

**To:** Private Equity Fund Clients  
**From:** Fund Services Group  
**Date:** January 10, 2006  
**Re:** **Website Tips and Suggestions**

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Nearly all venture capital and other private equity firms (each a "Firm") maintain a website designed to provide information to potential portfolio companies, their own limited partner investors, and the general public. While websites can be very useful, they also must be carefully designed to avoid creating legal liability. This memorandum briefly addresses some of the key considerations in designing a "legally safe" website.

***Beware Unintended Solicitation of Limited Partner Investors***

A standard website generally is viewed for legal purposes as the equivalent of a public, or published, document. Fundraising information or other fundraising materials presented on such a website can constitute a "general solicitation" that violates the securities law private placement rules under which most funds are marketed. This, in turn, can create substantial legal liability, including a right on the part of limited partner investors to rescind their investments (and demand repayment of their capital contributions) at a later date.<sup>1</sup>

Examples of improper fundraising information/materials include the following:

- \* Any type of direct investment solicitation
- \* Marketing materials such as private placement memoranda, IRR tables and other information designed to demonstrate that funds managed by the Firm have been good investments
- \* Fund organizational documents such as limited partnership agreements
- \* Statements generally intended to attract the interest of potential limited partner investors

As a general matter, the safest way to keep a website free of improper fundraising information/materials is to affirmatively focus the website's content and message on potential portfolio companies. This does not mean that a website cannot include information about the Firm's capabilities, past successes and accomplishments. It does mean, however, that such information should be presented to encourage potential portfolio companies to seek investment from a fund managed by the Firm, rather than to encourage potential limited partners to invest in such a fund.

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<sup>1</sup> For additional information on general solicitation issues, please see our memorandum to clients titled "Websites and Speaking With the Press While Raising Funds."

Many websites include a private, password-protected area in which fundraising or other confidential information is presented. In general, such areas do not present a material risk of creating a general solicitation so long as passwords are provided only to persons that already have been introduced to the Firm's fundraising efforts through proper (i.e., private) means.

### ***The Myth of "Read Only"***

Many Firms that post highly confidential information to password protected portions of their websites use technical methods to prevent such information from being easily printed or downloaded using a standard browser. It's important not to rely upon such methods to prevent highly confidential information from being improperly copied, used or distributed. Even if information cannot be printed or downloaded using a standard browser, it still can be copied or downloaded using readily available "screen capture" software or other means. Confidential information should be made available only to persons that have executed an appropriate nondisclosure and limited use agreement. With respect to the most confidential information, it simply may be unreasonably risky to provide access via a website.<sup>2</sup>

### ***Speak on Behalf of the Firm Rather than About Specific Funds***

It is important to respect the distinction between a Firm and the funds that it operates. In general, a Firm's website should speak on behalf of the entire Firm and should not speak on behalf of specific fund entities within the Firm's legal structure. This approach helps reduce the risk of a general solicitation and may also enhance the value and enforceability of the Firm's trademark/trade name.<sup>3</sup>

### ***Use Proper Titles for Investment Professionals***

In the early days of venture capital and private equity, many investment professionals were bona fide "general partners." Often, a fund was structured as a limited partnership with a general partnership (consisting of the Firm's investment professionals) as the fund's general partner.

Today, it is rare for a Firm's investment professionals to be bona fide general partners. Often, a fund's general partner will be a limited liability company, of which the investment professionals are "managing members" or "managing directors." Sometimes, a fund's general partner is itself a limited partnership, of which the investment professionals are both limited partners and the owners of a corporation or limited liability company that serves as the general partner of the general partner. These types of structures are created by Firm counsel in order to (among other reasons) protect investment professionals from unlimited personal liability for the Firm's debts and obligations.

Notwithstanding the efforts of Firm counsel, investment professionals may be held liable as general partners if they lead third parties to believe that they are, in fact, general partners. A public website that declares specific individuals to be "general partners" may be strong evidence supporting a third party claim. For this reason, it is safest to use titles that are consistent with the Firm's underlying legal structure. Examples of such titles include: "managing director," "managing member," "managing principal," and "investment professional."

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<sup>2</sup> For additional information, please see our memorandum to clients titled "Protecting Confidential Fund Information."

<sup>3</sup> For additional information, please see our memorandum to clients titled "Fund Names -- Protection and Ownership."

