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GENERAL COUNSEL  
2020 JAN 27 PM 2:24**VIA EMAIL AND**  
**HAND-DELIVERY VIA MESSENGER**Jeff S. Jordan  
Assistant General Counsel  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463**Re: MURs 7668 & 7669 (Bloomberg L.P., Bloomberg News, John Micklethwait, Michael R. Bloomberg, and Mike Bloomberg 2020, Inc. and Hayden Horowitz in his official capacity as treasurer)**

Dear Mr. Jordan:

This letter is submitted on behalf of the above-named respondents in response to complaints filed with the Federal Election Commission ("Commission") by the Republican National Lawyers Association (MUR 7668) and the Media Research Center (MUR 7669) (collectively, "Complainants").

Complainants allege that the costs incurred by Bloomberg News in covering the 2020 presidential election are prohibited in-kind contributions to its majority stakeholder and Democratic candidate for president, Michael R. Bloomberg, and that the exemption for candidate-owned media does not apply because Bloomberg News does not "give reasonably equal coverage to all opposing candidates."

Complainants do not dispute, however, that Mr. Bloomberg and his rivals in the Democratic primaries are being covered in the same manner. Their much narrower and novel argument is that Bloomberg News is not entitled to the media exemption because it will refrain from investigating Mr. Bloomberg's rivals in the Democratic primaries, just as it has traditionally refrained from investigating Mr. Bloomberg and his family, while continuing to investigate the Trump Administration. But because President Trump, as a Republican candidate for president, is not an "opposing candidate" of Mr. Bloomberg during the Democratic primaries, the ways in which Bloomberg News is covering the White House and the Democratic presidential race fall squarely within the media exemption. Coverage of the Trump Administration as the government of the day also is not a contribution or expenditure because covering public officials and the activities of government is not for the purpose of influencing a federal election.

Additionally, in applying the media exemption, the Commission has consistently avoided content-based distinctions or intrusions into editorial decision-making, which would violate First

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Amendment rights. Complainants would have the Commission subvert this practice, subjecting Bloomberg News to regulation simply because of the manner it has chosen to report on candidates in the 2020 presidential campaign and its decision to continue covering the current Administration. Such an application of the media exemption would be plainly unconstitutional.

For these reasons, the complaints should be dismissed.

## **I. Factual Background**

Bloomberg News is a fully-accredited global news service with more than 2,400 journalists in over 150 bureaus across more than 70 countries.<sup>1</sup> Bloomberg News delivers over 5,000 stories a day to more than 80 million consumers through an international network of print, television, radio, and digital media.<sup>2</sup> Bloomberg News publishes both its own stories as well as those from other news organizations. The Commission has previously recognized Bloomberg News (then known as Bloomberg Business News) as a press entity within the meaning of the Act.<sup>3</sup> Bloomberg News is a division of Bloomberg L.P., a limited partnership, whose incorporated general partner is Bloomberg, Inc. Bloomberg L.P. was co-founded by Mr. Bloomberg, who owns a majority stake in the company.

On November 21, 2019, Mr. Bloomberg filed a Statement of Candidacy with the Commission as a Democratic candidate for president. Following the formal announcement of his candidacy three days later, Bloomberg News Editor-in-Chief John Micklethwait sent a memo to staff announcing “basic principles” for covering the campaign and the Administration and certain organizational changes. Specifically, Mr. Micklethwait announced that Bloomberg News is suspending the editorial board of Bloomberg Opinion, the institution’s editorial division, and will publish no unsigned editorials. On the news side, the organization will continue to write about “virtually all aspects of this presidential contest in much the same way as we have done so far,” carrying polls, interviewing candidates, tracking who is winning and losing, and analyzing the candidates’ policies.<sup>4</sup> The memo noted that these changes “cover[] the vast majority of what this newsroom does.”<sup>5</sup> At the same time, Mr. Micklethwait acknowledged that Bloomberg News “cannot treat Mike’s Democratic competitors different from him” so will extend to them and their families its long-standing policy of not investigating Mr. Bloomberg or his family.

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<sup>1</sup> News, BLOOMBERG.COM, [bloomberg.com/distribution/products/news](https://www.bloomberg.com/distribution/products/news).

<sup>2</sup> *Bloomberg Impact Report 2018*, BLOOMBERG L.P. (2019), <https://data.bloomberglp.com/company/sites/48/2019/04/Impact-Report-WEB.pdf>.

<sup>3</sup> FEC Advisory Op. 1996-16 (Bloomberg).

