
SECURITIES DISCLOSURE

SEC Interpretive Guidance on Web Site Disclosure

The SEC's recently published guidance on public companies' Web site disclosures addresses several important issues, including the "public" status of the disclosures for Regulation FD purposes and antifraud considerations. While the SEC stated, for the first time, that "for some companies in some circumstances," a Web site posting may be a sufficient method for public disclosure under Regulation FD, the generality of the SEC's guidance and other practical hurdles likely will limit reliance on this new position initially to only to the largest public companies with very active trading markets and widespread media followings.

by **Alan Singer and Justin W. Chairman**

On August 1, 2008, the Securities and Exchange Commission (SEC) published an interpretive release addressing several topics related to public companies' Web site disclosures.¹ Among the topics addressed are: (1) whether Web site disclosures are deemed "public" for purposes of Regulation FD; (2) the application of the antifraud and other provisions of the Securities Exchange Act of 1934, as amended (Exchange Act), to information on, and hyperlinks from, Company Web sites; and (3) the use of interactive Web site features such as shareholder forums and investor blogs.

Prior to the Web Site Release, the SEC's long-standing position on Web site disclosure in the

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context of Regulation FD was that such disclosure would not, by itself, be an acceptable means of "public" disclosure. Significantly, the Web Site Release marks a departure from this position. However, the generality of the SEC's guidance and certain practical hurdles to reliance on its changed position likely will dissuade most companies from seeking to use their Web sites exclusively to satisfy Regulation FD at this time. In addressing antifraud considerations relating to Web site disclosure, the SEC essentially reaffirmed its existing position that Web site disclosures are subject to antifraud rules and otherwise broke no major new ground in its observations. It also provided some specific guidance regarding third-party hyperlinks and interactive Web site features that may be helpful to companies seeking to make more robust use of their Web sites to disseminate information to investors. In addition, the SEC clarified that, subject to very limited exceptions, the requirement that public companies maintain disclosure controls and procedures does not extend to information posted on a company's Web site. Nevertheless, prudence dictates that companies institute some safeguards to address liability concerns related to Web site information.

Evaluation of Whether and When Web Site Information Is "Public"

The first area of guidance in the Web Site Release deals with the circumstances in which disclosure on a company Web site would, for purposes of Regulation FD, constitute "public" disclosure. Regulation FD is designed to prevent selective disclosure by mandating that if a company or a person acting on behalf of a company makes a disclosure of material, non-public information to what the SEC characterizes in the Web Site Release as "enumerated persons" (analysts and other designated market professionals or, in certain circumstances, company shareholders), it must make "public" disclosure of the information simultaneously or, where the selective disclosure is non-intentional, promptly thereafter. The SEC refers to this requirement in the Web Site Release as the "public disclosure requirement."

The Web Site Release addresses the issue of whether and when a Web site disclosure is a “public” disclosure for purposes of Regulation FD in two contexts:

1. Is a Web site disclosure “public” so that a subsequent disclosure to the enumerated persons would not violate Regulation FD?
2. In the event a company or person acting on its behalf makes a selective disclosure of material non-public information to an enumerated person, would the posting of the information on the company’s Web site satisfy the public disclosure requirement of Regulation FD?

The SEC provided the following general criteria that companies must consider in evaluating whether and when information posted on a company Web site is “public” so that subsequent disclosures to the enumerated persons are permissible:

1. The company Web site is a recognized channel of distribution;
2. Posting of information on the company Web site disseminates the information in a manner that makes 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.

Is Company Information Posted on its Web Site “Public”?

The SEC did not provide a prescriptive list of actions a company must take to satisfy the criteria. Instead, the Web Site Release discusses a number of non-exclusive factors relating to the criteria for companies to consider. First, the SEC addresses, in one “non-exclusive” listing, eight factors relating to the first two general criteria—whether the company Web site is a recognized channel of distribution and whether the information is appropriately “disseminated”²—as described below:

1. *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 include disclosures in its periodic reports (and in its press releases) of its Web site address and that it routinely posts important information on its Web site?

