

CORPORATE ALERT

SEC ISSUES GUIDANCE ON USE OF CORPORATE WEB SITES



On August 1, 2008, the Securities and Exchange Commission (SEC) issued an interpretive release providing guidance on how companies can use their corporate web sites to provide information to investors in compliance with the federal securities laws.¹ The release, which becomes effective immediately upon publication in the Federal Register, provides guidance on

four topics:

1. **Liability issues.** The release discusses how companies can reduce their liability under the anti-fraud rules with respect to:
 - previously posted materials
 - hyperlinks to third-party information
 - summary information posted on a company's web site
 - company participation in blogs and electronic shareholder forums.
2. **Disclosure controls and procedures.** The release clarifies that companies need not establish disclosure controls and procedures with respect to their web site content, unless the information is posted as an alternative to being provided in an Exchange Act report. Nevertheless, the SEC cautions that it would be prudent for companies to maintain appropriate controls because web site disclosures are subject to other securities law provisions.
3. **Format.** The release clarifies that web site content does not need to be "printer-friendly" unless an SEC rule expressly so requires. For example, the SEC's "notice and access" provisions under the proxy rules require that proxy materials be presented in a format convenient for printing.

¹ The release, which is available at www.sec.gov/rules/interp/2008/34-58288.pdf, updates guidance last provided by the SEC in 2000 with respect to the use of corporate websites in the context of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the anti-fraud provisions of the federal securities laws. Guidance on Internet issues relating to securities offerings under the Securities Act of 1933, as amended, is provided in previously issued SEC releases, most notably SEC Release No. 33-7856 "Use of Electronic Media" (Apr. 28, 2000) and SEC Release No. 33-8591 "Securities Offering Reform" (Aug. 3, 2005).

4. **Use of web site disclosure to satisfy Regulation FD.** The release provides “principles-based” guidance on when a company’s web site disclosures may satisfy Regulation FD public disclosure requirements. Because no bright-line tests are provided, many companies will likely wait until further practice develops in this area before deciding whether they can rely on web site disclosure as an alternative means of satisfying Regulation FD. Moreover, companies listed on the New York Stock Exchange are still required under exchange rules to issue a press release to the major wire services when material information may reasonably be expected to affect the market in their securities.² In addition, under current Nasdaq and American Stock Exchange rules, posting of material information to a company’s web site by itself is not considered to be a sufficient method of public disclosure.³

1. LIABILITY ISSUES

The anti-fraud provisions of the federal securities laws apply to a company’s statements made on the Internet just as they apply to any other statement made by, or attributable to, the company. In the interpretive release, the SEC offers ways that companies can minimize their liability under the anti-fraud rules with respect to their web site disclosures:

- **Previously Posted Materials**

On prior occasions, the SEC had stated that information posted on a company’s web site may be considered “republished” each time the information is accessed by an investor. These statements raised concerns as to whether companies had a duty to continually update the information. In its new guidance, the SEC has clarified that the mere fact that a company maintains previously posted materials on its web site does not mean that the materials are republished when they are accessed or that the company has a duty to update the materials. The SEC goes on, however, to emphasize that, where it is not apparent to a reasonable person that the posted materials speak as of a certain date or earlier period, a company needs to make clear to investors that the materials speak as of a certain date or earlier period by:

- separately identifying the materials as historical or previously posted, including, for example, by dating the materials
- locating the materials in a separate section of the company’s web site devoted to previously posted materials or statements.

- **Hyperlinks to Third-Party Information**

A company can be liable under the anti-fraud provisions for third-party information to which it hyperlinks from its web site where the information may be attributable to the company because the company has explicitly or implicitly endorsed or approved the information. While explicit endorsement is, by definition, self-evident, there are several factors that can come into play in determining whether a company has implicitly endorsed or approved the information:

- *Company statements about the hyperlink.* One important factor in determining whether a company has implicitly approved or endorsed hyperlinked information is what the company says about the hyperlink,

² New York Stock Exchange Listed Company Manual § 202.06(C).

³ See NASDAQ MarketWatch Frequently Asked Questions, available at http://www.nasdaq.com/about/Marketwatch_FAQ.stm ; AMEX Company Guide §402.

including what is implied by the context in which the company places the hyperlink. Hyperlinks on a company product page, for example, will typically raise fewer securities law issues in contrast to a hyperlink on a company's investor relations page. A company may provide a hyperlink to a third-party web site simply because the company believes that the web site contains information that may be of interest or use to the reader, or a company may provide the hyperlink because the hyperlinked information supports a particular assertion on the company's web site. In any event, the SEC urges companies to expressly state the reason why the hyperlink is being provided.

