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How to Protect your Public Company in the Internet Age

Avoiding e-Liability, presented by Neil M. Kaufman,

I. Websites

A. Use of your company's website for public disclosure

- Typically via an Investor Relations (IR) site
 - designed to give wide range of information about the Company to:
 - current shareholders
 - potential investors
 - financial analysts
 - IR sites generally contain:
 - company profile (products/services/offices/directors)
 - company financial and related information (annual reports, quarterly results and SEC filings)
 - stockholder financial information (current/historical stock prices/dividend payments)
 - additional information of interest to stockholders (summaries of annual meetings, information about DRIPs (discussed below))
 - current developments (including press releases, discussed below)
 - FAQs

Benefits:

- low cost means of providing information to wide audience of current/potential investors
- rapid public dissemination
- easy for company to update and organize
- small and large investors have equal access to information
- small and large companies have equal ability to disseminate information

Potential liability:

- websites often contain extensive information, conveniently contained in one place, providing “one stop shopping” to plaintiffs in search of “incriminating evidence” against potential defendants

- potential securities violations (e.g., Rule 10b-5 -- posted information may be materially false or misleading)
 - for example, is the information on your website misleading because it omits information that, if included, would cause investors to view the disclosed facts in a materially different light?
- establishing an IR site, or making significant changes to information on your website, IR or otherwise, while in registration for an offering, may be deemed to be an illegal offer under the Securities Act

Rules/Tips for reviewing your company’s website:

1. Treat website as you would a more traditional medium (limit and monitor information presented):
 - if you wouldn’t say it on paper, do not say it on the website
 - disclose nothing material that was not disseminated through a press release or SEC filing
 - use disclaimers (discussed below)
 - avoid projections
2. Remember that it is not a traditional medium (due to unique nature of the Internet)
 - instant global reach
 - continuous availability
 - information can appear to be current to website visitors, even if stale
 - institute procedure for periodic updating
 - update sooner if you are aware of misleading/wrong information on website
3. Review entire website, not only IR pages
4. Delineate who controls the website content
 - do not let “techies” control the content of company’s IR disclosure on the website (should be the same individuals who control content for press releases/SEC filings)
 - many companies do not employ the same strict clearance procedures as with respect to press releases and other more formal written disclosure

5. Periodically have securities attorney review the website and website procedures

B. Press Releases on website

Traditional press releases are disseminated once, but press releases on a website are theoretically constantly disseminated by the issuer each time someone accesses an issuer's website. Therefore, you may be disseminating materially misleading information upon each and every redissemination as the facts relating to your company evolve.

To avoid the pitfalls of stale press releases, public companies should consider doing one or more of the following:

- not post them at all
- make sure they are clearly dated
- systematically segregate those a few days old in an "archives" section
- delete press releases a day or two after they are released
- use special disclaimer stating:
 - that the information in these press releases should not be deemed accurate or current except as of the date the release was posted;
 - that the company has no intention of updating, and specifically disclaiming any duty to update, the information in the press releases; and
 - that, to the extent the information is forward-looking, it is intended to fit within the safe harbor for forward-looking information, and is subject to material risk factors.
- ***Important: do not post or retain only positive press releases***

C. Hyperlinks: (user-friendly for visitors, but potential liability for companies)

Hyperlinks on IR sites typically either link to web pages within the company's website to information posted by the company or to information on third-party websites outside the company's control

- Has your company adopted information on a third-party website as a result of placing a hyperlink on your company's website to such third-party website?
 - This is particularly relevant while your company is "in registration" and/or when hyperlinks lead to websites of analysts and broker/dealers

Three factors:

1. Context of the hyperlink

- **General rule** -- a hyperlink embedded *within a document* on your website is considered to be adopted.
- If your company explicitly describes the information to which the hyperlink points as accurate or good, it is likely to be deemed to be adopted. (e.g. - “XYZ's website contains the best description of our business that is currently available”).
- If your company is in registration, there is a strong inference of adoption of information that the SEC would consider to be an “offer to sell,” “offer for sale” or “offer” under the Securities Act, and as a result, your company will be deemed to have committed a violation of the Securities Act that could derail or delay an offering.
 - For example, a company is not permitted to distribute a copy of an analyst report relating to its securities when in registration. If a company’s website contains a hyperlink to such a report, this may be deemed to be delivery of the report to anyone clicking on the hyperlink, and thus a violation of the Securities Act.