2. *Whether the company has made investors and the market 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.*

The first two factors suggest that one way a company can begin to establish that its Web site is a recognized channel of distribution would be to include an appropriate statement in press releases and in periodic reports filed with the SEC (e.g., annual reports on Form 10-K and quarterly reports on Form 10-Q) stating that it uses its Web site to disclose important investor information. With respect to press releases, we believe that earnings releases, which typically are issued periodically on a regular schedule, would be an appropriate form of communication in which to include this statement. The statement would include the Web site address on which information intended to be “public” will be posted, making clear that important information will be disclosed at that location. If the company intends to disclose specific categories of information on a regular basis on its Web site, the statement may also identify these categories (e.g., earnings forecasts, sales by product category, status of clinical tests, etc.)

3. *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.*

Several of the concepts in this factor should be relatively easy to address. Certainly, the use of “investor” Web pages by public companies is common, and, for most of the large number of public companies that maintain Web sites, investors and other persons can be expected to look initially to the investor Web page for information regarding the company, its securities, its financial performance

and other relevant information. Of course, this assumes that a link on the company's home page to the "investor" portion of the company's Web site is easy to find, and companies should see that this is the case. In addition, a company's inclusion of a prominent link on the investor page to the information designed to be "public" should be deemed to "lead investors and the market effectively" to the information. For example, a link captioned "Earnings Forecasts," or, perhaps more generally, "Important Investor Information," should serve this purpose.³ Finally, a company should be easily able to present information in a format "readily accessible to the general public."

The SEC provides no prescribed method for showing that information posted on a Web site is "regularly picked up by the market."

It may be more difficult, however, for even the very largest companies to demonstrate that information is disclosed "in the location known and routinely used for such disclosures," especially during the time that the company is seeking to establish its practice of Web site disclosure. Reference to a Web site being "known and routinely used" suggests adoption by users of a consistent practice over a period of time, and it is unclear when a company can conclude this has taken place. Perhaps a company can establish this by referencing the number of "hits" on the specific site, although wide variations in the number of hits from period to period may raise questions as to whether the Web site is "routinely used."

4. *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 of the market following of the company involved.*

This factor indicates that market and media attention to Web site postings provide an important

indication that a company's Web site is a recognized channel of distribution and, therefore, that the posted information is readily available to the securities marketplace, provided that the company has a sufficient market following. Interestingly, the factor appears to provide alternative ways a company can demonstrate sufficient market/media attention to its Web site postings. The first alternative relates to the SEC's statement that if a company with a broad market following can show that the Web site information is regularly picked up by the "market" and "readily available" media and reported in such media, this market/media factor will be sufficiently addressed. The SEC provides no prescribed method for showing that information posted on a Web site is "regularly picked up by the market." Perhaps trading data demonstrating timely market reaction to Web site postings, or discussion of Web site-posted information on shareholder forums (e.g., message boards) or investor blogs would indicate media and market awareness of posted information. Whether a media source is "readily available" as contemplated by this factor also is not subject to definitive guidance. Financial publications of broad circulation, such as the *The Wall Street Journal*, would almost certainly qualify, but less well-known sources not as clearly directed to the investment community, such as industry journals, may not. In addition, the factor also focuses on the extent to which the information is "regularly" picked up, so that a company will have to establish a consistent pattern of market reaction and media reporting.

As part of this factor, the SEC added the following observation:

For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and media may know that the market and the media will pick up and further distribute the disclosures they make on their Web sites. On the other hand, companies with less of a market following, which may include 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 SEC's statement will not be helpful to most public companies. While the largest and most actively traded companies may well be able to derive comfort by keeping track of published reports in "financial publications of general availability," most smaller companies will need to be cautious about reaching conclusions as to whether their Web page has the requisite following. These companies may seek to rely on the second alternative measure suggested by the factor, namely advising the newswires and the media (presumably through press releases, interviews or other forms of media advisories) about their Web site information. However, whether this alternative will be appropriately responsive to the requirements of this factor is unclear, particularly if a company's efforts do not result in increased media coverage. As discussed above, it will be helpful in this regard for a company to gauge market activity, as well as investor blogs and shareholder forums, after a posting of important information. But a company whose securities are thinly traded may simply be unable to satisfactorily address this factor. The SEC's focus on company size and market following underscores the significant, and in some cases perhaps insurmountable, challenges that a smaller company will face in seeking to make "public" disclosures solely on its Web site.

5. The steps the company has taken to make its Web site and the information accessible, including the use of "push" technology, such as RSS feeds or releases through other distribution channels either to widely distribute such information or advise the market of its availability.

