



JONES DAY COMMENTARY

SEC GUIDANCE ON THE USE OF COMPANY WEB SITES FOR DISCLOSURE TO INVESTORS

On August 1, 2008, the Securities and Exchange Commission issued an interpretive release providing guidance as to how public companies may use their web sites to comply with the federal securities laws.¹ The new guidance supplements the previous guidance issued by the SEC to reflect advances in technology, including the wide use of social networking, blogs, discussion forums, and other interactive web site features.

- liability for information on company web sites—including previously posted information, hyperlinks to third-party information, summary information, and the content of interactive web sites;
- when information posted on a company web site becomes subject to the certification requirements relating to disclosure controls and procedures; and
- the format of information presented on a company web site, with the focus on readability, not printability.

OVERVIEW

The new guidance addresses four primary topics related to the use of company web sites:

- when information posted on a company web site is “public” for purposes of the applicability of Regulation FD;

PRIMARY THEMES

Treatment Under Regulation FD. In a departure from previous SEC positions, the release provides a principles-based test for companies to determine if information posted on a company’s web site will

1. Commission Guidance on the Use of Company Websites, Exchange Act Release No. 34-58288 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>. The SEC has previously addressed internet related issues in other releases. See generally, Securities Offering Reform, Release No. 33-8591 (August 3, 2005), available at <http://sec.gov/rules/final/33-8591fr.pdf>; Use of Electronic Media, Release No. 33-7856 (April 28, 2000), available at <http://sec.gov/rules/concept/34-42728.htm>; Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (October 6, 1995), available at <http://sec.gov/rules/concept/33-7233.txt>.

be considered “public” under Regulation FD. If information on a company’s web site is public, then subsequent selective disclosure of that information would not be in violation of Regulation FD because such information, even if material, would not be nonpublic. Because this analysis is principles-based, the release discusses a number of nonexclusive factors that companies should consider when evaluating whether information posted to its web site will be considered “public,” including:

- whether the company provides notice 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;
- whether the company has a pattern of posting important information on its web site;
- whether the web site is designed to efficiently lead visitors to information about the company, including information specifically addressed to investors, and to prominently feature this information in a location and format that is consistent and readily accessible;
- whether newswires or the media expect information to be posted on the company’s web site and whether newswires or the media are in the practice of further distributing this information;
- whether the company uses “push” technology, such as RSS feeds,² or releases through other distribution channels either to widely distribute this information or advise the market of its availability;
- whether the company keeps its web site current and accurate;
- whether the company uses methods to disseminate information in addition to its web site; and
- the nature of the information.

Liability Framework. In the release, the SEC reaffirms that the antifraud provisions of the federal securities laws apply to company statements made on the internet in the same way they would apply to any other statement made by or attributable to a company. The release clarifies the liability under the antifraud provisions of the federal securities laws for certain types of web site disclosure, including how companies can:

- provide access to historical information or archived data without having it be considered reissued or republished every time it is accessed;

- hyperlink to third-party information or web sites without having to adopt or endorse such third-party content as statements made by, or attributed to, the company for liability purposes; and
- use summary information in the context of the securities laws antifraud provisions.

Historical Information. The release provides that companies maintaining previously posted materials or statements on their web sites are not reissuing or republishing such materials or information for purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. The release suggests that to ensure that investors understand that posted materials or statements speak as of a date or period earlier than when the investor may be accessing the posted materials or statements, such materials or statements should be:

- separately labeled as historical and dated; and
- located in a separate section of the company’s web site with other previously posted materials.

Hyperlinked Information. Under the antifraud provisions of the federal securities laws, the release restates the established principle that a company may be held liable for third-party information that is hyperlinked to its web site if that information is attributable to the company. Third-party information contained in a hyperlink is attributable to a company if the company was involved in the preparation of the information (the “entanglement” theory) or explicitly or implicitly endorsed or approved the information (the “adoption” theory). In the context of hyperlinks to third-party information, the SEC highlighted the following methods to avoid implicitly endorsing or approving hyperlinked information:

- explain why the hyperlinked material is being provided or provide a label for the type of information being provided (e.g., “recent news articles”);
- provide hyperlinks to third-party materials that provide a variety of viewpoints, including those that present negative views of the company;
- use “exit notices” or “intermediate screens” to denote that the hyperlink is to third-party information; and
- avoid hyperlinking to information the company knows, or is reckless in not knowing, is materially false or misleading.