<sup>4</sup> See Ex. A, Letter from John Micklethwait, Editor-in-Chief, Bloomberg News to Bloomberg News Staff (Nov. 24, 2019) (“We will describe who is winning and who is losing. We will look at policies and their consequences. We will carry polls, we will interview candidates and we will track their campaigns”) (*hereinafter* “*Micklethwait Memo*”).

<sup>5</sup> *Id.*

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Bloomberg News will still summarize or publish investigative pieces on the candidates – including Mr. Bloomberg – conducted by other media organizations. The memo added that Bloomberg News would “continue to investigate the Trump administration, as the government of the day,” a policy the organization would reassess if Mr. Bloomberg becomes the Democratic nominee.

## **II. Bloomberg News’s Coverage of the 2020 Presidential Election Falls Squarely within the Media Exemption**

Under the Federal Election Campaign Act (the “Act”) and Commission regulations, any spending for the purpose of influencing a federal election is considered an “expenditure.”<sup>6</sup> Further, anything of value given to a candidate for the purpose of influencing an election, including any expenditure made in coordination with a candidate, is considered a “contribution” to the candidate.<sup>7</sup> Corporations and limited partnerships with an incorporated general partner are prohibited from making any contribution to a federal candidate.<sup>8</sup>

Notwithstanding this general rule, the Act and Commission regulations provide that costs incurred to cover or carry any news story, commentary, or editorial are not contributions or expenditures for media outlets that are not owned or controlled by a political party, political committee, or candidate.<sup>9</sup> For media outlets owned or controlled by a candidate, Commission regulations provide that the costs of “bona fide news” coverage are not expenditures or contributions so long as they are part of a “general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates”.<sup>10</sup>

### **A. Complainants Fail to Point to Any Reporting Falling Outside the Media Exemption**

Complainants do not challenge any reporting by Bloomberg News on the basis that it is not “bona fide news,” or point to any reporting that shows a lack of “reasonably equal coverage to all opposing candidates.” Instead, the complaints rest on Mr. Micklethwait’s announcement of the “basic principles,” described above.

Unlike the advisory opinion process, in which the Commission may apply the law to anticipated conduct, a finding that there is reason to believe a party has made a prohibited contribution or expenditure must be based on specific facts. A general statement of editorial

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<sup>6</sup> 52 U.S.C. § 30101(9).

<sup>7</sup> 52 U.S.C. § 30101(8); 11 C.F.R. §§ 109.20(b), 109.21(b).

<sup>8</sup> 52 U.S.C. § 30118.

<sup>9</sup> 52 U.S.C. §§ 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

<sup>10</sup> 11 C.F.R. §§ 100.73(a)-(b); 100.132(a)-(b). *See also* Advisory Op. 2005-07 (Mayberry) at 5-6.

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policy, which Mr. Micklethwait noted is not “an exhaustive rulebook” and leaves room “to make some decisions on a case-by-case basis,”<sup>11</sup> does not support such a finding.<sup>12</sup>

**B. Candidates in Separate Party Primaries Are Not “Opposing Candidates” and Bloomberg News’s Uniform Policy for All Candidates in the Democratic Primaries Satisfies the “Media Exemption”**

The Commission has never addressed whether the term, “opposing candidates,” as used in the media exemption, could be applied to candidates running in different primaries. The same term, however, was used in the Bipartisan Campaign Reform Act of 2002, which allowed candidates to solicit contributions in amounts above the normal limits when running against a self-financed “opposing candidate” who spent personal funds over certain thresholds.<sup>13</sup> As with the media exemption, Congress did not specify the meaning of the term, “opposing candidate.”

In a rulemaking proceeding, the Commission sought comment as to whether the term could be construed to apply to candidates of different parties seeking the same office. The Commission concluded, however, that “this approach would constitute an expanded definition of the term opposing candidate.”<sup>14</sup> Thus, the Commission’s implementing regulation defined the term, as follows:

- (a) For the purposes of a primary election, *opposing candidate* means *another candidate seeking the nomination of the same political party for election to the office....*<sup>15</sup>

Following the adoption of the regulation, the Commission rejected an argument by an incumbent Senator that a self-funded candidate running in another party’s primary should be considered an “opposing candidate,” on the basis that the self-funded candidate was planning to run ads attacking her during the primaries. The Commission concluded that such spending would not convert the two into opposing candidates because they would not actually oppose one another unless and until they were running in the general election.<sup>16</sup>

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<sup>11</sup> See Ex. A, *Micklethwait Memo*.

