Real-Time Confusion: Classifying Instant Messages under Section 5 of the Securities Act of 1933

John N. Titley
COMMENTS

REAL-TIME CONFUSION:
CLASSIFYING INSTANT MESSAGES
UNDER SECTION 5 OF THE SECURITIES
ACT OF 1933

I. INTRODUCTION

Hypothetical: Complianceware, a software development firm, plans to issue a block of common voting stock to the public. Bear Morgan is the lead underwriter, and J.T. Marlin will participate in the offering as a retail concession dealer. The registration statement for the offering has been filed with the Securities and Exchange Commission (SEC). A, one of J.T. Marlin’s account representatives, is communicating with B, a friend and customer, via instant messaging (IM) software. Initially, the conversation is unrelated to securities. Eventually, however, A refers to the Complianceware offering and types:

Complianceware is issuing some more common stock. We’ll almost certainly be part of the selling group when the registration statement becomes effective. That would be a great buy for you. Complianceware stock is poised to really take off. Should I put you down for some?

A sends the message to B. Is this considered an oral or a written communication for the purpose of finding violations of section 5(b)(1) of the Securities Act of 1933 (Securities Act)? What about other forms of instant messaging that send audio and video messages?

---


This Comment argues that text-only IMs should be classified as written communications under the Securities Act, while audio and video messages should be non-written communications. Part II is a brief overview of the increasing use of IMs and the relevant technology. Part III is an exploration of the policies and implications of the SEC's distinction between written and oral communications. And Part IV argues that those underlying rationales dictate that a text-only IM message be defined as a written communication.

II. BACKGROUND ON THE USE AND TECHNOLOGY OF IM

A. Corporations and Professionals Are Using IM with Increasing Frequency

Since its creation in the mid-1990s, IM use has grown tremendously. According to a 2005 survey conducted by America Online, 70 percent of internet users also use IM. In 2005, overall IM use was up 19 percent. Thirty-eight percent of IM users reported that they send as many or more IMs than e-mails. In the workplace, IM is becoming nearly ubiquitous. A survey by Osterman Research revealed that 90 percent of corporations had some IM users in 2005, up from 63 percent in 2001; 24 percent of users of workplace e-mail also use IM, up from 8 percent in 2001; and 52 percent of organizations officially use IM for business applications, up from 21 percent in 2001. This trend is expected to continue. A recent survey estimates that over 80 percent of corporate e-mail users will have an enterprise-class IM application on their computers by 2009.

6 AIM Survey, supra note 5.
7 Id.
9 Id.
10 Jeff Raikes, The Increasing Need for Real-Time Collaboration, MICROSOFT OFFICE
B. The Technology and Mechanics of IM

Because of IM's widespread use virtually everyone with a computer knows how to use it. Few laypeople, however, understand how it actually works. While there is no universally used protocol, IM applications generally fall into two categories: those that employ a central server and those that use peer-to-peer technology. Server-based IM applications connect the user to a central network when they log on. When the user sends a message, the server routes that message through its network until it reaches its recipient. Unlike server-based applications, peer-to-peer applications exchange messages directly between users, with no server intervention.

Once a user has downloaded and installed the proper software, a basic IM application protocol follows this general pattern:

- The application connects to the central server, using a variation of one of the protocols discussed above.
- The user logs on by entering a username and password that is verified by the server.
- The application sends the server connection information (IP address and number of the port assigned to the application) about the user's computer. It also provides the user with the names of everyone in his contacts list.
- The server creates a temporary file that contains the user's connection information and list of contacts.
- The server checks to see if any of the user's contacts are currently logged on; it sends a message to the user's computer with the connection information for his contacts and sends the user's connection information to the people in his contact list that are logged on.

12 How IM Works, supra note 3.
When the application gets the connection information for a person in the user's contact list, it changes the "status" of that contact to "online."

- The user then clicks on the name of an online contact and a window opens. The user can enter text into that window and send it to the contact. A window then opens on the contact's screen with the sent message. The contact can then respond in the same window. Each party's typed messages appear in this window on both computers within milliseconds to a few seconds—virtually instantaneously. The window that both parties see on their respective computers expands to include a scrolling dialog of the conversation.13

IM applications are either public or enterprise. A public IM service is one in which anyone on the internet can download the required software and start sending and receiving messages. The service provider runs the main server network and determines what information is stored. Public IM services include AOL's (America Online's) Instant Messenger (AIM), Yahoo Messenger, and Microsoft .NET Messenger.14 An enterprise IM application, on the other hand, is privately run. Whoever runs the central server can restrict access, limit recipients, and install security precautions. A corporation wishing to control and restrict IM use to users within its network would employ an enterprise IM server. Examples of enterprise IM applications are Sun ONE Instant Messaging and IBM Lotus Instant Messaging & Web Conferencing (formerly called Sametime).

