Trading Securities over the Internet: Recent Developments in Japanese Securities Regulation

Sôichirô Kozuka *

I. INTRODUCTION

It was not until the 1990s that the Internet was used for business purposes. Today, however, it would be difficult to conceive of a business that is not conducted over the Internet. It is certainly amazing to see how drastically the Internet has changed the environment for business activity in the last decade. Trading in securities is, of course, no exception.

These amazing changes have necessitated adaptation on the side of relevant regulation, since no regulator wishes to see existing regulation be evaded by the use of the Internet. As in many other cases, securities regulation has faced numerous novel issues. In some cases all that is necessary is to apply the existing rules to the new situation. In others, no existing rule or concept is found suitable and an entirely different idea is required.[1]

---

* This article was published first in: KWON JONG HO (ed.), Celebrating the Retirement of Professor Woo Hong Ku. Courses of Korean Commercial Law in the 21st Century (Seoul 2002). We thank Professor *Kwon Jong Ho* of Konkuk University for the kind permission to reprint the article.

1 See Comment by S. KOZUKA, in: ÔSAKI/KOZUKA, *Denshi shôken torihiki to hôsei-jo no kadai* [Electronic Trading of Securities and Its Legal Issues], in: Jurisuto 1195 (2001) 98, 103.

This article aims to examine whether and to what extent Japanese securities regulation has resolved the issues raised by the Internet. For the sake of analysis, three features of the Internet are identified and discussed in turn. First, any communication over the Internet is made electronically, replacing records on paper by electronic data. The effect of this aspect on securities regulation will be discussed in Section II.

Second, using the Internet, which can be accessed from anywhere in the world under almost the same conditions, people easily engage in transactions across national borders. As a result, jurisdictional conflicts arise between national regulators, both positively and negatively. Regulators of securities transactions in various countries appear to have resolved, at least to some extent, these conflicts, as indicated in Section III.

Third, communications over the Internet are interactive, as contrasted with the one-way stream of information through traditional media. This enables the providing of financial services online by content providers on the Internet, including not only traditional broker-dealers but those entities with little or no experience in financial services as well. Although it appears that relevant regulation needs to be reviewed in this respect, Japanese securities regulation, as described in Section IV, has not yet made much development.

II. THE USE OF ELECTRONIC DATA IN PLACE OF PAPER DOCUMENTS

Under securities regulation, various flows of information are required in order to ensure the protection of investors and enhance the efficiency of the market. The most important of them is, of course, disclosure of information by the issuer. This is performed by filing with the regulating authority, as well as delivering to the investor, the disclosure documents. Other types of communication required under securities regulation include the delivery of information by broker-dealers to their customers and by investment advisors to their clients. All of these have traditionally been performed using paper documents.

1. American Precedent

The developments in information technology have enabled these communications to be made electronically. The United States was the first to accommodate its regulation to these developments. As early as 1984, the SEC (Securities and Exchange Commission) launched a system named EDGAR (Electronic Data Gathering, Analysis and Retrieval system), an automated system for the processing of disclosure documents filed with the SEC, followed by necessary amendments to Rule 100[2] pursuant to the Securities Act of 1933. It became obligatory for issuers in the United States to file electronically through

2 17 C.F.R. §230.100 (2001).

the EDGAR system in 1996 and the SEC now considers extending the mandatory use of this system to foreign issuers as well.[3] In the meantime, filings with the EDGAR system have been published on the SEC's website and have become accessible by anyone via the Internet since 1995.

Regarding the delivery of information between private parties, the SEC published interpretive releases in 1995[4] and 1996[5]. The 1995 release concerns the use of electronic media for the disclosure by or on behalf of the issuer or the third party (*e.g.*, a person making a tender offer), while the 1996 release discusses the electronic delivery and transmission of information by broker-dealers, transfer agents, and investment advisors. On the assumption that the relevant statutes and regulations do not specify any medium to be employed for the distribution of information, these two releases declare the use of electronic media as satisfying statutory requirements so long as it "results in the delivery to the intended recipients of substantially equivalent information as these recipients would have had if the information were delivered to them in paper form."[6] This approach, called the "Analogy to Paper" principle[7] by one commentator, may necessitate guidance for determining whether the substantial equivalence is achieved. For this purpose, the two releases list three major factors to be considered:

(1) timely and adequate notice to the recipient that information for them is available;

(2) access to the provided information comparable to the case of paper documents, including the right of the recipient to require the paper document, when necessary; and

(3) assurance that the information is delivered to the recipient, such as a prior consent to the electronic delivery or a confirmation of receipt by the recipient.[8]

2. IOSCO

The Internet Task Force to the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report[9] in 1998 that included a recommendation to the effect that national regulators provide guidance on the use of the Internet by financial services providers, with regard, in particular, to their obligation to deliver disclosure documents. The report, apparently in line with the two releases of the United States, listed three factors to be considered by the regulators when providing such guidance.

---

3 SEC release Nos. 33-8016; 34-44868; International Series Release No.1250 (28 Sept. 2001).

4 SEC release Nos. 33-7233; 34-36345; IC-21399 (6 Oct. 1995) [hereinafter as "1995 release"].

5 SEC release Nos. 33-7288; 34-37182; IC-21945 (9 May 1996) [hereinafter as "1996 release"].

6 1995 release, *supra* note 4, at 7; 1996 release, *supra* note 5, at 9.

7 D.W. SCHNEIDER, Toward a Universal Approach to E-Finance Regulation: The SEC's Electronic Media Releases, in: Banking Law Journal 118 (2001) 554, 557.

8 1995 release, *supra* note 4, at 8-11; 1996 release, *supra* note 5, at 11-13.

9 IOSCO, Securities Activity on the Internet: Report of the Internet Task Force to the Technical Committee (Sept. 19, 1998).

They are:[10]

- In providing guidance, regulators should consider what constitutes delivery and the extent to which electronic delivery provides timely and adequate notice.
- In permitting the use of electronic delivery by the financial services industry, regulators should require that access to electronic communications be at least as good as that provided by paper delivery.
- Regulators should permit the financial services industry to deliver disclosure documents electronically when an investor has given an informed consent to this form of delivery.

3. Revision of Japanese Regulation

In Japan, as contrasted with the United States, the existing regulation - which employs terms such as "instrument" (Art. 2 (10) of the Securities Exchange Act[11] [hereinafter "SEA"]), "file a registration statement" (Art. 5 (1) of the SEA), and "documents" (Art. 25 of the SEA) - was considered to not permit the use of electronic media.[12] Therefore, relevant statutory provisions were amended in 2000.

First, the filing by the issuer with the FSA (Financial Services Agency) via "electronic information processing system for disclosure" has been allowed by the amendment to the SEA (Arts. 27-30-2 *et seq*.). A network named EDINET (Electronic Disclosure for Investors Network) - which consists of computers among the issuers, the Cabinet Office, of which the FSA is an external organ, the securities exchanges, as well as the Japan Securities Dealers Association[13] - was accordingly established. It is accessible via the Internet and the issuer is deemed to have duly filed documents with the FSA when the electronic data sent by the issuer are stored in a file installed in a computer of the Cabinet Office (Art. 27-30-3 (3) of the SEA). The EDINET has been in operation

---

10 *Id.* at 31.

11 *Shôken torihiki-hô*, Law no. 25 of 1948, as amended. The English translation of the SEA is taken from CAPITAL MARKETS RESEARCH INSTITUTE (ed.), Securities and Exchange Law, Cabinet Order and Selected Ordinances (Tokyo, 2001), with some modifications by the author.

12 See On the Legislative Issues Relating to the Use of Electronic Measures in Corporate Disclosures [*Kigyô jôhô kaiji no denshika ni tomonau hôseimen tô no kentô kadai ni tsuite*], Report of the Roundtable on Electronic Disclosure [*Denshi kaiji kenkyû kondankai hôkoku*] (Tokyo, 1997) 80-81; see also H. KANSAKU, *Kigyô naiyô tô no kaiji tetsuzuki no denshi jôhô shori* [The Electronic Disclosure of Information of the Issuers], in: EGASHIRA / IWAHARA (eds.), *Atarashii kin'yu shisutemu to hô* [Law and the Renewed Financial System 68] (Jurisuto, Special Issue, November 2000).