- *Nature and content of hyperlinked information.* If a company selectively hyperlinks only to favorable information about the company, there is a higher risk that the company will be deemed to have endorsed or approved the information, in contrast to a situation where the company hyperlinks to more general or broad-based information. For example, if the company has a media page on which it hyperlinks to recent news articles, both positive and negative, about the company under a heading titled "Recent News Articles," it is less likely that the company will be deemed to have adopted the articles that are posted on the hyperlinked site. Even in this instance, however, a company may need to provide further explanation of the sources of its recent news articles. For example, if the company only includes recent articles published by bullish industry journals, the SEC cautions that the limited nature of the sources should be made clear and the company should explain why it selected those sources.
- *Use of "exit notices" or "intermediate screens."* A company should consider the use of "exit notices" and "intermediate screens" to clearly denote that the source of the hyperlinked information is a third party. While use of exit notices and intermediate screens may be helpful in determining whether a company has adopted third-party material, it is not dispositive. The failure to use exit notices or intermediate screens will not automatically result in a conclusion that a company has adopted third-party information, and the use of such devices will not necessarily preclude a determination that a company has approved or endorsed the third-party material. For example, a company may still be considered to have adopted an analyst's favorable report on the company's prospects where the company provides a link only to that report and does not mention that there are other negative analyst reports.

On the topic of disclaimers in general, the SEC also expressed the view that the use of a disclaimer alone will not be sufficient to insulate a company from liability with respect to hyperlinking to information the company knows, or is reckless in not knowing, is materially false and misleading.

- **Summary Information Posted on a Company's Web Site**

Companies often will post on their web sites summaries or overviews of company information, particularly financial information. While the SEC encourages the use of summaries or overviews, it also cautions that companies should make sure that the information is clearly identified as summary or overview information. Among the steps a company should consider are use of:

- appropriate titles to convey the abbreviated nature of the information
- additional explanatory language to identify the text as a summary or overview and the location of the more detailed information from which it is derived
- hyperlinking to the more detailed information

- “layering” or “tiering” the format, so that the most important summary or overview information is presented in an opening page, along with embedded links that allow the reader to drill down to the more detailed information.

- **Company Participation in Blogs and Electronic Shareholder Forums**

The SEC endorses robust use by companies of their web sites, including company participation in electronic shareholder forums and company-sponsored blogs. Because all communications by, or on behalf of, the company are subject to the anti-fraud provisions of the federal securities laws, companies should have in place controls and procedures to monitor statements made by, or on behalf of, the company via the Internet. Even though blogs and e-forums may be informal and conversational in nature, the anti-fraud provisions of the federal securities laws still reach statements made on these sites by, or on behalf of, the company. Most companies already have in place disclosure policies that designate only certain authorized persons to speak on behalf of the company, and all authorized personnel should be aware of their responsibilities under the federal securities laws (which they cannot avoid by claiming to speak only in their “individual” capacities). Moreover, companies cannot require investors to waive the protections of the federal securities laws as a condition to entering or participating in a blog or forum, since such a requirement would violate the anti-waiver provisions of the federal securities laws. The SEC also clarified that a company is not responsible for statements that third parties post on a company-sponsored web site and is not obligated to correct misstatements made by third parties (assuming the company has not approved or endorsed the statement).

2. DISCLOSURE CONTROLS AND PROCEDURES

Exchange Act rules require companies to establish and maintain disclosure controls and procedures designed to ensure that the information the company is required to disclose in its Exchange Act reports is timely processed and reported. Under various Exchange Act rules, a company is permitted to satisfy its reporting obligations by posting information on its web site rather than including the information in a report. The interpretive release clarifies that disclosure controls and procedures are required only with respect to web site information the company elects to disclose via its web site in lieu of providing the information in an Exchange Act report. However, because web site disclosures are also subject to other federal securities laws and regulations, including Regulation FD, the anti-fraud provisions, the proxy rules and the Securities Act of 1933 with respect to securities offerings, companies should nevertheless have in place appropriate controls and procedures to ensure compliance with such laws.

3. FORMAT

Acknowledging the increasingly interactive nature of online information, the SEC does not require that information on a company web site satisfy a printer-friendly standard unless SEC rules explicitly so require. Currently, only the SEC’s “notice and access” provisions under the proxy rules require that proxy materials be presented in a format convenient for printing. The notice and access provisions currently apply to large accelerated filers and will become mandatory for all other companies with respect to proxy solicitations commencing on or after January 1, 2009.

