The Evolution of the Prospectus…Not!

Webster's New World Dictionary of American English (Third College Edition – 1988) defines "progress" (as a noun) as "3 [an] advance toward perfection or to a higher or better state; improvement".

The Securities Act of 1933 (33 Act) codified the British concept of "full disclosure" for issuers of publicly offered securities in response to real and/or perceived abuses in the public offering process in the United States and in an attempt to let the sunshine of transparency assist potential investors in new issues.

When then President Franklin Delano Roosevelt signed the 33 Act into law, those present heard him proclaim that "Securities law is changing from a system of *caveat emptor* to one of *caveat vendor*."

Well, here we are some 72 years later right back to square one (*caveat emptor*), if the recent (September 14, 2005) Google $4.2 billion follow-on underwritten public offering is any indication. How could this retrogression occur?

Easily! The recipe for this cowardly retreat is straightforward. Mix in generous amounts of the following ingredients:

1. Full-scale adoption by the United States Securities and Exchange Commission (SEC) of the concept of "efficient market theory", *i.e.*, the secondary equity market, at all times, reflects all events that have occurred, or could occur, with respect to each equity security;
2. The evolution of the SEC's 1982 Shelf Registration rule to the point where, today, almost nothing of substance appears in an issuer's registration statement;
3. The overwhelming success of the securities tort bar at prosecuting any and all public companies for the slightest misstep in meeting the so-called "consensus Street estimate" for its quarterly earnings;
4. The attempt by securities attorneys representing issuers to foresee any and every conceivable adverse event that may befall an issuer after an underwritten offering (to the exclusion of almost any useful information) by loading the document with "Risk Factors"; and
5. The speed with which many underwritten deals come to market today…in order to get through the so-called market "window" of opportunity.

What is it about the recent Google deal that should upset investors? Simple – investors thinking about investing in Google had to wax their boards and surf the Internet to access eight different but very significant sources of information about Google: a 10-K; four 8-K's; two 10-Q's; and a registration statement filed on April 29, 2004 and declared "effective" on June 28, 2004 – as well as a plethora of other public filings, all "incorporated by reference" into the Google prospectus.

Now, in this day and age of high-speed internet connections, accessing all this information is not difficult per se. What is nettlesome, no bothersome, is that, for most of the 72 years since FDR put a pen to the 33 Act, all this information appeared in just one place, inside the four corners of just one document - a prospectus!

Google's prospectus dated September 14, 2005, while 36 pages in length, contains almost no "sunshine"…almost no facts about Google. What it does contain, in excruciating detail, are 18 pages of securities lawyerese (*a/k/a* "Risk Factors") and one page containing a "Special Note Regarding forward-Looking Statements", all in an attempt to cover every backside from Google's management to its board of directors, and all the "experts" – the company's auditors, attorneys, underwriters (and maybe even the boot black who works the lobby in the company's headquarters).

One wonders: did the framers of the 33 Act envisage this "3x5 notecard" masquerading as a surrogate for the full-blown, due diligence-rich prospectus we used to know and love? Evolution? Yes. Progress? Hardly!

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