

Using Corporate Websites for Regulation FD-Compliant Disclosures: Recommended Best Practices

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On August 7, the Securities and Exchange Commission issued interpretive guidance to public companies regarding the use of company websites to disclose information to investors.¹ Interpretive Release No. 34-58288 (the Release) modernizes guidance last provided in 2000 and follows other recent SEC initiatives to encourage the use of technology to enhance investor communication and reduce compliance costs. The Release provides guidance in the following areas that have up to this point created uncertainty among securities lawyers advising clients in the use of websites as a disclosure medium:

- When information posted on a company website is "public" for purposes of complying with Regulation FD;
- Company liability under federal securities laws for information posted or linked to on company websites;
- The SEC's rules on "disclosure controls and procedures" as they apply to information on company websites; and

- Confirmation that information on company websites does not have to satisfy a "printer-friendly" standard unless SEC rules explicitly require it.

This article examines the SEC's framework for evaluating the suitability of corporate websites for satisfying Regulation FD disclosure obligations, and provides suggested best practices for companies using corporate websites to communicate with investors in light of the SEC's new guidance.

[Please see related article, "Regulation Fair Disclosure: The SEC Casts the 'Net'" by Laura S. Unger, beginning on page 12 of this issue.]

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Regulation FD & Corporate Websites

More than eight years have passed since the adoption of Regulation FD profoundly altered the way in which public companies share information.² Regulation FD provides that if a company discloses material nonpublic information to select persons in the financial community, such as in a private conversation with an analyst or shareholder, the information also must be disclosed to the general public either simultaneously, if the selective disclosure is intentional, or promptly, if the selective disclosure is unintentional. Regulation FD achieved its objective of effectively eliminating what was once the widespread practice of “ball-parking” guidance and other types of risky private conversations involving arguably material disclosures. Well-counseled companies now disclose any information that could be considered material publicly first, such as through a press release or public webcast or conference call. While Regulation FD made selective disclosure to market participants a violation of SEC rules, the increasing ubiquity of the Internet has been the enabling factor in the broad, real-time and cost-effective distribution of information to investors.

Public companies were increasingly relying on the Internet as a means for communicating with investors prior to the adoption of Regulation FD.³ Initially, investor relations sections of corporate websites featured historical information that was otherwise available from other sources, such as press releases, SEC filings, annual reports, management biographies and product information. Corporate websites have since evolved to provide more robust offerings to investors. Links to third-party analyst reports and press coverage, interactive financial analysis tools, and access to “push” technologies, such as RSS feeds and email alerts, are now commonly found on corporate websites.

In recognition of the increasing relevance of the Internet to investors,⁴ over the last several years the SEC has modified various rules to facilitate the use of public company websites and other electronic channels. For example, by January 1, 2009, all issuers and other proxy solicitors will be required to post proxy materials on an Internet website, and delivery requirements for proxy ma-

terials may be satisfied by providing a brief paper or email notice to shareholders with instructions on how to access these materials online. Prospectus delivery requirements may also be satisfied through electronic delivery with the consent of the receiving shareholder. Additionally, certain Exchange Act disclosure obligations, such as disclosure of non-GAAP financial measures pursuant to Regulation G, may be satisfied by making information available either on EDGAR or on a website. In addition, on June 24, the SEC announced that it would undertake a comprehensive review of how it can modernize the way in which information is disclosed to investors and the marketplace, which will be supported by its internal study known as the “21st Century Disclosure Initiative.”

Notwithstanding the proliferation of investor tools and information on corporate websites and the SEC’s various rule changes noted above, public companies have not used their corporate websites as a primary means for satisfying their disclosure obligations under Regulation FD. The SEC noted in its adopting release for Regulation FD that a corporate website can be an important “component” of a public company’s disclosure process and indicated that, as technology evolves, companies with widely followed corporate websites could use them as a principal means for making information public.⁵ However, the SEC did not provide a roadmap for when and how companies could start relying on their corporate websites in this manner. Accordingly, the language in the Regulation FD release has created uncertainty among practitioners as to whether disclosure of material information on a corporate website makes such information “public” within the meaning of Regulation FD. Additionally, the New York Stock Exchange’s (NYSE) Immediate Release Policy continues to require disclosure of material information by press release, even if such information is otherwise disclosed using another Regulation FD-compliant medium.⁶ By contrast, Nasdaq has harmonized its disclosure rules with Regulation FD by requiring that any material information that would reasonably be expected to affect the value of a listed company’s securities or influence investors’ decisions be disclosed

promptly to the public through any Regulation FD compliant method.⁷ As a result, companies continue to first disclose material information either through publicized conference calls or webcasts, press releases or filings on Form 8-K.

