

- DISCLAIMER -

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DEALING WITH SHAREHOLDERS AND INVESTORS

CHECKLIST: DISCLOSURE AND THE INTERNET

Public companies and investors have been taken with the convenience and speed of Internet communications. Companies often post annual reports and other SEC filings on their websites, along with company news. For their part, investors have come to expect a wealth of on-line information. However, the law develops much more slowly than new and changing communications technologies, and companies can face unexpected legal risks when they use these new tools. Companies are wise to seek legal counsel when deciding what on-line content to provide their investors, and how to provide it. However, several simple steps reduce risk for corporations taking advantage of Internet venues.

- √ **Organize a group of executives to review all proposed web content and to monitor when existing web content should be removed or updated.**

An executive review panel can be the final safety check to ensure that new materials will not be posted prematurely, that all content posted is accurate and complete, and that previously posted information does not become "stale." When in doubt, this panel should consult the compliance officer or corporate counsel.

- √ **Don't post material on your website that hasn't been already been disclosed through SEC filings or press releases.**

Companies must guard against selective disclosure. This can occur when a company discloses only some material facts, or when a company discloses all material facts to only part of the investing public. Selective disclosure creates an opportunity for insider trading. The SEC has determined that disclosing material on the Internet does not satisfy disclosure obligations because not all of the investing public has Internet access.

- √ **Remove or update all web content as it becomes inaccurate or misleading, and prominently date all disclosure items so the reader can see how current they are.**

Companies have a duty to correct statements that are inaccurate when made. However, courts have recently held that companies should also correct statements that were true when made but which have become misleading if left unrevised. The SEC has stated that electronic communications must be updated in the same manner as traditional paper-based communications. (SEC Electronic Media Release, at n.20.) A company may have even a greater duty to remove or update information on a website because the materials are effectively "newly disseminated" every time a page is accessed.

If a company truly wants to take the risk of distributing analyst reports via the Internet, it should include a prominent disclaimer that it does not endorse statements made in the report, and it should not selectively distribute only favorable reports.

- √ **Don't post forward-looking statements on your website.**

Although forward-looking statements are not "facts" for the purposes of disclosure, and the SEC encourages such projections in general, posting them on a website can create unique risks. A company has a duty to update a projection if it becomes untrue. Because web pages are effectively newly disseminated each time they are accessed, it is especially critical to update on-line forward-looking statements. On a large website, it is easy to miss material that should be updated, and timely updates may be difficult.

√ **Don't post—or hyperlink to—analysts' reports.**

A company "adopts" another party's statement by accepting it explicitly or implicitly after it is published. Including analysts' reports on a corporate website or even hyperlinking to them on another site can be considered adoption. For example, if a company adopted a misleading analyst's report by mailing copies to shareholders, it would open itself to charges of distributing false and misleading information about its securities. Also, posting only favorable reports can be considered selective disclosure.

√ **Keep hyperlinks to a minimum, and use a disclaimer each time a reader on your site links to another website.**

The SEC has stated that using a hyperlink is equivalent to the company disseminating the material from the linked site. (SEC Electronic Media Release, n.16.) Therefore, the company may be liable for misleading information it adopts from a linked site, and may have selective disclosure problems if it links only to pages that are favorable to the company. Further, other sites' content changes without notice, so ensuring that the website hyperlinks only to accurate information is an onerous task.

When a user leaves the company site via a hyperlink, a "gateway" disclaimer, preferably on a separate page or a text box, should notify the user he or she is leaving the company's website. For example, such a disclaimer might read, "You are now leaving TechCorp's website. Techcorp does not take any responsibility for reviewing, updating, or insuring accuracy of information on other websites. Techcorp disclaims responsibility for the legality of materials and copyright compliance on other websites." A disclaimer notifies the reader that your company is not responsible for materials on the linked site, and may help by making the link less instantaneous, therefore decreasing the possibility that another site's materials would be attributed to your company.

√ **Maintain a policy prohibiting company executives from actively participating in chat rooms, newsgroups, and other such Internet venues with regard to company matters.**

Chat rooms allow "real time" communications, while messages are posted on newsgroups for an indefinite time and are often archived for months or years. Statements made by executives in these venues can be attributed to the company. Therefore, companies would run many risks including selective disclosure and the creation of a continuous duty to update these comments. Further, statements made under these circumstances are informal, and therefore possibly incomplete or misleading.