2. Risk of confusion (the presence or absence of precautions against investor confusion about the source of the information)

- Use of intermediate screens and disclaimers
 - Make the hyperlinked information available only after a visitor to your website as been presented with an *intermediate screen or other clear method that clearly and prominently indicates that a visitor is leaving your website and that the information subsequently viewed is not your company’s* in which your company disclaims responsibility for, or endorsement of, the information.
 - Intermediate screens and disclaimers will not insulate an issuer from liability for hyperlinked information when the relevant facts and circumstances otherwise indicate that the issuer has adopted the information.
- “Framing and Inlining” increases likelihood that your company has adopted information from other websites.
 - Framing involves a hyperlink that creates a *framed window on the company’s website within which content from another website appears*. A viewer may mistakenly conclude that this small window is part of the

company's website unless steps are taken to make clear that the information within that framed area is from a third-party website.

- Inlining is a *similar presentation of information, but does not include a visible border around the framed area, further increasing the risk of confusion* unless steps are taken to make clear that the inlined area contains information from a third-party website.

3. The presentation of the hyperlinks can increase the risk of adoption:

- Selectively providing hyperlinks
 - Directing an investor's attention to particular information where there is much more information available (for example, avoid links on your website to only positive analysts' reports; if you link to analyst reports, you must link to all of them)
 - Selective establishment and termination of links (may be viewed as attempting to control the flow of information to investors)
 - Manipulating the layout of the screen so as to differentiate a particular hyperlink through "prominence, size or location" or "color, type font or size" or in some other fashion intended to draw a viewer's attention to the hyperlink.
- Assume that the SEC and all state regulators are monitoring your website, including your hyperlinks.

D. Disclosure of "soft" information including forward looking statements

- Your company could be held liable, particularly under the antifraud provisions of Rule 10b-5, for economic projections, estimates of future performance, and similar optimistic statements, including those posted in a website if they turn out to be materially false.
- The "bespeaks caution" doctrine:
 - Judicially crafted, differs from jurisdiction to jurisdiction
 - Such projections, estimates and other statements, including those included in a website, are not actionable when accompanied by precise cautionary language that adequately discloses the risks involved. It does not matter if the optimistic statements are later found to have been based on erroneous or inaccurate assumptions when made, provided that the risk disclosure was:
 - conspicuous

- specific (not merely “boilerplate”, but rather tailored and substantive)
 - adequately disclosed, including assumptions upon which optimistic language was based
- Private Securities Litigation Reform Act of 1995 (PSLRA):
 - Legislatively-created safe harbor
 - Applies to:
 - issuers
 - persons acting on behalf of the issuer
 - outside reviewers (making statements on the issuer’s behalf)
 - underwriters (as to information provided by issuer)

A company may not be held liable under Securities Act or the Exchange Act for projections and other forward looking statements, written or oral, that later prove to be inaccurate if:

- the forward looking statement is identified as such and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially **or**
 - the plaintiff fails to prove the statement was made with actual knowledge that it was materially false or misleading
 - PSRLA (typically preferable to “bespeaks caution” because PSRLA requires plaintiff proving actual knowledge) is not available to:
 - initial public offerings
 - non-reporting companies
 - reporting companies issuing “penny stocks” or engaged in blank check offerings
- Where should cautionary language be placed?

In the paper context, “accompanied by” typically means immediately followed by, and not buried in an appendix or exhibit. In the electronic context, however, it is not clear where the cautionary language must be located relative to the forward looking information to fall within “bespeaks caution” or the PSRLA safe harbor.

