SEC Interpretive Guidance on the Use of Company Web Sites for Investor Disclosures

The Securities and Exchange Commission recently published an interpretive release providing guidance to companies regarding the use of their web sites in complying with the federal securities laws. The SEC issued the guidance because it believes it is necessary to encourage the continued development of company web sites as important vehicles for the dissemination of important company information to investors. The SEC’s interpretive guidance primarily addresses the four main topics set forth below.

While the guidance gives companies helpful information on how to use their web sites to communicate with investors and to comply with the federal securities laws, much of the guidance is principles-based and companies will want to consult with counsel to help evaluate, among other things, whether disclosure of material information on a company’s web site is an acceptable alternative to filing the information with the SEC on EDGAR.

I. Evaluation of the “Public” Nature of Information on Company Web Sites

The release provides guidance on when information posted on a company web site is “public” for purposes of the application of Regulation FD. In particular, if the web site is “public” for purposes of (1) evaluating the applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD’s “public disclosure” requirement. Previously, a company would either have had to file the information with the SEC on Form 8-K, or have used a method or combination of methods “reasonably designed to provide broad, non-exclusionary distribution of the information.” In the past the SEC had stated that web site disclosure alone was likely not sufficient to comply with Regulation FD.

The SEC has stated that in order for information to be public, it must be “disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.” This evaluation is principles-based and companies must consider whether and when:

1) the company web site is a recognized channel of distribution;

2) posting of information on the company web site disseminates the information in a manner making it available to the securities marketplace in general; and

3) there has been a reasonable waiting period for investors and the market to react to the posted information.

1 See Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45862 (Aug. 7, 2008). http://www.sec.gov/rules/interp/2008/34-58288.pdf. It should be noted that this current release does not expressly address the use of company web sites in other contexts, such as the context of the offer and sale of securities under the Securities Act of 1933 (see Securities Offering Reform, Release No. 33-8591 (August 3, 2005)) or information addressing the concept of current “public information” for purposes of Rule 144 under the Securities Act of 1933.
The SEC provided a list of non-exclusive factors for companies to consider in making this evaluation

**Non-Exclusive Factors—Recognized Channel of Distribution and Whether Information is Posted and Accessible**

- whether and how companies let investors and the markets know that the company has a web site and that they should look at the company’s web site for information;
- whether the company has made investors and the markets aware that it will post important information on its web site (and whether it has a pattern or practice of posting such information on its web site);
- whether the company’s web site is designed to lead investors and the market efficiently to information about the company;
- 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;
- the steps the company has taken to make its web site and the information accessible, including the use of “push” technology (e.g., like RSS feeds);
- 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 and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- the nature of the information.

**Non-Exclusive Factors—Reasonable Waiting Period for Investors to React to the Information**

- 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; and
- the nature and complexity of the information.

Among other things the guidance provides a potential benefit of allowing companies to use web site disclosures for purposes of disclosing material nonpublic information under Regulation FD rather than having to file a voluntary Form 8-K or holding a properly noticed teleconference or webcast. However, given the lack of a bright-line test to determine whether or not the use of a web site will comply with Regulation FD, companies should consult with counsel regarding the use of their web sites in complying with Regulation FD.

**II. Antifraud and Other Exchange Act Provisions**

The release also provides guidance with respect to the application of the antifraud provisions of the federal securities laws on materials posted on company web sites.

1. **Effect of Accessing Previously Posted Materials on Company Web Sites**

Companies have raised concerns that previously posted materials on their web sites could be considered “republished” each time a user accessed the materials. This could potentially expose companies to liability under antifraud rules such as Rule 10b-5 for failure to update the previously posted material. Accordingly, to help make it clear that the posted materials or statements speak as of the earlier date or period, the SEC has stated that the previously posted website materials or statements should be:

- separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and
• located in a separate section of the company’s web site containing previously posted materials or statements.

2. Hyperlinks to Third-Party Information

Another area of concern for companies has been liability for hyperlinks to third-party information included on their web sites. Third-party information can be attributable to the company if it has (1) involved itself in the preparation of the information, or (2) explicitly or implicitly endorsed or approved the information. The key focus is whether the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information.

The SEC stated that an important factor therefore is what the company actually says about the hyperlink. Accordingly, companies should consider including an explanation of why a particular hyperlink is included on its web site. The SEC also encouraged companies to consider the use of “exit notices” or “intermediate screens,” to denote that the hyperlink is to third-party information. The guidance also reminds companies that the use of disclaimers alone are not sufficient to insulate a company from liability for information that it makes available through a hyperlink.

3. Summary Information

The release also addresses the use of summaries or overviews on companies’ web sites. The SEC believes that such summary information can be useful to investors, but much like the guidance with respect to hyperlinks to third-party information, companies should consider ways to alert readers to the location of the detailed disclosure from which the summary information was derived. In particular, the SEC identified several techniques that may help highlight the nature of summary information to investors, such as the use of:

• appropriate titles;
• additional explanatory language;
• hyperlinks and the placement of hyperlinks; and
• “layered” or “tiered” formats on web sites.

4. Interactive Web Site Features

The SEC acknowledged that company-sponsored “blogs” and electronic shareholder forums can assist companies in communicating with their investors and other stakeholders. However, the SEC reminded companies that all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities law and companies should consider putting into place controls and procedures to monitor statements made on behalf of companies in these types of electronic forums. Also, companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.

III. Disclosure Controls and Procedures

Companies should be aware that if web site postings are used to satisfy disclosure obligations under the Exchange Act, then disclosure controls and procedures would apply to such information. This is because the posted web site information would be information required to be disclosed by the company in its Exchange Act reports (e.g., 10-K, 10-Q, and 8-K reports). Companies will want to evaluate their disclosure controls and procedures to make sure they appropriately encompass the company’s web site disclosures.

IV. Format of Information and Readability

Noting that the nature of online information is increasingly interactive and not static, the SEC provided in the guidance that information appearing on a company’s web site need not satisfy a printer-friendly standard unless other rules specifically require it.

2 The SEC has provided separate guidance on electronic shareholder forums. See Electronic Shareholder Forums, Release No. 34-57172 (January 18, 2008).
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