SEC Updates Its Guidance Regarding Company Web Sites

August 18, 2008

On August 1, 2008, the SEC published an interpretive release that provided substantive guidance regarding company Web sites under the Exchange Act and the antifraud provisions of the federal securities laws.[1] The last time the SEC issued guidance on this topic was more than eight years ago.[2]

The new release does not substantially change earlier guidance issued by the SEC on use of company Web sites. Rather, it supplements earlier guidance and addresses:

- when information disclosed on a company Web site is "public" for purposes of Regulation FD;
- company liability for information contained on its Web site;
- whether a company's disclosure controls and procedures apply to information on its Web site; and
- the format of information presented on a company Web site.

"PUBLIC" FOR PURPOSES OF REGULATION FD

Regulation FD provides that, when a company discloses material nonpublic information to certain enumerated categories of persons (such as research analysts or holders of the company's securities under circumstances where it is reasonably foreseeable that such holders will purchase or sell the company's securities based on that information), it must disclose the information publicly. The timing of the public disclosure depends on whether the selective disclosure was intentional or unintentional. For an intentional selective disclosure, the company must make its public disclosure simultaneously with its selective disclosure. For an unintentional selective disclosure, the company must make its public disclosure promptly following becoming aware of the selective disclosure. Public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods designed to effect broad, non-exclusionary distribution of the information to the public.

Company Web sites present a number of interesting issues in the context of Regulation FD. As noted in the SEC release, one such issue is whether and when information published on a company Web site (as opposed to another more traditional means of dissemination, such as a press release or the filing or furnishing with the SEC of a Current Report on Form 8-K) will be deemed "public" so that subsequent "selective" disclosures do not violate Regulation FD. A second issue is whether

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1 *See* Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 1, 2008 (available at <http://sec.gov/rules/interp/2008/34-58288.pdf>).

2 *See* Use of Electronic Media, Release No. 34-42728 (Apr. 28, 2000) (available at <http://sec.gov/rules/interp/34-42728.htm>).

information published on a company Web site promptly after an unintentional selective disclosure satisfies the requirement that the information be disclosed publicly.

Regulation FD and Subsequent Selective Disclosure - If information posted on a company Web site is public, subsequent selective disclosure is not subject to Regulation FD. According to the SEC release, in determining whether information published to a company Web site is public, companies must consider whether and when:

- a company Web site is a recognized channel of distribution of company information;
- the publication of information on the company Web site disseminates the information by making it available to the securities marketplace in general; and
- there has been a reasonable waiting period for investors and the securities marketplace to react to the information after it is published to the Web site.

Practice Tips:

- If a company wishes for its Web site to be a recognized channel of distribution of material company information, in light of the new SEC guidance, it may wish to consider ensuring (to the extend it does not already do so) that all unquestionably material releases of information intended for public disclosure are published on the company Web site.
- In addition, companies may wish to consider stating prominently on their Web sites and in their periodic reports and press releases that the company's Web site is being used for such distribution. Such a statement would seem particularly appropriate on the home page and in the news and press release areas, investor relations area, earnings and SEC filings areas and other similar locations. For example, a company could include the following statement in its periodic reports and press releases: "The Company uses its Web site as channel of distribution of material company information. Financial and other material information regarding the Company is routinely posted on and accessible at [*insert link to investor relations or similar page(s) on the company's Web site*]."
- Companies may also wish to consider using push technologies such as RSS feeds within pertinent sections of their Web sites as a means to make new material information posted on their Web sites "accessible" to those who choose to subscribe to such services.
- Until it is reasonably clear that the securities marketplace considers a company's Web site to be a recognized channel of distribution, the company should continue to disclose material information via more traditional FD-compliant modes of disclosure at the same time it publishes such information on its Web site.
- Appropriate attention should be given to hardware and bandwidth issues and the possible need for additional appropriate hardware and additional bandwidth at times when a material disclosure on a company Web site may prompt many investors to attempt to access the site simultaneously.
- As always, technological security precautions should be taken to prevent hackers or others from accessing the company Web site in an unauthorized fashion to publish false information to the securities marketplace.