- **Best case:** if included on same page as any projections or forward looking statements or prior to a visitor being able to access the forward looking statements
 - Through hyperlink—**probably sufficient**, if conspicuous and proximate enough
 - Elsewhere on website without linkage--may only be sufficient in some jurisdictions
 - It is advisable to include language at beginning or on the first page of:
 - investor relations section
 - any section that contains statements by management regarding the company's future performance
 - any section likely to contain projections or forward looking statements
- Many companies use general disclaimers and cautionary language on their websites that are intended to protect against not only forward looking statements, but against many other types of potential liability.
 - It is **not** sufficient to just refer to your SEC filings without at least a brief list of summarized specific risks.

For examples of cautionary language and general disclaimers, see [Appendix A](#).

- Company should review website:
 - identify forward looking statements
 - use risk factors, if possible (recent trend, especially with SEC filings)
 - use tailor-made risk factors, not generic
 - avoid cross referencing risk factors
 - reduce the specificity of forward looking statements
 - establish clearance procedures
 - treat webpages with same level of scrutiny as press releases
- Is there a duty of the company to update forward-looking statements?
 - ordinarily, no duty to update
 - may exist if there is a trend that is likely to cause a material and adverse change related to previously disseminated information that is still “alive in the market”
- Suggestions:
 - disclaim a duty to update

- date website postings
- update stale information if possible
- be especially sensitive to forecasts and other information that is no longer accurate

II. Regulation FD (Full Disclosure)

- Will go into effect on October 23, 2000 (adopted by the SEC in August 2000)
 - Addresses the selective disclosure of “material nonpublic information” by public companies. It provides that when a public company, or a person acting on its behalf, discloses “material nonpublic information” to certain persons, it must also publicly disclose the information in a method or combination of methods “that is reasonably designed to effect broad, nonexclusionary distribution of the information to the public.”
1. May include Internet postings by public companies, that lacks additional public dissemination of the information.
 2. Type of information considered to be “material nonpublic”:
 - not specifically defined by the SEC, but should be reviewed carefully to determine whether “there is a substantial likelihood the a reasonable shareholder would consider it important (positive or negative) in making an investment decision
 - no bright-line standard. The following are types of information that according to the SEC “should be reviewed carefully to determine whether they are material”, but are not material as a matter of law:
 - earnings information
 - mergers
 - acquisitions
 - tender offers
 - joint ventures or changes in assets
 - new products or discoveries
 - developments regarding customers or suppliers
 - changes in control or management
 - change in auditors (or notification that issuer may no longer rely on auditor’s report)
 - events regarding the issuer’s securities
 - bankruptcies or receiverships
 3. Coverage: -- includes only communications made to:
 - broker-dealers (and associated persons)
 - investment advisors (and associated persons)
 - investment companies, hedge funds and affiliated persons

- any holder of the public company's securities under circumstances in which it is reasonably foreseeable that such person would purchase/sell the securities on basis of such information

by:

- executive officers
- directors
- investor relations officers and public relations officers
- other employees or representatives who routinely communicate with stockholders or with persons listed above

4. Exclusions: communications made to:

- person who owes the issuer a duty of trust/confidence (attorney, accountant, investment banker)
- person who expressly agrees to maintain information in confidence (written or oral)
- person whose primary business is to issue credit ratings (if given to person in such capacity)
- in connection with most offerings of securities registered under the Securities Act during the offering period only. Does not apply to unregistered offerings, so be careful of information contained in private placement memoranda and stock purchase agreements.

5. Timing:

- If disclosure was intentional (having knowledge or recklessly not knowing prior to dissemination that information is material and nonpublic) – **proper public disclosure must be made simultaneously**
- If disclosure was unintentional – **proper public disclosure must be made as soon as reasonably practicable** (but no later than 24 hours).

6. Methods (flexible, based on facts and circumstances):

- Form 8-K filed with the SEC
- Press release on wire service
- Press conference/conference call (if public has adequate notice, and access to conference or call)
- Combination of methods, for example, a press release (to disseminate earnings information) followed up by a scheduled press conference (to discuss the earnings)
- Through the Internet?
 - An Internet posting, by itself, will not satisfy the requirements for public dissemination.
 - As technology evolves and more investors have access to the Internet, the SEC stated that some public companies could theoretically use the Internet to disseminate such information in the future.

