

PUBLIC COMPANY ALERT

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SEC Guidance on Company Web Sites

The SEC issued interpretive Release No. 34-58288 (the Release) in 2008, which was designed to provide guidance on the use of company Web sites under the Securities Exchange Act of 1934 (Exchange Act) and the antifraud provisions of the federal securities laws. The Release can be found at <http://www.sec.gov/divisions/enforce/internet/enforce/interpreleases.shtml>.

The guidance set forth in the Release focused on two main topics and also made two points of clarification with regard to information posted on company Web sites. The two main topics dealt with:

- the “public” nature and Regulation FD implications of information posted on company Web sites; and
- company antifraud liability for such information.

The Release also made some clarifications with regard to disclosure controls and procedures for information posted on company Web sites and the format and readability requirements with regard to such information. Set forth below is an overview of the guidance provided in the Release, along with some insight as to the practical implications of the guidance.

The “Public” Nature And Regulation FD Implications Of Information Posted On Company Web Sites

Regulation FD (found at Part 243 of Title 15 of the Federal Code of Regulations) sets forth rules with regard to the fair disclosure of information. Specifically, Regulation FD requires that in the event an issuer, or any person acting on the issuer’s behalf, discloses material nonpublic information regarding the issuer or its securities to an investment professional or a shareholder of the issuer, the issuer must make “public disclosure” of this information. The public disclosure must be simultaneous if the disclosure was intentional or promptly thereafter if the disclosure was made unintentionally. Regulation FD defines “public disclosure” as either: (i) the filing of a Form 8-K with the Securities and Exchange Commission (SEC); or (ii) dissemination of the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, nonexclusionary distribution of the information to the public.

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Traditionally, the filing of a Form 8-K or issuance of a press release via widely disseminated wire services have been the most accepted methods of satisfying Regulation FD's public disclosure requirement. Through the Release, however, the SEC has provided guidance as to when information posted to a company Web site may be considered "publicly disclosed" for purposes of Regulation FD. The Release sets forth three elements to aid a company in determining whether disclosure on the company Web site would meet the "public disclosure" requirements of Regulation FD, and therefore permit such information to be discussed in private conversations with people outside of the issuer. Such elements are:

- (a) whether the company Web site is a recognized channel of distribution;
- (b) whether posting information on the company Web site disseminates the information in a manner that makes it available to the securities marketplace in general; and
- (c) whether there has been a reasonable waiting period for investors and the market to react to the posted information.

Whether the company Web site is a "recognized channel of distribution" for information depends on the steps that the company has taken to alert the market to its disclosure practices in relation to the Web site, as well as the use by investors and the market of the Web site. Whether the information has been "disseminated" to the securities market in general depends, in part, on the manner in which the information is posted on the Web site and the timely and ready accessibility of the information to investors and the markets.

The Release lists various factors as being indicative of whether a company Web site would satisfy the "recognized channel of distribution" and "dissemination" requirements set forth above. They include, among other things, the following:

- whether the company has made investors and the markets aware that it will post important information on its Web site;

- whether the company has shown a pattern or practice of posting important information on the Web site;
- whether the company discloses in its periodic reports the location of its Web site and the fact that it routinely posts important information there;
- whether the information is prominently disclosed in a location known and routinely used for such disclosures in a format readily accessible to the general public;
- whether the Web site is kept current and accurate; and
- whether the company uses other methods in addition to its Web site to disseminate the information and the extent to which those methods are the predominant methods the company uses to disseminate information.

Additionally, the SEC indicates in the Release that companies that are not well-followed by the media may need to take affirmative steps to inform investors and others that information has been posted to their Web sites.

In addition to considering whether the company Web site satisfies the "recognized channel of distribution" and "dissemination" requirements discussed above, companies will also need to consider the timing element, which is the amount of time after the posting of the information on the Web site that is needed for investors and the market to react to the information. It is important to remember that each posting of information to the company Web site is different and is subject to a separate facts and circumstances analysis. What may be a reasonable waiting period after posting certain information by a certain company may not be a reasonable waiting period after posting the same information by a different company, or different information by the same company. The Release lists the following factors that should be considered, along with any other relevant facts, when analyzing what constitutes a reasonable waiting period for investors and the market to react to the information:

- the size of the company and the market following 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;
- 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; and
- the nature and complexity of the information.

