DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Using the Internet for Investor and Shareholder Relations

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Portions of this outline are based on "Investor Relations on the Web," an article co-authored by Mr. Dolmatch and Amy L. Goodman for *ACCA Docket*, July/August 2000.

1. Introduction

a. Importance of the Internet to Investor and Shareholder Relations. With its speed and broad accessibility, the Internet provides new opportunities for public companies to communicate with potential investors, existing shareholders and employee stockholders. This outline discusses some key legal issues that should be understood to take advantage of these opportunities.

i. Taking Advantage of the Internet. Companies can

1. Post earnings releases, quarterly reports and SEC filings.
2. Post management speeches and presentations.
3. Post transcripts of analyst conference calls.
4. Broadcast communications with analysts (e.g., conference calls, presentations) and annual meetings over the Internet. A National Investor Relations Institute survey indicated that 48% of companies conducting conference calls are webcasting them (NIRI Executive Alert, February 29, 2000).
5. Distribute required disclosure documents, annual reports and proxy statements to shareholders.
6. Implement electronic voting, whereby shareholders have the option (where state law permits) to record their proxy votes online.

i. Corporate Governance. Some issuers post corporate governance guidelines, many of which they established in response to interest from institutional investors. These include guidelines addressing board and committee composition and structure, term limits, retirement ages and other matters.

ii. Counsel's Role. Ensure there is a team responsible for creating and maintaining the website, and frequent review and updates of the website. Team must include representatives from relevant parts of the company, such as legal, investor relations, technology, and marketing. Counsel should visit other websites to stay on top of best practices.

2. Controlling Website Content

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a. Legal Review. Counsel should make sure that nothing is posted on the website without legal review. For example, marketing material that was not created with investor relations in mind can give rise to securities liability. In In re Carter-Wallace Securities Litig., 150 F.3d 153 (2nd Cir. 1998), the Second Circuit held that a company could be liable under Rule 10b-5 of the Securities Exchange Act of 1934 for a misleading advertisement in a medical journal that could be accessed by analysts.

i. Periodic Review. Company counsel should regularly review the entire website to ensure that company policies are being followed and that posted material does not raise liability concerns.

b. Maintaining Separate "Investor Relations" Section. A separate investor relations section not only serves the investment community by packaging relevant information in one convenient place, it also reduces (but, of course, does not eliminate) the risk that investors will rely on materials that were not prepared with securities liability in mind. A 1998 survey by the National Investor Relations Institute indicated that 86% of the public companies surveyed have a separate investor relations section in their websites. (A Study of Corporate Disclosure Practices, NIRI (May 1988)).

c. Avoiding the Duty to Update. The SEC's recent Internet release, Use of Electronic Media, Release No. 33-7856 (April 28, 2000), states that material on a website may be considered to be republished each time it is accessed by an investor–in contrast to a press release disseminated through a wire service, which is published only once.

i. Dating items. Companies must therefore avoid implying that specific information has been or will be updated. Important disclosures, such as press releases, should be dated and, when no longer current, removed or archived. Instead of phrases such as "updated 2/1/00" or "current SEC filing," use phrases such as "last posting 2/1/00" or include no date reference except for the specific entries.

ii. Using disclaimers. Disclaimers, discussed in more detail below, should be used to make clear that press releases speak only as of their date and that the company disclaims any obligation to update them.

d. Developing an Archival Policy. In order to avoid having to identify information that may no longer be current, press releases and other information should be moved to a historical section after a period of time. The policy should include specific procedures for determining what information is no longer current and when such information should be moved to the archival section.

e. Maintaining Records of Issuer's Website as it is Updated. In the event of a dispute, this will enable you to demonstrate what was or was not posted at any given time on your website.