13 The Japan Securities Dealers Association is a self-regulatory organization operating the OTC securities market called JASDAQ.

since June 2001. Electronic filing via this system will become mandatory in 2004, except for limited cases.

Second, by the same amendment it has been provided that the delivery of a prospectus or a tender offer circular can be replaced by the electronic communication to be specified in the Cabinet Office Ordinance (Art. 27-30-9 of the SEA). The Ordinance lists several electronic media to be used in place of the delivery of a prospectus, including sending of an e-mail message, uploading on the website, and transmission to the mobile phone of the recipient.[14] The employment of these shall be limited to cases when the recipient consents to it in advance, either in writing or electronically (*i.e.,* oral consent does not satisfy the requirement).[15]

Third, many statutory provisions that require delivery of documents in regard to securities transactions were amended in 2000 by the Act on the Use of Information and Communication Technology in Regard to the Delivery of Documents[16] so that furnishing the necessary information by electronic media shall be regarded as satisfying the requirements. Included in the relevant statutory requirements are delivery of a trade report to the customer by the broker when the transaction is consummated (Art. 41 of the SEA), delivery of a document stating conditions of the investment trust to the investor by the management company (Art. 26 (2) of the Act on Investment Trust and Trust Corporations[17]), and delivery of a report to the client by the investment advisor (Art. 32 of the Act on Regulation of Investment Advisors of Securities[18]), to name a few. The condition of the use of electronic media is the prior consent of the recipient either in writing or electronically.[19]

4. Evaluation

The amended Japanese regulation is structured to ensure that the electronic transmission of information is substantially equivalent to the traditional communication based on paper documents. It shares the principle of "Analogy to Paper" declared by the two re-

---

14 Art. 23-2 (2) of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs [*Kigyô naiyô tô no kaiji ni kansuru naikaku furei*], Ordinance no. 5 of the Ministry of Finance of 1973, as amended). Transmission to the mobile phone of the recipient is not permitted as a substitute to a tender offer circular (Art. 23-4 (2) of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs).

15 Art. 23-2 (1) of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs, *supra* note 14.

16 *Shomen no kôfu tô ni kansuru jôhô tsûshin no gijutsu no riyô no tame no kankei hôritsu no seibi ni kansuru hôritsu,* Law no. 126 of 2000.

17 *Tôshi shintaku oyobi tôshi hôjin ni kansuru hôritsu,* Law no. 198 of 1951, as amended.

18 *Yûka shôken ni kakaru tôshi komongyô no kisei tô ni kansuru hôritsu,* Law no. 74 of 1986, as amended.

19 See, *e.g.*, Art. 15-4 of the Cabinet Order for Enforcement of the Securities and Exchange Act [*Shôken torihiki-hô shikôrei*], Cabinet Order no. 321 of 1965, as amended.

leases of the SEC[20] and is in line with the recommendations of the report of IOSCO.[21] A prior consent by the recipient of the information is required as a precondition to the use of electronic media.[22] It is required that the recipient can download the transmitted electronic data into a hard copy[23] and that the recipient can revoke his or her consent to the use of electronic media and require delivery of a paper document at any time.[24] Also required is an adequate notice to the effect that the electronic data will be or are ready to be accessed.[25]

On the other hand, the basic idea lying behind these amendments is not clear enough. The two releases of the SEC clearly indicated the belief of the Commission that "given the numerous benefits of electronic distribution of information and the fact that in many respects it may be more useful to investors than paper, its use should not be disfavored."[26] With the use of electronic media, small investors can enjoy access to corporate information easily and the efficiency of the securities markets is enhanced by the rapid dissemination of information. In Japan, however, it was merely a statutory revision that has been undertaken; no official statements of a policy by the regulator toward developments in information technology has been made. As a result, it remains unclear whether Japanese regulation shares the same view on the use of advancing technologies as is held by its counterpart in the United States.

III. CONFLICTS OF JURISDICTION

Websites on the Internet can be accessed from anywhere in the world. When an issuer posts an advertisement for public offering or a broker-dealer makes solicitations for investments in securities on a website, such a website becomes available to investors in every country. This feature of the Internet raises conflicts of jurisdiction, that is, a question about which of the national regulators should or should not exert their jurisdiction over such an offer of securities trading.