Another feature that distinguishes among IM services is whether the service maintains a central record or log. Most service providers maintain a central log of the time and date of users' IM activity, but not necessarily an archive of the typed conversations. Others maintain an archive of the text of the conversations.15 This varies with the application and the preference of the party controlling the main server. It is certainly possible to do either, but not all services choose to.

So far, the discussion has concerned text-based IM applications. There are many applications, however, that allow users to transmit

---

13 Id.
14 Id.
15 See, e.g., OSTERMAN RESEARCH, supra note 8 (describing services available to archive IMs); Erica Rugullies, Connie Moore & Lucy Fossner, Archive Instant Messages and E-Mail Together, EXPRESS COMPUTER, June 6, 2005, http://www.expresscomputeronline.com/20050606/management03.shtml (offering guidance on when and how to archive IMs).
audio and video content. Voice messaging services, such as Google Talk or Apple's iChat, allow users to place phone calls over the internet using technology called Voice over Internet Protocol (VoIP). While there are a number of different VoIP protocols, they all share some common features. Each application records the user's voice and converts it into data packets that are transmitted over the internet, like an e-mail or IM. The recipient's computer then converts these data packets into audio format, and the conversation proceeds. Some voice messaging systems, such as Skype, use proprietary software and transmit calls between two computers. Others, like Vonage, allow users with a broadband connection to use their computer to call phones as well as other computers. Finally, businesses can install a local voice messaging service, in which their internal phone system uses their local network. From the user's perspective, the calls proceed as they would over traditional phone lines. VoIP services are generally much cheaper than traditional phone service but are typically harder to use.

Video messaging communications are similar to voice messaging communications, except that the information transmitted contains both video and audio components. Essentially, video messaging communications simulate a face-to-face conversation; all parties see the speaker on their computer monitor as they listen. Like the other messaging communications, video messaging systems generally share some basic characteristics. All of these conference systems employ software that converts and compresses an analog audio-video signal into digital data and transmits it over a digital line. The software reverses the process at the receiving end. Video messaging can be either "point-to-point," in which two users participate, or "multipoint," which allows simultaneous participation of three or more users. Examples of video messaging systems include Microsoft's Netmeeting and Apple's iChat.

17 Needleman & Yang, supra note 16; How VoIP Works, supra note 16.
18 Needleman & Yang, supra note 16; How VoIP Works, supra note 16.
This Comment will use the term "messaging communications" to describe IMs, voice messages, and video messages collectively.

III. EXPLORATION OF THE ORAL/WRITTEN DISTINCTION

A. The Law that Makes the Distinction

It is said that the Securities Act draws a binary distinction between oral and written communications. Indeed, the SEC, in its most recent pronouncements on the matter, takes the position that oral communications are "all communications that fall outside the definition [of written communication]." Written communications are now defined as "any communication that is written, printed, a radio or television broadcast, or a graphic communication."

This distinction has important implications. Once an issuer files a registration statement with the SEC, section 5(b)(1) of the Securities Act prohibits that issuer from distributing "any prospectus relating to any security." "Prospectus" is defined in Securities Act section 2(a)(10) as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale." Though section 5(b)(1) does not use the term "oral," the SEC uses that term to mean an offer that is non-written, radioed, or televised; thus, an oral communication is not a "prospectus." Oral communications, therefore, are excluded from section 5(b)(1)'s restrictions.

Subject to certain exceptions, the only written, radioed, or televised offer permitted after filing a registration statement is a prospectus meeting the requirements of Securities Act section 10 (a "Section 10 Prospectus"). Under the statutory language, once the registration statement is declared effective, offering participants can still make written offers through use of a Section 10 Prospectus, or additional written materials if those materials are accompanied or preceded by a

---


24 Id. § 77b(a)(10).

25 See, e.g., LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATIONS 110 (5th ed. 2004) ("Since § 5(b)(1) speaks in terms of a 'prospectus,' and that term is defined in §2(a)(10) as an offer made in writing (or by radio or television), it is perfectly lawful to make oral offers at any time after the filing date even though they are not accompanied or preceded by a §10 prospectus.").

26 Id. ("After the filing date, an oral offer may be made even by interstate telephone because an oral offer is in no case a 'prospectus.'").