<sup>12</sup> Statement of Reasons of Cmr. David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas, MUR 4960 (Clinton) at 1 (“The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Federal Election Campaign Act]. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true.”) (some citations omitted).

<sup>13</sup> See generally 52 U.S.C. §§ 30116(i), 30117. This provision, which was referred to as the Millionaire’s Amendment, was subsequently invalidated by *Davis v. FEC*, 554 U.S. 724 (2008).

<sup>14</sup> *Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates*, 68 Fed. Reg. 3970, 3976 (Jan. 27, 2003).

<sup>15</sup> 11 C.F.R. § 400.3(a) (emphasis added).

<sup>16</sup> Advisory Op. 2006-21 (Cantwell); see also Advisory Op. 2006-25 (Kyl).



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That opinion clearly shows that there is no basis for the argument made by the Republican National Lawyers Association that Mr. Bloomberg and President Trump should be considered “opposing candidates” because Mr. Bloomberg’s campaign website declares, “I’m running for president to defeat Donald Trump.”<sup>17</sup> In this context, too, such an approach would be contrary to the Act’s treatment of primary and general elections as separate elections.<sup>18</sup> It would also be an unworkable standard for the Commission to parse communications made by and on behalf of a candidate to determine whether that candidate is an “opposing candidate” of another and could lead to the absurd result that not every candidate running in the same primary is “opposing” a candidate running for the other party’s nomination to the same office.

The Federal Communications Commission has similarly interpreted the Federal Communication Act’s “equal opportunities rule,” which states that “[i]f any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to *all other such candidates for that office* in the use of such broadcasting station.”<sup>19</sup> According to FCC guidance, “[t]he FCC and the Federal courts have interpreted this requirement to apply only to candidates who are directly opposing each other for nomination or election. During the pre-nomination period, only the candidates seeking nomination for the same office by the same party are opposing candidates. . . . After each party has nominated its candidate, their two nominees will then become opposing candidates in the campaign for the election to that office.”<sup>20</sup>

These conclusions reflect the law’s clear delineation between primary and general elections as separate contests. By applying the same standards to all candidates for the Democratic presidential nomination and promising to reconsider its treatment of the Trump Administration if Mr. Bloomberg wins the primary, Bloomberg News has adopted a policy to provide reasonably equal coverage to all opposing candidates.

### **C. Costs Incurred to Cover Incumbent Officials Are Not “For the Purpose of Influencing an Election”**

Even if candidates of different parties could be considered “opposing candidates” during the primaries, the Bloomberg News policy makes clear that the continuation of its investigative coverage of President Trump is with respect to his Administration *as the government of the day*. The Commission has frequently considered whether particular activities involving an officeholder who is running for re-election result in a contribution or expenditure under the Act. The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or

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<sup>17</sup> Compl. at 5, MUR 7668.

<sup>18</sup> See, e.g., 11 C.F.R. § 110.13(c) (exemption to the definitions of “contribution” and “expenditure” for corporate debate sponsors applies when a sponsor hosts a debate for the primary candidates of one party, but not the other).

<sup>19</sup> 47 U.S.C. § 315(a).

<sup>20</sup> *The Law of Political Broadcasting and Cablecasting*, 43 Fed. Reg. 36342, 36346-47 (Aug. 16, 1978)

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acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election, or defeat of any candidate."<sup>21</sup> Thus, if a corporation invites an officeholder to participate in a corporate event in his or her official capacity, not in the role of candidate, costs incurred for the candidate's appearance will not constitute a corporate contribution so long as the event will not include fundraising or express advocacy.<sup>22</sup>

The Commission has also found there is no contribution when a broadcast of a regularly scheduled radio show concerning issues of the day is hosted by a candidate, provided there is no express advocacy or solicitation of contributions.<sup>23</sup> Based in part on the same reasons, the Commission dismissed a suit alleging that the continued publication of columns in *Forbes Magazine* by Malcolm S. ("Steve") Forbes, after Mr. Forbes became a presidential candidate, constituted an expenditure by Forbes, Inc., the magazine's parent company. Three of the four Commissioners voting for dismissal observed that the publication of Mr. Forbes's column

was of course not "in connection with any election" during the several years prior to the time Mr. Forbes became a candidate. After Mr. Forbes became a candidate, that practice continued apparently without material change, including without any change in the nature of the content. In that circumstance, Mr. Forbes' candidacy did not suddenly transform the continuation of this longstanding practice into an activity "in connection with an election," and it did not transmogrify the on-going cost of publication into an "expenditure" prohibited by the Act.<sup>24</sup>

Here, Bloomberg News is covering the Trump Administration in the same manner as it has covered prior Administrations and the same in virtually all respects as it covered the current Democratic presidential primaries before Mr. Bloomberg became a candidate. Bloomberg News's coverage of the campaign and the White House is therefore not for the purpose of influencing an election and is not an expenditure under the Act.

