

SEC Addresses Use of Company Websites

The U.S. Securities and Exchange Commission (SEC) has issued interpretative guidance¹ on the evolving use of company websites for dissemination of information. The guidance focuses on the treatment of website content under Regulation FD (Fair Disclosure), the application of the anti-fraud provisions of the U.S. federal securities laws to website content, the status of website content under a company's disclosure controls and procedures, and the format and readability of website content.

Regulation FD (Fair Disclosure)

The SEC confirmed that company websites may be an acceptable method of "public disclosure" of material non-public information for meeting the requirements of Regulation FD. In doing so, the SEC has provided analytical guidance that focuses on the following elements:

- a company's website as a recognized source for information about the company,
- the recognition of a company's website by investors as a recognized channel for dissemination of company information (manner of posting and accessibility of information), and
- the waiting period for investors and the market to react to the information posted on a company's website.

In each case the SEC describes factors to be considered in terms of a company's website in meeting these elements, such as website accessibility, website references made in other company materials, website design, use of push technology, updating of website content, and the nature of information generally posted on the website.

Federal Antifraud Provisions

The SEC has also addressed a company's liability for information posted on its website under the antifraud provisions of the US federal securities laws, including:

- liability for previously posted materials on a company website that are accessed at a later date,
- liability for information provided by means of hyperlinks,
- liability for summary information on a company's website,
- liability for information posted on a company sponsored blog or forum.

In each case the SEC describes techniques a company may want to consider to minimize company liability under the antifraud provisions of the US federal securities laws. Of particular interest are the SEC's suggestions to address liability concerns about the "restatement" and "re-issuance" of materials previously posted on a website, about hyperlinked third party information considered "prepared by" or "adopted" by the company, about summaries, and about interactive website features.

Disclosure Controls and Procedures

The SEC noted that information posted on a company's website as an alternative to inclusion in the reports filed with the SEC would be subject to a company's disclosure controls and procedures (and the certifications that principal executive and financial officers are required to make in terms of the disclosure controls and procedures).

Website Format

Recognizing that online information frequently is interactive and not static, the SEC has stated that all information included in a company's website need not be printer-friendly unless specifically required by the SEC rules (as is the case of proxy materials posted on a company's website under the notice and access model for proxy distribution).

Should you have any questions or comments on the subject of the SEC's interpretative release and its application to your company's website, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com).

Endnotes

¹ SEC Release Nos. 34-58288, IC-28351 (17 CFR Parts 241 and 271). A copy the SEC Release may be obtained from <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

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