

SEC Provides Guidance on the Use of Company Web Sites to Disseminate Investor Information

On August 1, 2008, the Securities and Exchange Commission issued interpretive guidance on the use of company web sites under the Securities Exchange Act of 1934 and various antifraud provisions of the federal securities laws. Given the widespread use of company web sites as a means of communications since the SEC last issued guidance in 2000, the SEC issued this additional guidance to “encourage the continued development of company web sites as a significant vehicle for the dissemination to investors of company information.”

The new guidance addresses, among other things:

- When information on a company web site may be deemed “public” for purposes of Regulation FD;
- Company liability under the various antifraud provisions of the federal securities laws for information on company web sites;
- The implications of web site information for certifications of controls and procedures regarding such information; and
- The format of information presented on company web sites.

Regulation FD

Regulation FD generally prohibits the selective disclosure of material non-public information by companies to select individuals. In evaluating whether posting information on a company web site is public disclosure for purposes of Regulation FD, the SEC has advised that companies must consider whether: (i) the web site is a “recognized channel” of distribution; (ii) posting information on a web site disseminates the information so as to make it available to the markets; and (iii) a reasonable waiting period has occurred so that the market can digest such information.

Whether a company’s web site is a recognized channel of distribution depends on “the steps that the company has taken to alert the market to its web site and its disclosure practices, as well as the use by investors and the market of the company’s web site.” Where information appears on the web site and whether a company uses “push” technology (as described below) to disseminate information will also factor into the determination.

One way in which a company could position its web site as a recognized channel of distribution would be to include a statement in its press releases that refers to the company web site as a source of important information. An example could be: “We routinely post information that may be important to investors in the [Investor Relations] section of our web site. We encourage investors to consult that section of our web site regularly for important information about us.” We believe references like this one will help to establish a web site as a source of disclosures, particularly for large companies with an established pattern or practice of posting information to their web sites. In addition, this language should aid smaller companies that are in the process of developing an established practice or pattern of relying on web site postings. A company could also use “push” technology to make information posted to the web site more accessible to the markets.

This technology enables an investor or other interested party to “subscribe” to receive company press releases, Exchange Act reports or other important information posted to the company’s web site by e-mail.

Companies and their legal advisors will want to be highly confident that their web site is widely viewed by the investing public as a recognized source of information before relying solely on web site posting of company information. Absent such determination, companies should continue using wire services and/or Form 8-Ks for public disclosure of material information so as to avoid potential violations of Regulation FD.

Anti-Fraud Liability

The SEC also reiterated its position that the antifraud provisions of the securities laws apply to company statements made on the Internet the same way as any other statement made by, or attributable to, a company. In an attempt to ease concerns that a company may incur liability from previously posted information accessed on the web site at a later date, the SEC affirmed that merely maintaining the accessibility of previously posted information on a web site does not “republish” that information. It recommends, however, that the information bear a publication date and be located in a separate section of the web site.

The SEC has also attempted to clarify company liability for hyperlinks on a company web site to third party information. In analyzing whether a company should incur liability for the hyperlinked material under the “adoption” theory, the focus should be on whether the company has approved or endorsed a third party statement (either explicitly or implicitly). To help refute an assertion that it has adopted the third party materials, particularly in situations where the context may not be so clear, a company should endeavor to provide a clear explanation for why the hyperlink is being provided.

The SEC has also stated its desire to promote increased use of company web sites by making them more interactive by using devices such as “blogs” and “electronic shareholder forums.” The SEC reminded companies that the antifraud provisions of the federal securities laws applies to blogs and shareholder forums. In addition, companies cannot require a waiver of protections under the federal securities laws for those that wish to enter and/or participate in a blog or shareholder forum.

The guidance also clarifies that a company’s disclosure controls and procedures — and the related officer certifications — generally do not apply to information posted on a company’s web site unless the company is electing to satisfy an Exchange Act disclosure obligation (when permitted) through such a posting.

Finally, the guidance provides that information appearing on company web sites need not be “printer friendly,” or formatted for ease of printing, unless explicitly required by the rules, such as the “E-Proxy” rules. This affords companies a great degree of flexibility as to how they present information on their web sites.

For further information concerning the SEC’s guidance on the use of company web sites, please contact your usual Ropes & Gray attorney.

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