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## SEC Publishes Interpretative Release on the Use of Corporate Web Sites

Since the issuance by the SEC in 2000 of its release on the use of electronic media as a means of satisfying certain delivery requirements under the federal securities laws and the promulgation of Regulation FD, the markets have witnessed a dramatic increase in the use of electronic media, including the internet, as a key vehicle for dissemination of information. Corporate information is now available real time to virtually the entire marketplace. As a result, corporate web sites have emerged as a valuable source of information about SEC registrants for existing investors, potential investors, analysts and others.

In response to the significant advances in communications technology and the pervasive use of the internet by market participants and investors, the SEC has published an interpretative release (the “Release”) to provide guidance to SEC registrants regarding the use of corporate web sites in light of the requirements of the Exchange Act and the antifraud provisions of the federal securities laws. The guidance falls into two principal categories – practices designed to avoid selective disclosure under Regulation FD and antifraud considerations. The guidance is directly applicable to domestic registrants; non-U.S. SEC registrants are not subject to Regulation FD, but some do follow U.S. best practices based on Regulation FD concepts, and the antifraud considerations are applicable to domestic and non-U.S. registrants.

### Overview

The Release focuses on four areas:

- whether and when information posted on a corporate web site is to be deemed “public” for purposes of Regulation FD;
- in what circumstances should a registrant be liable for information on web sites, including previously posted information, hyperlinks to third-party information and summary information included on web sites;
- what types of controls and procedures should registrants adopt in respect of information presented on their web sites; and
- in what format should information be presented.

The guidance set forth in the Release does not extend to issues arising under the Securities Act.

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## Regulation FD Considerations

### When is Information Posted on Company Web Sites “Public”

Under Regulation FD, material, non-public information must be disseminated through recognized channels of distribution and investors must be given a reasonable period to react to such information prior to the disclosure of that information to a select group of people, like analysts. The SEC releases proposing and promulgating Regulation FD left open the question of whether and, if so, when information on a corporate web site would be considered “public” for purposes of evaluating if subsequent selective disclosure of such information would implicate Regulation FD. If such information on a web site were to be deemed public, the subsequent disclosure (such as to an analyst in a private conversation) would not be deemed selective disclosure.

For purposes of evaluating whether information on corporate web sites is to be deemed public for purposes of Regulation FD, the SEC suggests that registrants evaluate the following three threshold factors:

- *Whether and when a corporate web site is a recognized channel of distribution.* This factor will depend on the steps taken by the registrant to alert the market to its web site and disclosure practices, and the use by investors and the market of the web site.
- *Whether and when the posting of information on a corporate web site “disseminates” the information in a manner making it available to investors and the markets.* The SEC believes that for this prong of the analysis, registrants should focus on the manner in which information is posted and accessible to investors and the markets and the timely and ready accessibility of such information to investors and the markets. Factors registrants should consider when determining whether the information posted on their corporate web sites should be deemed “disseminated” include:
  - whether the registrant informs the market about its web site and alerts investors to look at the corporate web site for information (*e.g.* in periodic reports);
  - whether the registrant has a pattern or practice of posting important information on its web site;
  - whether the registrant has informed investors that it will post important information on its web site;
  - whether the registrant’s web site is designed to efficiently lead investors to information about the registrant and whether information addressed to investors is prominently disclosed on such web site;
  - whether the information is presented in a format 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 registrant has advised newswires or the media about such information, and the size and market following of the registrant (smaller, less visible registrants may need to be more proactive in letting investors and others know information is available on a corporate web site);
  - whether the registrant has taken steps to make its web site and the information accessible (while there is no need for “push” technology (server push), it is one factor to consider; also the ability of the infrastructure to handle peak capacity surrounding a major announcement should be considered);
  - whether the registrant keeps its web site accurate and current;

- whether the registrant uses other methods to disseminate information; and
  - the nature of the information posted.
- *Whether and when there has been a reasonable waiting period for investors and the market to react to the posted information.* This factor needs to be evaluated on a case-by-case basis, and ultimately will depend on the circumstances of the dissemination of the information in question, which may include consideration of:
- the size and the market following of the registrant;
  - the extent to which investor oriented information on the website is regularly accessed;
  - whether the registrant has taken steps to inform investors that it uses its web site as a source of important disclosure of information;
  - whether the registrant has taken steps to actively disseminate the information or its availability on the corporate web site; and
  - the nature and complexity of information.