---

20. See *supra*, notes 6-8 and accompanying texts.
21 See *supra*, notes 9-10 and accompanying texts.
22 See, *e.g.*, Art. 23-2 (1) of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs, *supra* note 14; Art. 15-4 (1) of the Cabinet Order for Enforcement of the Securities and Exchange Act, *supra* note 19.
23 See, *e.g.*, Art. 23-2 (3) 1 of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs, *supra* note 14; Art. 29-2 (2) 1 of the Ordinance of the Cabinet Office Concerning Securities Company [*Shôken gaisha ni kansuru sôri furei*, Ordinance no. 32 of 1998 of the Prime Minister's Office and the Ministry of Finance, as amended].
24 See, *e.g.*, Art. 23-2 (6) of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs, *supra* note 14; Art. 15-4 (2) of the Cabinet Order for Enforcement of the Securities and Exchange Act, *supra* note 19.
25 See, *e.g.*, Art. 23-2 (3) 2 of the Ordinance of the Cabinet Office Concerning Disclosure of Corporate Affairs, *supra* note 14; Art. 29-2 (2) 2 of the Ordinance of the Cabinet Office Concerning Securities Company, *supra* note 23.
26 1995 release, *supra* note 4, at 2; see *also* 1996 release, *supra* note 5, at 7.

1. "Targeted at" Approach

On this jurisdictional issue, the Internet Task Force of IOSCO noted in its report in 1998 that no consensus was found among its members.[27] However, at least among regulators of major securities markets, a common approach appears to be emerging.

In the United States, the policy of the SEC is described in an interpretive release published in 1998.[28] According to this release, the Commission treats an offer of securities or investment services over the Internet as occurring in the United States and, therefore, subject to the relevant American regulation when the offer is targeted to persons in the United States or to U.S. persons.[29] If adequate measures are implemented in order to prevent U.S. persons from participating in an offer on the Internet, it is stated that the offer will not be regarded as "targeted at" the United States. Having stated that what constitutes adequate measures for this purpose depends on the facts and circumstances of each case, the release provides that the Commission generally considers an offer by an entity outside of the United States to not be targeted at the United States if:

(i) a prominent disclaimer is indicated on the website to the extent that the offer is directed only to countries other than the United States; and

(ii) the offeror implements procedures that are reasonably designed to guard against sales to U.S. persons.

The basic idea of this approach seems to have emanated from the practice adopted by the state of Pennsylvania in order to resolve jurisdictional conflicts among securities regulators of states concerning offers over the Internet.[30]

The United Kingdom has followed more or less the same approach. The seemingly unlimited territorial scope of application provided in sec. 21 (3) of the Financial Services and Markets Act 2000 has been cut back by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001,[31] which states that the restriction of financial promotions does not apply to any communication which is directed only at persons outside the United Kingdom.[32] The Order further lists factors that are taken into account in determining whether a communication is to be regarded as directed only at persons outside the United Kingdom. Among the factors are included a disclaimer and a device to bar a person in the United Kingdom from engaging in the investment activ-

27 IOSCO, *supra* note 9, at 24.

28 Release nos. 33-7516; 34-39779; IA-1710; IC-23071 (March 23, 1998) [hereinafter as "1998 release"].

29 The "U.S. person" is the term defined in Rule 902 (k) of Regulation S, 17 CFR §230.902 (k). The 1998 release noted that it includes a person having a residence in the United States, regardless of any temporary residence outside the United States.

30 See J.C. COFFEE, JR., Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation, in: Business Lawyer 52 (1997) 1195, 1231.

31 Statutory Instrument 2001 No. 1335.

32 Sec. 12 (1) (b) of the Order, *supra* note 31.

ity.[33] These provisions are expected to clarify the applicability of the regulation to advertisements posted on websites.[34]

Other examples of adopting a similar approach are found in the Netherlands and Germany. In the Netherlands, the regulator, *Stichting Toezicht Effectenverkeer* (STE), published a notice on the subject in 1999.[35] Confirming that the issuance of securities or providing of securities services via the Internet "in or from the Netherlands" is subject to the jurisdiction of the STE, the notice provides that activities of foreign entities on the Internet would not fall under Dutch regulation when not aimed (*gericht zijn*) at the Dutch market. Whether or not an activity at issue is "aimed at" Dutch residents would be judged on a case-by-case basis, taking into consideration such factors as disclaimers, the language used, solicitations to Dutch residents by e-mail, references to Dutch laws or the Dutch tax system, and the use of hyper-links. The securities regulator in Germany *(Bundesaufsichtsamt für den Wertpapierhandel[36])* also stated that it would apply German regulation *(Wertpapier-Verkaufsprospektgesetz)* when the German investor is solicited as the target by, or not explicitly excluded from, the offer of securities on the Internet.[37]