Securities Act section 10(a) final prospectus. Effective December 1, 2005, however, the SEC has relaxed many of those restrictions through its amendments to the Securities Act and the accompanying release (Release 33-8591). Release 33-8591 gives issuers greater freedom to make written offers during the waiting period. Use of these new rules, however, is subject to a number of issuer conditions and written offers are still subject to costly and burdensome prospectus delivery requirements. An offer that is non-written, radioed, or televised, on the other hand, has no such restrictions; such offers are excused from the requirements of section 5(b)(1).

B. Explanations and Rationales for the Distinction

There is no single underlying policy reason for distinguishing between oral and written, radioed, or televised offers. The SEC and commentators have hinted at several rationales for the distinction. Presumably, these rationales buttress the broad policies of the Securities Act: to provide investors with complete and accurate information about issuers before they make a decision to purchase (thus preventing issuers from “conditioning the market”); to facilitate the capital formation process; and to encourage communications between issuers and the public. Some of the proposed rationales for distinguishing between oral and written, radioed, or televised offers include:

1. Permanence

The SEC excludes “live, in real-time communications to a live audience” from the definition of written communications because

---

28 Id. § 77b(a)(10).
30 Id. § 77b(a)(10).
32 H.R REP. NO. 1542, 83d Cong., 2d Sess. 26 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 2973, 2978-87 (stating that the “intention of the [Securities Act is] that there should be general dissemination of information so that the public might be informed of what it is being solicited to buy”).
they "have less of the permanence" of such communications.\textsuperscript{34} Communications defined as "written," such as a sales brochure, are tangible, exist after the recipient receives them, and allow the recipient to repeatedly refer to them, thus strengthening their impact. On the other hand, an "oral" communication, like a telephone call, exists for a much shorter period of time: only during the communication's transmission. The recipient can only refer back to his memory of the call.

Permanence produces other dangers. For example, a written offer to sell a security can be copied, redistributed, or inadvertently seen by nonrecipients. Those nonrecipients are seeing the original offer. Its impact increases with each investor it reaches, especially if such offer looked professional (on firm letterhead, for example). Oral offers, on the other hand, can only be redistributed through verbal means. Such redistribution lacks much of the legitimacy implied by the original offer's professional appearance. It is one thing to tell a friend about a hot stock tip you heard; it is another to show him some slick marketing materials. Even a recorded and redistributed voicemail does not command the respect of a formal, written offer.

Further, the permanence of a written communication makes it easy to manipulate. The recipient of a written communication, especially an electronic one, can change or delete particular portions of a written communication while keeping the rest intact. He can then send the altered communication on to unwary parties.\textsuperscript{35} This preserves the perceived legitimacy of the original communication, as discussed above, but allows the manipulator to make subtle changes to suit his purposes. This is far more difficult, if not impossible, to maintain such legitimacy with an oral communication.

The SEC, in a series of no-action letters (the "Roadshow Letters"), has acknowledged the dangers associated with permanent, tangible communications.\textsuperscript{36} In the Roadshow Letters, the SEC took a no-action position on issuers' presenting certain Web casts and recorded presentations via the internet without adhering to section 5(b)(1)'s require-


\textsuperscript{35} See Ray Delgado, Starbucks Clipped by Phony Coupon: Internet Fake Promises Free Frappucinos, S.F. CHRON., July 19, 2002, at A25 (describing an internet scam in which someone scanned a Starbucks promotional coupon, changed its contents, and forwarded it on to unknowing recipients).

ments. The issuers reasoned that such communications were not "prospectuses," and thus not subject to section 5(b)(1)'s restrictions, in part because the issuer used technology that prevented the presentation from being copied, downloaded, or printed. This condition ameliorated many of the "permanence" concerns associated with written offers. In taking its no-action stance, the SEC acknowledged that the impermanent nature of such communications made them non-written, radioed, or televised.

2. Potentially Unlimited Dissemination

The SEC defines radio or television broadcasts as written communications because of "the potentially unlimited and uncontrolled nature of dissemination of broadcast communications." These communications reach anyone within their broadcast range; they cannot be limited to certain recipients. To some degree, all written offers present this problem. For example, mass e-mails or mailings can reach a potentially unlimited number of investors; their impact is limited only by the capabilities of the dissemination process. Another example is a posting on a blog or internet chat room. An unlimited number of people could see that posting if they simply visit the site. Further, oral offers generally have to be made singularly, which can take a great deal of time. Broadcasting or mass distributing that same offer, however, allows it to reach the same amount or more people in a far shorter time period, increasing its impact.