- In certain circumstances, an issuer may be able to demonstrate that disclosure made on its website could be part of a combination of methods reasonably designed to provide broad, non-exclusionary distribution of information to the public.

7. Evaluation of your company's policies:

- What types of non-public disclosures does your company typically make, and to whom?
- What exemptions, if any, apply to your company's communications, and are they valid/complete (e.g. are confidentiality agreements explicit?)
- How will non-exempt communications be made in future? (publicly? through exemptions?)
- Specifically, how will communications with analysts be made?
 - confidentiality agreements
 - coordinate timing relating to earnings release
- Actively monitor the flow of information from your company.
 - who is acting on behalf of your company?
 - educate spokespersons (and all employees) of pitfalls of violating Regulation FD
 - track your company's publically disclosed information
- Establish emergency procedures for rapidly dealing with inadvertent disclosures of nonpublic information

8. Liability under Regulation FD

- Regulation FD is a disclosure rule and not a antifraud rule (private plaintiffs and/or stockholders may not sue to enforce rights under it)
- Non-compliance can result in an SEC enforcement action against the company and personnel involved
- Plaintiffs may attempt to use Regulation FD violations by a company to prove scienter (knowledge) in antifraud cases
- Violation will not result in a company losing eligibility to use
 - Forms S-3 or S-8
 - Rule 144
 - PSLRA safe harbors

III. Rule 10b5-1

- Adopted along with Regulation FD (unlike Regulation FD itself, this is an anti-fraud provision)
- Imposes liability in insider trading cases where the defendant is **aware** of material non- public information when making the purchase or sale.
 - "possession" of inside information, rather than "use" of inside information, is the determining factor (very high standard).
- Affirmative defense relating to binding contracts to purchase/sell securities entered into, instructions given or written plans adopted before a person becomes aware of the information (no matter how material), where such contract, instruction or plan:
 - specified the amount, price and date with respect to the transaction
 - included a written formula or algorithm, or a computer program, for determining the amount, price and date with respect to the transaction, **or**
 - did not permit the person to exercise any subsequent influence over how, when or whether to effect such transaction (or subsequently entering into a corresponding or hedging position); provided that any person who, pursuant to the contract, instruction or plan, exercises the influence over the transaction is not aware of the information when executing the transaction.
- This defense permits (if compliant with the above factors):
 - certain company stock repurchase programs,
 - a plan to exercise stock options at some future date, or
 - the future acquisitions of company stock through payroll deductions under an employee stock purchase plan or a 401(k) plan.
- Regulation FD provides another affirmative defense which is available to an entity if:
 - the individual making the investment decision on behalf of the entity was not aware of the material nonpublic information, and
 - the entity had implemented reasonable policies and procedures, taking into consideration the nature of its business, to ensure that persons making the investment decisions would not violate the laws relating to trading on material nonpublic information.

IV. Rule 10b5-2

- Also adopted with Regulation FD (another antifraud rule)

Clarifies under what circumstances someone with a relationship to an “insider” may cause the violation of the insider trading rules by such person using inside information obtained from the

insider with respect to buying/selling securities. Test: was there a sufficient duty of trust or confidence that was breached.

- Non-exclusive list of three circumstances where a person has a duty of trust or confidence:
 - an agreement to maintain information in confidence exists
 - the people have a history, pattern or practice of sharing confidences, and it is reasonable that the information in question was expected to be kept in confidence
 - spouse, parent, children and/or siblings

V. E-mail issues:

As use of e-mails has dramatically increased over time:

- A large and growing number of companies have incorporated e-mail into their working culture and would find it difficult to function without frequent e-mail correspondence among employees.
- People tend to say things on e-mail that they would otherwise not put in writing

Example of potential problem: an executive of public company sent an e-mail message to his company's employees. The message was leaked outside the company, and was posted to an on-line service with 10,000 subscribers. This forced the issuer to terminate a planned initial public offering, because the posting occurred during the pre-offering "quiet period" imposed by SEC rules.