As noted by the SEC's Advisory Committee on Improvements to Financial Reporting, additional uncertainty lingered around the applicability of federal securities laws to information posted on company websites, such as hyperlinked information and summary presentations of data.⁸ As a logical extension of the SEC's technology initiatives and its recognition of uncertainties regarding the use of corporate websites, the SEC addressed these and other issues in the Release.

The SEC Guidance

When Information on a Corporate Website is "Public"

Regulation FD provides that a company's public disclosure obligation may be satisfied either through the filing of a Form 8-K with the SEC or through other means that are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."

The Release clarifies the analysis required in the context of corporate websites by providing guidance on when website information is deemed to be "public" for purposes of (1) determining whether Regulation FD applies to disclosure of such previously posted information; and (2) satisfying the disclosure requirement in Regulation FD.

To determine whether posting information on a company website makes it "public" for these purposes, the company must consider whether (1) the website is a recognized channel of distribution; (2) the posting disseminates the information in a manner making it available to the general securities marketplace; and (3) reasonable time has passed for investors and the market to react to the information. To assist in evaluating the first two considerations, the Release provides a non-exclusive list of factors:

- Whether and how the company informs investors and the markets about the company website and the information it contains;
 - Whether the company has notified investors and the markets that it will post important information on the website and whether the company has a pattern of doing so;
 - Whether the website is designed to direct investors and the markets to relevant information, and whether that information is prominently disclosed in a format accessible to the general public;
 - The extent to which information on the website is regularly picked up by the market and reported by news 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;
 - The company's efforts to make the website and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels to widely distribute the information or advise the market of its availability;
 - Whether the company keeps its website current and accurate;
 - Whether the company uses other methods in addition to the website to disseminate information and the extent to which other methods are predominant; and
 - The nature of the information.
- The Release provides another list of factors to guide the consideration of whether a reasonable time has passed for the market to react to information:
- The size and market following of the company;
 - The extent to which investor-oriented information on the website is regularly accessed;
 - The company's efforts to inform investors and the market that its website is a key source of important information and how to locate the information;

- Whether the company has actively disseminated the information or notice of its availability on the website, including through other channels of distribution; and
- The nature and complexity of the information.

Federal Antifraud Provisions & Company Websites

The SEC has long taken the position that the antifraud provisions of the federal securities laws apply to statements made by a company on its website in the same way they would apply to any other statements by the company. For example, Exchange Act Rule 10b-5, which prohibits a company from making material misstatements or omissions of fact in connection with the sale of its securities, would apply to such misstatements or omissions on its website just as it would in a written prospectus or other offering circular. The Release provides further guidance regarding how the antifraud provisions of the federal securities laws apply to four common website disclosure scenarios around which there has been uncertainty in the past:

Previously Posted Materials or Statements—The Release clarifies that, in general, previously posted information on a company's website will not be deemed to be republished for purposes of the antifraud provisions of the federal securities laws each time it is refreshed or accessed by a reader. However, in circumstances in which it is not apparent to the reasonable person that previously posted information pertains to an earlier period, the information should be (1) separately identified as historical or previously posted, such as by dating the information; and (2) located in a separate section of the website containing previously posted information (such as on an "archive" page). It should be noted, however, that the Release does not relax any duty to correct material disclosures that were incorrect when made, or to comply with any duty to update in a jurisdiction that recognizes such a duty.⁹

Hyperlinks to Third-Party Information—Since 2000, the SEC has warned that a company may be subject to liability for hyperlinked information

originating from a third party if (1) the company was involved in preparing the information; or (2) the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the information. In addition, securities class action plaintiffs have used a similar theory to attempt to hold companies liable for allegedly materially misleading statements in linked information on a third-party website.¹⁰ The Release provides guidance on steps a company can take to avoid being deemed to have approved or endorsed hyperlinked information. For example, a company with hyperlinks to third-party information should consider (1) making explicit why the company has provided a hyperlink to third-party information; (2) using "exit notices" to denote that the hyperlink is to third-party information; and (3) avoiding selective hyperlinks to only favorable information, which may give rise to an inference of endorsement.

Summary Information—In response to concern by some public companies that the inclusion of summary information on corporate websites might give rise to liability for failure to prominently disclose the underlying data being summarized, the Release makes some suggestions regarding the manner of presentation of such information. A company posting a summary or overview of information relevant to investors (such as selected financial information or "highlights") should consider using (1) appropriate titles or explanatory language indicating the abbreviated nature of the material and the location of the complete version; (2) hyperlinks to the complete version; and (3) a "layered" or "tiered" format in which abbreviated information contains embedded links that enable the reader to drill down to more detail.

Interactive Website Features—The Release encourages blogs and electronic shareholder forums as a means to disseminate information relevant to investors, but it reminds companies that the federal antifraud laws apply to statements made by the company on these forums. Employees acting as company representatives cannot avoid responsibility for material misstatements or omissions by purporting to speak in their individual capacities.