The release provides little meaningful guidance regarding what is "a reasonable waiting period" to give the securities marketplace time to react to information posted on a company Web site. What constitutes a "reasonable waiting period" is a facts and circumstances determination. According to the release, factors to consider are:

- the size and market following of the company;
- the extent to which the relevant information is regularly accessed;
- steps the company has taken to make the securities marketplace aware that the company Web site is a key source of disclosures;
- whether the company has taken active steps to disseminate the information, including the use of other channels of distribution of information; and
- the nature and complexity of the information.

Practice Tips:

- Even if a company's Web site has been established as a channel of distribution for company information, if the company intends to make selective disclosure shortly after disclosing the information, it may be prudent, absent changes in current technology or market practices, for the company to also simultaneously publish such information via more traditional FD-compliant modes of communication, such as standard news release distribution channels.
- Since the company may be called upon to establish the extent to which investor-oriented information on the company Web site is "regularly accessed", steps should be taken to capture and preserve logs of Web traffic to the site.

Satisfaction of Public Disclosure Requirement of Regulation FD – When Regulation FD was adopted in 2000, the SEC expressed the view that disclosure on a company Web site, by itself, could not be used as alternative method of disclosure satisfying the public disclosure requirements of Regulation FD, but did acknowledge that this position could change as technology evolved and use of the Internet by investors becomes more commonplace. In the new release, the SEC states that they now believe that the technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting of material information on a company Web site, in and of itself, may be a sufficient method of public disclosure under Regulation FD once a selective disclosure has been made. The release indicates that companies should look to the factors outlined above with respect to whether the company Web site is a recognized channel of distribution and whether information has been disseminated in determining whether and when solely posting on a company Web site will satisfy the requirements of Regulation FD. The company will also need to consider the capability of its Web site to meet the simultaneous or prompt timing requirements under Regulation FD once a selective disclosure has been made.

ANTIFRAUD AND OTHER EXCHANGE ACT CONSIDERATIONS

Similar to any statement made by, or attributable to, a company, the antifraud provisions of the federal securities laws apply to information published on a company Web site. The release clarifies a number of liability risks arising from the applicability of these antifraud provisions.

Reissuance or Republication of Information - The release clarifies that the SEC does not consider the continued accessibility of material previously published to a company Web site as a reissuance or republication of the material for purposes of antifraud liability, solely because the material remains accessible on the site. According to the release, "the fact that investors can access previously posted materials or statements on a company's Web site does not in itself mean that such previously posted materials or statements have been reissued or republished for purposes of the antifraud provisions of the federal securities laws, that the company has made a new statement, or that the company has created a duty to update the materials or statements."

Practice Tip:

- Consistent with current best practice, posted materials should be dated as of the publication date. In addition, older material such as older press releases, SEC filings and the like should be maintained separately from newer material in one or more archives designated as such.

Hyperlinks to Third-Party Information – In its April 28, 2000 release regarding the use of electronic media, the SEC provided examples of factors that may be relevant in determining whether a company has adopted hyperlinked information and, thus, subjected itself to risk of antifraud liability, including the context of the hyperlink, risk of confusing investors, and how the hyperlink is presented on the visitor's screen. Despite this earlier guidance, the SEC notes that companies "continue to be concerned about their liability for hyperlinks to third-party information included on their Web sites as part of their ongoing communications to the public."

In its new interpretive release, the SEC clarifies that any analysis of such factors must focus on "whether a company has explicitly or implicitly approved or endorsed the statement of a third-party." According to the SEC, explicit approval or endorsement would be "plainly evident." In the case of implicit approval or endorsement, the SEC now adopts a reasonableness standard: "[d]oes the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?"

