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### SEC Releases Guidance on the Use of Websites to Provide Information to Investors

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The SEC recently issued an interpretive release regarding the use of company websites to disclose information to investors. This new guidance focuses on four main topics:

- ☐ determining when information posted on a website is considered "public" for the purposes of Regulation FD;
- ☐ a company's liability under the antifraud provisions of the Securities Exchange Act of 1934;
- ☐ implications for disclosure controls and procedures; and
- ☐ readability of information on the website.

This Update provides key highlights of the SEC Staff's interpretive guidance and offers practical advice.

#### Website Disclosure Must Comply with Regulation FD

**Website Postings May Now Provide Sufficient Disclosure For Regulation FD Purposes.** Regulation FD generally requires broad disclosure of material information to investors. The SEC has recognized that with the increasingly widespread use of company websites to provide information to investors, posting of information on a company's website could, in and of itself, be a sufficient method of public disclosure under Regulation FD. To determine if a website posting is sufficient, companies must consider whether the posting is reasonably designed to provide broad, nonexclusionary distribution of the information to the public.

**Companies Must Evaluate Facts and Circumstances.** Although the analysis depends on particular facts and circumstances, the SEC identified three fundamental issues companies must consider when evaluating whether information is considered "public" for the purposes of Regulation FD:

- ☐ Is the company website a recognized channel for distribution of information to the market about the company? Factors to consider:
  - ☐ The company's historical website disclosure practices;
  - ☐ Whether the company has informed the market of these practices; and
  - ☐ Whether the company's investors, and the market as a whole, actually access the website for this information.
- ☐ Does the posting of information on the company website disseminate the information in a manner that makes it available to the securities marketplace in general? Factors to consider:
  - ☐ Does the company have a practice of posting important information on its website and does it let investors know that it does so, such as noting the use of the website in its periodic reports and press releases?
  - ☐ Is the website designed to lead investors efficiently to the information?

- ❑ Is the important information prominently displayed and easily accessible?
- ❑ Do the market and the media pick up and further distribute the company's website disclosures?
- ❑ Does the company keep the website current and accurate?
- ❑ Does the company use other methods to disseminate information, such as RSS feeds or releases through other distribution channels?
- ❑ What is the nature of the particular information?
- ❑ Has there been a reasonable waiting period for investors and the market to react to the information? Factors to consider:
  - ❑ The size and market following of the company;
  - ❑ The extent to which the investor-oriented information is accessed on the website;
  - ❑ The steps taken to make investors aware that the company posts important information and where that information can be accessed;
  - ❑ The company's efforts to actively disseminate the information; and
  - ❑ The nature and complexity of the information.

#### **Antifraud Provisions Apply to Website Information**

**Previously Posted Materials Are Not Deemed Republished for Purposes of Antifraud Rules.** The antifraud provisions of the federal securities laws impose liability on companies that make material misstatements or omissions. These provisions apply to statements made by a company on its website in the same way they apply to any other statement made by, or attributable to, the company. However, the SEC does not believe that companies that maintain previously posted materials on their websites are republishing or reissuing that information for purposes of the antifraud rules.

**Companies Could Be Liable for Hyperlinked Information.** Under Section 10(b) of the Exchange Act and related Rule 10b-5, a company can be liable for third-party information to which it provides hyperlinks from its website if the company has either

- ❑ involved itself in the preparation of the information or
- ❑ endorsed or approved the information either explicitly or implicitly.

To minimize the risk of liability, companies should evaluate whether the hyperlink and information together create a reasonable inference that the company has approved or endorsed the hyperlinked information. Factors to consider include:

- ❑ What does the company say about the hyperlink? What is implied by the hyperlink?
- ❑ Is there a risk of confusing investors?
- ❑ Is there an explanatory statement?
- ❑ How selective is the hyperlink? Is it a link to one positive report and not all reports?

**Companies Should Clearly Identify Summaries of Information.** The SEC realizes that summaries or overviews of more detailed information, such as financial reports, can be a useful way to communicate with investors on websites. However, companies should consider ways to alert readers that the information presented is only a summary and to tell readers where they can access the more detailed disclosure.

**Interactive Website Features Could Expose Companies to Liability.** Interactive website features, such as company blogs and electronic investor forums, are increasingly used to foster communication between a company and its investors. However, all communications by or on behalf of a company are subject to the antifraud provisions of the federal securities laws.

### **Website Postings May Affect Disclosure Controls and Procedures and CEO and CFO Certifications**

Use of company websites may have implications for the certifications relating to a company's disclosure controls and procedures. If a company uses a website posting to disclose information otherwise required in a report under the Exchange Act (for example, disclosure of a material amendment or waiver of the company's code of ethics), disclosure controls and procedures would apply to such posted information. Consequently, the CEO and CFO certifications would extend to the disclosure controls for the information required to be disclosed and posted on the website. However, such certifications would not apply to any other information voluntarily provided on the company's website.

### **SEC Clarifies Format of Information on Website**

The SEC has clarified that, unless otherwise required specifically by its rules, information on a company's website need not appear in a printer-friendly format.

#### **Practical Tips**

**Don't Rely Solely on Website Posting for Important Information!** If certain information being disclosed on a company's website is important, the company should consider taking additional steps, such as filing a Current Report on Form 8-K, to alert the market to the fact that important information will be posted prior to the actual posting of the information.

**Be Sure to Clearly Date All Materials Posted on Website.** To avoid potential liability under the antifraud rules for information maintained on the website, companies should clearly date all posted materials or statements and should maintain historical statements or materials in a separate section of the website. Providing dates and separating historical information from current information will help clarify as of when the company intends the information to speak for purposes of the antifraud rules.

**Take Steps to Clarify that Hyperlinked Information Is *Not* Company Disclosure.** Companies should provide clear and direct explanations for use of hyperlinks and consider using exit notices to make explicit the transition to third-party information to avoid situations in which the hyperlink and information together create a reasonable inference that the company has approved or endorsed the hyperlinked information.

**Use Titles to Clearly Identify When Posted Information Provides Only a Summary.** Companies should consider using appropriate titles to indicate the type of information to be provided, adding explanatory language and using a "layered" or "tiered" format with hyperlinks for any summaries so that readers can easily link to the more detailed disclosure.

**Website Waivers of Federal Securities Law Protections Ineffective.** Companies cannot require investors to waive any protections under the federal securities laws as a condition to entering or participating in a blog or forum. However, a company is not responsible for third-party statements made on the company's website, nor is the company obligated to respond to or correct misstatements made by third parties.

**Traps for the Unwary**

**Exercise Care When Affirmatively Restating or Reissuing a Prior Statement on Website.** If a company affirmatively restates or reissues a prior statement, the antifraud provisions would apply to the restatement or reissuance. Companies should ensure that those prior statements would not be deemed material misstatements or omissions, based on current information.

**Disclaimers Alone Are Not Sufficient Protection.** If a company knows or should have known that hyperlinked information it makes available to investors is materially false or misleading, disclaimers alone are not sufficient to insulate the company from responsibility for that information.

**Make Sure You Have Effective Controls and Procedures to Monitor Employee Statements on Websites.** Employee representatives cannot avoid creating company liability for their statements by purporting to speak in their "individual" capacities. Companies should consider putting into place controls and procedures to monitor statements made by or on behalf of the company on Internet-based forums.