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<sup>21</sup> Advisory Op. 1994-15 (Byrne).

<sup>22</sup> Advisory Op. 1996-11 (NRL); Advisory Op. 1992-06 (Duke); Advisory Op. 1988-27 (Mediavision); Advisory Op. 1982-50 (Shebel).

<sup>23</sup> Advisory Op. 1994-15 (Byrne); Advisory Op. 1992-05; MUR 5555 (Ross) (radio talk show host who became candidate eligible for press exemption where program format did not change after candidacy); MUR 4689 (Dornan) (radio guest-host who later became candidate eligible for press exemption where there was no change in in programming when candidate hosted as when regular host was present).

<sup>24</sup> Statement of Reasons of Cmr. Darryl R. Wold, Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom, MUR 4305 (Forbes) at 4 (Section IIA joined by Cmr. Wold, Elliott, and Mason) (*hereinafter Forbes SOR*).

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### **III. It would be Unconstitutional to Apply the Media Exemption in the Manner Urged by Complainants**

The Commission has consistently applied the media exemption to preserve the full protections of the First Amendment for bona fide press entities. As the legislative history makes clear:

... it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus, [the Act] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.<sup>25</sup>

It follows that the Commission should take special care to avoid substituting its judgment for the editorial decisions of media organizations concerning the manner and content of news coverage. As the Supreme Court unanimously ruled in striking down a state law compelling newspapers to give candidates a right of reply when their records or character are criticized:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>26</sup>

Complainants make no effort to hide that this is exactly what they are asking the Commission to do. Rather than defer to editorial decisions concerning what it means for coverage to be “reasonably equal,” Complainants are asking the Commission to substitute its own assessment. The complaint filed by the Republican National Lawyers Association charges that Bloomberg News’s campaign coverage is an “embarrassing dereliction of journalistic duty,” and argues that it “would have been better” for Mr. Bloomberg to find another solution, such as “selling the company or abstaining from all political news coverage.”<sup>27</sup> It is far outside the

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<sup>25</sup> H.R. Rep. No. 93-1239 (1974) at 4.

<sup>26</sup> *Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974). See also Statement of Reasons of Cmr. David M. Mason at 5, MUR 4689 (Dornan) (“It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media’s choice of formats, hosts, commentators, and editorial policies in addressing public policy issues.”)

<sup>27</sup> Compl. at 5-6, MUR 7668.

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bounds of the Commission's authority to pass judgment on journalistic duties or specify how a major news organization should cover the White House or a presidential campaign.

It is no surprise, then, that our research uncovered only one enforcement matter in the forty years since the media exemption was codified where the Commission found that a candidate-owned publication was not entitled to the exemption because it failed to give reasonably equal coverage to opposing candidates. In that matter, a newsletter was established contemporaneously with the launch of the candidate's campaign, the candidate's wife authored many articles in support of her husband, and one-third of the newsletter's advertising was for a Honda dealer owned by the candidate.<sup>28</sup> That case, itself over 20 years old, presents a very different situation than a global news organization that has been covering the Administration and presidential elections for many years. Indeed, while there is no legislative history explaining the exemption for candidate-owned media, "[i]t may be that the statutory exclusion . . . was intended to exclude only those publications whose essential purpose is political, and which could readily be used to circumvent the purposes of the Act if the full, unfettered freedom of the press to discuss candidates were extended to them."<sup>29</sup>

By contrast, denying Bloomberg News the media exemption would usurp the constitutionally-protected speech of one of the world's leading media organizations on the most pressing subjects of the day. As Commissioner David Mason observed in a prior media exemption matter, "[i]t is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media's choice of formats, hosts, commentators, and editorial policies in addressing public policy issues."<sup>30</sup>

#### IV. Conclusion

Complainants fundamentally misread the media exemption by overlooking settled law that candidates running for the same office in different parties are not "opposing candidates," and that costs incurred by a media organization to report on the current Administration are not expenditures because they are not for the purpose of influencing an election. In addition, it would violate core First Amendment principles for the Commission to apply the media exemption in the manner Complainants urge. It would effectively require Bloomberg News, a global news organization, to engage in reporting its editor has chosen not to do (investigate the Democratic primary candidates) or refrain from engaging in the kind of reporting it has always done (investigations of the current Administration). The complaints are meritless and should be dismissed.

