

## SECURITIES UPDATE

### SEC Issues Updated Guidance on Company Web Sites

August 12, 2008

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The Securities and Exchange Commission has issued an interpretative release titled “Commission Guidance on the Use of Company Web Sites” (Release No. 34-58288), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf> (the “Interpretative Release”). The Interpretative Release is important because it affects so many companies, including New York Stock Exchange listed companies required to maintain company web sites, companies that chose to use company web sites to satisfy certain SEC disclosure requirements and companies that maintain company web sites for a variety of marketing or investor relations matters without necessarily considering the securities law implications. The SEC issued the Interpretative Release, updating its previous guidance,<sup>1</sup> in recognition of technological advances and growth in Internet use. The Interpretative Release focuses on the antifraud provisions of the federal securities laws and certain provisions of the Securities Exchange Act of 1934.<sup>2</sup>

The SEC’s guidance focuses on four principal areas:

- When information posted on a company web site is considered “public” for purposes of the applicability of Regulation FD;
- Company liability for information on company web sites (including liability for 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 information posted on company web sites; and
- The format of information presented on company web sites, focusing on readability as opposed to printability.

The Interpretative Release became effective upon publication in the *Federal Register* on August 7, 2008. The SEC is seeking comments on the Interpretative Release through November 5, 2008, but these comments will be considered with respect to future guidance, as the guidance in the Interpretative Release is currently effective.

#### Public Information

In the Interpretative Release, the SEC states that when evaluating whether information posted on web sites is public, companies must consider whether and when:

- A company web site is a recognized by investors and the markets as a channel

of distribution of information about the company;

- Posting of information on a company web site disseminates the information in a manner making it available to the securities marketplace in general; and
- There has been a reasonable period for investors and the market in which to react to the posted information.

This analysis is important to avoid selective disclosure concerns under Regulation FD. Rule 101(e) of Regulation FD generally requires information to be furnished on a Form 8-K in order to avoid selective disclosure concerns, but permits information to be disclosed other than on a Form 8-K if it is disseminated through another method or combination of methods reasonably designed to provide broad non-exclusory distribution to the public, which generally would be deemed to include distributing a press release through a widely disseminated news or wire service. Prior to the Interpretative Release, the SEC stopped short of concluding that disclosure on a company web site, by itself, would be an acceptable method of public disclosure of material non-public information.<sup>3</sup> Now, with advancements in technology and growth of Internet usage, the SEC takes the position that, for “some companies in certain circumstances,” the posting of information on the company’s web site “may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD.”

Each company has the responsibility to evaluate whether the posting of information on its web site satisfies the Regulation FD requirement. In the Interpretative Release, the SEC provides a non-exclusive list of factors to evaluate when determining whether a

company’s web site is a recognized channel of distribution and whether information posted on the web site has been adequately disseminated. These factors are:

- Whether and how companies let investors and the markets know that the company has a web site and that they should look at the company’s web site for information.
  - » For example, does the company disclose its web site address in its periodic reports (and in its press releases) and does such disclosure mention that the company routinely posts important information on its web site?
- Whether the company has made investors and the markets aware that it will post important information on its web site and whether it has a pattern or practice of posting such information on its web site.
  - » In other words, in addition to generally letting the markets know that the company has a web site with information about the company, has the company let the markets know that it uses its web site as a source to publicize important information and does the company, in fact, use its web site to timely disseminate important news about the company?
- Whether the company’s web site is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the web site in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public.

- The extent to which information posted on the web site 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.

- » Companies that are well-followed by the market and the media may be confident that the market and the media will pick up and further distribute the disclosures they make on their web sites.

- » Companies with less of a market following, such as companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's web site and that they should look at the company web site for current information about the company.

- The steps the company has taken to make its web site and the information accessible.

- » Examples include the use of "push" technology, such as RSS feeds, or releases through other distribution channels to either widely distribute such information or advise the market of its availability of information. The Interpretive Release does not require use of push technology, but recognizes it as one factor to consider in evaluating the accessibility of the information.