The danger underlying such uncontrolled distribution is that it is impossible to anticipate who may receive the offer. It could be a savvy investor able to process and understand it, or it could be someone with no financial experience at all. Most importantly, it could also be someone who has not received a Section 10 Prospectus—precisely what section 5 of the Securities Act was designed to prevent.

Consistent with this goal, the SEC has excluded certain communications from the definition of "prospectus" because they are not directed to

---

37 Id.
38 Thomson Fin. Servs., Inc., SEC No-Action Letter, 1998 WL 575139, at *3 (Sept. 4, 1998) ("Virtual Roadshow transmissions will include technology designed to prevent the copying, downloading, or printing of any portion of the roadshow other than the prospectus."); Activate.net Corp., SEC No-Action Letter, 1999 WL 739423, at *4 (Sept. 4, 1999) ("[Presentations] will be protected against copying, downloading and printing utilizing the advantages of streaming media technology.").
40 See supra notes 32-33 and accompanying text.
the public at large.\textsuperscript{41} The presentations described in the Roadshow Letters were permitted on condition that the issuer restricts access to a "select and relatively exclusive group."\textsuperscript{42} This group is limited to "qualified investors who would customarily be invited to attend a traditional road show" and who have received a Section 10 Prospectus.\textsuperscript{43} Provided that the communication is made only to this limited group of recipients, it is considered to be non-written, radioed, or televised. Communications directed at the public at large, however, provide no insurance that the recipient has received a Section 10 Prospectus. This is why broadcast offers must be subjected to restrictions imposed on written offers.

3. "Give and Take" Nature

An oral communication, such as a face-to-face conversation, allows the parties to engage in responsive dialogue and an active back-and-forth. The recipient can "follow up" with the speaker; he can disagree or request clarification or elaboration of the speaker's statements. Oral communications also provide the benefit of spontaneity that allows both parties to evaluate the legitimacy or quality of the communication; the speakers have less time to consider their statements. Written communications, on the other hand, provide none of these benefits. The recipient of a written communication cannot immediately follow up with the speaker; they must first locate and contact them. If this process is lengthy or protracted, it may discourage some recipients from following up and getting the information they seek. Written communications also lack spontaneity.

The SEC has recognized the benefits of this "give and take." In the Roadshow Letters, it excluded certain electronic presentations from the definition of "prospectus," due in part to the "give and take" nature of those shows.\textsuperscript{44} One of the conditions of the exclusion is that the road shows "permit authorized viewers to electronically transmit,

\textsuperscript{41} See, e.g., Activate.net Corp., SEC No-Action Letter, 1999 WL 739423, at *5 (Sept. 21, 1999) ("Access to an Activate Roadshow will be restricted to qualified investors who would customarily be invited to attend a traditional road show, such as institutional investors, securities firms, trading and sales personnel from participants in the offering and research analysts.").


\textsuperscript{43} Activate.net Corp., SEC No-Action Letter, 1999 WL 739423, at *5 (Sept. 21, 1999).

\textsuperscript{44} Charles Schwab & Co., SEC No-Action Letter, 1999 WL 1038050, at *11 (Nov. 15, 1999) ("Schwab may also, on occasion, seek to include remote questions when the road show is presented 'live."); Activate.net Corp., SEC No-Action Letter, 1999 WL 739423, at *7 (Sept. 21, 1999) (requiring that the road show "include[e] a meaningful opportunity for persons electronically viewing a Live Roadshow to ask questions and receive answers"); Thomson Fin. Servs., SEC No-Action Letter, 1998 WL 575139, at *4 (Sept. 4, 1998) ("[V]iewers of live virtual road shows may be allowed to submit questions during the road show.").
on a real-time basis, questions to the issuer and managing underwriter.\footnote{Activate.net Corp., SEC No-Action Letter, 1999 WL 739423, at *4 (Sept. 21, 1999).} This aspect of the road shows approximated the spontaneous, "give and take" nature of face-to-face conversation and gave the participants a chance to follow up with the speaker. Provided that the road shows contained this "give and take" environment, they were deemed to be non-written, radioed, or televised.

