On October 5, 2011, the National Labor Relations Board (NLRB) announced that it has postponed the effective date of its new rule requiring employers to post a notice regarding employees’ union rights from November 14, 2011, to January 31, 2012. The new rule, found at 29 C.F.R. § 104.202, requires all employers covered by the National Labor Relations Act (NLRA) to post a notice informing employees of their rights to, among other things, form a union, join a union, assist a union, or refrain from doing any of these things.

The new rule has been highly controversial since the NLRB first proposed it in December 2010. Indeed, many commentators, and one dissenting NLRB board member, have argued that the NLRB has overstepped its jurisdictional authority by enacting the new rule. This article will focus on the requirements of the new rule, how it fits in with the Obama NLRB’s current agenda, as well as challenges to the new rule.

Content of Notice
The final rule requires employers to post a specific form notice at the workplace. The form notice begins with a general statement regarding the NLRA and its purpose:

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA.

The required notice goes on to inform employees of their rights to:

- Organize a union to negotiate with their employer concerning wages, hours, and other terms and conditions of employment.
- Form, join, or assist a union.
- Bargain collectively through representatives of the employees’ own choosing for a contract with the employer setting wages, benefits, hours, and other working conditions.
- Discuss wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union.
- Take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

The notice also advises employees that employers may not do any of the following under the NLRA:

- Prohibit employees from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Background
The NLRB first proposed the mandatory posting rule in December 2010, marking the board’s first exercise of its rule-making authority since 2004. During the six-month comment period, the NLRB received more than 7,000 comments on the proposed regulation—most of which opposed the rule. Notwithstanding, on August 30, 2011, Board Chairman Wilma Lieberman and members Mark Gaston Pearce and Craig Becker voted to approve the final rule. The NLRB’s sole Republican member, Brian Hayes, dissented from the majority, ending his dissent with the opinion that “a reviewing court will soon rescue the Board from itself and restore the law to where it was before the sorcerer’s apprentice sent it askew.”
• Question employees about union support or activities in a manner that discourages employees from engaging in that activity.

• Fire, demote, or transfer employees, or reduce hours or change shifts, or otherwise take adverse action against employees, or threaten to take any of these actions, because employees join or support a union, or because they engage in concerted activity for mutual aid and protection, or because they choose not to engage in any such activity.

• Threaten to close a workplace if workers choose a union to represent them.

• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

• Prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

The notice explains that unions and their representatives may not do any of the following under the NLRA:

• Threaten or coerce employees in order to gain support for the union.

• Refuse to process a grievance because an employee criticized union officials or because he or she is not a member of the union.

• Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

• Cause or attempt to cause an employer to discriminate against an employee because of his or her union-related activity.

• Take adverse action against employees because they have not joined or do not support the union.

The notice also contains a brief provision explaining the concept of collective bargaining and good faith negotiations relating to the terms and conditions of employment. Finally, the notice includes a phone number and a website to contact the NLRB with any questions regarding the new rule and its requirements.

Under the rule, all covered employers will be required to post notice on an 11-by-17-inch poster in a conspicuous place, where other notices to employees are customarily posted. In addition to the physical posting, the rule requires every covered employer to post the notice on an intranet site if personnel rules and policies are customarily made available to employees there. A previous version of the rule would have required employers to e-mail the notice to all employees. This requirement was not included in the final version. Employers whose workforces are more than 20 percent non-English-speaking must post translations of the notice as they become available.

Employers Covered Under the Rule

The new regulations cover most private-sector employers, even if an employer’s workforce is not currently unionized. In the past, applicable law required “union rights” postings only in advance of a scheduled union election or in response to an Unfair Labor Practice Charge. In contrast, under the new rule, all employers subject to the NLRA are subject to the posting requirement.

The NLRA covers most private-sector employers that meet fairly minimal standards for involvement in interstate commerce. Employers in the retail business, including home construction, must comply with the posting requirement if they have a “gross annual volume of business of $500,000 or more.” The nonretail standard, which applies to most other employers, is based either on the amount of goods sold or services provided by the employer out of state (called “outflow”) or goods or services purchased by the employer from out of state (called “inflow”). Nonretail employers with an annual inflow or outflow of at least $50,000 are covered by the NLRA. The new rule also includes a table identifying specific “miscellaneous” employer categories and sets various gross annual volume of business requirements (i.e., $500,000 for the gaming industry, $250,000 for hospitals, $500,000 for hotels, and $500,000 for restaurants).

Certain employers are specifically excluded from the new rule, including: (1) the federal government or any wholly owned government corporation; (2) any federal reserve bank; (3) any state or political subdivision thereof; (4) any employer subject to the Railway Labor Act; (5) any labor organization; and (6) any employer who only employs individuals excluded from the NLRA’s definition of “employee” (i.e., agricultural and domestic workers).

Where to Get the Notice

The NLRB has made the required posting available on its website at http://www.nlrb.gov. In addition, the posters may be obtained at no cost at the NLRB’s headquarters, located at 1099 14th Street NW, Washington, D.C. 20570, or any of its regional offices. Employers must take reasonable steps to ensure that the “notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.”

Failure to Comply With the New Rule

There are several potential consequences for failing to post the required notice.

First, failure to post the notice may result in an unfair labor practice. However, the NLRB does not audit workplaces or initiate enforcement actions on its own. Therefore, a failure to post the notice would need to be brought to the NLRB’s attention by employees, unions, or other persons. The NLRB has indicated that it does not anticipate issuing unfair labor practices charge in most situations, noting that “in most cases, the [NLRB] expects that employers who fail to post the Notice were unaware of the rule and will comply when requested by a [NLRB] agent” and that “in such cases, the unfair labor practice case will typically be closed without further action.”

Second, failure to post the notice may result in a finding by the NLRB extending the six-month statute of limitations for filing an unfair labor practice charge involving other unfair labor practice allegations against the employer. In practice, this may result in a virtually unlimited statute of
limitations for employees bringing unfair labor practice claims against employers who have not posted the notice. Finally, if the NLRB finds that the employer’s failure to post the notice was knowing and willful, such failure can be used as evidence of an unlawful motive in unfair labor practice cases alleging other violations of the NLRA.

Delay in Effective Date and Challenges to Posting Rule
As noted above, on October 5, 2011, the NLRB announced that it had postponed the effective date of the new rule to January 31, 2012. In announcing the delay, the NLRB noted that the postponement was necessary “in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium size businesses.” The NLRB also stated that the decision was made after the organization received “queries from business and trade organizations indicating uncertainty about which businesses fall under the [NLRB’s] jurisdiction” and that the extension was made “in the interest of ensuring broad voluntary compliance.”