3. Securities Offerings

a. Gun-jumping and Other Potential Market Conditioning. The SEC's April 2000 Internet release advises issuers to consider the application of Section 5 of the Securities Act of 1933 to communications made on the company's website and third-party sites to which the site is linked. The period prior to an offering is not a good time to launch new websites or substantially enhance existing ones. Normal advertising and ordinary-course communications activities (including posting of press releases, periodic reports and so on) can continue, but precautions must be taken to avoid unusual promotional activities.

b. SEC Review of Websites. The SEC staff routinely reviews company websites as part of the registration process.

c. Stock Plans. Issuers with dividend reinvestment plans or direct purchase plans must observe SEC restrictions in this area if they wish to use their websites to disseminate information about these plans.

i. The SEC's May 15, 1996 interpretive release on electronic media (33-7288) states that an issuer's website may refer to its dividend reinvestment plan and provide the phone number and address of the plan administrator or hyperlink to the administrator's website but may not link directly to plan materials. The release mandates a certain level of deliberate effort by the investor to seek out the information.

ii. A subsequent no-action letter to the Securities Transfer Association issued October 24, 1997 authorized a series of hyperlinks taking a visitor directly into plan materials and enrollment forms, requiring the investor to enter a certain number of clicks to access the information.

4. Hyperlinks

a. Links to Sources Outside Your Website. The SEC's April 2000 Internet release states that issuers are responsible for the accuracy of their statements that can reasonably be expected to reach investors. Information on a third-party's website may be attributed to an issuer if the issuer was involved in the preparation of the information (the "entanglement theory") or if it explicitly or implicitly endorsed it (the "adoption theory").

b. Adoption of Information. Adoption of hyperlinked information can occur due to the context of the information -- which may include the absence of disclaimers (as discussed in the next section) -- or the way in which the information is presented.

c. "Framing" or "Inlining." When a visitor is linked to a third-party website and the information has the same appearance as material in the company's website, the possibilities are increased that the company could be held responsible for the information. (Framing involves a visible border; inlining does not.)

d. Links to Analysts Reports. Under the "adoption" theory, a company may be held liable for adopting statements made in an analyst's report.

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i. In 1997, The SEC endorsed the "adoption" theory in In the matter of Presstek, Inc., 1997 SEC LEXIS 2645 (December 22, 1997), where it found an issuer responsible for information contained in an analyst report that it distributed. The SEC stated that an issuer can be held responsible for disseminating false third-party reports even if it had no role whatsoever in their preparation.

ii. If management believes that the benefits of linking to analysts' reports outweigh the risks, it should not be selective. It should include all analysts that cover it.

iii. The issuer should include a statement that by providing the list, the company does not endorse or approve the analysts' evaluation ratings, report or projections.

iv. The company should never comment on the content of specific reports, since failure to comment on other portions of the report, or other reports, could be taken as endorsement.

e. Other Links. Thought should be given even with third-party sources that are much less likely than analysts reports to raise liability concerns, such as a link to a provider of current stock prices or to the SEC EDGAR system or a commercial EDGAR site for company filings. Limitations of third party information, such as the existence of a 20-minute delay in stock price information, should be prominently disclosed.

5. Disclaimers

a. General. Disclaimers are an important means to avoid investor confusion and are discussed in the SEC's April 2000 Internet release. The release makes clear, however, that disclaimers will not overcome responsibility for third-party information if the context would otherwise indicate that an issuer is adopting the linked information.

i. To provide reasonable notice to investors, disclaimers should be clear and concise and closely associated with the information in question. The SEC stated in Release No. 33-7516 (March 23, 1998) addressing offshore Internet offerings, that "if the disclaimer is not on the same screen as the offering material, or is not on a screen that must be viewed before a person can view the offering materials, it would not be meaningful." Some companies provide a hyperlink to a disclaimer; however, this would tend to offer a relatively weak rebuttal of a claimant's assertion that he or she did not receive fair notice. More protection would be obtained with either (1) a hyperlink from the disclaimer to the information, (2) a disclaimer appearing on the same screen as the information in question or (3) a disclaimer appearing as a "click through" agreement that the visitor must acknowledge before accessing the information.

b. Disclaimers Involving Forward-Looking Information. A written forward-looking statement, under the Securities Litigation Reform Act, Section 21E of the Securities Exchange Act of 1934, must be "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ from those in the forward-looking statement" in order to be protected by the safe harbor from liability.

c. Risk Factor Disclosure. Companies might consider linking from the cautionary statements to any discussion of risk factors, which appear in a company's periodic reports such as risk factors in Form 10-K and 10-Q filings.

d. Oral Statements Posted on Website. Oral statements such as transcripts of analyst calls or speeches become "writings" once posted on the website as text. They are then subject to requirements of the Litigation Reform Act, so safe harbor language must then accompany the data posted on the website.

