

August 14, 2008

Corporate web site disclosure – is your company's web site up to par?

On Friday, August 1, 2008, the Securities and Exchange Commission released Guidance (SEC Guidance)¹ regarding disclosure of information on corporate web sites² specifically in relation to compliance with the Exchange Act.

In particular, the SEC Guidance focuses on:

- The applicability of Regulation FD or “fair disclosure” to web site content;
- A company's exposure to liability for information on its corporate web site, including liability for previously posted or historical data (for example, dated press releases and/or earnings releases), summary or overview corporate disclosure and information in third-party hyperlinks;
- Whether a company's disclosure controls and procedures are designed to address the disclosure of information on a corporate web site in certain cases where such posting may be made in lieu of filing an Exchange Act report³; and
- The format of information presented on a company web site and clarification that the SEC is focused on “readability” not “printability” unless a specific Exchange Act requirement mandates otherwise.⁴

This Client Alert examines the SEC Guidance particularly with respect to Regulation FD and the applicability of the antifraud provisions to information on a corporate web site and

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- 1 The SEC Guidance is available on the SEC's web site at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.
- 2 The SEC Guidance addresses public (Internet) corporate web sites as distinguished from private (intranet) sites.
- 3 While certifications as to the effectiveness of a company's disclosure controls and procedures typically speak to information contained in a company's reports filed under the Exchange Act, the SEC has adopted rules permitting companies to satisfy certain Exchange Act disclosure obligations by posting information on corporate web sites as an alternative to filing a report. For example, the notification of a material waiver of a provision of a company's code of ethics may be posted on a corporate web site as an alternative to filing the information in a Form 8-K. If a company elects to post this information on its web site, disclosure controls and procedures would be applicable to this information. This is discussed more fully in the SEC Guidance at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.
- 4 For example, the SEC's proxy delivery rules that went into effect for proxy solicitations for large accelerated filers commencing on or after January 1, 2008 (January 1, 2009 for all others) require that proxy materials be presented in a manner convenient for both reading on-line and printing in paper when delivered electronically.

addresses critical areas where a company may be exposed to liability. This Alert also provides practical guidance and key considerations for web site compliance under the Exchange Act as highlighted in the SEC Guidance.⁵

Corporate web site disclosure and Regulation FD

Regulation FD prohibits the selective disclosure of material non-public information to specified market professionals. While the posting of certain information about a company on its corporate web site may be available to the public, this does not mean that the information is necessarily deemed “public” for purposes of Regulation FD. Why is the consideration of Regulation FD important in the context of disclosures on corporate web sites? Because an understanding of whether information posted on a corporate web site is deemed “public” is necessary to ensure a company’s compliance with the public disclosure requirements under Regulation FD in the event of a subsequent selective disclosure of that same information.

An evaluation of whether and when information posted on a corporate web site is “public” so that a subsequent disclosure of that information to an enumerated person under Regulation FD is not a disclosure of non-public information (for example, in a conversation between a company official and an analyst), requires an analysis of the following factors:

- Whether and when a company’s web site is a recognized channel of distribution;
- Whether and when posting of information on a company web site disseminates the information in a manner making it available to the securities marketplace in general; and
- Whether and when there has been a reasonable waiting period for investors and the market to react to the posted information.

The determination of whether a company’s web site is a recognized channel for distribution depends upon the steps the company has taken to alert the market to its web site and disclosure practices, as well as the use by investors and the market of the web site. For example, how does your company inform its investors about its corporate web site as a vehicle for corporate information? One common practice would be disclosure of the location of the corporate web site and of the availability of corporate information on the web site in periodic reports on Forms 10-Q, 10-K, and in standard press releases.⁶

If a corporate web site can be deemed as a recognized location of company information, the next question to consider is whether the information on the web site is disseminated to the securities marketplace in general. This second prong of the analysis focuses on the manner in which the information is posted and the timely and ready accessibility of such information to investors and the markets.

⁵ The SEC Guidance makes it clear that the release only addresses matters with respect to corporate web sites in the context of the Exchange Act. All matters pertaining to web site disclosure and communication in the context of compliance with the Securities Act (i.e., such as for companies in a registration period) are covered by the 2000 Electronics Release which is available on the SEC’s web site at <http://www.sec.gov/rules/interp/34-42728.htm>. The SEC also clarified certain discrete Internet issues under the Securities Act in the final rules governing the Securities Offering Reform available at <http://www.sec.gov/rules/final/33-8591.pdf>.