A likely contributing factor to the NLRB’s decision to delay implementation is the fact that several suits have been filed challenging the NLRB’s authority to enact the new rule. Specifically, a suit by the National Association of Manufacturers seeks to enjoin the new rule, claiming that it is “in excess of the [NLRB’s] statutory jurisdiction, authority, limitations and rights.” A similar lawsuit filed by the U.S. Chamber of Commerce alleges that “the misguided NLRB violates federal labor and regulatory laws as well as the First Amendment.” Additionally, the National Right to Work Foundation has filed a lawsuit claiming that the NLRB has “exceeded its authority granted by Congress” and that the new requirement is “nothing more than yet another attempt by the Obama NLRB to force more workers into union ranks and stifle the rights of employees who want nothing to do with a union.” Indeed, the NLRB’s decision to postpone the rule’s effective date was likely influenced by a request that it do so by U.S. District Court Judge Amy Jack-son, who is deciding whether the NLRB should be enjoined from implementing its new rule until legal challenges to the rule are resolved.

In addition, the House Appropriations Committee has proposed a rider to the NLRB’s 2012 budget which, if passed, would prohibit the NLRB from allocating any portion of its budget toward enforcing the rule. Finally, Congressman Ben Quayle has introduced HR 2833, or “The Employee Workplace Freedom Act,” which would block the implementation of the new rule.

NLRB’s “New Agenda”
To be sure, the Obama NLRB has unequivocally signaled its desire to increase employee interest in union activity. In that context, many employment counsel argue that the posting requirement is just the latest salvo in the current board’s attempt to reverse the trend of declining union organization in the private sector. For example, in addition to the new posting rule, the NLRB recently issued decisions making it easier to organize small groups of employees in the health care industry, making it more difficult for employers to decertify their union, limiting the ability of employers to make unilateral changes to the workplace, and providing unions greater freedoms relating to handbilling and distribution of pro-union literature. The NLRB may also decide shortly whether class action waivers in arbitration agreements violate the right of employees to engage in protected concerted activity under the NLRA.

The current NLRB has also taken a special interest in social media. The NLRB is aggressively positioning itself to find employee social media communications to be protected concerted activity under the NLRA. Indeed, the NLRB’s acting general counsel has issued an extensive memorandum describing recent NLRB cases dealing with employee postings on social media sites, and in one recent case the NLRB has found that Facebook postings by employees critical of their employers constitute protected concerted activity under the NLRA. Similarly, the board has repeatedly criticized employer policies that attempt to curtail what might be considered protected employee speech on social media sites such as Facebook and Twitter.

What Should Employers Be Doing?
While the NLRB has indicated that it will not make any changes to the rule or the required notice, the NLRB’s most recent move has created uncertainty regarding the date by which employers will have to comply. Unless a court prevents the new rule from taking effect in the interim, however, it appears that employers should educate themselves regarding the NLRA and consider communicating with supervisors. Given the NLRB’s renewed interest in unionization, employers should educate themselves on the requirements of the NLRA and what type of activities it both protects and prohibits. Furthermore, employers should be aware that employees may perceive this poster as pro-union; indeed, some employees may even see the notice as suggesting that the employer is encouraging unionization. Accordingly, employers should consider discussing with managers and supervisors what the poster says and lawful strategies on how to respond to employee questions and comments about union the poster or even union organizing. Occasionally untrained supervisors make anti- or pro-union comments to employees at work that can result in allegations of unfair labor practices under the NLRA.

It should be noted however, that the new rule does not alter employers’ rights of free speech under the section 8(c) of the NLRA. Specifically, section 8(c) protects “[t]he expressing of any views, argument or opinion,” by the employer provided that “such expression contains no threat of reprisal or force or promise of benefit.” Thus, employers still retain the right to speak to truthfully to their employees about the NLRA, the NLRB, and unions.

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A recent Securities and Exchange Commission (SEC) action highlights the need for regulated entities and public companies to have in place policies to prevent insider trading and to follow such policies. In July 2011, Janney Montgomery Scott LLC (Janney), a registered broker-dealer, settled an administrative proceeding in which the SEC alleged that Janney willfully violated section 15(g) of the Securities Exchange Act of 1934 (Exchange Act), which requires registered broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by such broker-dealers and their associates.

Without admitting or denying the SEC’s findings, Janney consented to an order, pursuant to sections 15(b) and 21C of the Exchange Act, requiring Janney to pay a civil penalty of $850,000 and to retain an independent compliance consultant to review Janney’s policies and procedures and report to the SEC.

The Janney order took noticeable efforts to educate regulated and covered entities about their obligations to both maintain and enforce adequate policies and procedures to prevent misuse of material nonpublic information. As explained in the order, the SEC found that for nearly five years, Janney failed to institute and/or maintain adequate policies and procedures for its Equity Capital Markets division, creating the risk that material, nonpublic information could be used for insider trading. The SEC’s list of violations included Janney’s failure to:

- adequately monitor trading in the securities of companies to which Janney provided investment banking advice;
- maintain an adequate e-mail firewall between its investment banking and research staff;
- enforce its policies and procedures to prohibit noncompliance personnel from chaperoning meetings between investment banking and research staff;
- revise its policies and procedures to address its use of analysts in multiple roles, including working with investment bankers on business opportunities and deals; and
- enforce its policy that all Janney employees receive approval to maintain brokerage accounts at firms other than Janney.

Concerns about insider trading do not only affect registered entities such as broker-dealers and investment advisors, they also affect public companies. As a result of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITS-FEA), insider trading policies have become a mainstay of corporate compliance programs. Since the enactment of ITS-FEA, federal regulations impacting insider trading have further evolved as a result of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act. The heightened scrutiny of the insider trading landscape today compels consideration by public companies to adopt appropriate policies to prevent insider trading and to enforce compliance with these policies.

**Entity Obligations and Controlling Persons Liability**

Prior to 1984, the SEC’s remedy for insider trading violations was essentially limited to it seeking injunctions against future violations and disgorgement of ill-gotten profits (or losses avoided). With the Insider Trading Sanctions Act of 1984, Congress gave the SEC the authority to seek up to a three times civil money penalty for insider-trading violations. In 1988, in response to a wave of Wall Street insider trading scandals, Congress enacted ITSFEA, and specifically three provisions aimed at curtailing illegal insider trading.

First, Congress imposed an affirmative obligation on regulated entities (including broker-dealers and investment advisors) to adopt, maintain, and enforce policies and procedures designed to prevent insider trading. These requirements are contained in section 15(f) of the Exchange Act and section 204A of the Investment Advisors Act (Advisors Act).