6. Chatrooms

a. General. Discussions about a public company in chatrooms and message boards, e.g., those on such websites as Motley Fool and Yahoo! Finance, can easily impact a public company's share price. Sometimes rumors may be spread maliciously in an attempt to manipulate a stock's price (for example, as part of "pump and dump" schemes).

b. Monitoring. Companies need to consider devoting resources to monitor what is being said about them in chatrooms and message boards. If they decide to monitor, they can assign employees or retain outside firms to do so, or they can install automated web surveillance.

c. Responding to Chatroom Rumors.

i. It is generally best not to respond to online rumors or negative postings. Issuers that utilize web surveillance software offered by ChaseMellon typically have established policies not to respond to market rumors, including those appearing on the Internet. Responding may create an expectation that the company will continue to monitor and correct inaccurate third-party postings.

ii. In some cases, however, when rumors result in unusual trading activity in the stock it may be necessary to respond. The requirements of the New York Stock Exchange ("NYSE") and NASDAQ may require companies to respond to Internet rumors. NYSE's Listed Company Manual (Section 202.03) states: "If rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required. If rumors are in fact false or inaccurate, they should be promptly denied or clarified."

iii. Management also needs to evaluate whether its duty to shareholders requires the company to reply or to respond in some other way, such as instituting an investigation into the subject matter of the posting.

iv. Other examples of responsive action:

1. Issuing cease and desist letters to operators of the message boards or chat rooms demanding that offending postings be removed or blocked. (Beware: a cease and desist letter may be posted by the people spreading the rumors in an effort to embarrass the company).
2. Contacting the SEC or other law enforcement authorities.
3. Suing the persons who posted the messages for libel.

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    a. If the posting was anonymous, a "John Doe" litigation may be instituted using the court's subpoena powers to identify the defendants.
    b. The company can retain a private investigator to detect the identities of people who post information. Such investigators can use "data mining" techniques to find older postings that may identify the individual or lure a person to another site that may allow his or her identity to be revealed.

a. Postings by Employees. Companies should establish written policies in their codes of conduct strictly prohibiting employees from discussing corporate matters in chatrooms or message boards, since such postings may be viewed as official disclosures by the company.

2. Shareholder Services

a. Dissemination of Required Disclosure Documents. Electronic delivery saves printing and distribution costs and may offer speed advantages, as well as customer service and environmental benefits.

i. Content of Disclosure. SEC pronouncements regarding online distribution of SEC-mandated disclosure materials (SEC Release Nos. 33-7233 (October 13, 1995), 33-7288 (May 15, 1996), as well as the 2000 Internet release, mandate that shareholders who receive electronic delivery of required materials receive substantially equivalent information as shareholders who receive these materials in paper form. Shareholders should be able to keep a permanent record if they wish (e.g., by printing or downloading the document).

ii. Consent.

1. Issuers or financial intermediaries can deliver required materials to shareholders electronically rather than on paper only if the shareholder consents. The 2000 Internet release provides that:
    a. Consent may be telephonic, so long as a record is maintained.
    b. Consent may be global, covering multiple issuers.
    c. Consent must be informed and specify the specific type of electronic media the shareholder is willing to accept, as well as whether it is indefinite in duration. (The SEC even indicated that disclosure of potential costs, such as the cost of online time, might need to be disclosed for consent to be informed.)
2. Electronic distribution may not be sufficient when the shareholder's consent was granted several months prior to the distribution of the materials. Consent too far in advance would not necessarily put the shareholder on notice to check for receipt of the materials, according to the SEC's October 13, 1995 release.
3. The company may be deemed to have satisfied the consent requirement if there is a history of electronic communications between the shareholder and the company, providing a reasonable basis to expect that communications were received. Hard copy paper distribution must be resumed where there is no continuing consent to electronic distribution or if the shareholder requests printed materials. (There may be limited instances, however, where consent can be made irrevocable, at least within the context of a particular investment account: the 2000 Internet release acknowledged that certain brokerage accounts may be opened online and contain a requirement that all transactions be made online. Opening such an account may be conditioned on global consent to electronic delivery.)