C. Past SEC Interpretations of Electronic Media

Prior to Release 33-8591, the SEC was inconsistent in its classification of electronic media and internet communications. The SEC, in the Roadshow Letters discussed above, took a no-action position on issuers' distributing certain presentations via the internet without adhering to section 5(b)(1)’s requirements. These communications were excluded from the definition of "prospectus" because of their impermanence, their "give and take" nature, and their limited audience.\footnote{See supra Part III.B.1-3.} It would logically follow that any communication meeting these three criteria would also fall outside the definition of "prospectus." However, in a release dated after the Roadshow Letters, the SEC stated: "Written communications include all information disseminated otherwise than orally, including electronic communications and other future applications of changing technology. Videos and CD-ROMs, for example, should be filed on EDGAR by means of a transcript."\footnote{Final Rule: Regulation of Takeovers and Security Holder Communications, Securities Act Release 7760, Exchange Act Release No. 42,055, Investment Company Act Release No. 24,107, 64 Fed. Reg. 61,408, at 61,412 n.37 (Jan. 24, 2000).}

This broad language conflicts sharply with the SEC’s earlier no-action position. Based on this language, it would appear that all electronic communications, including Web casts, should be written communications and therefore prospectuses; it makes no reference to any policy-based exception. The SEC has given no justification for the divergence.

Further, the SEC has stated that "[a]n issuer in registration must consider the application of Section 5 of the Securities Act to all of its communications with the public. In our view, this includes information on an issuer’s web site."\footnote{Use of Electronic Media, Securities Act Release No. 7856, Exchange Act Release No. 42,728, Investment Company Act Release No. 24,426, 65 Fed. Reg. 25,843, at 25,850 (May 4, 2000).} Once again, this language conflicts with the SEC’s no-action stance in the Roadshow Letters, without explanation. Parts of Release 33-8591 were designed to resolve this
disparate treatment of electronic media; the rest of this Comment will examine if it was successful.

IV. APPLYING THE SEC'S DEFINITIONS TO ELECTRONIC MEDIA

A. The New Definition of "Written Communication"

New and revised SEC rules and definitions became effective December 1, 2005.\textsuperscript{49} Though these rules provide some guidance on classifying electronic media, they also raise significant new questions. The new rules define "written communication" as "any communication that is written, printed, a radio or television broadcast, or a graphic communication as defined in this section."\textsuperscript{50} IMs fall into at least two of these sub-categories: written and graphic. Voice or video messages, however, do not fall under any of the subcategories and are therefore oral communications.

1. Written and Printed Communications\textsuperscript{51}

As discussed in Part III.B.1, a communication is classified as written if it has a permanent, tangible quality. Such a communication can be easily sent to many recipients or redistributed by its intended recipients, increasing its effect with each new party it reaches. Further, a recipient can repeatedly refer to that communication.

IMs present these problems. Even if the application's central server does not maintain a log of the IM conversations, the recipient still has the text on his screen until he closes the program. He can refer to the communication throughout that time. He is free to copy and paste the message into a more permanent format, such as the body of an e-mail or a saved word processing document.\textsuperscript{52} Unlike the Web casts discussed in the Roadshow Letters, IM programs do not offer the technology to prevent copying or printing the text of the message. The recipient can forward the message, show others the


\textsuperscript{50} 17 C.F.R. § 230.405 (2005). Note that the regulatory definition of "written" must include both radio and television broadcasts, because the statutory definition of "prospectus" includes offers that are "written or by radio or television." 15 U.S.C. § 77b(a)(10) (2006). Given the SEC's concern with the "unlimited dissemination" aspect of radio or televised communications, those terms likely refer to the broadcast nature of such communications, not the technology used. Therefore, this Comment presumes that the terms used in the definition of "prospectus" have the same meaning as in the definition of "written."

\textsuperscript{51} The policy concerns underlying written and printed communications are similar, so this analysis will apply to both.

\textsuperscript{52} See Gliedman, supra note 11 ("[I]ntant messages can be retained long after they were created by simply cutting and pasting message text into a separate document for later retrieval, printing out the communication or creating electronic logs of communications.").
message on his screen, or copy and paste the message into a number of other, more easily disseminated, formats. In addition, the recipient can alter the message of the IM. Such manipulation is generally only possible with written communications; manipulating oral communications, such as voicemails, is far more difficult. Since IMs share these qualities with written communications, they should be subjected to the same restrictions.

Voice or video messages, on the other hand, do not present the dangers associated with permanent, tangible communications. These communications closely approximate the impermanent nature of face-to-face communications: they cannot be easily copied, downloaded, or redistributed. Further, the SEC has stated that the definition of written communications "excludes live telephone calls (through whatever means by which they are transmitted, including the Internet)."  This language illustrates the SEC’s specific intent to exclude both voice and video messages from the definition of written communication.