Practice Tips:

- The SEC's "clarifications" in its most recent release continue to leave the waters muddy as to antifraud liability for hyperlinked information. Companies should explain the reason for which the hyperlink is provided and use other methods such as exit notices or intermediate screens to note that the visitor is leaving the site.
- Care should be taken to avoid selective hyperlinking that might be equated with unbalanced and potentially misleading disclosure. For example, linking to positive third-party news stories but not to negative third-party news stories about the company may raise such concerns and should be avoided.
- The SEC continues to make clear that disclaimers alone are not sufficient to insulate a company from antifraud liability for hyperlinked information. Nevertheless, it may be prudent to provide such a disclaimer on the site or even on exit notices or intermediate screens.

Summary Information – The release notes that companies have been concerned about providing summary information because, by definition, it omits much of the detailed information from which the summary is derived. Recognizing the utility of such summaries, the release indicates that, as with hyperlinks, companies must consider the context in which the information is provided. The SEC suggests a series of non-exhaustive factors that it will consider in assessing whether a summary or an overview of information is misleading:

- the use of appropriate titles that make clear the information is summary or abbreviated in nature;
- the use of additional explanatory language to identify the information as summary or abbreviated and to identify the location of more detailed information;
- hyperlinking from the summary to the more detailed information; and
- use of a so-called "layered" or "tiered" presentation that allows a visitor to "drill down" from plainly labeled summary information to more detail via a logical path.

Interactive Web Site Features Including Blogs and Shareholder Forums –In the new release, the SEC encourages companies to use interactive Web site features such as blogs and shareholder forums to communicate with investors. However, the release also acknowledges the risks associated with such interactions, as all communications made by a company through such interactive tools remain subject to the antifraud provisions of the federal securities laws. [3] The release emphasizes that companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in such blogs or forums. While a company remains responsible

[3] *See also* Electronic Shareholder Forums, Release No. 34-57172 (Jan. 18, 2008) (available at <http://sec.gov/rules/final/2008/34-57172.pdf>). This release adopted amendments to the proxy rules to exempt participation in electronic shareholder forums from the proxy rules if certain conditions are satisfied. In addition, the release also adopted rules that provide that issuers will not be liable under the federal securities laws for any statement or information provided by third parties in an electronic shareholder forum.

for its own statements (including statements by persons acting on the company's behalf), the release also clarifies that a company "is not responsible for the statements that third parties post" when using such features, nor is it obligated to respond to or correct misstatements made by third parties.

Practice Tips:

- Even though the SEC's guidance is clear with respect to statements posted by third parties on such forums, there seems to be little downside to providing a disclaimer to users of such interactive Web site features to the effect that the company is not responsible for statements by third parties and is not obligated to respond to or correct misstatements by third parties.
- The SEC notes in its release that "companies should consider taking steps to put into place controls and procedures to monitor statements made by or on behalf of the company" in such forums. Therefore, it is recommended that all company personnel who have authorization to post on behalf of the company be trained regarding the company's potential liabilities under federal securities laws for statements made in such forums and be made aware of their responsibilities in such forums, which cannot be avoided by purporting to speak in an "individual" capacity. It is also recommended that in-house counsel knowledgeable about federal securities laws be involved in such training and in monitoring statements made by or on behalf of the company on such forums.

DISCLOSURE CONTROLS AND PROCEDURES

The SEC has adopted various rules that permit issuers to satisfy certain Exchange Act disclosure obligations by posting the information on their Web sites as an alternative to providing the information in an Exchange Act report. For example, a company may elect, subject to certain limitations, to disclose waivers or amendments to its code of ethics on its Web site in lieu of filing a Current Report on Form 8-K. In the new release, the SEC warns that if a company elects to satisfy its disclosure obligations by posting the information on its Web site, such postings would implicate Exchange Act rules that govern certification requirements relating to disclosure controls and procedures. Accordingly, companies must ensure that their disclosure controls and procedures are designed to address the disclosure of such information on their Web sites.

FORMAT OF INFORMATION AND READABILITY

Recognizing the technological difficulties of presenting information from a robust and interactive Web site in a printer-friendly format, the SEC release explicitly states that information appearing on a company Web site need not satisfy a printer-friendly standard unless SEC rules explicitly require it.

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