⁶ Accelerated filers and large accelerated filers are required to disclose this information in annual reports on Form 10-K and state whether their Exchange Act reports are available on their web sites.

Some key factors to consider in making the determination as to when and whether a company web site is a recognized channel of distribution, and exactly what “dissemination” means in the context of web site disclosure, include:

- the pattern of posting such information (is the disclosure of corporate information a routine practice?) and the ease of finding such information (is it displayed prominently and in a format readily accessible to the general public?);
- the accuracy of the data on the web site (how often is the web site scrubbed and updated with current information?);
- the extent to which information posted on the web site is regularly picked up by the market and the media and reported in the media; and
- the extent to which the company has advised newswires or the media about the information and the size and market following of the company involved. For example, in evaluating accessibility to posted information, a company with a smaller market cap may be less likely to be well-followed by the market and media and may consider taking additional affirmative steps to inform investors that information about the company is available on its corporate web site.

The last element in the “is it public information” analysis involves a determination as to whether there has been a reasonable waiting period for investors and the market to react to the posted information. The SEC cautions that this is a “facts and circumstances” analysis and notes that companies may consider the following factors to make this determination:

- 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 taken by the company to make the market and investors aware that it uses the corporate web site as a key source of important corporate information (including the location of the posted information); and
- the nature and complexity of the information.

The key here is whether the information has been broadly disseminated. A company with a large market cap and market following with readily accessible corporate information on its web site may have a greater comfort level in making this decision. In cases where there is doubt, a company may be wise to take additional steps to alert the market and investors that important information will be posted on the corporate web site, such as issuing a press release with the information.

If the information posted on a corporate web site is “public” in accordance with the SEC Guidance, then subsequent selective disclosure of such information (even if material) would not trigger Regulation FD. If the data is determined to be non-public, however, and a subsequent selective disclosure is made, disclosure obligations under Regulation FD may be triggered. Standard compliance with Regulation FD disclosure obligations involve furnishing or filing a Form 8-K disclosing the information or using a combined approach of methods reasonably designed to provide broad distribution of the information to the public. However, the SEC Guidance now indicates that for certain

companies with a wide market following and web sites that are well-known channels of distribution (via an analysis of the aforementioned factors), Regulation FD disclosure may be satisfied simply by posting the information on a corporate web site.⁷

Liability under the Exchange Act for content on corporate web sites

The SEC Guidance makes clear that company statements made on the Internet are subject to the antifraud provisions of the federal securities laws, including Exchange Act Section 10(b) and Rule 10b-5 (prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of a security), in the same manner as are any other statements made by, or attributable to, a company. This means that statements posted on corporate web sites and information contained in hyperlinked materials may subject a company to liability.

Effect of previously posted materials or statements on company web sites

Under the SEC Guidance, maintaining previously posted materials or statements on a corporate web site does not mean that a company is reissuing or republishing such materials or information simply because the materials remain accessible to the public. For example, the fact that an investor may periodically access a historic corporate earnings release does not generally mean that the data has been reissued or restated, that the company has made a new statement, or that the company has created a duty to update the materials or statements.

If, however, a company affirmatively restates or reissues the data, the antifraud provisions would again apply to the reissuance or restatement, and the company may also have a duty to update the statement so that it is accurate as of the date it is restated or reissued.

To ensure that it is clear to investors that historic statements speak to a certain date or earlier period, the SEC Guidance recommends that a company separately identify such material as historical or previously posted (including, for example, dating the posted material) and maintain the historic data in a separate location on the corporate web site.