Generally, however, a company is not liable for statements that third parties post on interactive websites they sponsor, nor is the company obligated to correct misstatements made by them, unless in each case the company endorses or adopts such statements.¹¹ The Release also clarifies that a company cannot require investors to waive federal securities law protection as a condition to participating in electronic forums.

Obviously, the type of information being conveyed on a website should be considered in determining what steps should be taken to avoid liability for these statements. For example, more caution should be taken with respect to investor-oriented portions of a company's website than might be necessary with respect to product-focused portions.

Disclosure Controls & Procedures

Exchange Act rules require a company's principal executive officer and principal financial officer to make certifications in quarterly and annual SEC filings about their responsibility for establishing and maintaining disclosure controls and procedures, and the effectiveness of those controls and procedures. The Release clarifies that those disclosure controls and procedures, and therefore the officers' certifications, only apply to website content that is posted as an alternative to providing that information in an Exchange Act report. For example, disclosure controls and procedures would apply where a company posts its audit, nominating, or compensation committee charters on its website, or discloses its policy regarding director attendance at annual stockholder meetings on its website, rather than including such information in its proxy statement.

Readable vs. Printer-Friendly Formats

The Release acknowledges that some website content may be designed for interactive viewing rather than printing, and places more importance on the readability of information over the ability to print it. Information on a company website does not have to satisfy a printer-friendly standard unless SEC rules explicitly require it (such as

is the case with the SEC's recent notice and access rules for electronic delivery of proxy materials).

Suggested Best Practices

Regulation FD Disclosure

It is important to note that the SEC has not established a bright-line test for the analysis of when information on a company website is deemed to be public for the purposes described above. The factors described above are deemed by the SEC to be a non-exclusive list of considerations for evaluation as part of a "facts and circumstances" test. However, a company that wishes to use its website to make information "public" for purposes of complying with Regulation FD should consider adopting, the following practices.

Disclose website address; investor relations page—The SEC currently requires companies having websites to disclose in their annual reports on Form 10-K their website addresses and whether their Exchange Act reports are available on their websites. The NYSE goes further by affirmatively requiring each of its listed companies to maintain a publicly available website.¹² In order to maximize market visibility of corporate websites, a company should also prominently disclose in its periodic SEC filings and press releases its website address, that it routinely posts important information for investors, and that it intends to use its website for disclosing material non-public information for purposes of complying with Regulation FD. Additionally, we recommend that a company also make this disclosure at the beginning of each public conference call and webcast. Such disclosure could take the following form:

"The company intends to use its website {insert web address} as a means of disclosing material non-public information and for complying with its disclosure obligations under SEC Regulation FD. Such disclosures will be included on the company's website under the heading {insert heading of current news section}. Accordingly, investors should monitor such portions of the company's website, in addition to fol-

lowing the company's press releases, SEC filings and public conference calls and webcasts."

A company should also prominently display on its homepage the link to the investor relations section of its website and consistently post and update important information there using an easily accessible format. We recommend a company adopt these procedures at least one quarterly disclosure cycle prior to using a website to disclose material non-public information.

Direct the media to the website—In order to ensure that the media uses a corporate website as a source of information rather than relying on press releases, a company should advise newswires and the media that it will post important information to its website, especially if the company has a smaller market following. Furthermore, a company should announce the date when it will start using its corporate website as a means for disclosing material non-public information. NYSE-listed companies, however, should continue to comply with the exchange's Immediate Release Policy, which mandates that important corporate information be published by means of a press release. Since Nasdaq has harmonized its disclosure rules with Regulation FD, listed companies generally may comply with Nasdaq disclosure requirements regarding material information through any Regulation FD compliant method.¹³

Route traffic to the website—In order to maximize reliance on its corporate website as a source of important information, a company should use other channels of distribution to move investors, the market, and the news media to its website. Such channels would include "push" technology, such as RSS feeds and email alerts, and blogs targeted to the investment community and the media. The SEC cautions, however, that a company should ensure that its technology infrastructure is sufficient to handle any spikes in traffic to its corporate website that may result from the release of important company news.

Allow sufficient time to pass after posting—A company should exercise caution in considering material information to have been publicly disclosed after it has been posted to its corporate

website. Even a company that generates significant traffic to its corporate website should adopt a waiting period after posting material information before disclosing such information in a private manner to members of the investment community, opening its trading window, engaging in securities offerings or making repurchases of its shares. The length of such waiting period will vary by the size and following of a particular company, but should be at least as conservative as the company's current policies covering public dissemination of information in press releases.

Talk to your shareholder and analyst base about your website communication plan—While not covered in the Release, we believe another worthwhile step in transitioning to using your website for Regulation FD-compliant communications is to ensure, through direct communication, that shareholders and members of the analyst community that follow the company are aware of your plans and agree that the approach you are taking is reasonable in terms of providing public dissemination of information.

