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Financial Services Litigation
ALERT

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SEC Issues Guidance On Use of Company Web sites

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On August 7, 2008, the Securities Exchange Commission (SEC) issued an interpretive release "Commission Guidance on the Use of Company Web Sites" (release) to provide guidance to companies about the use of company Web sites under the Securities Exchange Act of 1934 and the antifraud provisions of the federal securities laws. The release is available for public comment until November 5, 2008.

The SEC prefaces its release with the general position statement that it strongly encourages the electronic dissemination and filing of public documents as the most efficient and effective in today's media landscape. This is evidenced by recent developments with respect to EDGAR ("Electronic Data Gathering, Analysis and Retrieval"), in which companies are required to provide information to EDGAR in interactive data files which are easier for investors to analyze. The SEC has also encouraged companies to make their public filings available on their company Web sites in addition to their EDGAR filings or even, in some instances, giving the companies the alternative between EDGAR and a company Web site.

Regulation FD Compliance

The touchstone of Regulation FD compliance in this context is whether information on the Web site is "publicly" available. In order the make the information public, it must be disseminated in a manner calculated to reach the securities marketplace in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information. *Faberge, Inc.*, 45 S.E.C. 249, 255 (1973). The SEC notes that, with the evolving of internet technology, the posting of information on the company's Web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD. But companies will still need to consider whether the disclosure is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." The SEC warns that, if the disclosure is not "public" on the company Web site, then a subsequent selective disclosure of that information, if material, may trigger the application of Regulation FD.

In evaluating whether a disclosure is sufficiently "public" to satisfy the requirements of Regulation FD, the company must consider the following:

(1) Is a company Web site a recognized channel of distribution? This depends on the steps that the company has taken to alert the market to its Web site and disclosure practices.

(2) Is the posting of information on a company Web site disseminated in a way to make it available to the securities marketplace in general? This depends on the manner in which the information is posted on a company Web site and the timely and ready accessibility of such information to investors and markets. Factors to consider are the ways companies let investors and the markets know that they have a Web site, for example, in their periodic reports and press releases; whether the company makes a regular practice of posting important information on its Web site; whether the Web site's design is conducive to leading investors to the information and the information is presented in a format readily accessible to the general public; the steps the company has taken to implement "push" technology such as RSS feeds; whether the Web site is kept current and accurate; and the extent to which the information on the Web site is regularly picked up by the market and the media.

(3) Has there been a reasonable waiting period for investors and the market to react to the posted information? This will vary depending on the size and market following of the company, the steps the company has taken to advise investors of the location of the information, and the nature and complexity of the information. The SEC makes clear that companies must look at the particular facts and circumstances in determining whether the waiting period is reasonable.

Thus, under the foregoing analysis, if information of the company's Web site is "public," then subsequent disclosure of that information would not trigger Regulation FD because such information, even if material, would not be non-public.

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Antifraud Compliance

The antifraud provisions of the federal securities laws apply to statements made on the Internet the same way they would apply to any other statement made by, or attributable to, a company. Statements that a company makes on the Internet must, therefore, comply with the prohibition on material misstatements and omissions of fact in connection with the purchase or sale of securities of Exchange Act Section 10(b) and Rule 10b-5. This includes postings on the Web site, as well as hyperlinks to other statements made on other sites.

Whether a company may be held liable for information obtained through hyperlinks on a corporate Web site depends upon whether the company has (1) involved itself in the preparation of the information on the hyperlink; or (2) explicitly or implicitly endorsed or approved the information, otherwise known as the "entanglement" and "adoption" theories. If a company has explicitly approved the statement of a third party, then the company should be liable. To avoid any unintended "adoption" or "approval" of statements obtained through a hyperlink, companies also should include an explanation on their Web site of why the company is including particular hyperlinks. Companies also should consider the use of "exit notices" to denote that the hyperlink is to third-party information, but that alone will not absolve a company from liability for misstatements and omissions. Indeed, the SEC does not consider a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise.

But the mere ability of investors to access previously published information on a company Web site does not automatically trigger liability. Thus, maintaining previously posted materials or statements on a company Web site should normally not be considered a "republication" of the information for purposes of the antifraud provisions of the federal securities laws, but of course, the antifraud provisions would apply to statements contained in the posted materials when such statements were initially made. And the antifraud provisions also would apply if the company affirmatively restated or reissued a previously posted statement. In circumstances where it is not apparent that the posted materials or statements speak to an earlier date in time, companies should consider separately identifying historical materials as such by dating the material and locating it on a separate section of the Web site.

The release also provides guidance on the use of summaries or overviews of financial information. Summaries must be perceived as summaries by a reasonable person in order not to be misleading. Thus, companies should consider ways of alerting Web site visitors to the location of more detailed financial disclosures. The use of appropriate titles, explanatory language, and use of hyperlinks to access detailed financial information are suggested and encouraged.

Finally and importantly, the SEC makes clear that the antifraud provisions of the securities laws apply to blogs and electronic shareholder forums and that blog postings can and do create liability for companies. Statements that a company, or its employees, or a person acting on behalf of a company, make on a blog or electronic shareholder forum are attributable to the company. Employees acting as representatives of the company cannot avoid their responsibilities by purporting to act and speak in an "individual" capacity. Companies also cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or shareholder forum.

The new interpretive release provides much-needed guidance to companies with respect to Internet and company Web site usage and content. The potential liabilities should be carefully considered in view of both the interpretive release and the underlying federal laws and regulations. Companies that anticipate that they may be required to engage in a substantial and costly overhaul of their corporate Web presence under the guidance of the release as presently articulated may want to consider consulting with counsel concerning the submission of comments before the November 5, 2008 deadline.◆

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