Second, ITSFEA also provided that other covered entities (including public companies) may be subject to insider trading penalties for violations by persons that they have been deemed to have directly
or indirectly controlled. Control person liability would apply to an entity where it failed to carry out its express statutory obligations to enact, maintain, and enforce adequate insider trading policies and procedures. Under section 21A of the Exchange Act, in order to impose controlling person liability on an entity the SEC must prove one of two conditions:

(1) The controlling person knew or was reckless in not knowing that the controlled person was likely to engage in insider trading and failed to take appropriate steps before the violation occurred; or

(2) For brokers and investment advisors, they knowingly or recklessly failed to adopt, maintain, or enforce the policies and procedures designed to prevent insider trading under section 15(f) of the Exchange Act or Section 204A of the Advisors Act.

As a result, public companies have an affirmative obligation to develop compliance programs designed to prevent violations by controlled persons.

Third, ITSFEA expanded the definition of “controlling persons” to (1) provide an incentive for organizations to internally police potential insider trading activities among its employees, (2) impose an affirmative duty on broker-dealers and investment advisors to maintain reasonably effective written compliance programs, (3) codify a private right of action for “contemporaneous traders,” (4) increase penalties for all Exchange Act violations, and (5) permit the SEC to pay bounties to persons who provide information about inside trading.

Controlling person liability would not apply where the “controlling person acted in good faith and did not directly or indirectly induce” the violation. However, such exposure to liability would exist where a “controlling person” allows access to material non-public information (about itself or another entity) without implementing procedures to prevent insider trading or improper disclosure by the “controlled person.” Under section 15 of the Securities Act of 1933, controlling person liability will apply “unless the controlling person has no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.”

SEC Report of Investigation on RSA

The SEC previously set forth its views on insider trading policies in a Report of Investigation issued pursuant to section 21(a) of the Exchange Act (RSA Report) regarding the conduct of the Retirement Systems of Alabama (RSA). In the RSA Report, released in March 2008, the SEC discussed its investigation into whether RSA violated insider trading laws by purchasing shares of the Liberty Corporation using material, nonpublic information it had received about a prospective acquisition of Liberty by Raycom Media, Inc. RSA was involved in the discussion and negotiation of the Liberty-Raycom deal as the parent guarantor of Raycom. RSA then purchased 73,700 Liberty shares during the two weeks immediately prior to the public announcement of the transaction in August 2005. After the public announcement, the price of Liberty stock rose significantly, increasing the value of RSA’s Liberty shares by more than $700,000.

In the RSA Report, the SEC noted the following deficiencies in RSA’s compliance efforts:

- RSA’s personnel involved in the violations, including its CEO, lacked clear understanding of the securities law duties and risks implicated in the Liberty-Raycom transaction.
- Neither RSA’s in-house general counsel nor outside counsel were tasked with monitoring the company’s compliance with the securities laws, nor were they consulted before the trades, and RSA did not have a practice of seeking advice from its counsel regarding such issues.
- If RSA had a reasonable compliance program in place, it likely would not have purchased Liberty stock prior to the public announcement of the transaction.

At the time of the RSA Report, RSA had no program, policy, practice, or training to ensure that its investment staff understood and complied with federal securities laws in general or insider trading laws in particular. RSA did not have a compliance officer, and the responsibilities of its general counsel did not include oversight of RSA’s investment activities.

Ultimately, the SEC decided not to seek or to impose penalties against RSA for the following articulated reasons:

- RSA took remedial action, including compensating sellers of the Liberty stock RSA purchased;
- Any penalties imposed by the SEC would be paid from Alabama public employee contributions to the funds managed by RSA;
- RSA cooperated in the staff’s investigation;
- RSA’s CEO cooperated in the staff’s investigation, acknowledged error in directing RSA’s purchases of Liberty stock, and authorized remedial action;
- No individual profited from the stock purchases and violations; and
- RSA adopted a compliance program aimed at preventing future violations.

The SEC decided to issue the RSA Report “to emphasize the responsibilities of all investment professionals, including large public retirement systems and other public entities, under the federal securities laws and to highlight the risks of not having a compliance program.” As was demonstrated in the RSA and Janney cases, companies that fail to institute and enforce effective compliance programs expose themselves to charges for insider trading and controlling person liability.

Establishing Proper Control Procedures

In addition to concerns about stepped-up enforcement efforts, the financial crisis that closed out the last decade has particularly highlighted practices that are worth revisiting in the context of insider trading policies, including, among others, of allowing employee hedging, pledging, or short selling of company securities, or other derivative transactions that have similar effect. The financial crisis focused attention on the issues arising in conne-
tion with market products used by executives of public companies to sell their interests, and companies should revisit their compliance programs to ensure that they properly consider current investment activities of their employees. The following should be considered in properly aligning compliance programs with insider trading regulations:

**Having a Company Policy**

Companies should institute policies governing trading of their securities by officers, directors, employees, and others with inside information (insiders), targeted at preventing trades at times when insiders may be in possession of material nonpublic information. Policies and procedures are not one-size fits all and covered entities should develop individual policies and procedures that are tailored to their specific operation, industry and employee base.

**Implementing Effective Monitoring Procedures**

It is important to establish appropriate monitoring procedures that will not only serve to detect potentially problematic trades, but will also serve as a deterrent against violations of the policy and federal securities laws. Potential breach of an insider trading policy can be costly (both economically and to the reputation of the company). Ensuring that the policies are designed to promote compliance with the insider trading laws will provide greater protection from the risk of claims from regulators and private parties.

**Pre-clearance Requirements and Blackout Periods**

In order to promote greater oversight, companies should require pre-clearance of trading of company securities by appropriate insiders with a designated member of management and a trading blackout period for such insiders. This does not suggest that such pre-clearance and blackout procedures be used for all employees. Each company is different and the universe of insiders to be covered by such procedures needs to be considered on a company-by-company basis. Quarterly blackout periods should range from the time period during a quarter when results begin to be known, which can be 30 to 45 days before the end of the quarter, to one to two days after the end of the quarter. It is important for the blackout period to provide for time after the earnings are released for the news to be absorbed by the public. Instituting pre-clearance measures serves three very important purposes: (1) they provide added protection for the company against accusations that it enabled or neglected insider trading violations, (2) they provide added protection for directors and officers of the company against claims of insider trading by lessening the likelihood of inadvertent insider trading, and (3) they allow the company access to real time information on the trading activities of its officers and directors, which fosters better compliance with Form 4 (Beneficial Ownership) reporting.

