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VIA E-MAIL

To Our Investment Adviser Clients and Other Friends

Re: Website Terms of Use -- Legal Developments

A recent decision by the Federal Ninth Circuit Court of Appeals, which covers nine Western states, including California, suggests that a business cannot enforce its website's Terms of Use against users unless they affirmatively agree to those terms. Website Terms of Use frequently disclose material information and disclaim liability for certain losses.

Many websites present Terms of Use as a hyperlink to a copy of the Terms of Use, which state by virtue of merely browsing or using the website, the user consents to the website's Terms of Use (also known as "browsewrap"). Websites using browsewrap do not require a user to click "I agree" to the Terms of Use or otherwise affirm a user's acceptance to those terms.

In *Nguyen v. Barnes & Nobel, Inc.*,¹ the Ninth Circuit found that merely posting a website's Terms of Use by hyperlink did not give a website user constructive notice of the Terms of Use and did not bind that user to those terms. Based on this case, if you have a website that disseminates material information to clients and investors or that supports client or investor transactions, we recommend that the site require users to demonstrate assent to that website's Terms of Use through an "I agree" button.

If you choose to take the risk of not requiring users to affirmatively agree to your Terms of Use, then you should take the following precautions:

1. The Terms of Use hyperlink should be clear and prominent on every page of the website, and website visitors should not be able to create a profile or access the site without seeing the link and an explanation that the user, by accessing the website, will be bound to the Terms of Use and should click on the Terms of Use hyperlink and view its contents;
2. The hyperlink should be in a noticeably larger font than the surrounding text and in a color or combination of colors that cause it to stand out against the website background;

¹ *Nguyen v. Barnes & Nobel, Inc.*, 2014 U.S. App. LEXIS 15868 (9th Cir. August 18, 2014).

3. The hyperlink should state “I agree that the Terms of Use create an enforceable agreement”; and

4. The hyperlink should be placed so that the user does not need to scroll down the page to view it (regardless of the type of browser used to view the website).

It is not certain that presenting Terms of Use as described in items 1-4 is sufficient to enforce those terms against website users. The law is rapidly evolving in this area, and in light of the recent Ninth Circuit decision, we recommend using a click through “I agree” button to demonstrate unambiguous constructive notice of a website’s Terms of Use.

This letter is not intended as specific or complete advice, and is subject to change as the industry develops best practices for online business. For further assistance, including discussing the enforceability of your website’s Terms of Use, please contact John Broadhurst, Geoff Haynes, Chris Rupright, Carolyn Reiser, Neil Koren, Jim Frolik, Christina Hamilton, Joan Grant, Ellyn Roberts, Anthony Caldwell, David Suozzi or Kathryn Miller.

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