

SEC Provides Interpretive Guidance on the Use of Company Web Sites under the Exchange Act and the Antifraud Provisions of the Federal Securities Laws

On August 1, 2008, the Securities and Exchange Commission (“SEC”) published an interpretive release (the “Release”)¹ to provide guidance on the use of company web sites² to provide information to investors in compliance with the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and without violating the antifraud provisions of the federal securities laws. The Release was prompted by the February 2008 Progress Report published by the Federal Advisory Committee on Improvements to Financial Reporting³, which encouraged the SEC to provide additional guidance in light of significant technological advances and wide-spread use of company web sites as a vehicle of disseminating important company information to investors.⁴ Additionally, the Release provides some answers as to when a company can satisfy the requirements of Regulation FD by posting information on its web site -- an issue which has lacked clarity in prior SEC pronouncements on the use of electronic media to make disclosures.

The Release focuses on four issues:

- when information posted on a company web site is “public” for purposes of the applicability of Regulation FD;
- company liability for information on company web sites - including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites;
- the types of controls and procedures advisable with respect to such information; and
- the format of information presented on a company web site, with the focus on readability, not printability.

The guidance is effective August 7, 2008, and the SEC asked that comments on the Release with other approaches or issues be submitted on or before November 5, 2008.

¹ Release Nos. 34-58288, IC-28351; File No. S7-23-08, *Commission Guidance on the Use of Company Web Sites* (Aug. 1, 2008) available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

² The term “web site,” as contemplated by the Release, refers to a company’s public Internet web site, as distinguished from private intranet sites. See Release at n. 2.

³ Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting, Release No. 33-8896 (Feb. 14, 2008) available at <http://www.sec.gov/rules/other/2008/33-8896.pdf>.

⁴ The SEC addressed certain other discrete Internet issues relating to the Securities Act of 1933 (the “Securities Act”) in 2005. See Securities Offering Reform, Release No. 33-8591 (Aug. 3, 2005) [70 FR 44721] available at <http://www.sec.gov/rules/final/33-8591.pdf>. Additionally, the SEC last provided guidance on the electronic delivery of disclosure documents, as well as company liability for web site content, in 2000. See Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] available at <http://www.sec.gov/rules/interp/34-42728.htm> (“2000 Electronics Release”).

I. Overview of Exchange Act Rules on the Use of Company Web sites

The SEC has issued a series of interpretative releases that promote the use of web sites as a means of communicating with investors under the Securities Act and the Exchange Act.⁵ These interpretations have promoted web sites in two respects. First, when delivery of documents is required under the federal securities laws, the SEC has encouraged the delivery in electronic format or recognized that electronic access can satisfy delivery. Second, where disclosure is required under the Exchange Act, the SEC has allowed companies to provide information on their web sites, either as a supplement to material filed on the SEC's EDGAR system or as stand-alone method independent of EDGAR, depending on the circumstances.

II. Areas of Guidance

“Public” Information for Purposes of Regulation FD

The Release provides interpretive guidance on the issue of whether information posted on a company's web site would be considered “public” for purposes of the applicability of Regulation FD⁶ to subsequent private discussions or disclosures and the satisfaction of Regulation FD's “public disclosure” requirement.

In evaluating whether information is public for the purposes of the applicability of Regulation FD, companies should consider whether:

- (1) the company web site is a recognized channel of distribution,
- (2) posting of information on a 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.⁷

Information posted solely on a web site could theoretically satisfy the simultaneous and prompt timing requirements for public disclosure required by Regulation FD once a selective disclosure has been made if these criteria are satisfied.

A. Is the Web Site a Recognized Channel of Distribution that Disseminates Information to the Securities Marketplace?

The Release highlights certain factors to consider in evaluating whether both a company's web site is a recognized channel of distribution and the information is “posted and accessible.” These factors include:

⁵ See generally supra note 4. See also Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] available at <http://www.sec.gov/rules/proposed/33-7233.txt>; Use of Electronic Media by Broker-Dealers, Release No. 33-7288 (May 9, 1996) [61 FR 24643] available at <http://www.sec.gov/rules/concept/33-7288.txt>.

⁶ Regulation FD (for “Fair Disclosure”) was adopted in 2000 to address the issue of disclosure by companies of non-public information to a select few who could gain a market advantage over other investors—so called “selective disclosure.” Regulation FD requires that if a selective disclosure has been made, the company must make a broad, non-exclusionary distribution of information to the public – simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. See Regulation FD [17 CFR 243.100 et seq.].

⁷ See Release at 18.

- whether and how companies let investors and the markets know that the company has a web site and that they should look at the web site for information;
- whether the 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;
- the steps the company has taken to make its web site and the information accessible, including the use of “push” technology⁸, such as RSS feeds⁹;
- whether the company keeps its web site current and accurate;
- whether the company uses other methods of disseminating information in addition to its web site; and
- the nature of the information.

B. Have Investors Been Afforded a Reasonable Amount of Time to React to the Information?

Whether a reasonable waiting period¹⁰ has been afforded to investors and the market is a facts and circumstances determination, and the factors to consider include:

- the size and market following of the company;
- the extent to which investor oriented information is regularly accessed;
- the steps the company has taken to make investors and the market aware of the company’s use of the web site;
- other steps the company has taken to actively disseminate the information; and
- the nature and complexity of the information.

⁸ Push technology refers to a type of Internet communication where the transmission of information is initiated by the publisher of the information, as opposed to being initiated by the end user. See Release at 21. The SEC noted that the use of these technologies is not necessary but is one factor in evaluating access to web site information.