For ongoing monitoring, companies with existing pre-clearance requirements should evaluate whether additional officers or employees should be covered by their pre-clearance requirements and blackout periods in light of their potential direct or indirect access to material nonpublic information. In addition, for companies undergoing specific events (i.e., the consideration of major strategic decisions, customer acquisitions, government investigations, etc.), adopting specific procedures and blackout periods for those employees and insiders involved with or having knowledge of such events should be considered. All pre-clearance policies should make clear that the imposition of any special blackout period or the fact that any intended trade has been denied pre-clearance should itself be treated as confidential information, and should only be disclosed to those persons with a need to know such information.

Additionally, all insiders should be cautioned that even if there is no blackout in place that they cannot trade if they possess any material nonpublic information.

**Consultants, Contractors, and Other Outside Resources**

Such companies and individuals retained by a public company for their specialized expertise should be considered as market professionals who should adhere to the company’s policies and procedures governing insider trading. Public companies should ensure that their policies and procedures address how to maintain the confidentiality of material non-public information that they shares with their consultants and contractors. In appropriate situations, companies should have such outsiders represent that they have their own insider trading policies.

**Protecting Confidential Information**

Nonpublic information should be narrowly disseminated to employees on a need to know basis. It is important to educate insiders on the nature and scope of insider trading regulations and their obligations to uphold company policies and procedures for handling and maintaining the confidentiality of any material nonpublic information.

**Sharing Information About and Trading in Securities of Other Companies**

Employees should be advised through the company’s code of conduct and policies that they should not trade in the securities of other companies based on information learned while working at the company or derived from their course of dealings with those third-party companies.

**Training and Awareness**

It is important for employees to understand the significant ramifications that can result from using or disclosing material nonpublic information to anyone (including co-workers, family members, or others). Companies should conduct training programs regarding their insider trading policies periodically with employees for ongoing monitoring and updating, and effectively communicating any updates to these policies to their employees. Training and awareness programs should also effectively communicate the consequences that the employee and the company could face for violations of insider trading regulations.

**Pledging, Hedging, Short Sales, and Other Similar Activities**

SEC rules have required that companies disclose pledging arrangements by...
management in their annual proxies. Additionally, the Dodd-Frank Act requires the SEC to adopt rules requiring companies to provide additional disclosures regarding employee and director hedging arrangements. The SEC has not yet issued such rules, but they are required to mandate disclosure as to whether or not employees or board members are permitted to engage in hedging transactions regarding their holdings of company securities. As a result of what will be new disclosure requirements, companies should consider adopting policies or adding provisions to existing insider trading policies that cover these types of transactions as well as procedures for disclosing such arrangements in their proxy, including: (1) prohibiting hedging transactions for employees and directors; (2) subjecting hedging transactions to a pre-approval process; or (3) restricting the types of hedging transactions that may be undertaken.

**Rule 10b5-1 Plans**
Companies should encourage insiders who wish to sell company stock to institute Rule 10b5-1 plans as a complement to the company’s insider trading policies, which permit insiders to achieve liquidity for their stock positions in an orderly and controlled manner, while providing a safe harbor to the individual from insider trading violations. Rule 10b5-1 trading plans, when properly adopted, have become an effective means for insiders to continue to trade in their company’s securities even when they are aware of material non-public information and even during a blackout period. An effective insider trading policy should specifically acknowledge the use of Rule 10b5-1 plans as an exception to the general prohibitions on trading while in possession of material non-public information. Companies can institute separate procedures or incorporate procedures for Rule 10b5-1 plans into their existing insider trading policy. Parameters for Rule 10b5-1 plans should consider: (1) specifying when a plan may be entered into (e.g., outside of a blackout period); (2) pre-approval procedures for the plan; (3) a cooling-off period before the first trade under a Rule 10b5-1 plan is permitted; (4) restrictions on termination of, and the entry into successive plans; (5) limitations on modifications to plans, (e.g., mandatory waiting periods before modifications can take effect); and (6) the disclosure of the entry into Rule 10b5-1 plans.

**Conclusion**
A well-designed and properly implemented insider trading policy creates an effective prophylactic against inadvertent insider trading, and provides a mechanism for a company to demonstrate that appropriate steps have been taken to prevent insider trading violations, and to assert a defense against “controlling person” liability for trades made by its insiders under the Exchange Act.

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Do Web-based Terms of Sale Work?  
Only through Incorporation by Reference

By Raymond P. Kolak and Ryan D. Strohmeier

Clients use their websites to tell the world about their products and services, and what used to be printed on paper now exists only in electronic form. This also applies to the contracts of clients, such as their terms of sale. A business lawyer would ask if those terms of sale are legally enforceable against the world if they were simply posted on the client’s website.

The answer is not as simple as it may seem. Enforceability will always depend on the facts, the parties, and the jurisdiction examining the question. However, as technology develops and businesses and customers find innovative ways to contract, both on paper and electronically, new lines of case law are emerging, combining technical realities and traditional contract principles, which instruct the practitioner how to incorporate web-based terms of sale by reference into a client’s contracts.

The terms of sale under which goods or services are sold are critical to both seller and buyer. The terms of sale set forth the contract rules, for example, relating to methods for acceptance of the offer, price, payment, delivery, risk of loss, credit and collection, warranty, limitations on liability, indemnification, choice of term, choice of venue, period for making claims, and so forth. A well drafted set of terms of sale should be customized for the client’s situation and the interests of the client that need legal protection.

A decade or so ago, the terms of sale always appeared on paper—somewhere. Usually, they were printed, in small font, grayed-out, on the reverse side of the seller’s order acknowledgement or invoice form. Sometimes, they were a five-page appendix stapled to the contract for services. Today, though, it is possible to simply post the terms of sale on the client’s website.

Posting terms of sale on the client’s website has several advantages. For example, doing so allows for universal accessibility by the client’s customers. This is certainly true if the client sells only business-to-business, since virtually all businesses can be expected to have web access, and over time will also apply to individual consumers. Also, a client may not desire—or even be able—to print order acknowledgments or invoices with an extensive listing of the terms of sale on the reverse side. This may be especially difficult for a client whose orders come in via e-mail, PDF, or electronic data interchange. For clients who sell only through their website, the only option is to post the terms of sale there. Finally, posting the terms on the client’s website might allow the client to change the terms of sale as needed in the future for either current or future customers. This idea makes too much sense to ignore. This article seeks to determine the best ways that it can be done.

Are Web-based Terms Enforceable?  
As website-based contract terms are a specifically modern development, case law has only begun to address the issue of their enforceability and application. The first situations addressed by courts were those in which contract terms were posted on a seller’s website, but without explicit reference to the terms within the contract itself. Is it enough for a client to post its terms of sale on its website, without more? Does doing so make them automatically binding on anyone buying the client’s goods or services?

