

**THOMPSON
HINE**

August 2008

PUBLIC COMPANIES UPDATE

SEC Provides Updated Guidance on Use of Company Web Sites

On August 1, 2008, the Securities and Exchange Commission (SEC) released updated guidance on the use of company web sites. The guidance becomes effective immediately upon publication in the Federal Register.

“PUBLIC” INFORMATION UNDER REGULATION FD

The guidance explains when the information posted on a company web site will be considered “public,” thus avoiding issues under Regulation FD with respect to any subsequent selective disclosure of the information. If a company meets the tests below, then subsequent selective disclosure of the information posted on the company web site will not trigger Regulation FD because such information, even if material, will be “public.” The guidance clarifies that information on a company web site is “public” when:

- A company web site is a recognized channel of distribution;
- Posting of information on a company web site disseminates the information in a manner making it generally available to the market; and
- A reasonable waiting period passes for investors and the market to react to the posted information.

While the tests above require a facts-and-circumstances analysis, a company should consider the following list of non-exclusive factors in evaluating whether its web site is a recognized channel of distribution and whether the information is sufficiently disseminated:

- Whether and how the company lets investors and the markets know that it has a web site and that they should look at the company web site for information (*e.g.*, disclosure in press releases and periodic reports of the company web site address and that it routinely posts important information on its web site);
- Whether the company has informed investors and the markets that it will post important information on its web site and whether it has a pattern or practice of posting such information;
- Whether the web site is designed to lead efficiently to information about the company, whether the information is prominently disclosed on the web site in the location known and routinely used for such disclosures, and whether the information is in a format that is readily accessible to the general public;



- The extent to which information posted on the web site is regularly picked up by the market and readily available media, or the extent to which the company has informed newswires or the media about such information, and the size and market following of the company involved;
- The steps the company has implemented to make its web site and the information accessible, including the use of “push” technology;
- Whether the company updates its web site to keep it current and accurate;
- Whether the company uses other methods to disseminate the information and whether and to what extent those other methods are predominant; and
- The nature of the information.

A waiting period that may be considered reasonable also depends on the circumstances of dissemination, including:

- The size and market following of the company;
- The extent to which investor information on the web site is regularly accessed;
- The steps the company has taken to inform investors and the market that the company uses its web site as the main source of important information, including the location of the information;
- Whether the company has taken steps to actively disseminate the information, or the availability of the posted information, including the use of other distribution channels; and
- The nature and complexity of information. If the information is important, the company should consider issuing an advance notice that important information will be posted by filing with, or furnishing such a notice to, the SEC or issuing a press release.

REGULATION FD DISCLOSURE ON WEB SITE IN LIEU OF FORM 8-K

Once a selective disclosure is made, Regulation FD requires distribution of the information to the public – simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. Companies have typically satisfied this requirement by filing or furnishing a Form 8-K, but Rule 101(e) of Regulation FD has always provided that alternative methods of disclosure in lieu of an 8-K might be acceptable “if reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” When the SEC adopted Regulation FD in 2000, it did not expressly endorse web site disclosure as an adequate alternative to an 8-K filing. The new guidance now clarifies that posting the information on the company web site may be a sufficient method of disclosure, at least “for some companies in certain circumstances.”



For purposes of determining whether web site disclosure will constitute adequate disclosure for Regulation FD purposes, the guidance directs companies to the factors described above in the analysis of whether the web site is a recognized channel of distribution and whether the information is sufficiently disseminated. Additionally, companies must also consider their web sites' capabilities to meet simultaneous or prompt timing requirements for public disclosure once a selective disclosure occurs.

FRAUD LIABILITY FOR INFORMATION POSTED ON WEB SITES

The guidance reiterates that the antifraud provisions in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 apply to company statements made on the Internet in the same way such provisions would apply to any other statement made by, or attributable to, the company. The guidance goes on to apply these principles to several specific categories of web site information.

Previously Posted Materials

The guidance clarifies that companies that maintain previously posted materials or statements on their web sites will not be deemed to reissue or republish such information for purposes of the securities laws' antifraud provisions just because such information remains accessible to the public. Of course, the affirmative restatement or reissuance of such a statement may create a duty to update the statement so that it is accurate as of the date it is restated or reissued.

When it is not apparent that the posted information speaks as of an earlier date, companies should:

- Identify such information as historical (*e.g.*, by dating it); and
- Locate such information in a separate section of the company web site containing previously posted materials or statements.

Hyperlinks to Third-Party Information

Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, a company may be liable for third-party information to which it hyperlinks from its web site when such information can be attributable to the company. As the SEC has previously explained, third-party information is attributable to the company if the company has (1) involved itself in the preparation of the information or (2) explicitly or implicitly endorsed or approved the information. In determining whether the company adopted or endorsed the hyperlinked information, companies should consider the following, non-exhaustive list of factors:

- Context of the hyperlink – what the company stated about the hyperlink or what is implied by the context in which the hyperlink is placed. The guidance suggests that companies explain why the hyperlink is being provided (*e.g.*, explicitly endorsing a hyperlink or simply noting that the third-party web site contains information that readers may find useful). The degree to



which a company is making a selective choice to hyperlink to a specific piece of third-party information (e.g., a hyperlink to a favorable news article when the majority of articles are negative) may also indicate the extent to which the company has a positive view of the information.

- Risk of confusion to investors – the presence or absence of precautions against investor confusion about the source of the information. The guidance clarifies that disclaimers, “exit notices” and “intermediate screens” denoting that the hyperlink is to third-party information are helpful, but not sufficient by themselves, to insulate companies from responsibility for third-party information.
- Presentation of the hyperlinked information – how the hyperlink is presented graphically on the web site, including the layout of the screen.

Summaries

In context of the securities laws’ antifraud provisions, the guidance provides a few techniques for proper use of summary information. Companies should consider:

- Using appropriate titles to convey the abbreviated nature of information;
- Using additional explanatory language to identify the information as a summary or an overview and to provide the location of the more detailed information;
- Placing summary information close to hyperlinks to the more detailed information; and
- Using a “layered” or “tiered” format on web sites such that the most important summary appears on the opening page, with embedded links that allow the reader to access more detailed information by clicking on the links.

Blogs and Electronic Shareholder Forums

The guidance clarifies that the antifraud provisions apply to statements made by a company, or by a person acting on the company’s behalf, in blogs and electronic shareholder forums. However, the company is not responsible for third parties’ statements on a web site sponsored by the company and is not obligated to correct misstatements in such statements. The guidance also confirms that the company cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in blogs or forums.



DISCLOSURE CONTROLS AND PROCEDURES

Pursuant to the guidance, information on company web sites is not generally subject to “disclosure controls and procedures” rules under the Sarbanes-Oxley Act. An exception exists when a company satisfies its Exchange Act obligations by posting information on its web site instead of filing the information with the SEC (*e.g.*, posting waivers to the company’s code of ethics on the web site).

FORMAT OF INFORMATION ON WEB SITES

Finally, the guidance clarifies that the information generally does not have to be in a “printer-friendly” format unless the “printer-friendly” standard is imposed by other rules (*e.g.*, proxy rules for the notice and access model).

FOR MORE INFORMATION

If you have any questions about the implications of the guidance, please call any lawyer in our **Corporate Transactions & Securities** group.

Based on SEC Release No. 34-58288 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

If you do not wish to receive future communications by email, please reply to this email with “unsubscribe” in the subject line.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2008 THOMPSON HINE LLP. ALL RIGHTS RESERVED.