges on the SEC's ability to adopt a technology strategy that is geared toward understanding and adapting to the rapid pace of innovation. Perforce, that strategy will require the SEC to develop a set of predictions about how technology will evolve in the future and what those changes will mean for the securities markets. Recognizing the difficulty of making these predictions, Professor Grundfest advocates that the SEC adopt a flexible and varied technology strategy. Under certain circumstances, that may call for a "technology-forcing" approach, under which the SEC compels the industry to move in a certain direction. Alternatively, the path of technological innovation and its impact on the markets may be unclear, suggesting that the SEC should take a "wait-and-see" approach. Professor Grundfest then outlines a variety of current technology-based issues—ranging from market fragmentation to market manipulation through the use of bogus Internet press releases—and discusses how the SEC might employ different strategies to address those issues.

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[48] *See* PERINO, *supra* note 46, at 2027.

Annette Nazareth, the SEC's Director of the Division of Market Regulation, reviews the important market structure issues that the SEC is currently addressing. Do changes in information technology require a radical reworking of the National Market System? To answer that question, Ms. Nazareth focuses on three basic structural questions that the SEC has begun to address: (1) market center competition; (2) order interaction; and (3) price transparency and linkages among markets. From these examples, Ms. Nazareth elucidates the general principles that underlie the SEC's responses to market structure issues. In particular, she first notes that the SEC tends to favor competition and flexibility over rigid regulatory edicts. Second, the SEC favors investor interests to protecting market centers or participants. Finally, the SEC has only been willing to impose solutions in the relatively rare subset of cases in which self-regulatory initiatives have been insufficient to address practices that are harmful to the National Market System or that impair investor confidence.

John D'Alimonte, Mary Carty, and Thomas Finkelstein from Willkie, Farr & Gallagher provide practitioners' perspectives on securities offerings in the electronic age. To set the stage for that discussion, the authors review both the historical underpinnings of the federal securities laws and the various proposals made over the last 35 years to overhaul those acts, particularly those proposals geared toward company registration. The authors then provide a ground level view of the characteristics of today's capital markets that have resulted in so much strain on the traditional regulatory framework. In particular, they address why a company-based registration model provides a much better fit with today's fast-paced, diverse, global capital markets than the traditional transaction-oriented model. The authors discount the likelihood of radical legislative or regulatory reform of the offering process in the near term but do offer some suggestions about changes the SEC can make to better meet the needs of today's capital market participants.

Max Berger, John P. Coffey, and Gerald H. Silk from Bernstein Litowitz Berger & Grossman LLP examine the changing face of private securities litigation from the perspective of the plaintiff's class action attorney. When Congress passed the PSLRA it hoped to encourage institutional investors to take a more active role in the prosecution of securities fraud class

actions by creating the lead plaintiff provision.[49] So far, institutions have stepped forward to serve as lead plaintiffs in a relatively small number of cases, in large part because there are significant disincentives to institutional participation as lead plaintiff combined with very uncertain upside gain from taking on that role. Mr. Berger has been among the most successful attorneys in attracting institutions as clients in securities class actions. From this practical background, he and his co-authors examine some of the benefits of institutional participation as lead plaintiffs, analyze some of the strategic adaptations the lead plaintiff provisions have engendered, and evaluate the prospects for future increased levels of institutional activism in securities litigation.

In sum, these articles illustrate the dynamic nature of securities regulation and the capital markets today. We hope that this symposium will provide guidance to those working in this important area about how best to address today's and tomorrow's changes in the capital markets.

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[49] *See id.* at 2029.