2. Radio or Television Broadcast Communications

Though messaging communications may share some technological qualities with radio or television broadcasts, they do not present the dangers inherent in broadcast communications. For example, all three may require a computer monitor, which uses much of the same technology as television. The SEC, however, has clearly stated that it is the potentially unlimited dissemination of broadcast communications that justifies their classification as written, not the type of technology used. Messaging communications do not present a similar danger of unlimited dissemination. Though the sender of a messaging communication can send one communication to multiple recipients, he must first know each recipient’s contact information. He cannot simply send the communication to anyone within an entire geographic area. The fact that the sender must use each recipient’s contact information means that he can limit the transmission to proper recipients (i.e., those that have received a Section 10 Prospectus). Therefore, messaging communications do not present the dangers inherent in radio or television broadcast communications and should not be defined as either.

---

54 See supra Part III.B.2.
3. Graphic Communications

The new rules also provide a new definition of "graphic communication," which includes: "All forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation."\(^{55}\)

This language clearly encompasses messaging communications. It lists "computers [and] computer networks" as a type of media included in the "graphic" definition. Messaging communications, obviously, are transmitted through the medium of computers or computer networks. They are created and stored entirely on a computer and transmitted through a server network.\(^{56}\) Similar types of electronic messages, transmitted through computers and computer networks, are included in the definition of "graphic." Release 33-8591 specifically includes e-mails and internet chat rooms in that; it would be inconsistent to define messaging communications otherwise.\(^{57}\) Therefore, there is little doubt that the definition of "graphic communication" includes messaging communications.

Further clarifying the issue, the SEC stated:

While we have addressed the issue of electronic communications in a number of different contexts, at this time we are adopting rules making it clear that all electronic communications (other than telephone and other live, in real-time communications to a live audience, as discussed below) are graphic and, therefore, written communications for purposes

\(^{55}\) 17 C.F.R. § 230.405 (2005) (emphasis added). The syntax of this definition is puzzling. It is unclear whether "computers, computer networks and other forms of computer data compilation" should be construed as an object of "distributed on." Logically, though, these three elements, cannot be objects of "distributed on," because, if they were, the "and" would mean that those three, combined with "telephone answering or voice mail systems," would constitute a conjunctive list, which is obviously not the case. That list, if conjunctive, would cover very little. Further, if that is the case, the sentence ends without a final conjunction; it would need an "and" before "substantially" to be grammatically correct. Therefore, this Comment will presume that "computers, computer networks and other forms of data compilation" are all distinct forms of electronic media.

\(^{56}\) See supra Part II.B.

of the Securities Act. In this manner, we intend to encompass new technologies. 58

This language strongly supports the inclusion of messaging communications as "graphic." It specifically includes all electronic communications (subject to one exception, discussed infra Part IV.B). Messaging communications are clearly an "electronic communication." A commonsense interpretation of the term includes them: they are created, sent, and stored entirely through electronic means.

Further, while the Securities Act does not define "electronic communication," that term, as defined in other areas of the law, would include messaging communications. The Electronic Communications Privacy Act (ECPA) defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 59 Messaging communications, which are transmitted over the internet, would clearly fall into this definition. Courts interpreting the ECPA have held that the definition of "electronic communication service" encompasses internet service providers as well as telecommunications companies whose lines carry internet traffic. 60 Many of those companies defined as electronic communications service providers also provide messaging communications services, a fact that further strengthens the conclusion that messaging communications are electronic communications. So, analogizing to non-securities areas of the law, there is a strong argument that messaging communications are electronic communications and thus graphic communications for purposes of the Securities Act.

In addition, the language of Release 33-8591 supports classifying messaging communications as graphic. It specifically advocates a broad application of the "graphic" definition by stating the SEC's intent to "encompass new technologies" 61 and that "[i]n recognition of continuing developments in technology, the forms of electronic media described in the definition [of graphic communication] are

58 Id. (emphasis added).
intended to be illustrative rather than exhaustive." The SEC realized that new technologies would gain popularity and their use would become prevalent; therefore, they wanted to broadly define their regulatory authority to encompass them. This language creates the presumption that new forms of technology will be graphic; they will be defined otherwise only if specifically exempted. The next section will analyze which messaging communications are so exempted.

B. The Exception to "Graphic Communication"

The definition of graphic communication contains one exception: "[g]raphic communication shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means." An analysis of this exception reveals that it applies only to voice or video messages. IMs originate as a graphic communication and therefore do not fall under the exception.