If a Firm concludes that its investment professionals must be listed as "general partners" notwithstanding their actual legal status, it may be possible to reduce potential liability by including a disclaimer on the website. For example:

"Legal Notice: Visitors to this website are advised that, although certain individuals are identified on this website as "General Partners," such titles reflect business usage that is customary within the venture capital and private equity industry and are not intended to indicate that any such individual is actually a general partner of any partnership as those terms are used for legal purposes."

### ***Do Not Use a Public Website to Describe the Firm as an Investment Adviser***

Venture capital and other private equity firms typically are "investment advisers" within the meaning of the Investment Advisers Act of 1940, and rely upon an exemption to avoid the burdens of the Advisers Act's registration requirements. In general, no exemption is available to a Firm that holds itself out to the public as an investment adviser. For this reason, the public portion of a website should not speak of the Firm as providing investment advisory, money management or similar services.<sup>4</sup>

Many Firms wish to describe the amount of capital they manage in order to show potential portfolio companies that they have the resources to be a strong partner for growth. A statement to this effect, if crafted with care, should not be deemed holding the Firm out to the public as an investment adviser. For example:

"Since inception, ABC Ventures has invested over \$500 million in its portfolio companies and currently has over \$200 million in committed capital available for future investment."

### ***Avoid Responsibility for Protecting the Confidentiality of Materials Submitted by Potential Portfolio Companies***

Many websites expressly invite potential portfolio companies, entrepreneurs and other parties to submit business plans or other materials that describe an investment opportunity for a fund managed by the Firm. While this is an appropriate website function, it is important to minimize the risk that the Firm will later be subject to claims that it improperly disclosed or misused such plans or other materials. In general, the safest course is to discourage the submission of any confidential or proprietary information. For example, a website may include the following warning:

"Do not submit any information or other materials that you consider to be confidential or proprietary. Because of the large number of business plans and related materials that we review, and the similarity of many such plans and materials, we cannot accept responsibility for protecting against misuse or disclosure any confidential or proprietary information or other materials in the absence of our express written agreement to do so."

### ***Beware of Blogs***

From a legal perspective, there may be little or no difference between a Firm's "official" website and the business-related blogs maintained by one or more of the Firm's members. So long as a blog's content relates to the Firm's activities, any statements or activities made or conducted through the blog may be attributed to

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<sup>4</sup> For additional information, please see our memorandum to clients titled "Investment Advisers Act of 1940."

the Firm. As a general matter, the best course is to treat blogs as part of the official website -- if material is unsuitable for the official website, it most likely will be unsuitable for a blog as well.

One of the greatest challenges associated with blogs is the informal style adopted by many blog writers. It is important to note that informal style is just that -- a style. Whether a blog's style is formal, informal or somewhere in-between, its content should adhere to the same standards of care and propriety as any other document published by the Firm.

Similar considerations apply to "podcasts" and other evolving forms of communication.

### ***Disclaim Responsibility for Third Party Comments***

Some websites include bulletin boards, "wikis" or other areas in which non-Firm persons may post their own views or comments. In general, it is easier and safer to disclaim responsibility for the contents of all such posts than to assume responsibility for editing or deleting posts with inappropriate content. For example:

"ABC Ventures requests that all persons posting comments to this bulletin board follow the rules of courtesy and common sense. All posters are fully responsible for the contents of their posts and ABC Ventures accepts no responsibility therefor. Nevertheless, ABC Ventures reserves the right to delete any post in its sole and absolute discretion."

### ***Update to Reflect Firm Changes***

It generally is advisable to update websites promptly after personnel and other significant changes to the Firm. Such updates can reduce a variety of risks, such as the risk of former personnel continuing to act with "apparent authority" on behalf of the Firm.

### ***Consider Archiving***

Consider off-line archiving older versions of web pages rather than simply deleting them. Easy access to such pages may be useful in rebutting claims of improper activity on or through a Firm's website.<sup>5</sup>

### ***Consider Other Needs***

Websites that collect information from visitors, present copyrighted information or engage visitors on an interactive basis may require additional protections such as a privacy policy or terms of use agreement.

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This memorandum is intended only as a general discussion of the information presented and should not be regarded as legal advice. For more information, please contact your Fund Services Group attorney.

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<sup>5</sup> For additional information, please see our presentation titled "Smoking Gun vs. Proof of Innocence: Safe Document Creation and Retention Practices for Venture Capital and Other Private Equity Firms."