- Whether the company keeps its web site current and accurate.
- Whether the company uses other methods in addition to its web site 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.

The SEC does not define what constitutes a reasonable waiting period. In fact, the Interpretive Release makes clear that this will vary from company to company and may depend on the type of information. The Interpretive Release does identify factors to consider regarding whether a waiting period is sufficient, which in the context of company web sites may include:

- 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 the company has taken to make investors and the market aware that it uses its company web site as a key source of important information about the company, including the location of the posted information.
  - » Examples include issuing a press release or filing or furnishing a Form 8-K that discloses the time and day that such information will be available on the web site, and that provides the link to where the information will be posted are examples of such steps.

- Whether the company has taken steps to actively disseminate the information or the availability of the information posted on the web site, including using other channels of distribution of information.

- The nature and complexity of the information.

The SEC now recognizes that, with advances in technology, the posting of information on web sites may sometimes be sufficient to constitute public disclosure under Rule 101(e) of Regulation FD. In addition to the factors described above, companies that rely solely on web site disclosure for the purpose of Regulation FD will have to consider whether their web sites are capable of meeting the simultaneous and prompt timing requirements.

### Liability and Antifraud Issues

Liability can arise under Section 10(b) of the Exchange Act and Rule 10b-5 based on statements on company web sites in the same way it would arise with respect to other types of statements made by a company. Where a company is permitted to, and elects to, disclose information exclusively on its web site, such as providing board committee charters on its web site rather than in its proxy statement or disclosing material amendments or waivers to its code of ethics on its web site rather than on a Form 8-K, liability may also arise under the Exchange Act. With respect to company web sites, the Interpretive Release discusses antifraud liability in the context of previously posted materials, hyperlinks to third-party sites, summary information and interactive web site features.

**Previously Posted Materials.** The antifraud provisions of the federal securities laws apply to statements posted on company web sites when they are first made or affirmatively reissued or restated, but the SEC stated in the Interpretive Release that it does not believe that companies maintaining previously posted materials on their web sites are thereby continuously reissuing or republishing such materials for the purposes of the federal securities law antifraud provisions solely

because such materials or statements remain accessible to the public. Where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, the Interpretive Release states that previously posted materials or statements on a company's web site should be:

- Separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and
- Located in a separate section of the company's web site containing previously posted materials or statements.

**Hyperlinks.** Hyperlinks on a company's web site, connecting a user directly to third-party information on a different web site, can have implications under the federal securities laws. In the SEC's 2000 guidance on electronic media,<sup>4</sup> the SEC identified the context of the hyperlink (i.e., what the company says about the hyperlink or what is implied by the company's placement of the hyperlink), the risk of confusing the investors and the graphic presentation of the hyperlinked information as non-exhaustive factors that influence the analysis of whether a company is deemed to have adopted hyperlinked information. In the Interpretive Release, the SEC elaborates on this issue, indicating that the key question is whether the context and the hyperlinked information, taken together, create a reasonable inference that the company has approved or endorsed the hyperlinked information.

The SEC suggests in the Interpretive Release that the company should consider explaining the context of the hyperlinked information,

and thereby make explicit, rather than implicit, why the hyperlink is being provided. For example, a company should consider explaining the source of a highly laudatory news article that is hyperlinked. If a company selectively hyperlinks to a favorable news article, it should consider providing an explanation about the source of the article and why the company is providing the hyperlink in order to avoid implying that the company is commenting upon or approving the article, or was involved in its preparation. On the other hand, a more general media page, with hyperlinks to positive and negative articles, may only need a broad description such as “Recent News Articles.”

The Interpretive Release also notes that “exit notices” or “intermediate screens” that signal the reader is leaving the company’s web site can help to avoid confusion as to the source of the third-party information, but that failure to use them does not result in a determination that the company has adopted the hyperlinked, third-party information. Furthermore, the existence of an exit notice or intermediate screen will not automatically absolve companies from antifraud liability for third-party hyperlinked information. For example, if the company chooses to hyperlink to one favorable analyst report, ignoring other analyst reports that are negative, use of an exit screen may not be sufficient to avoid an inference that the company has endorsed the positive analyst report.