The answer is no. In E.J. Rogers, Inc. v. UPS, 338 F. Supp. 2d 935 (S. D. Ind. 2004), a customer sought to ship a loose diamond via UPS. When UPS lost the package, it refused to reimburse the customer based on a tariff containing terms of service which stated that UPS would not be liable for any packages containing articles of “unusual value,” such as precious stones. The tariff had been posted on the UPS website, but no reference to it was included in the paper airbill received by the customer. The court held that the terms of the tariff were not enforceable because there was no reference in the airbill to the tariff or any other documents. In the end, the lesson from E.J. Rogers is that some reference must be in the contract that the customer actually sees. Is it enough for a client to post its terms of sale on its website, without reference to the terms within the contract?

How Much of a Reference is Needed?  
In Manasher v. NECC, 2007 WL 2713845 (E. D. Mich. 2007), a telecommunications service provider sought to enforce an arbitration provision contained in a “discl-
sure and liabilities” agreement, which was posted on the web. The reference to the agreement on the paper invoice stated the following:

NECC’s Agreement “Disclosure and Liabilities” can be found on-line @ www.necc.us or you could request a copy by calling us at (800) 766-2642

The Manasher court held that the disclosure and liabilities agreement was not enforceable because the clause in the paper invoice did not indicate a clear intent that the provisions would be considered part of the agreement between the parties. The court explained that there was no explicit indication that the disclosure and liabilities agreement applied to the service contract between the parties. Also, there was no indication that the parties intended it to be incorporated into the agreement. Cases like Manasher instruct that the plain text of the contract must do more than simply state the existence and location of similar “disclosure and liabilities” sections intended to be incorporated by the sellers. Rather, the reference in the contract must clearly show that both parties intend to be bound by the web-based terms.

In Affinity Internet, Inc., v. Consolidated Credit Counseling Services, Inc., 920 So.2d 1286 (Fla. Dist. Ct. App. 2006), an arbitration clause contained among a list of terms of sale posted on a website was not enforced when the paper contract stated this:

This contract is subject to all of SkyNetWEB’s terms, conditions, user and acceptable use policies located at http://www.skynetweb.com/company/legal/legal.php.

Surprisingly, even the statement that the contract was “subject to” web-based terms was insufficient to bind a customer to the terms of sale. The Affinity Internet court, in reaching its decision, said that no clear language was present evidencing an intention by the parties to incorporate the website terms, despite the “subject to” language used. In addition, the court considered that the customer was not given a paper copy of the website terms and that the terms were not attached to the paper contract. For successful incorporation of web-based terms, a paper contract has to both sufficiently describe what is to be incorporated as well as express the parties’ intent to be bound by it.

A Formula for Enforceability?
In seeking a formula that makes web-based contract terms enforceable, begin with basic contract law principles. According to the Restatement (Second) of Contracts, a contract may consist of several writings if one of the writings is signed and the writings clearly indicate that they relate to the same transaction. (Restatement (Second) of Contracts §132 (1981)). The comments to this section indicate that explicit “incorporation by reference” is not necessary, but if the connection is dependent on external evidence, the evidence of the connection must be clear and convincing. Due to the relative difficulty of establishing clear and convincing evidence of a connection from external evidence, the clearest path to enforceability is the “incorporation by reference” doctrine.

Most attorneys are familiar with the incorporation by reference doctrine, and there is case law from virtually every state upholding its application. It is often used, and in many different legal contexts. Perhaps the most familiar is the incorporation by reference treatment afforded American Institute of Architects Form A201, General Conditions of the Contract for Construction. This form, which is not even meant to be signed, is made legally binding on owner and contractor by incorporating it by reference in the dozen or so AIA construction contract forms that are signed by owner and contractor.

Signed Contracts
The clearest cases for enforcing website terms of sale are those with a signed paper contract. In International Star Registry of Illinois v. Omnipoint Marketing, LLC, 2006 WL 2598056 (N. D. Ill. 2006), the disputed paper contract stated:

. . . by my signature below, I certify that I have read and agree to the provisions set forth in this invoice and to the terms and conditions posted at http://www.omnipoint.marketing.com/genterm.html.

The court found a choice of venue clause in the website’s terms of sale to be enforceable. The clause was contained in a page displaying three hyperlinks, all of which were found by the court to be incorporated by reference. The court found these to be enforceable because the external documents were described with the requisite specificity, and the parties’ intent to be bound by the terms was clearly expressed.

Clickwrap Agreements
Clickwrap agreements are those in which a customer must evidence affirmative assent to viewable contract terms in order to gain access to a licensed product, typically through the use of “Agree” and “Disagree” buttons. In Hugger-Mugger, L.L.C. v. Netsuite, Inc., 2005 WL 2206128 (D. Utah 2005), the court held a customer to be bound to a choice of venue clause contained in web-based terms of service by affirmatively agreeing to exactly this type of clickwrap agreement. The agreement in dispute stated:

. . . In consideration of the license fee paid by Customer [Hugger-Mugger] and subject to the terms of this agreement and the Terms of Service posted at www.netsuite.com, or successor Website, Netsuite grants Customer . . . a . . . license . . .

This Agreement and Incorporated Terms of Service represent the entire agreement of the parties and may not be modified unless expressly agreed to in writing by both parties.

The court noted, in addition, that whether the customer actually read the terms was irrelevant. Later courts have reinforced the binding quality of terms of sale incorporated by clickwrap agreements. In Appliance Zone, LLC v. Nextag, Inc., an online merchant using an online registration process selected a box stating “I accept the Nextag Terms of Service” by clicking that box on the web page next to a hypertext link to the terms. 2009 U.S.
It is possible to bind a customer to incorporated terms of sale through notification from other sources, such as a telephone conversation. In Greer v. 1-800-Flowers.com, Inc., 2007 WL 3102178 (S. D. Tex. 2007), a customer placed a telephone order for flowers for his girlfriend, at which time he inquired about the company’s privacy policy. Privacy seemed important to this customer. The vendor directed the customer to the company’s website, which stated:

Privacy Policy is part of the Terms of Use, which governs your use of 1-800-Flowers.com.

The girlfriend received the flowers. Shortly afterward, 1-800-Flowers, attempting to show good customer service, sent a thank-you-for-ordering note for the flowers to the customer’s wife. The customer sued for a violation of the privacy policy. The court held that a choice of venue clause, which was contained in the terms of use, was enforceable against the customer. Since the customer sued under the web-based privacy policy, this meant the customer was bound by the broader terms of use, of which the privacy policy was but one part, even if the customer had not even read the terms of use, or in fact even visited the website at all.