1. "Live, in Real-Time"

The second component of the exception is whether an IM occurs live, in real-time. The SEC has not defined "in real-time," and it has no generally accepted definition to apply to messaging communications. It has become a popular buzzword, widely used without precise definition. Many courts and technical publications, however, have summarily concluded that messaging communications are in real-time. In the area of securities regulation, it has been used to mean different things in different contexts. For example, the SEC described a process used by the Municipal Securities Rulemaking Board (MSRB) as "near real-time." That process requires brokers, dealers,
and municipal securities dealers to report transactions in municipal securities to the MSRB's Real-Time Transaction Reporting System within fifteen minutes of trade execution. The system then performs automated error checking and disseminates prices. Here, the SEC seems to loosely equate "in real-time" with "synchronous" or "contemporaneous"; in other words, the reporting system reflects events soon after they occur. The SEC, however, provides no guidance as to how much time may lapse between the event and reporting to remain in real-time; here, fifteen minutes was not too long. This is a very broad definition of real-time; stringent technical definitions of real-time restrict the time lapse between event and reporting to less than one second.

Congress provides another use of real-time in section 409 of the Sarbanes-Oxley Act, which requires "real time issuer disclosures" for certain events. The SEC has interpreted this to mean disclosure within four days of the event. Thus, the SEC appears to have a different conception of real-time. Generally, issuers must make certain reports at various predetermined intervals; for example, certain issuers must file a 10-Q every quarter, regardless of what has occurred during the quarter. With these real time issuer disclosures, however, the issuer must report events independent of those predetermined intervals. The disclosure times are determined by the occurrence of the reported event. If no such event occurs, no filing is required. This is distinct from the previously discussed use of real-time: a four-day gap between event and disclosure is certainly not contemporaneous or synchronous. Rather, its use describes reporting requirements distinct from the predetermined times at which other disclosures are required. For these real-time disclosures, there is no calendar or schedule; the disclosures are contingent on certain events occurring.

As the disparate use of the term real-time illustrates, it has no single, precise definition. Since a thorough analysis of IMs must be based on a well-defined concept of real-time, this Comment develops

---

66 Id.
68 See, e.g., Compro Simulation Solutions, Real-Time Environment, COMPRO SIMULATION SOLUTIONS, Apr. 23, 2002, http://www.encore.com/Real-Time-Products/Real-Time_Envir.php ("A complete real-time application may execute in ten milliseconds, but each application module may require from a few microseconds to several milliseconds for execution.").
one. Logically, the development begins with the SEC’s exception to the definition of written communication, which excludes certain communications that are transmitted live and in real-time. Assuming no pointless redundancy or superfluity, “in real-time” must have a meaning distinct from “live.” Therefore, to properly define real-time, live must also be defined. This Comment asserts that a live communication, in the context of the Securities Act, has two components. The first component is that a person makes the decision to transmit the communication at the time the communication is sent; this means that a live communication cannot be one sent at a certain time by a pre-programmed machine. The second component is that a person is present to receive the communication when it arrives. This means that the communication cannot linger after arrival, waiting for its recipient. To illustrate, imagine person A making a telephone call to person B. If person B answers the phone, the ensuing communication is live; both components are satisfied. If person A gets person B’s voicemail and leaves a message, that communication is not live; the second component is lacking.

With any live communication, however, there is bound to be some lag time, the time between the communication’s transmission and its receipt. For example, imagine a face-to-face conversation. The speaker decides to speak and the listener hears the communication within a small fraction of a second, giving it a very short lag time. Now imagine someone sending a letter via overnight delivery. The sender decides to send the letter at noon of day one. The recipient receives the letter at noon of day two. The communication is still live, but the lag time is much longer (twenty-four hours). It is from the length of this lag time that a definition of real-time emerges.

Given that being in real-time brings a communication closer to being non-written, radioed, or televised, any definition of that term must address the policy concerns embodied in those terms. Of the three policy concerns previously discussed (permanence, distribution, and back-and-forth), only a communication’s back-and-forth nature contains a temporal element. Since the concept of real-time is inherently temporal, it must be tailored to that policy concern: the communication’s lag time must allow for meaningful back-and-forth between parties. Thus, in this context, real-time describes a means of communication with a lag time short enough to allow reasonable

---

72 This is also known as a communication’s “latency.” See, e.g., Video Development Initiative: Network Fundamentals for the Videoconference, http://www.videnet.gatech.edu/cookbook.en (last visited May 12, 2006) (“Latency is the time delay between an event occurring and the remote end seeing it.”).
parties to engage in a meaningful, responsive dialogue that approximates a face-to-face conversation. Under this definition, real-time communications would include phone or face-to-face conversations, but not communications sent via traditional mail, bike courier, or carrier pigeon.