4. USE OF WEB SITE DISCLOSURE TO SATISFY REGULATION FD

Regulation FD provides that, whenever a public company or any person acting on its behalf discloses any material non-public information about the company or its securities to certain persons, generally investors or analysts, the company must also make public disclosure of the information in a manner designed to achieve broad, public dissemination of the

information. The SEC has previously provided guidance indicating that merely posting material on a company's web site will not satisfy the public disclosure requirement of Regulation FD. But due to technological advances and the dramatic increase in the use of the Internet since the adoption of Regulation FD, the SEC has provided additional guidance on this subject. In its interpretive release, the SEC sets forth guidelines for determining whether information posted on a company's web site could be considered "public" for purposes of evaluating (a) whether subsequent private discussions or disclosure of the posted information would implicate Regulation FD and (b) whether the public disclosure requirement of Regulation FD is satisfied.

"Public" Information for Purposes of Subsequent Selective Disclosures

For information to be considered public such that subsequent selective disclosure of the information will not implicate Regulation FD, companies must consider whether –

- the company web site is a **recognized channel of distribution**
- posting information on the company web site ensures **adequate dissemination** of the information in a manner that makes it available to the securities marketplace in general
- there has been a **reasonable waiting period** for investors and the market to react to the posted information.

Recognized Channel of Distribution.

In determining whether a company's web site is a recognized channel of distribution of information, a company should consider both (1) the steps the company has taken to alert the market to its web site and its disclosure practices and (2) the degree of use that the web site gets from investors and the market.

Adequate Dissemination.

If a company determines that its web site is a recognized channel of distribution, it must then analyze whether information is adequately disseminated by posting the information on its web site. In this analysis, companies should focus on the manner in which the information is posted on the company web site and the timely and ready accessibility of such information to investors and the markets.

In assessing whether a company's web site is a recognized channel of distribution and whether the information on the site is "posted and accessible" and therefore disseminated, the SEC has suggested that companies consider the following factors –

- whether and how the company informs investors and the market about its web site and that they should look at the web site for information, such as disclosing information about its web site in periodic reports and press releases
- whether the company has made investors and the markets aware that it will post information on its web site and whether it has a pattern or practice of doing so
- whether the company's web site is designed to lead investors and the market efficiently to information about the company

- whether the information is prominently disclosed on the web site in the location known and routinely used for such disclosures
- whether the information is presented in a format readily accessible to the general public
- the extent to which information posted on the web site is regularly picked up by the market and readily available media, and reported in such media, or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved (information posted on the web site of well-followed companies may get picked up and distributed by the market and media, whereas smaller companies may need to take additional steps to alert the market to its web site)
- the steps the company has taken to make its web site and the information accessible, including the use of “push” technology,⁴ such as RSS feeds, or other distribution channels known for widely distributing information
- whether the company keeps its web site current and accurate
- whether the company uses other methods in addition to its web site posting to disseminate the information
- the nature of the information.

Reasonable Waiting Period.

A company must also determine what constitutes a reasonable waiting period for investors and the market to react to the information. This determination largely depends on the particular facts and circumstances of the dissemination, including –

- the size and market following of the company
- the extent to which investor-oriented information on the company web site is regularly accessed
- the steps the company has taken to make investors and the market aware that it uses its company web site as a key source of important information about the company, including the location of the posted information
- whether the company has taken steps to actively disseminate the information or the availability of the information posted on the web site, including using other channels of distribution of information
- the nature and complexity of the information.

A reasonable waiting period for a particular company or a particular type of information may not be a reasonable time for another company or other types of information. The SEC suggested that companies could look to cases involving what constitutes a reasonable waiting period in the context of insider trading for guidance. The SEC also suggested that if the information is important, companies should consider taking additional steps to alert investors and the market of future postings. Filing or furnishing information with the SEC or issuing a press release with information on the particular posting will help facilitate the broad dissemination of the information.

⁴ Push technology is a type of Internet-based communication wherein the publisher or Web server pushes information to the user rather than waiting until the user specifically requests it.

Satisfaction of Public Disclosure Requirement of Regulation FD

Regulation FD requires that if a company makes a selective disclosure, the company must file or furnish a Form 8-K or use an alternative method of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public—simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. In the adopting release for Regulation FD, the SEC stopped short of concluding that disclosure on a company web site would, itself be an acceptable method of “public disclosure” for purposes of complying with Regulation FD. But with the evolution of technology, the SEC has now acknowledged that, for *some* companies in *certain circumstances*, posting material, non-public information on a company’s web site may be a sufficient method of public disclosure under Regulation FD. In making this determination, the SEC recommends that companies look to the factors set forth above relating to whether the company web site is a recognized channel of distribution and whether the information is adequately disseminated via the web site posting.