Incorporation of web-based terms will not be effective unless there is proof of direct affirmative assent. In Feldman v. UPS, 2008 WL 800989 (S. D. N. Y. 2008), the shipper of a diamond ring was forced to print his own shipping label on a computer at the UPS store. There was proof that the customer clicked a “Print” button, but not an “Agree” button. The court ruled there was a triable dispute as to whether the customer had been given adequate notice of the UPS tariff limited the company’s liability, since there was no proof that the tariff was accessible on the UPS computer or present at the store in paper form.

Website Changes
Web-based terms of sale can be changed by a seller with a single mouse click. If a seller does so, are all of its customers bound to the new terms? In Douglas v.

United States District Court for the Central District of California, 495 F.3d 1062 (9th Cir. 2007), a customer alleged that his phone provider had changed the terms of his service contract without notifying him. The provider countered that it had posted the changed terms on its website. The court held that the mere posting of revised terms on the company website was insufficient notice. The court distinguished the situation from other cases in which service providers had notified customers of changes to web-based terms of service by written notice. In contrast, in Conference America, the court noted that where a series of unilateral contracts existed, the terms of service present on the website at the time services were rendered were the only relevant terms; anything posted prior was irrelevant. Thus, the service provider in Conference America could change the terms of sale, and enforce the changed terms on future sales of services.

Changing web-based terms of sale can become complicated. Clients who seek to change the terms must retain a record of the terms that were posted at their website at the time of execution of any contract. In addition, having a separate URL for each successive amended terms of sale, or coding the website to allow a user to reference a complete set of terms by particular date, would lead to a multitude of forms, seemingly undermining the entire purpose of having a standard contract form in the first place. If a client is seeking to alter its terms of sale of sales on a regular basis, it may not be feasible for the terms of sale to be solely web-based.

How to Do It
In summary, there are several things to remember in seeking to make terms of sale posted on a client’s website enforceable. First, the contract should make a specific reference to the terms of sale in the contract document itself. If possible, it is always helpful to obtain either a manual signature or to obtain customer consent by using a clickwrap-style “I Agree” button. Also, it is vital to state that the terms of sale are “incorporated by this reference and made a part of the agreement between the parties.” Finally, remember that it is...
insufficient to simply refer to the terms of sale, or just provide the website reference, or even to make the transaction “subject to” the terms of sale.

Here is a sample clause applying the preceding principles:

This sale is subject to the Client Products, Inc. Terms of Sale effective on the date the purchase order is received, which are incorporated in full by this reference. The Terms of Sale are available at www.client.com/terms, and also will be sent by mail or fax to the purchaser upon request. Client Products, Inc. limits acceptance to the Terms of Sale, and objects to any other additional or different terms in the purchaser’s purchase order or acceptance.

Here are two final cautions to consider. First, some clients may not want their terms of sale to be disclosed to all the world. For example, a client may include pricing formulas or special warranties in a set of terms of sale, which are to be made available to certain customers but not to others, and certainly not to its competitors. Second, since courts will examine the parties’ notice of the terms of sale and intent to be bound, conclusions on the enforceability of web-based terms of sale are less certain when applied to sale of consumer goods or services, as opposed to a business-to-business sale. In a business-to-business sale, it can be presumed that the purchasing business has a computer with web access to view the terms of sale. According to recent surveys, however, only about 60 percent of the American public has usable access to the web. Several of the cases cited in this article enforce website terms of sale against consumers. But suppose a court were asked to enforce a warranty disclaimer posted on a website for a consumer product like, for example, oven cleaner, against a poor person who could not afford a computer. If the injured consumer lacked web access, it is unlikely that a court would enforce the disclaimer.

**Conclusion**

A client can post its terms of sale on its website and make them enforceable using the traditional contract doctrine of incorporation by reference, so long as it is tailored to the medium of the contract, be it on paper or electronic. The key issue is whether the customer received adequate notice of the existence or changes of the terms.

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Keeping Current: Fiduciary Duties
Renouncing the Corporate Opportunity Doctrine

By Stuart L. Pachman

New Jersey amended its Business Corporation Act on March 1, 2011, to grant New Jersey corporations the power to renounce the corporate opportunity doctrine. In 2000, the General Corporation Law of the State of Delaware had been amended to the same effect. Renunciation may be accomplished either by a provision in the certificate of incorporation (charter) or simply by action of the corporation’s board. Why has this power been afforded? Should it be available to all corporations, or only to some or not at all? And what issues might be inherent in its exercise?

The corporate opportunity doctrine embodies one of the fiduciary duties owed by directors and officers (and sometimes shareholders) to their corporation. It is a duty of disclosure under the concept of duty of loyalty. Although the doctrine itself requires a fact intensive analysis, the theory behind it is simple. The corporation can act only through its human agents. When an opportunity within the corporation’s line of business, or its reasonable expansion or expectancy, comes to an agent’s attention, the agent must afford the corporation first crack at it. For example, if a corporation is in the business of buying and selling real estate, and its president (or a director or perhaps a major shareholder) learns of a tract of land that can be bought for a song and flipped at a profit, it is incumbent on the agent to disclose to the corporation the possibility of cashing in on this fantastic opportunity. If the corporation declines, perhaps because the transaction may be viewed by its board as more risky than fantastic, the agent may then seize it personally for better or worse.

What prompted New Jersey and Delaware to amend their corporate statutes to authorize the renunciation of this protective doctrine? The statement annexed to the New Jersey bill describes the doctrine “as a disincentive . . . to attract and retain businesspersons as board members.” It also suggests the doctrine is subject to “uncertainty” as to what is to be considered as an “opportunity.” As to the latter, there is no doubt. The doctrine’s applicability, other than in extreme cases, is often open to question.

As a practical matter, renunciation offers a method for corporations in need of financing to satisfy the requirement imposed by potential sources that wish to place a representative on the board. The doctrine might also be renounced when an established strategic entity looks to acquire an interest in a fledgling “New Corp” or in a vendor, either of which may be seeking fresh capital or a relationship. Renouncing the doctrine avoids the conflict and substantially reduces the risk attendant upon not offering first to the corporation an opportunity that may be desired by the financing source or the outside investor.

Renunciation may also prove useful in the small entity whose principals prefer operating in the corporate form rather than as a limited liability company. Thus if Mary, Mo, and Jack as the three shareholders of MMJ, Inc., each have individual aspirations to pursue other endeavors, they might wish to renounce the corporate opportunity doctrine. This would be consistent with the principle of freedom of contract inherent in limited liability company law where operating agreements often provide that members may pursue individual opportunities without first offering them to the LLC or to each other.