Other Recommendations

In light of the additional guidance included in the Release about the applicability of antifraud rules to information provided on company websites, companies should consider taking the following actions:

- Date each document (such as a press release or investor presentation) that has been posted to the company website, and move older documents to an "archive" page. Additionally, we recommend that companies include a disclaimer of any duty to update historical information, such as:

"The information included and linked to in this page contains historical and dated information concerning the company. The company disclaims, and does not undertake, any obligation to update or revise any such historical information."

- Provide context for third-party websites for which the company has provided a hyper-

link. For example, use titles such as “Recent News Articles” and include all such hyperlinks in a common location on the company website.

- Include an exit page or other form of notice when redirecting readers to third-party websites, making it clear that they are leaving the company website, and include an appropriate disclaimer, such as:

“You are being redirected to a third-party website. We are not responsible or liable for the content or policies of the website or any other website which may be linked to our website. We provide these links merely as a convenience and the inclusion of such links does not constitute or imply endorsement by us of the linked websites, or the information, products, or services contained therein.”

- Ensure that third-party information for which the company has provided a hyperlink does not contain material misstatements or omissions, and be cautious of selectively providing hyperlinks only to third-party information that is positive of the company. For instance, while we do not recommend including links to analyst reports on corporate web sites, a web page that does contain them should include reports offering both favorable and unfavorable coverage.
- Provide a clear path to locating more detailed information underlying “highlight” or summary information included on a company website.
- Review insider trading policies to ensure that they apply to material nonpublic information posted on the company’s website in at least as conservative a manner as they would apply to information disclosed in a press release.
- Review disclosure controls and procedures to ensure that information provided over the company website as an alternative to providing such information in an Exchange Act report is appropriately vetted. Additionally,

it is recommended that the same rigor as is used in preparation and dissemination of formal earnings releases and current reports on Form 8-K should be applied to all other investor information posted in corporate websites.

Conclusion

The Release provides important guidance to companies using their websites as an investor communication tool. However, the Release does not offer a “bright line” test or provide certainty that following the guidance will render information on a website “public” for the purposes of Regulation FD. Accordingly, we expect many public companies, especially those with smaller public followings, to proceed more cautiously in relying on the new guidance. All companies should consult with counsel and their investor relations professionals in formulating their website disclosure policies in light of the new guidance, and consider a phase-in period or continuing to use other Regulation FD compliant means to disclose material non-public information.

NOTES

1. See “Commission Guidance on the Use of Company Web Sites,” Aug. 1, 2008, available at www.sec.gov/rules/interp/2008/34-58288.pdf.
2. See Steven E. Bochner and Jason S. Frankl, “Suggestions for Best Practices Under Regulation FD,” WALLSTREETLAWYER.COM, Oct. 2000, at 1.
3. See Steven E. Bochner and Anita S. Presser, “Corporate Disclosure Practices in the Electronic Age: The Web Site—Opportunities and Pitfalls,” WALLSTREETLAWYER.COM, Apr. 1998, at 1.
4. See the Release, at 6.
5. See “Final Rule: Selective Disclosure and Insider Trading,” Aug. 15, 2000, available at www.sec.gov/rules/final/33-7881.htm.
6. See NYSE Euronext, Listed Company Manual § 202.06.
7. See Nasdaq Marketplace Rules 4310(c)(16) and 4320(e)(14).
8. See “Final Report of the Advisory Committee of Improvements to Financial Reporting to the United States Securities and Exchange Commission,” Aug. 1, 2008, at 108. See also Steven E. Bochner, “A Tangled Web,” WALLSTREETLAWYER.COM, Sep. 1997, at 12.

9. *See Steven E. Bochner & Samir Bukhari*, "The Duty to Update and Disclosure Reform: The Impact of Regulation FD and Current Disclosure Initiatives," 7 STAN. J.L. BUS. & FIN. 225 (2002). *See also Weiner v. Quaker Oats Co.*, 129 F.3d 310 (3d Cir. 1997).
10. *See* In re RasterOps Corp. Sec. Litig., [1994-1995 Tr. Binder] FED. SEC. L. REP. [CCH] ¶ 98,467, at 91,195 (N.D. Cal. Oct. 31, 1994), (company passed out favorable analyst reports and as a result was held responsible for the contents of such reports). *See also* Steven E. Bochner and Ignacio E. Salceda, "Over the Wall: Handling Securities Analysts' Conference Calls, Earnings Forecasts, and Reports Effectively," WALLSTREETLAWYER.COM, Apr. 1999, at 1.
11. *See* the Release, at 42.
12. *See* NYSE Euronext, Listed Company Manual § 303A.14.
13. *See* note 7.