⁹ RSS, or Really Simple Syndication, is an Internet format used by information providers to automatically publish frequently updated content directly to end users by way of specialized programs or filtered displays.

¹⁰ The Release also notes the question of what constitutes a reasonable waiting period has been heavily litigated in the context of insider trading. The Release suggests that these cases may provide companies with additional guidance on the subject.

Company Liability for Information on Company Web sites

The SEC has reaffirmed that the anti-fraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement. Accordingly, a company should keep in mind the applicability of Exchange Act Section 10(b) and Rule 10b-5 to its web site content.¹¹

A. Previously Posted Materials or Statements

A concern raised by companies is whether previously posted materials or statements on a company's web site will be treated as "republished"¹² each time the materials or statements are accessed, which would create a duty for the company to update the disclosure. In general, the SEC believes that the fact that investors can access previous materials or statements on a company's web site does not in itself mean that such materials or statements have been republished. However, in circumstances where it would not be apparent to a reasonable person that the posted materials or statements speak as of a certain date, then the company should take steps, including separately identifying materials as historical and locating previously posted materials in a separate section of the web site, to clarify the status of such information.

B. Hyperlinking to Third-Party Information

With respect to hyperlinking, the SEC has previously explained that whether third party information would be attributed to a company would depend on whether the company has involved itself in the preparation of information or has explicitly or implicitly endorsed or approved the information.¹³ In the hyperlinking context, the most important factor is what the company has actually said about the hyperlink, including what is implied by the context in which the company places the hyperlink.¹⁴ To avoid any confusion on the part of investors, the company should make explicit, rather than implicit, why the hyperlink is being provided. The use of "exit notices" or "intermediate screens" to denote that the hyperlink is to third-party information may help to avoid confusion. However, a company cannot rely on disclaimers as a shield from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading.

C. Summaries and Overviews

The SEC encourages the use of summaries or overviews on company web sites, but urges companies to consider the context in which such information is presented. Companies should consider the following techniques:

¹¹ Specifically, to satisfy the materiality requirement of a Rule 10b-5 claim the disclosure of an omitted fact must have been viewed by the reasonable investor as having "altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449 (1976). *See also Basic v. Levinson*, 485 U.S. 224, 231 (1988).

¹² If previously posted information is considered republished, a company may be concerned that even if the information was accurate when initially posted or issued, it may no longer be current or accurate as of a later date.

¹³ *See* 2000 Electronics Release, *supra* note 4, at Section II.B.

¹⁴ The Release explains that "[i]n considering the context of the hyperlink, we begin with the assumption that providing a hyperlink to a third-party web site indicates that the company believes the information on the third-party web site may be of interest to the users of its web site. Otherwise, it is unclear to us why the company would provide the link." Release at 34.

- use appropriate titles;
- use additional explanatory language and identify the location of more detailed information;
- use and place hyperlinks in a way that helps investors understand the appropriate scope of the summarized information or overview; and
- use layered or tiered formats with embedded links that allow viewers to follow a logical path into increasingly greater detail about the financial statements.

D. Interactive Web Site Features

The Release also discusses how interactive web site features, like blogs or electronic shareholder forums, will be treated under the antifraud provisions of the federal securities laws. The SEC encourages the use of interactive features, but notes that statements made by or on behalf of a company will be subject to the antifraud provisions of the federal securities laws. In addition, companies cannot require investors to waive the protections under the federal securities laws as a condition to entering or participating in a blog or forum. Most importantly, however, the Release reaffirms that “a company will not be responsible for statements that third parties post on a web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties.”¹⁵

Disclosure Controls and Procedures for Web site Content

If a company elects to use its web site to satisfy its Regulation FD disclosure requirements, its disclosure controls and procedures must include oversight of such use. Under rules adopted pursuant to the Sarbanes-Oxley Act, companies are required to establish effective disclosure controls and procedures.¹⁶ Company CEOs and CFOs are required to assess those controls and procedures and certify on a quarterly basis as to the effectiveness of the controls and procedures.¹⁷ Therefore, unless a company’s disclosure controls and procedures are extended to cover web site use, there is a risk that such certifications would be inaccurate.

Formatting Information - Readability not Printability

Because web site content is increasingly interactive and not static the SEC does not believe that it is necessary for web site content to be “printer friendly” except when expressly required.¹⁸ Therefore, companies are not required to prepare or provide information posted to their web sites in a comparable paper-based format.

While the Release provides helpful guidance and suggestions, particularly in the area of third-party statements, there are still no “bright line” procedures that companies can rely on to ensure that companies can use their websites to satisfy their Regulation FD obligations.

¹⁵ Release at 43.

¹⁶ See Exchange Act Rule 13a-15(a) [17 CFR 240.13a-15(a)]; Exchange Act Rule 15d-15(a) [17 CFR 240.15d-15(a)]; Sarbanes-Oxley Act of 2002 [Pub. L. No. 107-204, 116 Stat. 745 (2002)].

¹⁷ See Exchange Act Rule 13a-14(a) [17 CFR 240.13a-14(a)]; Exchange Act Rule 15d-14(a) [17 CFR 240.15d-14(a)]; Item 601(b)(31)(i) of Regulation S-K [17 CFR 229.601(b)(31)(i)].

¹⁸ For example, Exchange Act Rule 14a-16(c) [17 CFR 240.14a-16(c)] requires proxy materials to be presented in a format convenient for both reading online and printing in paper when delivered electronically.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Banks Bruce at 212.701.3052 or bbruce@cahill.com.

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