When a corporation is considering renouncing the doctrine, counsel should air its pros and cons with the board and, where reasonable, with the shareholders as well because, as with all things legal, there is the potential for abuse. We might envision a shareholder-director in a closely held corporation who fails to comprehend the consequences of a renunciation resolution. In a corporation where shares are more widely held, directors could adopt a renouncing resolution without the shareholder body being aware of it. The directors might be acting in the corporation’s best interest to make the company, as it grows, more attractive to knowledgeable businesspersons to sit on the board, but if the resolution were adopted after, rather than before an opportunity arose, the resolution could be questioned.

Drafting the resolution or the provision in a new certificate of incorporation or its amendment requires thought. Resolving to “renounce the corporate opportunity doctrine” may be too simple. Both the New Jersey and Delaware statutes speak...
of “specified business opportunities or specified classes or categories of business opportunities.” Consideration also should be given to whether renunciation is to apply only to directors or to extend to officers or officers and shareholders.

Unanswered is how renunciation will affect creditors. Common law teaches that the corporate opportunity doctrine does not apply to a solvent corporation where the opportunity is taken by the sole shareholder or by all shareholders because consent or ratification binds them and their entity. If an opportunity knocks at a time that the corporation is insolvent and fiduciary duties are owed to creditors, would a preexisting renunciation bind them? Would a provision in the charter, rather than a director’s resolution, be more binding on creditors? It will be interesting to see what case law develops to answer these questions, and whether more jurisdictions will add to the powers of their corporations the ability to renounce the corporate opportunity doctrine.

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Each year, thousands of people flee persecution in their home countries and seek protection in the United States in the form of asylum. Applying for asylum in the United States requires an understanding of the laws of our country and familiarity with our legal procedures. Most applicants for asylum are financially strained and woefully unequipped to effectively represent themselves, making the need for pro bono representation in the field of asylum law especially crucial.

At major law firms, where practices are generally divided into either transactional or litigation groups, conventional wisdom holds that the work of representing asylum-seekers is best suited for litigators. After all, representing an asylum-seeker often involves traditional litigation skills, such as arguing a case in front of an adjudicator, writing a legal brief, and preparing a witness to testify.

However, there is much to be said about the unique skills developed by attorneys practicing in the transactional field that can be applied to pro bono work in asylum law. Such skills can render a transactional attorney uniquely well-positioned to serve as an outstanding advocate for an asylum-seeker, for whom legal representation could mean the difference between being allowed to live safely in this country or being returned to the arms of persecutors.

To be sure, there are certain skills that attorneys develop in either a transactional or litigation practice—including empathy, intellectual curiosity, excellent listening skills, integrity, and a devotion to high quality work product—that are essential when representing asylum-seekers. Nonetheless, the nature of work in a transactional field provides special training for several important characteristics, as discussed below.

**Attention to Detail**

We transactional attorneys are the detail attorneys. We are trained to find the single item of concern in the far corner of a page buried in a stack of agreements, and to know quickly how to make connections within seemingly distant aspects of a financing. Our eyes are sharp, and so is our passion for finding even the most insignificant of discrepancies, knowing that such may be the most vital aspect of a transaction.

This skill is a true advantage in asylum work. Because a case depends largely on an adjudicator’s determination of the applicant’s credibility, completing an application for asylum requires careful attention to detail. In determining credibility, immigration judges consider, among other things, the consistency between an applicant’s written or oral statements, the internal consistency of such statements, as well as any inaccuracies or falsehoods contained in the applicant’s statements, whether or not material to the asylum claim. So, while seemingly minor details of an application—for example, names of towns or approximate dates of events—may not be material to the specific events of an asylum-seeker’s persecution, any discrepancy has the potential to lead to a finding of non-credibility, and, in turn, to a denial of an asylum claim. Having an attorney with a keen appreciation for detail—who looks carefully over an application, as well as between the application, the written affidavit and the various supporting documents—can better ensure an applicant is presenting an accurate and consistent narrative in a way that will avoid an application being denied for otherwise insignificant reasons.

**Cultural Understanding**

In the increasingly global market place, more and more of our transactional representations require us to think and act across borders. As our clients and financial markets cross borders, transactional attorneys are increasingly gaining experience interacting and negotiating with clients and attorneys from across the globe. Law firms are also merging internationally, giving transactional attorneys more routine cross-cultural interaction. As a result, transactional attorneys today are developing a sensitivity to cultural, religious, and other differences, in a way that our colleagues in the litigation field may not.

Such expertise is precisely the type of skill that can have a positive impact in a pro bono asylum case. Asylum-seekers do not come to the United States from
developed relationships with individuals attorneys in educational law may have journalists fleeing their countries because kidneys in media law might find that their much better access. Transactional attor-

while a transactional attorney may have assistance of potential expert witnesses, asylum-seeker to identify and obtain the times, it can be especially difficult for an

ity to an asylum-seeker’s testimony. Often can help bring an added layer of credibil-

eances can have an immeasurable impact on the outcome of a case.

Access to Business Expertise
In most transactional practices, attorneys work with clients over a long period of time. Our clients are in the world of business, and often have bodies of knowledge and expertise that can be put to excellent use in asylum cases. While relationships between attorneys and clients in the litigation realm may typically last only a brief amount of time, relationships in the transactional field are relatively longer-lasting. Especially at large law firms, clients in the transactional realm come to us for repeated transactions, and seek us out in between transactions as issues require attention.

The relationships we develop with business professionals can be of special use in an asylum case. Most observers agree that one of the most critical elements in a case can be identifying an expert witness who can help bring an added layer of credibility to an asylum-seeker’s testimony. Often times, it can be especially difficult for an asylum-seeker to identify and obtain the assistance of potential expert witnesses, while a transactional attorney may have much better access. Transactional attorneys in media law might find that their media clients can serve as excellent resources when taking on pro bono cases for journalists fleeing their countries because of their political opinions. Transactional attorneys in educational law may have developed relationships with individuals at universities, including professors and researchers, who could serve, or readily identify colleagues to serve, as expert witnesses in a variety of cases. In my field of public finance, many of my clients are hospitals. Many of my pro bono cases have involved instances of past physical abuse for which a medical evaluation was helpful in documenting past persecution. Several of my past pro bono clients have demonstrated symptoms of post traumatic stress disorder, for whom receiving professional mental health services has been critical. I have found that my relationships with transactional clients have helped me to identify medical professionals who can offer advice and support, including in the form of written affidavits or oral testimo-

ny. Such relationships can certainly make a difference, by providing corroborating for an asylum-seeker’s narrative and by providing victims of abuse with the treat-

ment they desperately need.

