



SEC's Recent Guidance on Use of Company Websites

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On August 7, 2008, the Securities and Exchange Commission issued an interpretive release (the Release) regarding the use of company websites to disseminate information while complying with the antifraud and other provisions of the federal securities laws. The SEC seeks to encourage the continued development of company websites as vehicles for the dissemination of important information to investors. In the release, the SEC addressed:

- the “public” nature of information on company websites for purposes of Regulation FD
- antifraud and other Exchange Act provisions
- disclosure controls and procedures
- format of information and readability

Comments on the guidance included in the Release are due November 5, 2008. Depending on the nature of the comments, the SEC may revise the guidance.

The “Public” Nature of Information on Company Websites

Regulation FD prohibits selective disclosure of material, non-public information. If a company selectively discloses this type of information, it must simultaneously (or promptly in the case of unintentional disclosures) disclose the same information to all investors by filing a Form 8-K or using an alternative method of public disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In the Release, the SEC provided detailed guidance regarding whether information posted on a

company website is “public” for purposes of (1) the applicability of Regulation FD to subsequent private discussions or disclosure of such posted information and (2) satisfaction of Regulation FD’s public disclosure requirement.

Posting information on a company’s website may cause such information to be “public” for purposes of Regulation FD if: (1) the website is a recognized channel of distribution; (2) the information has been disseminated 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.

In determining whether the website is a “recognized channel of distribution,” an issuer should consider various factors, including:

- whether and how it lets investors and the markets know that the company has a website and that the public should look at the company’s website for information
- whether it has made investors and the markets aware that it will post important information on its website
- whether the website is designed to lead investors and the market efficiently to information about the company
- the extent to which information posted on the website 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 it has taken to make its website and the information accessible, including the use of “push” technology, such as RSS feeds
- whether it keeps its website current and accurate
- whether it uses other methods in addition to its website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information
- the nature of the information

To determine when information posted on a company website becomes “public” for the purpose of evaluating whether a subsequent disclosure (for example, to an investor or analyst) may implicate the selective disclosure prohibitions imposed by Regulation FD, issuers must determine whether there has been a reasonable waiting period for the market to react to the posted information. In making this determination, issuers should consider the surrounding circumstances, including:

- the size and market following of the company
- the extent to which investor oriented information on the company website is regularly accessed
- the steps the company has taken to make investors and the market aware that it uses its company website 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 website, including using other channels of distribution
- the nature and complexity of the information

Despite these guidelines, there is no bright-line test to determine whether or not the use of a website will comply with the public disclosure requirement of Regulation FD. Historically, the SEC position has been that website disclosure alone was not sufficient to comply with Regulation FD. In the Release, the SEC acknowledged that for some companies in certain circumstances, posting of information on its website, by itself, may be sufficient public disclosure.

Smaller public companies with limited media, investor and analyst following, would likely not be able to satisfy the “public disclosure” requirement of Regulation FD by website posting alone. As a result, disclosure of material, non-public information on the company website should be preceded by a press release or Form 8-K. These companies should consider stating in their press releases and periodic reports that (1) they maintain, regularly update and regularly post important information about the company on their website, and (2) investors should visit the company website for current information about the company. Smaller issuers should also consider monitoring the volume of traffic to their site and whether and to what extent the media picks up and disseminates information posted on their website.

Antifraud and Other Exchange Act Provisions

Rule 10b-5 under the Exchange Act is a general antifraud provision that prohibits companies from making material misstatements or omissions in connection with the purchase or sale of securities. Rule 10b-5 applies to company information posted on its website as it is considered part of the “total mix” of information made available to the public. In the Release, the SEC provided guidance with respect to the following kinds of website postings:

- previously posted materials
- hyperlinks to third-party information
- summary information
- blogs and shareholder forums

Previously Posted Information. Information on a company’s website may become incorrect or otherwise out of date over time. This raises the issue of whether such previously posted materials could be considered “republished” each time a user accesses the materials, and potentially expose companies to liability under antifraud rules for failure to update the previously posted material. The SEC does not believe that maintaining previously posted materials or statements on websites constitutes republishing such materials *solely* because the materials or statements remain accessible to the public. Nevertheless, to make it clear that the posted

materials or statements speak as of the earlier date or period, the previously posted website materials or statements should be (1) separately identified as historical (for example, by dating the information) and (2) located in a separate section of the website (for example, in a section marked “archives”).

Hyperlinks to Third-Party Information. Issuers may be responsible for the content of hyperlinked information if they were involved in the preparation of the information, or explicitly or implicitly endorse or approve the information. Most of the uncertainty in this area evolves around whether such third-party information has been “adopted” by the issuer. An important factor in this analysis is what the company says about the hyperlink. Accordingly, issuers should consider including an explanation of why a particular hyperlink is included on its website. 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 SEC emphasized, however, that companies may, depending on circumstances, be responsible for the content of hyperlinked information even if their website includes an exit notice, disclaimer or other warning that the information comes from a third party.

Summary Information. To mitigate the risk of liability for summary information, issuers should consider using appropriate headings to identify information as summary information and provide ways to alert readers to the location of the detailed disclosure from which the summary information was derived. These could include use of appropriate titles, additional explanatory language, hyperlinks, and a layered or tiered approach where investors are provided with increasingly more detailed information via embedded links.

Blogs and Shareholder Forums. The SEC acknowledged that company-sponsored “blogs” and electronic-shareholder forums can assist companies in communicating with investors and other stakeholders. In the Release, the SEC provided the following guidance:

- confirmed the anti-fraud provisions apply to such blogs and forums and that issuers are

responsible for statements made by officers or others on their behalf

- confirmed that companies cannot require investors to waive protection under federal securities laws as a condition to entering or participating in a blog or forum

As a result, companies should consider monitoring statements made on their behalf in these types of electronic forums.

Disclosure Controls and Procedures

Information posted to a website is generally not subject to Exchange Act rules governing officer certification of disclosure controls and procedures. However, if website postings are used to satisfy disclosure obligations under the Exchange Act, then disclosure controls and procedures would apply to such information. Accordingly, issuers will want to evaluate their disclosure controls and procedures to make sure they appropriately encompass the company’s website disclosures.

Format of Information and Readability

The SEC does not believe that it is necessary for information appearing on a company’s website to be in a printer-friendly format, unless other rules specifically require it.

Electronic Filing of Form D Now Permitted

As reported in previous editions of this newsletter, the SEC approved amendments to Regulation D, which, among other things, mandate electronic filing of SEC Form D. Effective September 15, 2008, Form D may be filed in paper format or electronically. The SEC has set up a link on its website to permit electronic filings and published a compliance guide regarding accessing the Edgar System. Effective March 16, 2009, all Form D filings will be required to be filed electronically.

Auditor Attestation Report Required Under Section 404 of Sarbanes-Oxley Extended for an Additional Year

On June 20, 2008, the SEC approved a one-year extension for smaller public companies to comply with the outside auditor attestation report required under Section 404(b) of Sarbanes-Oxley. As amended, "non-accelerated filers" (those with a public float of less than \$75 million) will be required to provide the attestation report of their outside auditors of management's assessment of the effectiveness of the issuer's internal control over financial reporting

beginning with fiscal years ending on or after December 15, 2009. The one-year deferral will give these companies additional time to consider the Public Company Accounting Oversight Board's guidance on internal control audits and give auditors of non-accelerated filers more time to incorporate such guidance into their planning and conduct of internal control audits in 2009. Non-accelerated filers and smaller reporting companies will continue to include in their Annual Reports on Form 10-K, management's report on the effectiveness of the issuer's internal control over financial reporting.

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