Disclaimers alone are insufficient to insulate a company from liability for hyperlinked information. For example, a disclaimer would not shield a company from antifraud liability for hyperlinking to information

that it knows, or is reckless in not knowing, is materially false or misleading. The Interpretive Release contains a reminder that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.

**Summary Information.** While recognizing that summaries and overviews of information on web sites can be helpful to investors, the SEC believes it is important to alert readers to the location of the detailed information from which the summary or overview information is derived, as well as to other information on a company’s web site. It is important to provide summary or overview information in a context where it is recognized as such. The Interpretive Release suggests the following techniques to highlight the nature of summary or overview information:

- Use of appropriate titles or headings that convey the information’s summary, overview or abbreviated nature.
- Use of additional explanatory language to identify the text as a summary or overview and the location of the more detailed information.
- Placement of a summary or overview section in close proximity to hyperlinks to the more detailed information.
- Use of “layered” or “tiered” format to present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links.

**Interactive Web Site Features.** Recognizing that company web sites are becoming interactive through the use of blogs and

electronic shareholder forums, the Interpretive Release provides the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

- Statements made by the company (or by a person acting on behalf of the company) on blogs or electronic shareholder forums are treated in the same manner as other company statements for the purposes of the antifraud provisions of the federal securities laws.
  - » Companies may not avoid these responsibilities by having employees participate in blogs or electronic shareholder forums by purporting to speak in their “individual” capacities.
- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.
- Companies are not responsible for third-party statements posted on company-sponsored web sites.
- Companies are not obligated to respond to or correct misstatements posted by third parties on company-sponsored web sites.

## Disclosure Controls and Procedures

When Exchange Act rules permit a company to satisfy disclosure obligations by posting the information on its web site, and the company elects to comply with that obligation through web site disclosure, the company’s disclosure controls and procedures apply to such information because it is information that the company is required to disclose in Exchange Act reports. Because failure to make those disclosures on the company’s

web site in that situation would result in an Exchange Act report being incomplete, companies electing that disclosure option must design their disclosure controls and procedures to address the disclosure of such information on their web sites. However, disclosure controls and procedures do not apply to other disclosures of information on a company’s web site. Therefore the chief executive officer and chief accounting officer certifications regarding disclosure controls and procedures do not necessarily cover all web site information. However, because all disclosures on a company’s web site are subject to antifraud liability, companies need to consider whether such disclosures are in compliance with the provisions of the federal securities laws.

## Format and Readability

The Interpretive Release does not require that all web site information be printer friendly. The printer-friendly standard for web site information applies only in the limited situation where the SEC rules explicitly require it, such as proxy materials under the mandatory e-proxy rules pursuant to Rule 14a-16(c).

## Practical Considerations

Companies making presentations to investors frequently prepare slides with detailed information, some of which previously may not have been publicly available. Prior to the Interpretive Release, the SEC had not endorsed the position that posting the slides on the company’s web site could be sufficient for Regulation FD purposes, even if a press release announced the availability of the presentation and the accompanying slides. Under the new guidance, if a company can

satisfy itself that its web site is a recognized public channel capable of disseminating information broadly and simultaneously, that uncertainty is eliminated. As a result, companies may furnish fewer Form 8-Ks reporting under Item 7.01 to satisfy Regulation FD, or may furnish Form 8-Ks reporting under Item 7.01 without exhibits, or with only press releases as exhibits, eliminating the cost of preparing and proof-reading EDGAR versions of presentations they post on their web sites.

If important information is to be disseminated through posting on a web site—such as investor presentations or financial supplements—companies should consider issuing a press release (or furnishing a Form 8-K) to let the market know when and where that information will be posted. The Interpretative Release contemplates that information may be disclosed only on a company web site. However, for the information to be disseminated, it is important that it be noticed by investors. Unless a company can establish that the market looks to the company's web site for press releases, it may be necessary for the notice of availability of information—as opposed to the information itself—to be disseminated through a third-party press release service or through a furnished Form 8-K reporting under Item 7.01.