This is one of several factors that refer to steps that the company is taking, outside of the mere posting of the information on the Web site itself, to direct the attention of investors and others to the information. An RSS feed provides a method for companies and others to alert users to changing Web site content. After a user subscribes to an RSS feed, the user receives alerts, or "feeds," providing summaries of, and links to, the updated content. Another, considerably less cutting-edge, "push" technology is an email alert.

Interestingly, after highlighting "push" technology, the SEC goes on to state that it does not believe that push technology need be used in order

for the information to be disseminated, although "that may be one factor to consider in evaluating the accessibility of the information." However, if the use of "other distribution channels" is an important consideration, the factor underscores the uncertainty as to when, if ever, a company can become comfortable that a mere posting on its Web site would constitute "public" disclosure for purposes of Regulation FD.

6. Whether the company keeps its Web site current and accurate.

This is a logical factor. Certainly, a company should not be using Web site postings to disseminate important kinds of information if it will not regularly report on and update such information. In this regard, a company should be cognizant of the need to update Web site information regardless of whether a company seeks to use its Web site to make "public" disclosures for purposes of Regulation FD.

7. 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.

This factor echoes a theme discussed several times above. Of the eight factors listed in this portion of the Web Site Release, five of them address efforts the company makes, outside of the Web site itself, either to alert the marketplace to the presence of the information on its Web site or to disseminate the information through other channels. In light of the SEC's focus on non-Web page communications, most companies will need to proceed with a good deal of caution before concluding that the posting of information on their Web sites, by itself, is sufficient to constitute public disclosure for purposes of Regulation FD.

8. The nature of the information.

There is no specific additional guidance as to the meaning of this particular factor, although, as discussed below, the SEC suggests the advisability of using alternative distribution channels "if the information is important."

Has a “Reasonable Waiting Period” Elapsed?

As noted above, the third general criterion to use in evaluating whether a Web site disclosure is “public” so that subsequent disclosure can be made to the enumerated persons is whether investors and the market have been afforded a reasonable waiting period to react to the information after it is posted on the Web site. After stating that the determination of a reasonable waiting period “depends on the circumstances of the dissemination,” the SEC lists the following five non-exclusive factors,⁴ several of which raise similar considerations to those discussed above:

1. *The size and market following of the company;*
2. *The extent to which investor oriented information on a company Web site is regularly accessed.*

As was the case with regard to some of the factors for determining whether Web site posted information is “public,” the SEC references company size and market following. Considerations relating to determining if the information is “regularly accessed” should be similar to those discussed above in determining whether a company’s information is posted in a “location known and routinely used” for such information.

3. *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.*

An appropriately worded statement in earnings releases and periodic filings, in the manner discussed above, should enable the company to demonstrate that it has taken sufficient action.

4. *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.*

As noted above, references to other channels of distribution in factors articulated by the SEC will

raise uncertainty for many companies as to their ability to rely on their Web sites as the exclusive means of providing certain types of information intended to be “public” for Regulation FD purposes. In fact, in additional commentary following its listing of factors, the SEC states:

If the information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted—for example, prior to such posting, filing or furnishing such information to us or issuing a press release with that information.

This statement certainly should give pause to any company wishing to disseminate “public” information exclusively through its Web site.

In its 2000 release adopting Regulation FD, the SEC stated: “The Regulation does not define the terms ‘material’ and ‘nonpublic,’ but relies on existing definitions of these terms established in the case law. Information is material if ‘there is a substantial likelihood that a reasonable investor would consider it important’ in making an investment decision.”⁵ Presumably, therefore, “important” information means “material information” for purposes of Regulation FD. But if this is the case, then the Web Site Release may be read to state that an issuer may always have to consider issuing a press release or furnishing information to the SEC in a periodic filing to be sure that investors and the market have been afforded a reasonable waiting period to react to the information. It is difficult to imagine that the SEC intended this result. Such an interpretation would present a challenge for any company seeking to conclude that information presented exclusively on its Web site is “public” so that, after a reasonable waiting period, it may provide the information to enumerated persons.

On the other hand, a more benign reading of the SEC’s guidance may be that while alternative forms of dissemination will shorten the time period that must elapse following the posting, at least some companies may be able to provide material information to enumerated persons even if the information appeared solely in the Web site

posting. Nevertheless, based on the SEC's guidance, it seems prudent, at least until further clarification is provided by the SEC, or industry practice becomes generally accepted, for most companies to use alternative forms of dissemination to address the waiting period criteria.