If after applying the above analysis, a company determines that by posting information on its Web site, the information would be delivered through a “recognized channel of distribution” and “disseminated” to the securities market in general, with a “reasonable waiting period” for investors and the market to digest such information, then the company may decide to satisfy the “public disclosure” requirements of Regulation FD merely with such a Web site disclosure. The Release does specify, however, that if information is “important,” companies should consider taking additional steps, such as issuing a press release or filing a Form 8-K, to alert investors and the market to the fact that important information will be posted.

The Impact Of Antifraud And Other Exchange Act Provisions On Companies’ Web Sites

The SEC has consistently taken the view, and reiterates in the Release, that the antifraud provisions of the federal securities laws apply to company statements made on the Internet the same way they would apply to any other statement made by a company. Companies should remain cognizant of laws such as Section 10(b) of

the Exchange Act and Rule 10b-5 promulgated under the Exchange Act, which prohibit the making of material misstatements or omissions of fact in connection with the purchase or sale of securities.

The Effect of Previously Posted Materials or Statements on Company Web Sites

The SEC clarifies in the Release that companies that maintain previously posted materials or statements on their Web sites are not considered to be reissuing or republishing such materials or information just because they remain accessible to the public. The antifraud provisions of the securities laws would still apply to the statements contained in these materials upon initial posting or if the company affirmatively restates or reissues the statement. In the event a company restates or reissues a statement that is posted on the Web site, the company may have a duty to update the statement so that it is accurate as of the date it is restated or reissued.

In the case where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, then, to ensure that investors understand that to be the case, the previously posted materials or statements on the Web site should be:

- separately identified as such (for example, by dating the posted materials or statements); and
- located in a separate section of the company’s Web site designated for previously posted materials or statements.

Hyperlinks to Third-Party Information

Whether a company can be held liable for third-party information to which it hyperlinks from its Web site depends on whether the company has: (i) involved itself in the preparation of the information; or (ii) explicitly or implicitly endorsed or approved the information. In order to reduce a company’s potential

for antifraud liability for hyperlinks, the Release suggests that the company explain on the Web site the context for the hyperlink and make explicit why the hyperlink is being provided. In addition, the company can also use “exit notices” or “intermediate screens” to indicate that the hyperlinked information is from a third party. It should be noted, however, that the use of an “exit notice” or “intermediate screen” alone, without more, may not be sufficient to absolve companies from antifraud liability.

Summary and Overview Information on Web Sites

Summaries and overviews on Web sites can be helpful to highlight important information to investors. However, the Release warns against summaries or overviews that, standing alone, might be perceived by a reasonable person to be the whole of the material information (not just a summary). Companies should direct readers to the location of the detailed disclosure from which the summary information is derived or upon which the overview is based. Similar to hyperlinked information, companies should consider using appropriate explanatory language to identify summary and overview information. Suggested items that may aid companies in highlighting the nature of summaries and overviews are:

- use of appropriate titles that convey the summary, overview or abbreviated nature of the information;
- use of additional explanatory language identifying the text as a summary or overview and directing the reader to the location of more detailed information;
- use and placement of hyperlinks to the more detailed information; and
- use of a layered or tiered format to organize the Web site such that the most important summary or overview information is presented on the opening page, which in turn has links that enable the reader to access more detail.

Interactive Web Site Features

It is important for companies that use “blogs” or “electronic shareholder forums” to consider the potential antifraud liabilities related to using these forms of communication. Any communications made by or on behalf of a company are subject to the antifraud provisions of the securities laws. It is therefore important for companies that use blogs or electronic shareholder forums to establish controls and procedures to monitor statements made by or on behalf of the company on these types of forums. Employees acting as representatives of the company must be made aware of their responsibilities in these forums, which cannot be avoided by purporting to speak in their “individual” capacities. Additionally, companies cannot avoid this liability by requiring users to agree not to make investment decisions based on the blog’s or forum’s content or by disclaiming liability for damages of any kind arising from use or inability to use the blog or forum. The SEC has taken the position that these terms and conditions or disclaimers violate the anti-waiver provisions of the federal securities laws.

Matters Of Clarification

Disclosure Controls and Procedures

Information posted on a Web site is not typically subject to the rules of the Exchange Act governing certification of disclosure controls and procedures made by the principal executive officer and principal financial officer. However, where a company has elected to satisfy certain Exchange Act disclosure obligations by posting the required information on its Web site instead of providing the information in an Exchange Act report, this information is in fact subject to the Exchange Act rules governing certification of disclosure controls and procedures. An example would be a company posting its nominating committee charter on its Web site rather than in SEC filings.