2. *Japanese Guidelines*

Japan has joined the group of countries that have adopted the "targeted at" approach by publishing guidelines[38] on the use of the Internet by a foreign broker-dealer. In the

---

33 Sec. 12 (3) & (4) of the Order, *supra* note 31.

34 See M. BLAIR ET AL, Financial Services & Markets Act 2000 (London 2001), at 63. Under the previous Financial Services Act 1986, although there existed the guidance by the Financial Services Authority (Financial Services Authority, Treatment of material on overseas Internet World Wide Web sites accessible in the UK but not intended for investors in the UK (May 1998)), the situation was not entirely clear because of the broad terms used in the 1986 Act.

35 Beleidsnotitie 99-0003 van de Stichting Toezicht Effectenverkeer inzake het Internet in relatie tot het toezicht op het effectenverkeer in Nederland; available on the website of STE <*http://www.ste.nl/static/index3.html*>. See also J. WILLEUMIER & R. RAAS, Electronic offering and trading of securities in the Netherlands, in: International Financial Law Review, July 2000, at 22.

36 Now integrated into the newly established *Bundesanstalt für Finanzdienstleistungsaufsicht* [the editor].

37 H.-D. ASSMANN, Neuemissionen von Wertpapieren über Internet: Initial Public Offerings (IPO's) als Gegenstand des deutschen Kapitalmarktrechts, in: GEIMER (Hrsg.), Wege zur Globalisierung des Rechts. Festschrift für Rolf A. Schütze zum 65. Geburtstag (München, 1999) 27-28.

38 Guidelines of Supervision of Securities Companies, Securities Investment Fund Management Companies, Trust Corporations and Investment Advisors [*Shôken gyôsha, shôken tôshi shintaku itaku gyôsha oyobi shôken tôshi hôjin tô narabiryui jikôni shôken tôshi komon gyôsha tô no kantoku tô ni atatte no ryuijikô ni tsuite,* June 1998, as amended]. The English translation of the relevant part is available on the website <*http://www.fsa.go.jp/topics/densie/dee_002.html*>.

guidelines, it is recognized that a foreign broker-dealer shall not engage in securities transactions with a person in Japan unless registered with the Prime Minister.[39] An exception to this rule is the case where a person in Japan makes an order for the transaction without prior solicitation from the foreign broker-dealer.[40] In this regard, the guidelines declare that the providing of information on a website by a foreign broker-dealer is not regarded as prior solicitation so long as reasonable measures are implemented to prevent a person in Japan from engaging in securities transactions. As non-exclusive examples of such measures, the guidelines refer to a disclaimer to the effect that the service advertised on the website is not targeted at investors in Japan as well as to a device to prevent transactions with investors in Japan.[41]

3. Remaining Issues

Having reviewed recent developments in various countries, it may appear that the jurisdictional conflicts concerning securities transactions have basically been resolved by the "targeted at" approach. However, there still remain two issues to be discussed.

First, it must be pointed out that the "targeted at" approach consists merely of a basic principle and a list of factors to be considered, not specifying *how* the relevant factors are considered. Therefore, it is more than possible that national regulators might reach divergent conclusions by applying the rules commonly based on the "targeted at" approach. If such cases of divergence are not considered negligible, another effort geared toward the unification of how to apply the principle may become necessary.

Second, the "targeted at" approach cannot resolve all kinds of conflicts of jurisdiction. When, for example, the regulation of a broker-dealer, not on its specific acts, is at issue, as in the case of prudential regulation, where the broker-dealer is domiciled must be explored instead of whom the act is targeted at.[42] This will raise a serious problem if the broker-dealer has no actual office or maintains an office in a country where the regulation is less stringent. To date, no such case has been reported in Japan.