5. *The nature and complexity of the information.*

In essence, the SEC takes the logical position that the more complex the information, the more time should be allowed for dissemination of the information prior to subsequent discussions with enumerated persons.

Consequences of Failing to Meet the "Public" Criteria

As indicated above, the Web Site Release does not provide companies with a clear path for concluding that the communication of material information exclusively on their Web sites will be "public" for the purposes of enabling subsequent communication of the information to enumerated persons. The Web Site Release does, however, provide helpful advice that the failure of a Web site posting to satisfy the criteria to be deemed "public" likely will not, by itself, cause a violation of Regulation FD. In other words, the Web site posting may fail to be "public" for purposes of Regulation FD, but so long as the disclosure appears "in a location and format readily accessible to the general public," it would not be deemed to be "selective disclosure" that would violate Regulation FD, even if accessed by an enumerated person. On the other hand, it is important to note that subsequent disclosure of the posted information to an enumerated person, other than through the Web site posting itself, would nevertheless violate Regulation FD unless the required public disclosures are made at or before that time (or, if the disclosure was not made intentionally, promptly thereafter).

When Does a Web Site Posting Satisfy Regulation FD's Public Disclosure Requirement?

The Web Site Release also addresses considerations for companies seeking to use Web site

disclosures to comply with Regulation FD's public disclosure requirement, *i.e.*, to provide material non-public information no later than simultaneously with the selective disclosure of that information to an enumerated person (or promptly thereafter, if the disclosure was not intentional). In this regard, in a departure from its previous, long standing position, the SEC stated that: "we now believe that technology has evolved and the use of the Internet has grown such that for some companies in certain circumstances posting of the information on the company's Web site in and of itself may be a sufficient method" of meeting the public disclosure requirement.⁶ In addressing whether a company's Web site posting of information would be a sufficient method, the SEC stated that companies "will need to consider whether and when" their Web site postings meet the Regulation FD requirement that the information be disseminated in a manner "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." It is not surprising that, in addressing considerations relating to whether Web site postings satisfy Regulation FD's public disclosure requirements, the SEC referenced the factors, discussed above, to be used by companies in determining whether their Web sites are recognized channels of distribution and whether the information is appropriately "disseminated." The SEC emphasized that companies also will need to consider their Web sites' capability to meet the simultaneous or prompt timing requirements for public disclosure.

Antifraud Considerations

The Web Site Release also discusses the application of other securities law provisions to Web site disclosure, most significantly the antifraud provisions of the Exchange Act, namely Section 10(b) and Rule 10b-5 thereunder. Not surprisingly, and consistent with past SEC guidance in the context of electronic communications,⁷ the Web Site Release makes clear that the antifraud provisions apply to statements that a company makes on the Internet in the same manner as they would to a more traditional published statement. The Web Site Release notes that whether a statement or omission is "material" for the purposes of these liability standards will be determined based on the same factors used to determine materiality in other contexts, including whether the

information in question would be viewed by a reasonable investor as having significantly altered the “total mix” of information made available.

In addition to its general overview of the applicability of antifraud liability in the context of a company’s statements on its Web site, the Web Site Release discusses antifraud liability issues relating to four specific issues relevant to these communications.

Are Previously Posted Materials “Republished”?

Because a company’s statements on its Web site may remain accessible for some period of time after the initial posting, a key question is whether the statements are deemed “republished” when they are later accessed. A determination that a company’s Web site statements have been republished could result in liability for the company if the statements, even if accurate when made, are inaccurate when the statement is subsequently accessed. The conclusion that the statements are republished when later accessed would suggest that the company has a duty to update the previously posted information to insure that the statement is not deemed to include a material misstatement or to be subject to a material omission.

In the Web Site Release, the SEC states its general view that: “We do not believe that companies maintaining previously posted materials or statements on their Web sites are reissuing or republishing such materials or information for purposes of the anti-fraud provisions of the federal securities laws just because the materials or statements remain accessible to the public.” This position does not apply if the statement in question is affirmatively restated or reissued by the company. Moreover, for instances when the dated nature of the statement is not apparent, the SEC suggests that the statements should be separately identified as historical and previously posted, for example by dating the statements, and they should be located in a separate section of the Web site that contains previously posted information. Presumably, this could be achieved by locating the statement on a Web page entitled, for example, “Archive” or “Historical Information.” Many companies already follow this practice for their old earnings releases and analysts’ and investors’ call transcripts, as well as other information.

