

SECURITIES REGULATION AND COMPLIANCE ALERT

SEC GUIDANCE ON COMPANY WEB SITE USE:

On August 1, 2008, the Securities and Exchange Commission issued an interpretive release that provides guidance on securities laws implications related to the disclosure of information on company web sites. The release provides the SEC's first guidance on this subject since it issued Regulation FD in 2000. The release which supplements earlier guidance addresses the following areas.

- 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 blogs);
- Controls and procedures advisable with respect to information posted on a company web site and
- Format of information posted on a company web site.

Whether information on company web sites is "public" for purposes of Regulation FD

Regulation FD was adopted to address the problem of selective disclosure of material information by companies. Regulation FD requires that once a selective disclosure has been made, a company must disclose the information to the public, either simultaneously in the case of an intentional disclosure or promptly in the case of an accidental disclosure. Given the significant technological advances since Regulation FD was adopted and the pervasive use of the Internet by companies and investors, the SEC recognized in the release that in certain circumstances information may be adequately publicly disclosed solely by a posting on the company's web site. The SEC provided guidance as to circumstances under which information posted on a company web site would be considered "public" for purposes of evaluating (1) whether subsequent private communications of posted information will trigger further disclosure requirements under Regulation FD and (2) whether information published on a company's web site promptly after an unintentional selective disclosure satisfies the requirement that the information be disclosed publicly.

In evaluating whether information posted on a company web site is "public" for the purposes of Regulation FD, the SEC states that companies must consider whether and when:

- A company web site is a recognized channel of distribution,
- Posting 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 waiting period for investors and the market to react to the posted information.

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In the release, the SEC indicates that it would consider several factors, such as the ones listed below, in making the foregoing assessments based on the facts and circumstances. Unless it is reasonably clear based on these factors that the securities marketplace considers a company's web site to be a recognized channel of distribution, the company should continue to disclose material information via more traditional modes of disclosure, such as filing or furnishing such information to the SEC or issuing a press release, at the same time it publishes such information on its web site.

- What steps has your company taken to alert the market to its web site and its disclosure practices;
- Do your periodic reports and press releases include your company's web site address and indicate that you routinely post important information there;
- Do you have a pattern of posting such information on your web site;
- Is your web site designed to lead investors efficiently to information about the company and is the information prominently disclosed in the location known and routinely used for such disclosures;
- Is the information on your web site presented in a format readily accessible to the general public;
- Is the information on your web site current and accurate;
- Is information posted on your web site regularly picked up by the securities markets and regularly picked up and reported by readily available news media; (*Companies with less of a market following, including smaller market capitalizations, may need to take more affirmative steps so that investors know that the information has been posted on the company's web site*)
- Has your company taken steps to make your web site more accessible, such as "push" technology like RSS feeds;
- Do you use other methods in addition to web site posting to disseminate information and what is the predominant method;
- What is the size and market following of your company; and
- What is the nature and complexity of the information being disclosed?

The release does not provide clear guidance on what is considered a "reasonable waiting period" to react to the information. What constitutes a "reasonable waiting period" is a facts and circumstances determination that may vary from company to company and on the particular type of information being disclosed. The SEC indicates in the release that the factors listed above would be considered in the assessment. Given the uncertainty of the timing of the reasonable waiting period, if a company intends to make selective disclosure shortly after disclosing the information on its web site, it may be prudent to simultaneously publish such

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information via a more traditional mode or to alert investors and the securities marketplace in some manner that important information is being or has been posted on its web site.

The SEC acknowledges that in certain circumstances, posting of material information on a company web site may be a sufficient method of public disclosure under Regulation FD once a selective disclosure has been made. The release indicates that the company should look to the factors outlined above to determine whether a posting on its web site will, by itself, satisfy Regulation FD.

Antifraud and other Exchange Act Provisions

The release confirms that the antifraud provisions of the federal securities laws apply to company statements made on the Internet, including postings on and hyperlinks from a company web site, in the same way they would apply to any other statement made by or attributable to a company. The release provides advice and clarifications on liability risks from the antifraud provisions for a few specific situations.