IV. PROVIDING OF FINANCIAL SERVICES ONLINE

1. Duty of Online Brokers to Ensure Security

One of the unique features of the Internet as compared with traditional media is interactivity. Posting an offer of securities transactions on a website is much different from

---

39 Art. 3 of the Act on Foreign Securities Firms [*Gaikoku shôken gyôsha ni kansuru hôritsu*, Law no. 5 of 1971, as amended].

40 Art. 2 no. 2 of the Cabinet Order for Enforcement of the Act on Foreign Securities Firms [*Gaikoku shôken gyôsha ni kansuru hôritsu shikôrei]*, Cabinet Order no. 267 of 1971, as amended.

41 4-4 of the Guidelines, *supra* note 37.

42 See ASSMAN, *supra* note 36, at 31.

putting an advertisement in a newspaper, in that a device can be designed on the website to enable conclusion of the transaction with a visitor to the website "on the spot," which is inconceivable in the case of a newspaper advertisement. Presently, it is reported, more than fifty brokers are engaged in the online securities business in Japan.[43]

Trading entirely online, however, entails specific problems, because no paper document is used and no face-to-face communication is made. In view of such problems, the Japan Securities Dealers Association published guidelines in 1999[44] for broker-dealers engaged in online trading. The guidelines require a broker-dealer to examine, prior to commencing online brokerage business, the investors to be targeted, the kinds of services to be provided, the capability of the computer system, measures for identifying attributes of the investor as well as the internal control structure, and provide a detailed checklist to be utilized for this purpose.

Among the listed items, the requirement for a secure and robust computer system may merit further consideration, since, in many cases, the establishment and maintenance of a computer system cannot be carried out by the broker-dealer itself but is entrusted ("outsourced") to a specialized firm. When a malfunction takes place because of poor maintenance of the system, the broker-dealer will be liable for it even though the system is practically controlled by an outside firm and not the broker-dealer. The regulator in France, where similar requirements are imposed on brokers engaging in online business by the decision of the rulemaking body,[45] is said to be concerned about this issue and is considering subjecting a broker-dealer to the obligation to duly monitor the outside company that undertakes the maintenance of the system.[46] It is supposed that the approach should be the same in Japan.[47]

2. Who Is a Broker?

The interactivity of the Internet goes even further, enabling those entities that have not traditionally been considered as brokers to provide services that are almost equivalent to brokerage. A content provider can establish a website that contains information on

---

43 H. TAKAHASHI / A. ÔHATA, *Onrainu shôken torihiki no genjô to tenbô* [The Present and Future of Securities Business Online], in: Gekkan Shihon Shijô 185 (2001) at 24.

44 Nihon Shôken Kyôkai [Japan Securities Dealers Association], *Intâneto torihiki ni oite ryuisu beki jikô ni tsuite* [Guidelines on Points to be Examined when Trading over the Internet], September 1999.

45 Décision no. 99-07 du Counseil des Marchés Financiers relative aux prescriptions et recommandations pour les prestataires de services d'investissement offrants un service de réception-transmission ou d'exécution d'ordres de bourse comportant une réception des ordres via Internet (September 15, 1999).

46 C. CAFFARD & P. BOYS, Online brokers lead the way for French Internet finance, in: International Financial Law Review, March 2001, at 23.

47 See KIN'YU SÂBISU NO DENSHI TORIHIKI TÔ KANTOKU GYÔSEI NI KANSURU KENKYÛKAI, *Kin'yu sâbisu no denshi torihiki no shinten to kantoku gyôsei* [The Developments of Electronic Transactions in Financial Services and Its Regulation] 30-31 (2000).

online trading of securities and provide hyper-links to websites on which the investor can sell or purchase securities. Also conceivable is a portal that consists of hyper-links to websites of broker-dealers or issuers. In such a case, the content provider or the operator of the portal might be worried about whether they are regarded as engaging in securities transactions and, as a result, subject to the regulation of broker-dealers.