If a company wants to satisfy the public disclosure requirements of Regulation FD by solely posting the information on its web site, it needs to be sure that its web site can handle the demands of this role. For example, the company must satisfy itself that large numbers of investors can access the posted material at the same time, without crashing the web site (or generating

a message that due to a high volume of Internet traffic the web site is busy and that the request should be tried again later).

It is generally a good idea for a company to take a consistent approach to dissemination of information. For example, a company, as a regular practice, might choose to issue a press release to alert the market that information is posted on its web site, with the web site being the sole location for the detailed information. However, while the company may conclude that web site posting alone is sufficient for disclosing most information, there may be situations where information is so newsworthy that the company expects web site viewership to increase dramatically over a short period of time. In that circumstance, a company may consider it prudent to furnish the information itself (and not just a notice of Internet availability) on a Form 8-K reporting under Item 7.01, in addition to web site posting, to be sure that the information is readily available to all investors simultaneously.

While push technology, such as RSS feeds, is not required for information on a company web site to be deemed disseminated, it is a factor that is helpful for the analysis of whether a web site is a recognized public channel of distribution, disseminating information to the securities marketplace. Therefore, companies may want to consider adding such a feature to their web sites.

Maintaining an accurate and current web site is important in assessing whether a web site is a recognized channel of distribution through which public information is disseminated. Therefore, companies should take steps to monitor their web sites to ensure that information is being promptly

posted and updated when appropriate. For example, if the web site is maintained by the investor relations department, it may be advisable to assign in-house lawyers the responsibility both to advise when changes should be made regarding certain matters—such as corporate governance—and to periodically review the web site to verify that information, other than historical information, remains accurate.

It is important to determine that older information that is presented on the web site is clearly there for historical purposes. Financial information typically identifies the period or date for which information is given, but that is not always the case in narrative reports. Whenever possible, documents posted on a company web site should be dated. To the extent it is practical to maintain a separate section of the web site for historical presentations, clear language should be added, at least to the web page providing the links, that such materials are being provided for historical references and that the company is not reissuing such materials and is under no obligation to update them. For example, it may be beneficial to store historical information in an archives that requires the user to click-through to access.

Companies should review their use of hyperlinks to third-party web sites and whether they are following a consistent policy. Companies should also consider adding or revising web site statements clarifying that they are not adopting or advocating the third-party information.

Companies should analyze whether it is clear that summary and overview sections on their web sites are recognized as such and

that links to more complete information are easy to find on summary and overview pages.

Employees acting as representatives of the company must be trained to understand that when they post on company blogs and electronic forums, they may subject the company to antifraud liability, which cannot be avoided by purporting to speak in individual capacities. Employees should also be aware that such postings may subject themselves to personal antifraud liability. These blogs and forums should be regularly reviewed by counsel from a securities law perspective.

Companies should periodically review their web sites from a securities law perspective. The recent guidance in the Interpretive Release presents a good framework for such an analysis.

## Endnotes

- <sup>1</sup> See the interpretive release which the SEC issued in 2000 titled “Use of Electronic Media” (Release No. 33-7856), available at <http://www.sec.gov/rules/interp/34-42728.htm>.
- <sup>2</sup> For issues relating to company web sites in connection with the Securities Act of 1933, and which do not change as a result of the Interpretive Release, see the release which the SEC issued in 2005 titled “Securities Offering Reform” (Release No. 33-8591), available at <http://www.sec.gov/rules/final/33-8591.pdf>.
- <sup>3</sup> See the release which the SEC issued in 2000 titled “Selective Disclosure and Insider Trading” (Release No. 33-7881), available at <http://www.sec.gov/rules/final/33-7881.htm>.
- <sup>4</sup> See Release No. 33-7856, available <http://www.sec.gov/rules/interp/34-42728.htm>.

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