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<sup>28</sup> Factual & Legal Analysis at 7-9, MUR 4064 (Sherrill Morgan).

<sup>29</sup> *Forbes SOR* at 5 (Cmrs. Wold, Elliott, and Mason).

<sup>30</sup> Statement of Reasons of Cmr. David M. Mason at 5, MUR 4689 (Dornan).



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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lawrence H. Norton", is written over a horizontal line.

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## EXHIBIT A

Subject line: The Newsroom and Mike's Campaign

So Mike is running.

There is no point in trying to claim that covering this presidential campaign will be easy for a newsroom that has built up its reputation for independence in part by not writing about ourselves (and very rarely about our direct competitors). No previous presidential candidate has owned a journalistic organization of this size. We have electoral laws to follow - to do with both balance and opinion. We will certainly obey them, but I think we need to do more than just that - and I believe we can. So this is how we will proceed.

We are not going to follow an exhaustive rulebook. That is partly because I believe that in journalism you "show" your virtue, you don't "tell" it. You prove your independence by what you write and broadcast, rather than by proclaiming the details in advance. And I am loath to tie our hands at this stage. We cannot predict every detail of the future: we will have to make some decisions on a case-by-case basis. But we can follow some basic principles, and we will make a few organizational changes.

The place where Mike has had the most contact with Editorial is Bloomberg Opinion: our editorials have reflected his views. David Shipley, Tim O'Brien and some members of the Board responsible for those editorials will take a leave of absence to join Mike's campaign. We will suspend the Board, so there will be no unsigned editorials. Our columnists, who produce the majority of Bloomberg Opinion's content, will continue to speak for themselves, and we will continue to take some op-ed articles from outsiders (although not op-eds on the election). Bloomberg Opinion will be led by Bob Burgess, with Reto being the main overseer on the Editorial Management Committee.

On News, we will write about virtually all aspects of this presidential contest in much the same way as we have done so far. We will describe who is winning and who is losing. We will look at policies and their consequences. We will carry polls, we will interview candidates and we will track their campaigns, including Mike's. We have already assigned a reporter to follow his campaign (just as we did when Mike was in City Hall). And in the stories we write on the presidential contest, we will make clear that our owner is now a candidate.

That covers the vast majority of what this newsroom does. We will continue our tradition of not investigating Mike (and his family and foundation) and we will extend the same policy to his rivals in the Democratic primaries. We cannot treat Mike's Democratic competitors differently from him. If other credible journalistic institutions publish investigative work on Mike or the other Democratic candidates, we will either publish those articles in full, or summarize them for our readers - and we will not hide them. For the moment, our P&I team will continue to investigate the Trump administration, as the government of the day. If Mike is chosen as the Democratic presidential candidate (and Donald Trump emerges as the Republican one), we will reassess how we do that.

To those who would rather that we did not write about Mike at all, I would reply that Bloomberg News has handled these conflicts before - and proved our independence. We are following the same policy that we have applied to Bloomberg LP and our direct rivals in the financial markets and media: we report on but do not investigate Reuters and CNBC. When Mike ran for mayor, we reported on the facts of his campaign and summarized other articles.

So those are the principles that we will follow. They are broad - and so there will be decisions to be made at the margin. That is what editors are for. And that leads to an organizational change, designed to add even more managerial clout.

Our news coverage of the 2020 race will be run on a day-to-day basis by Wes Kosova, Craig Gordon and our team in Washington, DC. If questions arise, we have Laura Zelenko's Standards team to call on. But I have asked Marty Schenker, our Chief Content Officer who works alongside Reto and myself on the Editorial Management Committee, to take special responsibility for overseeing our news coverage of Mike and his rivals (and the questions that may occur about this election all the way round the world), in the same way that Reto will oversee Opinion. We may well have to make quick decisions across many platforms. Marty has covered every election since Watergate; we need his experience and judgment, even if responsibility for any mistakes we make ultimately rests with me.

Given the workload this will involve, I have asked Heather Harris to take on Marty's responsibilities as Chief Content Officer for EMEA and APAC - and she will join Reto, Marty and me on our management committee.

I think this is a structure that can cope with many eventualities. No doubt, many of you are already thinking of possible complexities that may arise. My response is: let's get back to work. We can spend a long time debating "what ifs". I would rather that we got on with the journalism and let that speak for itself. So write, blog, broadcast - and the rest will take care of itself.

John