WHAT COMPANIES SHOULD BE DOING NOW

In light of the SEC’s new interpretive guidance, public companies should be taking steps to ensure that their web site disclosures comply with federal securities laws:

- **Historical information.** To reduce the risk that historical information posted on a company’s web site is deemed republished when accessed by an investor, the company should –
 - ensure that the information is dated
 - archive historical information in a separate section of the company’s web site that is clearly identified as historical or previously posted information
 - include disclaimers to the effect that the information is not being republished and speaks only as of its date or earlier period.
- **Hyperlinks.** To reduce the risk that a company will be deemed to have adopted third-party information to which the company provides hyperlinks, the company should –
 - avoid explicit endorsement of the hyperlinked information
 - state the reason for the hyperlink
 - make clear that the information is provided by a third party
 - use “exit notices” and “intermediate screens” that alert readers that they are leaving the company’s web site and that the company assumes no responsibility for information outside its web site
 - avoid selective hyperlinking by hyperlinking to all reports or articles, not just favorable ones
 - include disclaimers regarding the third-party information.
- **Summary information.** To reduce the risk that readers will not understand the incomplete nature of summary or overview information posted on a company’s web site, the company should –

- use titles that clearly convey the summary or overview nature of the information
- include introductory language that further explains that the information is a summary or overview only, is inherently incomplete and is qualified by the more detailed information from which it is derived, identifying the location of the more detailed information
- include hyperlinks to the more detailed information, including, where appropriate, “layered” or “tiered” embedded links that allow the reader to drill down to additional, more detailed information.
- **Company participation in blogs and electronic shareholder forums.** Although the SEC encourages company participation in electronic shareholder forums, companies have been slow to create e-forums. A February 2008 survey by Thomson Financial found that only 4 percent of 42 public companies surveyed were planning to create or were seriously considering creating a shareholder e-forum.⁵ If a company does sponsor an e-forum or blog, to reduce the risk that statements made by the company in the forum or blog may violate federal securities laws, the company should –
 - adopt a disclosure policy that authorizes only certain officers and investor relations personnel to participate on behalf of the company in such blogs or forums
 - train these authorized persons with respect to the company’s obligations under the federal securities laws, including Regulation FD, the anti-fraud provisions and the proxy rules
 - have an in-house attorney periodically monitor web site disclosures made by authorized personnel.
- **Disclosure controls and procedures.** A company should make sure that it has appropriate disclosure controls and procedures with respect to information the company elects to disclose via its web site in lieu of providing the information in an Exchange Act report. Typically, the legal department will be charged with responsibility, prior to the filing of a report with the SEC, to review any web site disclosure that the company has elected to make in lieu of including the information in the report.
- **Formatting of web site content.** To ensure that its web site content satisfies any SEC requirements as to formatting, the company should –
 - Make sure that its proxy statement is available in a format convenient for printing if the company is subject to the proxy rules’ “notice and access” requirement. This requirement currently applies to all large accelerated filers and will apply to all other companies beginning January 1, 2009.
 - Require the legal department to inform the investor relations department of any additional SEC requirements as to the formatting of web site content.⁶
- **“Public” information for FD purposes.** The “principles-based” guidance on when a company’s web site disclosures may satisfy Regulation FD creates a grey area that may not provide the majority of companies with sufficient comfort to immediately change their current disclosure practices. While there may be some large

⁵ K. Wutkowski, “Companies shrug off shareholder e-forum idea,” Reuters, May 16, 2008, available at <http://www.reuters.com/articlePrint?articleId=USN1655068620080516>.

⁶ The SEC has issued proposed rules that would require web site posting of financial statements and related footnotes and schedules in XBRL format through a three-year phase-in commencing next year.

companies whose web site disclosures are widely followed by the media and investors, we expect that it will be difficult for many companies to establish that their web sites are “recognized channels of distribution” regularly visited by investors and the market to obtain material news about the company. A company can, however, take proactive steps to drive investors and media sources to its web site. These steps should help position a company to be able to defend the “public” nature of information posted on its web site as the practice of using a company’s web site to satisfy Regulation FD evolves. Among the steps a company should take include –

- *Inform the market of web site.* A company should alert investors and the market to the company’s web site and make it known that the web site is a vehicle for important company information. A company should disclose in its Exchange Act reports and press releases the company’s web site address and the fact that the company routinely posts material information on its web site. A company should also advise newswires and the media about material information or the availability of material information posted on its web site.
- *Ensure that information on web site is readily available.* Information on a company’s web site must be up-to-date and accurate. Material information should be prominently disclosed and readily accessible.
- *Consider using other methods to disseminate the information.* Depending on the materiality of the information, a company should consider using other methods, such as a press release or a Form 8-K, in addition to web site postings to disseminate the information and ensure that important information reaches investors and the marketplace. A company should also consider using “push” technology, such as RSS feeds or email alerts, or releases through other distribution channels to widely distribute the information or advise the market of the availability of the information.

CONTACT INFORMATION

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