iii. Employee Shareholders. Under the SEC's May 15, 1996 release, a company may discharge its disclosure obligations to employee shareholders electronically, without advance consent, where an employee's access to e-mail or the company's intranet provides a reasonable basis to expect that the disclosure will be received. If an employee requests paper documents, however, the company should provide them.

b. Proxy Voting

i. Registered shareholders. For the 2000 proxy season, 91 public companies served by ChaseMellon offered their registered shareholders an Internet voting option. This number is more than three times the number of companies that did so in 1999, but still a small minority.

1. Company counsel must review the issuer's charter and by laws, as well as the law of its state of incorporation to determine if it can offer electronic voting for registered shareholders. At least 31 states, including Delaware, New York and California, now have laws viewed as permitting electronic proxy voting. State corporate laws that do not permit internet voting may be preempted by the Electronic Signatures in Global and National Commerce Act, which became effective on October 1, 2000.

ii. Street-Name Holders. Holders in street name may vote electronically if their broker or bank offers this service.

iii. Employees. Issuers can save printing costs and improve the percentage of their employees that vote their proxies, by distributing materials and collecting votes over their corporate intranets, using ChaseMellon's VoteDirect^{SM} service.

c. Other Uses of Internet Technology

c. Other Uses of Internet Technology.

i. Stock Option Plans. Companies may allow employees to exercise stock options directly from their desktop PC via their corporate intranet using ChaseMellon's OptionsDirect℠ service. Optionees access their personal account information using their social security number and a PIN. They can view the number of options they were granted, vesting data and current market price and perform "what if" modeling scenarios to see how a specified market value affects the exercise of an option, including applicable taxes and net proceeds.

ii. Information for Management. Company employees charged with shareholder relations can view registered shareholder data online and monitor ownership levels and payment histories, respond to inquiries, track proxy voting on a real time basis, as well as view statistical data, including demographic, geographical and share concentration data, using ChaseMellon's Client ServiceDirect℠ product.

iii. Investor Self-Service. Public companies can also offer their registered shareholders Internet access to their holdings to review account status, payment history, etc. and perform various transactions, using ChaseMellon's Investor ServiceDirect℠.

1. The interactive capabilities of the Internet can also simplify complicated transfer requirements, by walking a shareholder through simple questions one at a time (e.g., does the transfer involve a non-U.S. citizen, is the transfer due to an individual's death, does the transfer involve a trust, etc.).

iv. Demos of Client ServiceDirect, Investor ServiceDirect and other web-enabled services can be accessed at www.ChaseMellon.com.

3. Limitations of Electronic Communications

a. Posting Not Substitute for Press Release. The NYSE Listed Company Manual (Section 202.05) states that a listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities (although there is no general duty to disclose material nonpublic information).

i. The NYSE treats the press release as the approved means for listed companies to publicize important developments (NYSE Listed Company Manual, Section 202.06(A)).

ii. Although posting information on the Internet would tend to result in broad dissemination of the information, doing so is not yet considered sufficient to discharge any such obligation, and companies should not post material disclosures on their websites before they make the disclosure public in a press release. Disclosure of information via the company website is not considered public dissemination according to the SEC. (Release No. 33-7233, October 13, 1995). Similarly, under proposed SEC Regulation FD dealing with selective disclosure, a website posting by itself is not considered to be a sufficient means of public disclosure (SEC Release No. 33-7787 dated December 20, 1999).

iii. The NASD adopted a rule change to provide that companies may not disseminate information over the Internet before the traditional news media receive it. (See NASD Interpretation IM-4120-1 and SEC Release No. 34-4-0988 dated January 28, 1999 approving the interpretation.)