Companies should consider the following steps to minimize the likelihood that employee e-mails will harm your company:

- engage in e-mail sensitivity training, cautioning employees to write nothing on an e-mail message that they would not want to see in a newspaper article
- warn employees that the government, in investigations, and private parties, in litigation, routinely subpoena e-mail messages, which are not easily deleted from the company's system, and which can be used against the employee and/or the company
- require privileged and confidential messages to be marked as such on the message so that later, if the message is subpoenaed, it is more likely that the claim will be identified and supported
- delete all archived messages after they have been stored for a sufficient period of time (but remember that once a memo has been sent, it is likely that paper copies may exist)
- caution employees that the e-mail addresses assigned to them by the company are for business use only

- adopt a policy regarding e-mail, warning that e-mail messages are company property, that employees have no privacy protections on the company's e-mail system, and that employees should expect that the company will save, monitor and/or seize messages at any time
 - include in the policy a warning that e-mail must not be used in a manner that fosters a hostile environment for any race, religion or gender
 - post the policy periodically as a greeting screen when employees log onto the company's e-mail system, and require employees to confirm that they understand the policy before they are allowed to log on
- E-mail and the attorney-client privilege
 - General rule: a communication must be made in confidence, or at least with the reasonable expectation of confidentiality, for the privilege to apply
 - E-mails involve transmission of information over open public networks where it may be intercepted - does attorney-client privilege necessarily apply?
 - No conclusive answer
 - Federal law - no otherwise privileged electronic communication that is intercepted, whether lawfully or unlawfully, shall lose privileged character for that reason
 - States - mixed - some require encryption of e-mails, but trend appears to be that it is reasonable to expect that e-mail correspondence between attorneys and clients is confidential
 - Be aware of this issue. Consider encryption or alternative means of transferring highly sensitive communications to your attorney.

VI. Electronic Proxy Solicitation

Companies have traditionally solicited proxies by mailing paper proxy statements, proxy cards, and annual reports to shareholders (or providing the same to the banks and brokers holding shares on behalf of beneficial owners, who will, in turn, mail them). Developments in electronic communications now provide an alternative means of delivery.

In order to deliver proxy statements electronically, three requirements must be met:

1. Shareholders must have timely and adequate notice that information is available electronically
 - Timely: SEC does not specify how close in time notice must be to availability of document (based on reasonableness)

adequate:

- e-mail (assuming other requirements are met)
- by mail
- by telephone (as per the SEC's recent Electronic Delivery Release)
- not sufficient to merely post notice on website or in The Wall Street Journal

2. Documents must be easily accessible for an adequate period of time, and the recipient must have the opportunity to retain the information or have ongoing access equivalent to personal retention

- Annual report and proxy statements should remain available until the votes have been cast and shareholders meeting is adjourned

3. Each shareholder receiving electronic delivery must consent to the specific method of delivery:

- consent must be revocable at any time
 - shareholder must be informed of intended use
 - company must disclose period that consent will be effective
 - company must specify documents to which the consent would apply
 - company must set forth any material cost to shareholder
 - shareholder must retain right to receive paper copy, even after electronic delivery is received
- Delivery method can be used by brokerage firms delivering to beneficial owners of all securities in an account, if all requirements are met
 - Return of proxy card
 - electronic (see state law issues below) or
 - shareholder prints paper copy, and mails to company
 - Annual reports to shareholders are required to be delivered with or prior to proxy statements.
 - can be delivered electronically (with same restrictions as proxy statements)
 - should be posted for at least one year
 - can be delivered by paper (company may wish to distribute “glossy” annual report that would be cumbersome on website)
 - if proxy is delivered electronically, must take reasonable steps to coordinate timing

- Annual reports/proxy statements to employee - shareholders:
 - may be delivered electronically via e-mail to employees if company has widespread e-mail systems (consent by employees will be presumed)
- State law issues:
 - ordinary timing requirements pursuant to company's bylaws
 - is e-mail a sufficient means of delivery of the proxy statement in a particular state?
 - Delaware—requires “written” notice, and does not say “electronic”. Unclear if notice requirement is satisfied by e-mail because later subsection provides that proxies may be delivered “electronically”.
 - New York—allows “Written or electronic”
 - If proxy cards are not manually signed, but are delivered electronically from stockholder to the company, states (NY and Delaware included) may require evidence that transmission is authorized by shareholder
 - unique PIN numbers with each proxy statement/notice
 - encryption of proxy card by means that prove that only the correct person could have sent it