The need for the services of pro bono attorneys in the field of asylum law is great, and such need cannot be met by our colleagues in the litigation field alone. Unlike the criminal justice system, there are no provisions made by the government to provide asylum-seekers with legal representation. Even in removal proceedings, which are held before an immigration judge, the Immigration and Nationality Act states that asylum-seekers may be represented by counsel but that such representation shall be at no expense to the government. Not surprisingly, the U.S. Department of Justice’s Executive Office for Immigration Review, which has oversight of the immigration court system, has stated that the large number of asylum-seekers appearing pro se is of great concern. In 2010, 57 percent of cases in immigration court were pro se, and in 2009, 60 percent of cases were pro se. Studies have found that having representation in court is the single most important factor affecting the outcome of the asylum-seeker’s case. Indeed, one recent study found that from January 2000 through August 2004, asylum-seekers with representation were granted asylum at a rate of 45.6 percent, compared with only 16.3 percent for pro se asylum-seek-

ers over the same period.

Even for transactional attorneys worried about extending their pro bono practices outside of their transactional field, odds are they would ultimately feel satisfied with their pro bono representation of asylum-seekers. A 2009 report from the ABA on pro bono work looked in part at the types of pro bono engagements that attorneys take on. (Supporting Justice II: A Report on the Pro Bono Work of America’s Lawyers (2009).) The ABA found that while about 80 percent of pro bono attorneys carried out their represent-

ation in an area within the scope of their regular practice, only 27 percent of the attorneys who practiced in pro bono outside of their field of expertise indicated that such representation caused them any concern. This should provide comfort for transactional attorneys looking to step outside of their day-to-day practice and take on the challenge of representing an asylum-seeker.

So clearly there is a place for transac-

tional attorneys to make a difference. With the unique talents and experiences that come from transactional work, transac-
tional attorneys are well-positioned to make excellent and needed contributions to the field. The work of a pro bono attorney can truly make a life-altering difference for someone in need.

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Published in Business Law Today, October 2011. © 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
Ward Classen’s new edition of the ABA’s A Practical Guide to Software Licensing for Licensees and Licensors does an excellent job of capturing and explaining the practical concerns facing counsel supporting organizations that create, license, and use software. Its thorough analysis of the myriad aspects of software licensing gives all the essential background for practitioners who need to understand why software license agreements take the form they do. It also addresses new (and sometimes re-labeled) developments, such as open source, cloud computing, and privacy and data security issues, that are at the top of mind for deals in the second decade of the twenty-first century. This book and its associated forms should be in every practitioner’s library.

The book is organized in a straightforward and easy to access manner. For example, a chapter on the negotiation process lays out the typical RFI/RFP (Request for Information/Request for Proposal) process, providing good advice to both provider and customer. Issues are presented from the perspective of both the licensor and licensee, and all differences are reasonably explained. Frequent citation to relevant U.S. case law, statutes, and commentary helps the reader to follow up as necessary.

The 100-page chapter on grant of license is essential reading for any practitioner representing a company that is considering developing or licensing software. For example, the discussion of limitation of liability captures all the nuances of this critical component of the licensing transaction, reviewing in detail issues of consequential, direct, deemed direct, indirect, special and punitive damages, the relationship between limitation of liability and indemnity, the various exceptions to the limitation clause, and potential compromise positions.

But the grant of license chapter is not everything. In a chapter titled “Other Important Issues,” the book covers issues such as ownership and work-for-hire, statements of work, functional and technical specifications, change control, audit and compliance assurance, service level agreements, business continuity, antitrust, guarantees and performance bonds, and the differences between “best efforts,” “reasonable efforts,” and the choices in between.

This new edition addresses many new developments. The discussion of cloud computing is well presented, with an emphasis on the “software as a service” (SaaS) services model. Open source software licenses are explained, but the specifics of available open software licenses are not covered in detail. Chapter 10 covers privacy and data security issues, but almost entirely from a U.S. perspective. Understandably, very complicated international cross-border transactions require more international perspective than this book can provide.

Chapters 16 and 17, titled “When Problems Arise” and “Bankruptcy,” are important reading to undertake before drafting and negotiating the contract, since the cases illustrate the importance of good contract drafting for these agreements. Many software development and licensing transactions run aground for any number of reasons. Experienced counsel for providers will almost always be well-versed in the issues of maintaining attorney-client privilege, the use of alternative dispute resolution, how to document disputes, and various settlement techniques, covered by the book. Counsel for customers need to become knowledgeable on all these topics, and this book gives an excellent introduction on how to prepare a customer claim, if and when it comes to that.

An important element of this work is the Model Forms, most of which are available in print, and all of which are included in the accompanying CD-ROM. Over 100 forms of agreements, policies, and checklists give a broad array of starting points for the drafting of practically everything one would have to draft to support software development projects and multiple
software licensing structures. Form 23.B.1 is a 150-page annotated form for a generic software license and services agreement. The annotations are excellent, and well summarize the likely trajectory of the potential negotiation of the clause.

A well-constructed clause library posits clauses that are provider-friendly, customer-friendly, or neutral, as well as commentary that, as in the annotated form, tracks the likely negotiation path in the event a one-sided clause is used and the other side is knowledgeable about the risks. As such, the commentary provides valuable direction for practitioners who have not had a great deal of experience negotiating these agreements. Even for those who are very experienced, the commentary is a good source of training for associates and junior attorneys supporting them.

A caveat is necessary that applies to all forms books. Do not use the forms without understanding the elements of the deal your client intends to negotiate. Rather, pick and choose among the forms, clauses, and checklists to construct the agreement that is right for you. *A Practical Guide to Software Licensing for Licensees and Licensors* has good explanations of the key issues which need to be addressed, so do not simply copy a form. Read the commentary and annotations and structure the agreement accordingly.

Over all, the most important attribute of *A Practical Guide to Software Licensing for Licensees and Licensors* is, as its title proclaims, its practicality. In his forward, Ward Classen writes that he sought to summarize his “practical licensing experiences over 25 years.” He has created a work that clearly and concisely presents almost all of the issues facing a software licensing attorney, and how they will be addressed and negotiated by the knowledgeable provider and customer. It is a well written and well organized tool for everyday use.

Julian S. Millstein is an attorney who provides neutral ADR services, expert services, and legal consulting. He has over 30 years of experience representing providers and customers in the negotiation of IT, software, outsourcing, and e-Commerce transactions, and litigation of claims arising from those agreements.