Hyperlinks to third-party information

In the 2000 Electronics Release, the Commission addressed the implications for the use of hyperlinks from company web sites to third-party information in the context of the offer and sale of securities.⁸ Examples include a hyperlink to an analyst research report or to a media news article about the company. The 2000 Electronics Release also discusses the “adoption” theory (a company’s explicit or implicit endorsement of the information) and “entanglement” theory (the extent to which a company has involved itself in the

⁷ Under Regulation FD, when an issuer, or person acting on its behalf, discloses material non-public information to certain enumerated persons (in general, securities market professionals and holders of the issuer’s securities who may well trade on the basis of the information), it must make public disclosure of that information. The timing of the required public disclosure depends on whether the selective disclosure was intentional or non-intentional; for an intentional selective disclosure, the issuer must make public disclosure simultaneously; for a non-intentional disclosure, the issuer must make public disclosure promptly. The SEC cautions that it remains the company’s responsibility to determine whether a posting on its web site is sufficient to satisfy the Regulation FD disclosure requirements.

⁸ The SEC Guidance affirms that the 2000 Electronics Release continues to be the authority on guidance in connection with use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act. The 2000 Electronics Release also provides insight into the relevant factors in determining whether companies have adopted hyperlinked information in evaluating potential antifraud liability.

preparation of the hyperlinked information) in the context of when and whether a company may be exposed to liability for hyperlinked information. An examination of these theories is beyond the scope of this Client Alert. However, the SEC Guidance highlights the following regarding the evaluation of whether a company is exposed to potential antifraud liability for implicit approval⁹ of third-party information to which a company provides a hyperlink:

- The key question is whether the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information.
- One important factor in this determination is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink.
- To avoid potential confusion about what the company's view or opinion is with respect to the hyperlinked information, the SEC recommends that a company explain the context for the hyperlink. In this process, the nature and content of the hyperlinked information should be considered. For example, if a company has a media page and hyperlinks to positive and negative news articles about the company with a title "recent news articles," the risk that the company endorses each and every news article may be reduced.
- The use of "exit notices" or "intermediate screens" to denote that the hyperlink is to third-party information and the use of disclaimers does not automatically insulate a company from liability for third-party statements.

Summary information on corporate web sites

The SEC Guidance clarifies that statements made in summaries or overviews of more lengthy corporate data, particularly with respect to financial information, and posted on corporate web sites are subject to the antifraud provisions of the federal securities laws. The concern with the presentation of condensed or "partial" information is that an investor may not perceive the statement to be a summary or overview and deem the information to be complete.

When using summaries or overviews on corporate web sites, the SEC recommends that companies:

- Consider ways to alert readers to the location of the detailed disclosure from which the summary information is derived or upon which the overview is based;
- Consider the context of the information being presented – utilize appropriate titles and explanatory information to identify summary or overview information (for example, in a glossy annual report, a company typically has an introductory page with graphs and charts introducing key performance metrics derived from financial statements contained later in the document);
- Consider placing a summary section or overview in close proximity to hyperlinks to the more detailed information from which the summary is derived; and

⁹ Explicit approval or endorsement of third-party information contained in a hyperlink on a corporate web site, as noted by the SEC, is "plainly evident" and the focus should be on the circumstances under which a company may be deemed to have implicitly approved or endorsed a third-party statement by hyperlinking to the information.

- Create a logical path by using a layered approach – organize the web site presentations so that the most important summary is on the opening page with embedded links to more detailed information accessible by simply clicking the link.

Interactive web sites

Corporate blogs (including CEO blogs and investor relations blogs which, among other purposes, allow for the exchange of opinions and ideas between a company’s management or other employees and its various stakeholders) and electronic shareholder forums (which can serve as a means for investors to communicate with companies and each other to provide investor feedback on various issues in a real-time basis) are the latest interactive technologies for communicating over the Internet with various stakeholders. The SEC Guidance provides the following considerations for companies hosting or participating in such forums:

- A company may be liable under the antifraud provisions for statements made by the company or on its behalf in blogs or electronic shareholder forums;
- A company cannot require an investor to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum;
- A company is not responsible for statements that third parties post on a web site the company sponsors; and
- A company is not obligated to respond to or correct misstatements made by third parties, provided that the company is not deemed to have adopted, approved or endorsed such statement.

This is by no means an exhaustive discussion of the SEC Guidance with respect to corporate web site disclosure, Regulation FD and the applicability of the antifraud provisions to such information, and should be reviewed in conjunction with the full text of the SEC Guidance and the 2000 Electronics Release, available on the SEC’s web site at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>. and <http://www.sec.gov/rules/interp/34-42728.htm>, respectively.

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