

## Comment on Hyperlinked Disclaimers

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Virtually all financial institutions attach disclaimers to outgoing e-mail. The intent is to notify the recipient of the e-mail that receipt conveys certain confidentiality rights and protection of intellectual property. Over time, disclaimers have gotten longer, and in many cases, become far longer than the actual e-mail message. As a result, some firms have begun to use a hyperlinked disclaimer in which the actual disclaimer is referenced via a hyperlink. This Comment recommends that financial industry adopt hyperlinked disclaimers. Not only will it save space in a regulatory archive but also a more detailed disclaimer will provide the sender better legal protection.

However, there are certain technical requirements for an effective and legally-binding disclaimer and, to date, we find most hyperlinked disclaimers have not been implemented correctly and will, we believe, if tested in Court fail to have properly notified the recipient of the sending institution's legal rights.

### Presenting the Case

All electronic communication implies certain legal rights and responsibilities, but the dramatic changes in technology including instant messaging, chat rooms, profile pages on social networking sites, etc., make it extremely difficult to express the creator's legal rights. For instance, how can I apply a disclaimer to a text message sent from a Blackberry phone? Some firms have taken the approach that there is a fair use precedence in which the receiver understands the legal rights without having them specifically articulated in a disclaimer. For instance, if I attend a concert, it is implied that I cannot take pictures for commercial resale. As the financial industry is highly regulated, a implied disclaimer can be inappropriate. If a broker, for instance, sends an e-mail to a customer with a recommendation, it is important that the customer know that they should not forward it to another customer as the investment may be too risky.

Let's first make the case for a hyperlinked disclaimer. We estimate that disclaimers account for approximately 12% of all archival storage. With the cost of retaining e-mail records currently costing the financial industry several hundred million dollars per year, a reduction of 10% of that storage could represent a savings of between \$20 and \$40 million dollars annually. In addition, disclaimers often use such words as confidential, guarantee, privacy which are the same words flagged by supervisory systems. We estimate that 15% of the time spent reviewing e-mails is spent approving messages which have been flagged by words in the disclaimer and not actually in the body of the e-mail. Our estimate of this cost is approximately \$25 million dollars. In total, moving to hyperlinked disclaimers could save the financial industry approximately \$50 million annually.

Now \$50 million may not be a compelling sum but it also does not include nor quantify the potential losses associated with disseminating information without articulated legal rights. It is our non-legal opinion that courts would not extend to an e-mail the implied disclaimer restrictions. For instance, when you install software, you click on an Accept Terms box which imposes the vendor's rights associated with the software-use terms. If there is no Accept Terms required to use the software, then there is no imposition on the vendor's legal terms. When you open an e-mail with a disclaimer, there is an acknowledgement of the sender's restrictions.

## Proper Use of an e-Disclaimer

The SEC has provided 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.

The current e-Disclaimer for Goldman Sachs is: <http://www.gs.com/disclaimer/e-mail>. On e-mails we've received from Goldman, this has been the same link for several years. If Goldman changes the disclaimer and does not change the link, then all of the previous e-mails would link to a disclaimer that was not actually in effect at the time of the e-mail. Without tangible proof that the e-disclaimer is in fact the same disclaimer at the time of the e-mail, the legality of the disclaimer is negated. Disclaimers are only enforceable if can be proved either by a third party, a hash code in the actual URL, or other means of verification that, at the time of the email, a specific e-disclaimer was referenced through a valid link.

We believe the correct approach is to attach a hyperlink with a date and hash code built into the URL. This approach allows a firm to prove the integrity of the hyperlink with the actual e-disclaimer that was linked at the time of the original e-mail.

## Other Issues

Language is another concern as a disclaimer is only binding if the language of the e-mail matches the language of the disclaimer. In our Goldman example above, Goldman provides multiple languages on the linked disclaimer site. However, if the language of the e-mail is not included as one of these, then the disclaimer is not binding. For large, international companies, this is an issue. All languages in which the firm conducts business should have an e-disclaimer in that language. If that is not possible, then we recommend a policy that employees who communicate in languages not covered by an e-disclaimer, must set up a signature incorporating the disclaimer language in the language of the e-mail and attach it when appropriate.

For LinkedIn and other social networking sites, we again recommend a policy requiring employees to embed an e-Disclaimer link in their profile. This may require a new e-Disclaimer that applies to social networking issues rather than e-messaging issues.

## Summary

The advantages of e-disclaimers including smaller archival requirements, fewer e-mails to review and supervise and more complete legal terms and conditions all argue for the adoption of hyperlinked disclaimers. However, it is also critical for compliance and IT to realize that the implementation and linking technologies may undermine the effectiveness of the disclaimer and, as a result, compromise the legal rights of the sending institution.