Hyperlinks to Third-Party Information

The use of hyperlinks to third party information, and the circumstances under which a company could have liability for hyperlinked material, was addressed by the SEC in a 2000 interpretive release.⁸ That release addressed liability for hyperlinked information, including use of such information in the context of an offer and sale of securities under the Securities Act of 1933, as amended (Securities Act). In the Web Site Release, the SEC addressed the issue of hyperlinks by providing “additional guidance” outside of the Securities Act offering context.⁹

The SEC stated that a company “can be held liable” for hyperlinked third-party information, “which could be attributable” to the company, although it is clear from earlier guidance and the Web Site Release that a company’s use of a hyperlink would not necessarily cause the hyperlinked information to be attributable to the Company. Referencing the 2000 Electronic Media Release, the SEC stated that whether the third-party information is attributable to a company depends on whether the company has been involved in the preparation of the information (referred to as the “entanglement” theory), or whether the company has explicitly or implicitly endorsed or approved the information, (referred to as the “adoption” theory). The SEC did not focus on the entanglement theory, under which a company’s liability depends on “the level of the company’s pre-publication involvement in the preparation of the material in question.” Exposure of an issuer that participates in the preparation of hyperlinked information to antifraud liability is relatively clear, and the SEC obviously saw no need to address the concept in the Web Site Release. Similarly, the SEC did not address the adoption theory in the context of an obvious endorsement of hyperlinked information. Instead, it focused on a company’s implicit adoption of third party information, reasoning that because “an explicit approval or endorsement is, by definition, plainly evident, the analytical scrutiny is on the circumstances or conditions under which a company can fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to that information.”¹⁰

The SEC’s analysis began with a reference to its listing, in the 2000 Electronic Media Release, of

three non-exclusive factors to be considered in analyzing whether a company has adopted hyperlinked information:

1. *Context of the hyperlink.* What the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
2. *Risk of confusing the investors.* The presence or absence of precautions against investor confusion about the source of the information; and
3. *Presentation of the hyperlinked information.* How the hyperlink is presented graphically on the Web site, including the layout of the screen containing the hyperlink.

While these three areas remain relevant to an adoption analysis, the Web Site Release distilled the considerations to be taken into account in the analysis of implicit adoption to what the SEC called the “key question” in the hyperlinking context: “Does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?”¹¹

The SEC stated that “one important factor” in addressing this question is “what the company says about the hyperlink and what is implied by the context in which it is placed.” Because the SEC assumes that “a company providing a hyperlink to a third party Web site believes it is important,” it suggests that a company should provide an explanation that makes explicit why the hyperlink is being provided “[t]o avoid potential confusion or misunderstanding about what the company’s view or opinion is” on the hyperlinked information. An example provided by the SEC is a statement by a company that it explicitly endorses the hyperlinked information or suggests that the information “supports a particular assertion on the company’s Web site.” It is unclear, however, whether a suggestion that hyperlinked information supports a company assertion means the company is adopting the information. On the other hand, if, for example, a company explains a hyperlink to a general, non-selective sampling of industry journals by stating that the links are being provided to give investors access to information relating to products produced by the company or

its competitors, it would seem reasonable in most cases to conclude that the company is not implicitly adopting the information. In fact, the SEC stated that “a company might simply note that the third party Web site contains information that may be of interest or use to the reader.”

The SEC also stated that the inclusion of hyperlinks on Web site pages that are not directed to investors but to other audiences, for example, consumers of company products, “has different implications from a securities law perspective” than a hyperlink from an investor-oriented page, although, as discussed below, the content of the hyperlink is also an important element of the analysis.

Another factor in determining whether an issuer has implicitly adopted the hyperlinked information is the nature and content of the information. In this regard, selective provision of information can be important. For example, if the company provides links only to materials that provide favorable perspectives on the company, as opposed to providing links to all similarly situated materials, regardless of point of view (*i.e.*, linking only to positive recent news articles, as opposed to both positive and negative news articles), implicit adoption of the material is suggested. In this context, a determination that a company has implicitly adopted the selectively chosen information may subject the company to anti-fraud liability for omitting to state material facts, namely the information included in the less flattering publications.