VII. Electronic Bulletin Boards and Chat Rooms

- These forums often generate sufficient traffic so that information about a small company posted on a bulletin board, news group, or chatroom can move the market price of that stock a significant amount almost immediately.
 - Can be harmful rumors or helpful rumors
 - Some of these rumors may be the deliberate acts of persons attempting to manipulate the company's stock for their own purposes (short sellers)
 - Others may simply be rumors or gossip with no intention to affect the company's stock
- What are your options and obligations if you learn of a misleading posting on a bulletin board or news group that has the potential to alter the market in your company's stock?
 - monitor the Internet in order to be fully apprized regarding the rumors being posted about your company:
 - A company can have its own public relations department perform this task or it can hire a PR firm which surfs the Internet in order to keep track of what Internet communications exist relating to such company

When your company discovers inaccurate and harmful rumors or helpful rumors about it, its products or its stock, you can:

- Remain silent

- Counter with your Company’s point of view in a public forum (press release)
- Respond in a limited manner
- Reasons not to respond:
 - such responses are communications that are subject to anti fraud rules (e.g. Rule 10b-5)
 - If you respond in the specific chat room or bulletin board, you run risk of inadequate disclosure, including Regulation FD violations if you disclose material information
 - may raise additional duty to continue to monitor and correct mistakes
 - if you correct “bad” information, you must correct “good” information
- Reasons to respond:
 - unwarranted damage to your company’s stock price
 - if your company’s website hyperlinks to the chat room or news group
 - if your company is listed on the NYSE, AMEX, or Nasdaq, it may be required to respond even to a rumor not attributable to it. For example, under the rules of the NYSE, a company must promptly deny or clarify rumors, even if not attributable to it, if they are false or inaccurate and causing unusual market activity (same concept applies to traditional market rumors)
- How to respond:
 - depends on facts and circumstances
 - ordinarily, no response is the best response (too many pitfalls)
 - if stock price is materially affected, you would likely put out press release denying rumor
 - if rumor is on a specific forum, and may reasonably lead to material effect on company, you may consider posting in a specific forum, stating:
 - you represent the company
 - the company does not ordinarily respond to rumors and undertakes no obligation to do so in future
 - identify rumor
 - deny it by referring to publicly available information (financial statements, press releases, etc.)
 - beware: it is very easy to cross line and wind-up violating securities laws by disclosing material non public information
- Posting of disclaimer on your company’s website relating to chat rooms in general, or if there is a hyperlink to a chat room, to such specific chat room

VIII. Employee Stock Plans, Dividend Reinvestment Plans and Direct Stock Purchase Plans

- Registered stock option/equity incentive plans (Registered under S-8)
 - Internet can be used for delivery purposes (delivering notices and/or prospectus electronically), if participants consent to electronic delivery, saving printing and delivery costs
- Dividend reinvestment plans (DRIPs) or employee stock repurchase plan (unregistered)
 - Historically
 - through nonaffiliated B-D (or banks or other nonaffiliated agents)
 - purchasing shares through open market
 - Issuer's role must be relatively minimal/administrative (no offers)
 - Issuer pays brokerage commissions
 - Today, an issuer may also:
 - announce the plan's existence to employees/shareholders electronically
 - may, for instance, place notice on website
 - could contain phone number for the nonaffiliated B-D, from whom information relating to the plan could be received
 - could contain hyperlink to B-D or agent's website, including brochure/enrollment card
 - provide names/addresses to B-D's to distribute to employees
 - address communications to be distributed by B-D or agent
- Open-enrollment direct stock purchase plans
 - Extension of DRIPs
 - Registration of the plan is required
 - Capital raising--sold to non-employees/non-shareholders
 - Directly from the issuer--No underwriters/B-Ds
 - Regulated by Regulation M (established 1997)
 - Issuer must use an agent to actually execute the transactions, however
 - Generally, the issuer must be limited in what he can say: (Rule 134 compliant tombstone ads)--may be disseminated on issuer's website as well as by more conventional means