Format and Readability of Information on the Web Site

The SEC clarified in the Release that, given the nature of online information as increasingly interactive and not static, the information appearing on a company's Web site need not satisfy the printer-friendly standard unless explicitly required by rule or law (e.g., electronic proxy materials are required by Exchange Act Rule 14a-16(c) to be presented in a format "convenient for both reading online and printing on paper" and therefore must satisfy the printer-friendly requirement).

Practical Guidance

While the Release indicates that the use of a company Web site to make information "public" in accordance with Regulation FD is possible, it appears that only very large companies with strong, well-established and highly visited Web sites should currently feel comfortable in concluding that they may rely on Web site postings alone as the means of public disclosure for purposes of Regulation FD. Still, smaller companies can take advantage of the guidance and take steps to make disclosure on their Web sites more public by describing their Web site disclosure policies in their public filings and using their Web sites as a simultaneous means of disclosure along with the more traditional filing of a Form 8-K and/or issuance of a press release. Over time, such companies may be able to rely on their Web sites for these disclosure purposes.

For companies listed on a stock exchange or quotation system, it is important to recognize that, at least in their current state, the public disclosure rules of such exchange or quotation system may not match the guidance set forth in the Release. For example, the New York Stock Exchange rules currently require a press release as the normal method of public disclosure.

With regard to the antifraud and other provisions of the Exchange Act, companies should evaluate their Web sites and update where necessary to ensure that: (i) previously posted materials or statements are dated and separately identified; (ii) hyperlinks to third-party information utilize exit notices or intermediate screens; (iii) the company's views with regard to the information posted at such hyperlinked sites are explicit and clear through the context of text surrounding the hyperlink; and (iv) summary or overview information on the Web site is labeled as such and contains links to more detailed information. With regard to blogs and e-forums, the use of these forums is still fairly new and a bright-line market practice has yet to emerge with respect to how companies handle them. Should a company decide to participate in a blog or e-forum, it is important that any representatives of the company understand that their statements in the e-forum are considered the company's statements and the inadvertent release of material nonpublic information without prompt public disclosure would violate Regulation FD. ■



For further information regarding this subject, please contact Eric Schoenborn (856.321.2413 or eschoenborn@stradley.com) or Lori Buchanan Goldman (215.564.8707 or lgoldman@stradley.com).



New Developments for 2009

E-Proxy In Effect for All Filers in 2009

For 2009 annual meetings, reporting companies need to decide if they want to rely on Internet availability of proxy materials (notice only option), use the full-set delivery option or some combination thereof. Regardless, reporting companies will need to post their proxy materials on an Internet web site and provide notice of such posting to shareholders. For further information on e-proxy delivery options and the underlying rules, see the September 2007 edition of the Public Company Alert.

Mandatory Electronic Filing of Form D

Form D is a form for a notice required to be filed with the SEC when a company sells securities without registration under the Securities Act of 1933, as amended (1933 Act), in an offering based on a claim of exemption under Rule 504, 505 or 506 promulgated under the 1933 Act. SEC rules require the Form D to be filed within 15 days after the first sale of securities in the offering based on the exemption. Until March 16, 2009, a company may file a Form D notice or an amendment with the SEC either on paper or online via the SEC's "EDGAR" system. After that date, you must file online via EDGAR. Please note, however, that to file online with the SEC you must have your own filer identification number (called a "Central Index Key" or "CIK" number) and a set of password-like "access codes" which will allow you to use EDGAR. You can obtain a CIK

number and EDGAR access codes at any time, even well before your company is ready to file its first online Form D notice. In addition, the SEC adopted a new version of Form D. Until March 16, 2009, a company may file a Form D using either the existing Form D or the new Form D. After that date, a company may only use the new Form D.

SEC Adopts Interactive Data (XBRL)

In December 2008, the SEC adopted rules requiring reporting companies to submit their financial statements in eXtensible Business Reporting Language (XBRL) to the SEC EDGAR system. Per the SEC, use of this interactive data for financial information "has the potential to increase the speed, accuracy and usability of financial disclosure and eventually reduce costs for investors." Interactive data allows investors to immediately pull out exactly the information they want from lengthy disclosure documents, and instantly compare it to the results of other companies, performance in past years, industry averages, etc. The rules require domestic and foreign large accelerated filers with a public float greater than \$5 billion to provide their financial statements in interactive data starting with their first quarterly report for fiscal periods ending on or after June 15, 2009. Other public companies and foreign issuers will be phased into the program over the next two years, with the exact dates to be set forth in the final rules once they are published. ■

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