Finally, the SEC noted a company could use “exit notices” or “intermediate screens,” or make disclaimers, to underscore the third-party nature of the hyperlinked material or disclaim responsibility for its content. However, these steps will not, by themselves, eliminate the possibility that a company will be subject to antifraud liability in connection with hyperlinks to third-party information. The Web Site Release specifically notes that a disclaimer would not shield a company from antifraud liability “for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading.” Moreover, these kinds of disclaimers and screens generally are not favored by users and Web site designers.¹²

Summary Information

The Web Site Release endorsed the use of summaries or overviews to present information, “particularly financial information,” on Web sites, and provides guidance for mitigating antifraud concerns in conjunction with providing summaries. The SEC noted that if a reasonable person does not perceive the disclosure to be a summary, the person may not understand that the disclosure should be read in the context of the information being summarized. Techniques to avoid potential liability include the use of appropriate titles to indicate that the material presented is a summary or overview, as well as the use of additional explanatory language. The SEC also suggested placing the summary or overview section in close proximity to hyperlinks to the more detailed information and organizing Web site presentations to use a layered or tiered format in which the summary contains embedded links to the additional relevant detail.

Interactive Web Site Features

With the goal of promoting “robust use” of company Web sites, the SEC provided guidance on the use of interactive features such as company-sponsored blogs and shareholder forums. The Web Site Release emphasizes that all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, regardless of whether they are informal and conversational in nature, and suggested that companies put into place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums. In this regard, the SEC stated that a company cannot avoid liability for statements by a company official solely by virtue of that person purporting to speak in his or her “individual” capacity. In addition, the SEC noted that, in the context of shareholder forums, the antifraud provisions of the proxy rules may require a participant in a shareholder forum to identify herself or himself.¹³ On the other hand, the SEC stated that a company is not responsible for third party statements posted on a Web site, nor is a company obligated to respond to or correct third party misstatements. Nevertheless, companies should consider that making only selective responses to or

corrections of third party statements might create an inference that the company is implicitly adopting relatively contemporaneous third party statements on the same topic to which the company is not making comments or corrections.

The SEC also noted that companies cannot require investors to agree not to make investment decisions based on the content of a blog or forum, or to disclaim liability for damages arising from the use or inability to use the blog or forum. The SEC stated that such a waiver is “inconsistent with the federal securities laws, and, we believe violates the anti-waiver provisions of the federal securities laws.”¹⁴

Other Matters

Disclosure Controls and Procedures

In the limited circumstances where information may be posted on a company Web site as an alternative to being included in a periodic or current report filed under the Exchange Act, such as disclosures of a waiver of the company’s code of ethics or disclosure of director attendance at annual meetings of securityholders, the Exchange Act rules relating to a company’s disclosure controls and procedures may apply to posted information. For example, if a company fails to disclose a waiver of its code of ethics on its Web site after disclosing its intention to do so, and also fails to make alternative Form 8-K disclosure, a deficiency in its disclosure controls and procedures may be implicated. These alternative disclosure situations are very limited, and the SEC stated that Exchange Act rules relating to disclosure controls and procedures otherwise do not apply to Web site disclosure. Accordingly, the principal executive officer and principal financial officer of a company are not disclosing, in certifications contained in the company’s periodic reports, their conclusions regarding the effectiveness of any controls that a company may have in place regarding its Web site disclosure of information, except as to the limited types of disclosures referred to above. Nevertheless, to address the potential for antifraud liability with respect to Web site information, a company should have procedures in place designed to ensure the accuracy and timeliness of its Web site disclosure.

Format of Information and Readability

In contrast to the SEC's rules on electronic availability of proxy materials,¹⁵ Web site information is not required to appear in a printer-friendly format. In this context, the SEC's focus is on "readability" of the information.

Recommended Actions

As a result of the imprecise nature of much of the SEC guidance as to when a Web site posting will be deemed "public" for Regulation FD purposes, companies should proceed in this area with caution. Nevertheless, companies can begin to lay the groundwork for using their Web sites to disseminate "public" information for purposes of Regulation FD. Even if a company is not focused on using Web site information for Regulation FD purposes, it can take steps to make its Web site an effective source of investor communications.