2. “Push” technology includes such items as email alerts or RSS feeds, which enable the automatic, electronic dissemination of new information on the site to subscribers.

Summary Information. Given the flexibility of web site design, the release indicates that the use of summaries or overviews on a company's web site, particularly regarding financial information, has the potential to raise issues under the anti-fraud provisions of the federal securities laws. When using summaries or overviews, companies should consider ways to alert readers to the location of the more detailed disclosure from which the summary information is derived or the overview is based, as well as to other information about a company on a company's web site. The SEC recommends the following techniques to highlight the summary nature of certain information:

- use of appropriate titles;
- use of additional explanatory language;
- use and placement of hyperlinks to more detailed information; and
- use of layered or tiered formats.³

*Interactive Web Site Features.*⁴ In recognition of the latest interactive technologies for communicating with investors through the internet, the SEC provided guidance on the use of various forms of communications such as company "blogs" and "electronic shareholder forums." Because all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, the release highlights that companies should take steps to monitor statements on these types of electronic forums. For example, although CEO blogs and other company forums are informal and conversational, statements made by company representatives will not be treated differently from other company statements under the antifraud provisions of the federal securities laws. In addition, the release states that such responsibility cannot be avoided by purporting to speak in an "individual" capacity and companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.

Additional Guidance. The release clarifies that the Sarbanes-Oxley rules relating to a company's disclosure controls and procedures generally do not apply to information posted on a company's web site unless the information is posted on a web site as an alternative to being provided in a report filed under the Securities Exchange Act of 1934 (the "Exchange Act"). As a result, certifications by the principal executive officer and principal financial officer will not include such officers' conclusions regarding the effectiveness of any controls that a company may have in place regarding its web site disclosures.

Finally, the release clarifies that information posted on a company's web site does not need to satisfy a "printer-friendly" standard (unless other rules explicitly require it) that could restrict creative web site enhancements incorporating interactive and dynamic design features.

POTENTIAL IMPLICATIONS OF THE INTERPRETATIVE RELEASE

The release recognizes that company web sites are driven in large part by the market's desire for more current and interactive data. With that backdrop, the release attempts to address a number of difficult securities law issues raised by web site disclosure. The release does not define the outer boundaries of how technology can or should be used on a company's web site. However, the release provides guidance on how companies can present information in formats different from those dictated by current SEC forms. This flexibility could provide a number of benefits to companies, investors, and the markets generally, including the ability for companies to:

- enhance the quality of information available on web sites and make such information available to its investors more quickly and in a more cost-effective manner;

3. "Layered" or "tiered" formats organize web site presentations such that they 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.

4. In January 2008, the SEC issued a release regarding Electronic Shareholder Forums, in which it stated that a shareholder, company, or third party acting on behalf of a shareholder or company that establishes, maintains, or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided to a person participating in the forum. See Electronic Shareholder Forums, Release No. 34-57172 (Jan. 18, 2008), available at <http://sec.gov/rules/final/2008/34-57172fr.pdf>.

- use web site disclosures for purposes of disclosing material nonpublic information under Regulation FD (instead of filing a voluntary Form 8-K or holding a properly noticed webcast or teleconference);
- experiment with new ways of communicating with its investors, such as through RSS feeds, push technology, social networking, blogs, and discussion forums; and
- permit investors to click through or drill down to the level of detail that is appropriate or desirable through the use of interactive and dynamic design features.

Aside from these benefits, the guidance is largely principles-based and relies on companies to determine whether access is freely available to all. As such, there are some potential traps for the unwary.

- Because the SEC did not provide a bright-line test to determine whether or not using a web site to disseminate nonpublic information satisfies the selective disclosure requirements of Regulation FD, and in light of the high level of scrutiny used by the SEC in recent Regulation FD enforcement actions, it is not clear how the staff will implement the guidance or enforce violations of Regulation FD in the future.
- Because the release primarily addresses antifraud and disclosure issues under the Exchange Act, companies are reminded that they will also need to consider the application of the proxy solicitation rules regarding false and misleading proxy solicitations and rules regarding solicitations before furnishing a proxy statement. Companies in registration must also consider the application of Section 5 of the Securities Act.
- Finally, the release highlights the need for companies to carefully monitor the substance and presentation of information disclosed on their web sites.

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