Previously Posted Material

The release clarifies that the SEC does not consider the maintenance of previously posted materials or statements on a web site as a reissuance or republication of such materials for purposes of the antifraud provisions just because the materials or statements remain accessible to the public on the web site. If the originally posted information simply remains available on your web site as historic information, then you will not have a duty to correct or update the information; however, if you affirmatively restate or reissue a statement, such action may create a duty to update the statement. The SEC advises that to assure investors understand that posted materials or statements speak as of an earlier date or period, previously posted materials or statements should be separately identified as historical by dating the materials and should be located in a separate section of the company's web site containing previously posted materials or statements.

Hyperlinks to Third Party Information

The release provides guidance on circumstances under which a company may be subject to antifraud liability for information that is contained on a third-party web site hyperlinked from the company's web site. The SEC explained that whether such third-party information is attributable to the company depends on whether the company has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. Among the important factors that the SEC will consider in this determination is what the company says about the hyperlink including what is implied by the context of the hyperlink, as well as, the nature and content of the hyperlink. To avoid the inference that the company is commenting on or approving the hyperlink, the SEC indicates that companies should consider adding explanatory language about the source of the hyperlink and why the company is providing the hyperlink. While the SEC makes it clear that the use of disclaimers alone will not

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shield a company from antifraud liability, a company should consider including “exit notices” or “intermediate screens” to clarify that the hyperlink is to third-party information.

Summary Information

The release provides guidance with respect to companies’ use of summaries or overviews to present information on their web sites. As with hyperlinks, in order to avoid confusion as to the level of incompleteness in these disclosures, the SEC recommends that companies consider taking the following steps when presenting summary information on their web sites:

- Using explanatory language to identify the information as summary and to identify the location of more detailed information;
- Using appropriate titles that convey the summary or overview nature of the information;
- Using hyperlinks from the summary to more detailed information, and
- Using a “layered” or “tiered” format that allows the reader to “drill down” to more detail by clicking on the links.

Blogs, shareholder forums and other interactive features

In the release, the SEC affirms that all communications made by or on behalf of a company, including blogs and shareholder forums are subject to the antifraud provisions of the federal securities laws and therefore recommends that companies take steps to put into place controls and procedures to monitor statements made by or on behalf of the company in electronic forums. The SEC notes that employees acting as representatives of the company should be aware of their responsibilities in these forums and that they cannot avoid such responsibilities by purporting to speak in their individual capacities. In addition, companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum. The release also clarifies that a company is not 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.

Disclosure Controls and Procedures

The release notes that disclosure on a company’s web site may implicate Securities Exchange Act rules governing certification requirements relating to disclosure controls and procedures. Various rules adopted by the SEC permit issuers to satisfy certain Securities Exchange Act disclosure obligations by posting information on their web sites as an alternative to providing a report. If a company elects to satisfy its disclosure obligations by posting information on its web site, such disclosure would be subject to the certification of disclosure controls and procedures by the company’s principal executive officer and principal financial officer. Therefore companies should ensure that their disclosure controls and procedures are designed to address the disclosure of such information on their web sites.

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Format of Information and Readability

The release clarifies that given the increasingly interactive nature of online information, information appearing on company web sites need not be in printer-friendly format, unless the SEC rules explicitly require it in a particular circumstance. Note however, that the SEC's notice and access model for e-proxy requires that electronically posted proxy materials be present in a format "convenient for both reading online and printing on paper." (As a reminder, beginning January 1, 2009, all reporting companies must comply with the SEC's mandatory e-proxy rules. At a minimum, compliance with the e-proxy rules will require a company to post its proxy materials on a publicly-available web site no later than the date the notice is first sent to stockholders. See our *December 2007 Securities Regulation and Compliance Alert* for more information on e-proxy requirements.)

Comment Period

The comment period for this release ends on November 5, 2008, after which the SEC may provide further guidance on this subject.

The Securities Regulation and Compliance Alert is intended to keep readers current on matters affecting securities regulation and compliance and is not intended to be legal advice. For more information, please contact any of the following attorneys in the firm's Securities and Corporate Finance Practice Group:

Pittsburgh

Gary Walker 412.566.2910 gwalker@eckertseamans.com

Philadelphia

Gary Miller 215.851.8472 gmiller@eckertseamans.com

Boston

Elizabeth Simon 617.342.6849 esimon@eckertseamans.com

White Plains, NY

Briar McNutt 914.949.2909 bmcnutt@eckertseamans.com