At the outset, exclusive posting of important information on the Web site should occur only after a transition period in which the information also is provided through one or more traditional channels of communication.¹⁶ In addition, references to the Web site posting should regularly be made in press releases and periodic filings. For a company meeting the conditions set forth above, once the use of the company's Web site information by investors and others becomes established, such that the company can show that the Web site is regularly referenced by a large number of users (and, hopefully, that content on the Web site is picked up in the media), the company should be able to reduce and ultimately eliminate its reliance on alternative channels of information for purposes of Regulation FD compliance.

Even after the transition period, however, only a company that is a large accelerated filer (and perhaps a larger company within the category of accelerated filers) and has a significant market and media following should rely exclusively on Web site postings of information for Regulation FD purposes. Moreover, the company's equity securities should be actively traded. The SEC clearly has provided a more favorable status to larger companies in its factors addressing the scope of a company's market following. A

company that does not meet this large, actively traded, widely followed criteria will have to provide alternate channels of communication that effectively alert investors and the public generally to the posting of the information and perhaps provide a summary description of the posted information. However, even if a company cannot rely exclusively on Web site postings for Regulation FD purposes, it is not precluded from using its Web site to provide investor information in innovative, user-friendly ways.

Companies can begin to lay the groundwork for using their Web sites to disseminate "public" information for purposes of Regulation FD.

The company's reference to its Web site postings should include a statement in its earnings press releases and in its periodic reports on Forms 10-K and 10-Q that provides the Web site address, a statement that the postings provide important information and a general description of the type of information posted. The statement in a periodic report should include a caution that that information on the Web site is not incorporated by reference in the periodic report. The company also should consider an announcement to wire services upon the initiation (or, if information is already posted, reintroduction) of Web site postings of important information.

The company's home page should include a prominent link to the company's investor page, which in turn should include a prominent link to the posted information. In addition, a company may consider placing a link to new investor information on its home page.

The company should monitor Web site activity on the page, as well as the extent to which financial and other broadly-based publications reference or report on the information contained on the Web page. Additionally, following each posting of new material information, the company should monitor the volume of activity on any actively used shareholder forums and investor blogs that discuss the company as one indicator of market following.

The company should consider whether improvements to its Web site, such as the use of “push” technology, would enhance the timeliness of accessibility to newly posted information. The company should note that requiring user registration for RSS feeds and similar technology can reduce user participation. Because RSS feeds do not require a user to provide an email address, users may be more amenable to subscribing to RSS feeds, without the need for registration, than to email alerts.

The company should take appropriate steps to make sure that the information it is providing on the Web page is accurate and updated as needed. Although, for the most part, the need to maintain disclosure controls and procedures does not extend to the company’s Web site, a company should have procedures designed to ensure that its Web site disclosures are current and accurate. The company also should consider dating each item of information and moving older information to an “archives” page. The company should further consider, as appropriate, adding language indicating that the information speaks only as of the date on which it initially is posted. In some instances, a company may feel comfortable in stating that the information should be considered current until revised,¹⁷ but obviously, such an advisement underscores the need to update promptly when appropriate.

If the company intends to use its Web site as a means to satisfy the public disclosure requirements of Regulation FD, it should consider the issuance of a press release that would, at the very least, direct the attention of readers to the Web site. If the company wishes to use the Web site in this fashion on an ongoing basis, regular references to the Web site should appear in earnings and perhaps other press releases, as well as in its periodic reports. The inclusion of standard language in all press releases, in a manner similar to the company description and forward-looking statement presentation, is another viable approach, as long as the language is sufficiently prominent.

There likely will be ongoing developments in this area, which may include more guidance by the staff of the SEC’s Division of Corporation Finance and the development of generally accepted practices by public companies. A company should monitor these

developments in order to gauge when, and how, it can prudently adopt an exclusive Web site posting approach to “public” information.

A company should exercise care in its use of third party hyperlinks, including by managing the context in which the hyperlink is provided. The company should explain its reasons for inclusion of the hyperlink; this is especially important if the company wants to support a position that it is not adopting the hyperlinked information. While exit notices and intermediate screens may have some utility, companies should not expect them to have substantial value in preventing a conclusion that the company has implicitly adopted the hyperlinked information.

A company may wish to enhance its Web site by adding features such as investor blogs and message boards. Nevertheless, a company is subject to antifraud liability for statements on these forums by persons deemed to be acting on its behalf, and it is important for the company to have in place well designed procedures that, among other things, designate appropriate spokespersons and provide for careful pre-release review of spokespersons’ communications.