In the United States, where the term "broker" - which is defined in the Securities Exchange Act of 1934 as any person engaged in the business of effecting transactions in securities for the account of others[48] - has been considered to include all those participating in meaningful ways at key points in securities transactions, a content provider or a portal operator will be required to file as a broker if it receives transaction-based compensation.[49] If a portal operator is paid a referral fee, which means a fee based on the number of new customer accounts brought to the broker as a result of the hyper-link from the portal, it has been argued that the portal could qualify as a broker-dealer.[50]

Under the SEA of Japan, a "securities business" (*shôkengyô*), which must be registered with the Prime Minister,[51] is defined as including activities "[t]o act as a finder, broker, or agent for the sale or purchase of a security."[52] "To act as a finder" (*baikai*) is understood to refer to an activity of making efforts toward conclusion of contracts between other parties. Therefore, the kind of fee the content provider or the portal operator receives cannot be the decisive factor. However, it has been pointed out that a certain type of compensation might induce such an entity to endeavor so much toward the conclusion of a transaction as to be regarded as "acting as a finder."[53]

V. CONCLUSION

The securities regulator in Japan, like its counterparts in other countries, has recently been faced with various issues brought about by the rapid developments of the Internet. Most of the issues, however, have been duly solved by adaptation of the relevant regulation, sometimes through statutory reform and sometimes by the announcement of a new interpretation. Quite often an international agreement has been formed regarding the measures to be taken so that the national regulator has little alternative but to follow the "harmonized" approach. This is the case with the jurisdictional issue of the advertisements posted on the Internet or the admission of the use of electronic media as sub-

48 15 U.S.C. §78c (a) (4).
49 L.S. UNGER, The Securities and Exchange Commission, Online Brokerage: Keeping Apace of Cyberspace 101 (Nov. 1999).
50 ID., at 101 - 102
51 Art. 28 of the SEA.
52 Art. 2 (8) 2 of the SEA.
53 KIN'YU SÂBISU NO DENSHI TORIHIKI TÔ KANTOKU GYÔSEI NI KANSURU KENKYÛKAI, *supra* note 46, at 35 n. 44.

stitutes for paper documents. Japan has almost kept pace with other major jurisdictions in this regard.

There are, on the other hand, a few subjects that are more complicated. The question of whether or not a content provider or a portal operator shall be regulated as a broker falls into this category. Another example is the possible conflict of jurisdictions in regulating a "virtual" broker with no real office in any country. The existing regulation must be applied to these kinds of novel situations when they are found to be functionally equivalent to the presently regulated situations. As a result, a case-by-case analysis may become inevitable. The idea is still unclear under the Japanese regulation with regard to these subjects.

Lastly, the fundamental attitude of regulators toward technological developments may be worth mentioning. The regulator of the United States, which has, without doubt, led the world on the regulation of securities trading on the Internet, has articulated the basic idea that technological developments, inclusive of the use of the Internet, bring numerous benefits to the investor and, in the end, to the capital market, if appropriately controlled.[54] Policies on specific issues have been built on the basis of this general idea. In Japan, on the other hand, the regulator appears to be rather reluctant to state the policy goal in general terms, while specific issues are cleared one by one. The difference appears to be more one of style than substance. However, someday in the future, it may possibly become necessary to examine whether or not the style of regulatory change matters.

ZUSAMMENFASSUNG

Der Beitrag befaßt sich mit den regulatorischen Aspekten, die die neuen Informations- und Kommunikationstechnologien und der darauf basierende Handel mit Wertpapieren über das Internet mit sich bringen. In einem rechtsvergleichenden Überblick kritisiert der Verfasser, daß sich die japanische Regierung auf eine Anpassung der Gesetze an diese Entwicklungen beschränkt habe, ohne zuvor eine kohärente Regulierungspolitik zu formulieren. Des weiteren geht es um den sog. „targeted at"-Regulierungsansatz, der sich international zunehmend durchsetzt. Danach wird das nationale Kapitalmarktrecht eines Staates dann extraterritorial angewandt, wenn ein auf einer ausländischen Website international zugänglich gemachtes Angebot zum Verkauf von Wertpapieren die in dem betreffenden Land ansässigen Anleger nicht ausdrücklich von dem Angebot ausschließt. Auch Japan hat diese Vorgehensweise übernommen. Abschließend setzt sich der Verfasser mit Fragen der Sicherheit auseinander, die auftauchen, wenn Finanzdienstleistungen über das Internet angeboten werden.

(Die Redaktion)

54 See *supra* note 26 and accompanying texts.