

Comment on Embedded Hyperlinks and Linked Documents (Google Docs™, Microsoft's Hosted Office™)

Just as with Benedict and Beatrice in Shakespeare's *Much Ado About Nothing*, compliance and technology *'never meet but there's a skirmish between them'* (I.i.49–51). Though technology offers many opportunities to increase corporate profitability or efficiency, it almost always has implications for compliance and legal exposure. In this comment, we discuss two issues: Content referenced by embedded hyperlinks and emails sent with attachments which are only links to cloud-hosted documents. The latter issue has recently become far more common as companies switch to Google Docs and Microsoft's Hosted Office Product. In each case, we have moved from the previous email paradigm in which all content is incorporated into an email message to one in which the email references content external the message.

Embedded Hyperlinks

Though hyperlinks represent a technology that makes it far easier to access content not directly incorporated into an email or document, it is treated by regulators very differently than a bibliographical reference or footnote. For instance, the SEC has provided the following guidance with respect to the incorporation of content using hyperlinks. (SEC Interpretation: Use of Electronic Media. <http://www.sec.gov/rules/concept/34-42728.htm>). The SEC's position regarding hyperlinks may be summarized as:

In the context of a document required to be filed or delivered under the federal securities laws, we believe that when an issuer embeds a hyperlink to a web site within the document, the issuer should always be deemed to be adopting the hyperlinked information. **(Release Nos. 33-7856. Section 1a.)**

Thus, any hyperlinks within an e-mail are incorporated into that document regardless as to whether the recipient actually clicks on the hyperlink.

However, if a document contains merely a footnote referencing the information, then the SEC does not consider that incorporated into the envelope of the original document. This makes for an interesting situation should the browser not display a URL as hyperlinked but only as text. The reader would not be able to click on the link but could certainly copy and paste it into the address bar. Our position is that text URLs do not incorporate the reference link into the content of the email or document.

How to comply with hyperlinked content

If a broker sends an email to a customer with a hyperlink to a research report, the brokerage firm will comply with SEC regulations by capturing the email message but will be out of compliance if it doesn't perform the further step of connecting to the hyperlinked content and archiving that content. Similarly, if a broker attaches a research report to an email which hyperlinks to further research data, then that additional information must be captured and archived as well. It is, in our opinion, not sufficient to expect that the hyperlinked content will remain available nor will the additional content be retained in accordance with SEC Rule 17a-4.

Our solution is to examine the body of emails and attachments for URLs (Any string, for instance beginning with http or www.) When these are found, then a software program pulls that

additional content into the archive. If, in the future, that email is retrieved from the archive and the hyperlink is accessed, instead of going out to the original Internet site, the software would capture the original archived data.

Linked Documents

In order to challenge Microsoft's hegemony on desktop systems, Google has taken the lead in hosting documents, also referred to as Software as a Service (SAAS) or cloud-based services. In response, Microsoft's Office 2010 will allow users to manage their documents and collaborations in the 'cloud.' What this means for regulated firms is that emails will no longer have the actual document attached but rather a link to the hosted document. If the user deletes the cloud-based document, then the archived email will not link and the integrity of the email record will be lost. We believe that cloud-based documents will grow rapidly and this issue will, in the future, become far more problematic.

How to comply with regulations for linked documents

The first defense (as it almost always is) is for compliance and legal departments to articulate a policy with respect to whether Google Docs may be used to conduct business and attached to emails. If a policy is that such links are not allowed, then the institution should periodically monitor emails to insure that the internal policy is adhered to.

If the policy is that Google Docs may be used, then our position is similar to the one we describe for embedded hyperlinks. The archive system should scan for linked documents and when it finds such an external reference, it should access the hosted content and pull it into the archive. If such an email is accessed by compliance or as part of a legal production, then the resulting email should replace the attached link with the actual document which has been separately archived. This process insures that the actual document at the time of transmission is the same document at the time of legal production.

Additional Thoughts

Though one could argue whether Benedict or Beatrice won most of their skirmishes, it is worthwhile to note that, in the end, they were married. Such is also the fate of compliance/ legal and technology. In the end, the two will have to work out an accommodation which allows both to co-exist. Our approach to such issues, including the ones outlined below, is that firms should have a committee consisting of IT, legal and compliance to review on an annual basis the use of new technologies and their implications for the compliance and legal departments. Use of some of these technologies should be restricted by new policy, some should be monitored to discover with users whether these technologies provide a better means to conduct business, and some should be embraced by the institution and addressed with tools for capture and e-Discovery productions.

Having such a committee is consistent with regulatory guidance as set forth in both SEC Rule 206(4)-7 and FINRA Rule 3013. Rule 206(4)-7 requires:

[E]ach registered adviser to review its policies and procedures annually to determine their adequacy and the effectiveness of their implementation. The review should consider any compliance matters that arose during the previous year, any changes in the business activities of the adviser or its affiliates, and any changes in the Advisers Act or applicable regulations that might suggest a need to revise the policies or procedures.