Conclusion

The Web Site Release’s guidance with regard to whether Web site postings are “public” for Regulation FD purposes is, at least for now, too general and qualified for most companies comfortably to consider their Web site postings to be “public” for the purposes of Regulation FD (at least without the supplementary use of more traditional alternative means of communication to direct investors’ attention to the specific location of the material on a company’s Web site). However, companies certainly can take steps to prepare to use their Web sites for Regulation FD purposes and also should follow the development of accepted practices in this area, which likely will be established by the largest companies that are widely followed by the media and have the most active trading markets.

Other guidance in the release should, however, be helpful to those companies that wish to use

their Web sites as a meaningful, if not exclusive, alternative source of investor information. With the concomitant use of alternative forms of disclosures directing investors and the public to the Web site, companies certainly can respond to the encouragement provided by the SEC towards the “development of company Web sites as a significant vehicle for the dissemination to investors of important company information.”¹⁸

NOTES

1. Commission Guidance on the Use of Company Web Sites, Release No. 33-58288, August 1, 2008 (the Web Site Release). The SEC stated that the Web Site Release was prompted, in part, by the February 2008 Progress Report of the Federal Advisory Committee on Improvements to Financial Reporting. The report recommended that the SEC provide more guidance as to how companies can use their Web sites to provide information to investors in compliance with the federal securities laws.
2. Web Site Release, Section II.A.1.
3. With respect to information, such as earnings forecasts, intended to speak only as of a specific date, a company should make clear the time-specific nature of the information. Otherwise, this information may be deemed current as of the date it is accessed by an investor. See the discussion below on antifraud considerations relating to previously posted Web site information.
4. Web Site Release, Section II.A.1.
5. Selective Disclosure and Insider Trading, Release No. 33-7881 (August 15, 2000), Section II.B.2., *citing TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449.
6. Web Site Release, Section II.A.2.
7. *See, e.g.*, 2000 Electronic Media Release, Section II.B.1.
8. Use of Electronic Media, Release No. 33-7856 (April 28, 2000) (the 2000 Electronic Media Release).
9. The SEC did not address Securities Act concepts in the Web Site Release, stating that “the treatment of hyperlinks for purposes of the Securities Act is clear from our prior interpretation.” Web Site Release, Section II.

B.2. In the context of an offer and sale of securities, the SEC has indicated that hyperlinked information meeting the definition of an offer “raises a strong inference that the hyperlinked information is attributable to the issuer for purposes of a Section 5 analysis.” 2000 Electronic Media Release, Section II.B.2. *See also*, Singer, “Gun Jumping, Adoption of Third Party Statements and Web Page Communications,” Fourth Annual Federal Securities Law Forum (Pennsylvania Bar Institute, 2001).

It is also important to note that the SEC’s analysis in the Web Site Release does not affect its previous guidance that if a company embeds a hyperlink in a document required to be filed with the SEC, the Company will always be deemed to adopt the hyperlinked information. Web Site Release, n.77.

10. Web Site Release, Section II.B.2.
11. Web Site Release, Section II.B.2.
12. *See, e.g.*, Dominic Jones, “Evaluating NIRI’s IR Web site guidelines 2,” Investor Relations Blog (September 9, 2008), available at <http://www.irwebreport.com/daily/2008/09/09/evaluating-niris-ir-website-guidelines-part-2/> (criticizing U.S. National Investor Relations Institute guidelines recommending use of intermediate screens).
13. Web Site Release, n. 95 (*citing* Electronic Shareholder Forums, Release No. 34-57172 (January 18, 2008), n. 24).
14. Web Site Release, Section II.B.4. (*citing* in n. 97, Section 14 of the Securities Act and Section 29(a) of the Exchange Act).
15. *See* Rule 14a-16(c) under the Exchange Act.
16. Companies listed on the New York Stock Exchange (NYSE) should also be mindful of Section 202.06 of the NYSE’s Listed Company Manual, which states that NYSE listed companies should issue press releases in order to communicate material information. Unless this mandate is modified in light of the Web Site Release, NYSE companies likely will need to issue press releases to convey material information, regardless of whether their Web site postings would be an appropriate means of dissemination from a Regulation FD standpoint.
17. An example of such a statement may be found at <http://www.intc.com/outlook.cfm>.
18. Web Site Release, Section I.A.