Based on this paradigm, all messaging communications would be both live and in real-time, assuming one condition. The recipient of the communication must be present to receive the communication when it arrives; if not, the communication is not live and is thus a graphic communication. Generally, messaging communications applications provide the sender with a way of knowing if his intended recipient is present to receive. For IMs and voice messages, that is usually in the form of a contact list with status indicators. For video messages, the sender can simply look at his recipient before communicating. If the recipient is present, therefore, the communication is live. It is also in real-time, as virtually all messaging communications programs provide a lag time of less than a few seconds and the chance for both parties to reply to one another. Therefore, each type of messaging communication simulates a face-to-face conversation. A video message is most analogous to a face-to-face conversation, as the parties can both see and hear one another. A voice message is clearly a conversation, just not face-to-face. An IM, the poorest approximation of a face-to-face conversation, still provides a responsive dialogue with minimal lag time. Thus, so long as the recipient is present, a messaging communication is a live, real-time communication for purposes of the Securities Act.

2. "Originate . . . as a Graphic Communication"

Though it is an important term in the exception, the SEC does not specifically define "originate." Resorting to a common dictionary definition, originate simply means "to bring into existence." For this broad, imprecise definition to be analytically useful in the securities context, however, it must be defined in the context of what is being originated, that is, when does a communication originate? A communication, by definition, is designed to be an exchange between two or

---

73 This definition of "in real-time" resembles certain technical definitions that refer to a system in which events are simulated at the same rate they occur in reality. See Webopedia: What Is Real-Time?, http://webopedia.com/TERM/r/real_time.html (last visited May 12, 2006) ("Real time can also refer to events simulated by a computer at the same speed that they would occur in real life. In graphics animation, for example, a real-time program would display objects moving across the screen at the same speed that they would actually move.").

74 5 OXFORD ENGLISH DICTIONARY 935 (2d ed. 1989) (defining "originate").
more parties; it is inherently interactive. Therefore, a communication originates when a person other than the originator is first able to perceive it, as is necessarily distinct from when another person actually does perceive it. Thus, a communication does not originate when the speaker thinks of what he is going to say. It is only when he actually says something that a communication originates, regardless of whether someone is present to hear it.

Release 33-8591 provides two examples of the exception, both of which support this definition. The exception covers single voicemails and certain Web casts; therefore, neither of those communications “originate . . . as a graphic communication.” Both are clearly non-graphic when they originate, i.e., when a person other than the originator is able to perceive them. A voicemail originates when the speaker actually speaks into the phone; a Web cast originates when the presenters verbalize the presentation material. This is the first point when someone could perceive either communication. At this point, the definition of graphic communication would not encompass those communications, regardless of what happens subsequently (recording, retransmitting). Though the recipient may receive the communication in graphic form, it originated in non-graphic form.

Voice or video messages similarly originate in non-graphic form. The analysis is the same as for a traditional phone call or a live, real-time Web cast. A person can first perceive either communication when the originator first speaks it. Thus, it originates non-graphically, though it may be subsequently transmitted otherwise.

An IM, on the other hand, originates when it is first typed on a computer. That is the first point at which another person could perceive it. Since it is typed on a computer screen, it originates as a graphic communication, as discussed in the previous section. It is then sent as a graphic communication. At no point in its existence is an IM non-graphic. The SEC’s treatment of e-mails further strengthens this point: “e-mails . . . by their nature, originate in graphic form

75 Id. 579 (defining “communication” as “[t]he imparting, conveying, or exchange of ideas, knowledge, information, etc. (whether by speech, writing, or signs)).
77 Id. at 44,732 (“[A] live, in real-time road show to a live audience that is transmitted graphically is not a graphic communication.”).
78 Like traditional phone calls, voice messages are specifically excluded from the definition of “written communication.” Id. (stating that the definition of written communication “excludes live telephone calls (through whatever means by which they are transmitted, including the Internet).”)
and, therefore, are graphic communications. It would be wholly inconsistent to treat IMs any differently. Therefore, the exception to graphic communication cannot apply to IMs, meaning that they are graphic and therefore written communications.

V. CONCLUSION

Messaging communications must be evaluated by examining the underlying policies of the Securities Act and the distinction between written and non-written communications. IMs, which present the risks associated with permanent communications, must be subjected to the restrictions placed on written communications. Voice or video messages, on the other hand, present none of the risks associated with written communications and should be excluded from that definition.

JOHN N. TITLEY
t

79 Id. at 44,732 (emphasis added).
† J.D. candidate 2006, Case Western Reserve University School of Law. I would like to thank Professor Ronald J. Coffey, Alex van Voorhees, Jason Grove, Kevin Pendergast, and Daniel Applegate for their help with this Comment.