IX. Internet road shows

- During the “waiting period” (the period between filing of registration statement and its effectiveness), the Securities Act prohibits “written” communications other than:
 - tombstone ads
 - preliminary prospectuses
- Traditional road shows, if consistent with information disclosed in the prospectus, are permissible because they are “oral”
- Until recently, “virtual” road shows were only permissible if they were not in connection with public offerings
- Today:
 - electronic road shows are permitted (by underwriters or issuers) if:
 - the viewing audience is limited to qualified investors
 - the road show is presented only after the registration statement is filed with the SEC
 - in the event the registration statement is not yet effective, a legend must be included stating that securities may not be sold and offers may not be accepted
 - prospective investors receive a copy of the preliminary prospectus prior to viewing the road show
 - reasonable steps have been taken to insure that information is consistent with information in the prospectus.

X. Internet public offerings

- Issuers can disseminate a Rule 134 tombstone advertisement and copies of its prospectus after filing a registration statement, both during the waiting period and after effectiveness of the registration statement using:
 - traditional media
 - issuer’s website
 - broker-dealer website
 - other (non-broker-dealer) third-party websites
 - it is not clear that this can be done prior to effectiveness
 - cannot pay third party based on funds raised
 - a combination of these media

- Rules and regulations are dynamic, not settled:
 - public offerings exclusively via the Internet without broker-dealer -- very difficult (uncertain and evolving area of law)
 - Wit Capital - the SEC allowed registered broker-dealer to make public offerings available through its website through specific “cul de sacs” exclusively to Wit’s customers -- led to influx of companies facilitating offerings
 - but pitfalls exist:
 - some online “IPO companies” are acting as B-Ds, but are not registered as such (Main Street IPO.com is currently being accused of this by the SEC)
 - some third parties involved with an offering (B-Ds or otherwise), may violate securities laws through improper postings on their websites, for example, and your company can be deemed to violate the Securities Act due to a hyperlink to such third-party website (IPO.com, after allegedly posting deficient prospectuses on its website, has caused significant problems with a number of its issuer-client’s offerings)
 - If you plan to use electronic media to facilitate your offering, make sure you have done due diligence with respect to any third party that you retain to help with the offering. Further, because the SEC is constantly trying to keep up with the rapidly evolving technological advances, do not assume that any company you retain in this capacity, even one that is established and has a track record, is necessarily correctly complying with existing regulations.

Appendix A

Cautionary language

The following appear within the following companies' websites, following the text containing the forward looking statements:

(IBM)

Certain of the above statements regarding [Product] constitute forward-looking statements, which may involve risks and uncertainties. Actual results could differ materially from such forward-looking statements as a result of a variety of factors, including, but not limited to, technology changes, competitive developments, industry and market acceptance of new products and services, and risk factors listed from time to time in [our] SEC filings.

(Intel)

This release contains forward-looking statements that are based upon current expectations or beliefs, as well as a number of assumptions about future events. The reader is cautioned not to put undue reliance on these forward-looking statements, as they are subject to numerous factors and uncertainties, including, without limitation, business and economic conditions, growth of the Internet and the computing and communications industries, as well as continued technological advances, any of which may cause actual results to differ materially from those described here. In addition to the factors discussed above, other factors that could cause actual results to differ materially are discussed in Intel's most recent Form 10-Q and Form 10-K filings with the Securities and Exchange Commission.

(Microsoft)

This press release contains statements that are forward-looking. These statements are based on current expectations that are subject to risks and uncertainties. Actual results will vary because of factors such as PC shipment growth; technological shifts; customer demand; competitive products and pricing; product mix; product ship schedules; life cycles; terms and conditions; litigation; and other issues discussed in the company's Form 10-K and other SEC filings.

General Disclaimers

Intel (via a hyperlink appearing on bottom of every page)

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