What will be deemed a reasonable period will vary from company to company and potentially will vary depending on the significance of the information. A larger registrant may rely on a shorter period where it makes frequent use of its web site as a key source of information, investors and the market are aware of this and it believes its web site is actively followed. Important information may, regardless of other factors, need advance notice to the market.

#### **Satisfaction of the Public Disclosure Requirement of Regulation FD**

Under Regulation FD, a registrant is required to file or furnish a Form 8-K or use an alternative method of disclosure that is “reasonably designed to provide broad, non-exclusionary distribution of information to the public,” in the case of intentional selective disclosure, concurrently or, in the case of unintentional selective disclosure, promptly thereafter.

The SEC recognizes that, for some registrants in certain circumstances, posting of information on a corporate web site may be a sufficient method of public disclosure for purposes of Regulation FD. In order to determine whether and when this requirement is met, registrants should consider whether their web sites are a recognized channel of distribution and whether the information is deemed “disseminated” (under the first two prongs of the analysis described above). Registrants should also consider their web sites’ capability to meet simultaneous or prompt timing disclosure requirements once selective disclosure has been made. Note that, for purposes of these requirements of Regulation FD, the third prong of the analysis discussed above (the waiting period) is not relevant.

#### **Antifraud Considerations**

The antifraud provisions of the federal securities laws apply to a registrant’s statements made on the internet, including postings on or hyperlinks from corporate web sites. Under Rule 10b-5, liability can attach to material misstatements and omissions, and what is material likely will turn on whether a reasonable investor would view an omitted fact as significantly altering the “total mix” of information available. The SEC notes, in the Release, that registrants can take steps that affect whether information on or hyperlinked from a corporate web site is part of the “total mix” of information. In that context, the SEC has provided guidance on certain issues that could trigger liability under the antifraud provisions of the federal securities laws.

***Effect of accessing previously posted materials or statements on corporate web sites.***

The SEC has clarified that the fact that investors have access to previously posted statements or materials on a registrant's web site does not itself mean that such information has been reissued or republished for purposes of the antifraud rules. The SEC recommends, in order to make clear that the materials or statements do speak as of an earlier date, that the information be separately identified as historical or previously posted (for example, by dating the materials or statements) and located in a separate section of the web site.

If a registrant affirmatively reinstates or reissues a statement, the antifraud provisions would apply to such statements when the registrant reissues them, which may then create a duty to update such statement (so that it is accurate as of the date of reissuance or reinstatement). The fact that investors can access previously posted materials or statements, however, is not tantamount to a reissuance or republication. Moreover, it does not mean that the registrant has made a new statement or has triggered a duty to update such previously posted materials or statements.

***Hyperlinks to third-party information.*** In 2000, the SEC discussed in its release on electronic communications the implications of hyperlinks under both the Securities Act and the Exchange Act. In the Release, the SEC has provided additional guidance as to the circumstances under which registrants may have liability for posted information outside the context of the offer and sale of securities.

Under the antifraud provisions of the Exchange Act, a registrant may be liable for third-party information to which it hyperlinks from its web site if that information could be attributed to the registrant. The Release reminds the market that whether information in any context may be attributable to a registrant depends on whether the registrant has (a) involved itself in the preparation of the information (known as the "entanglement" theory) or (b) explicitly or implicitly endorsed or approved such information (known as the "adoption" theory).

As explicit endorsement in connection with hyperlinked information would be clear, the guidance focuses on what might constitute implicit endorsement or approval for purposes of the adoption theory. The SEC makes clear that this analysis should turn on whether the context of the hyperlink and the hyperlinked information together create a reasonable inference that a registrant has endorsed or approved the hyperlinked information. Factors that may be relevant in determining whether a registrant has adopted hyperlinked information include (but are not limited to):

- *What has the registrant said about the hyperlink, including what is implied by the context.* The registrant should avoid confusion or misunderstanding as to its views or opinions on the hyperlinked information by explaining the context and making explicit the reason for providing the hyperlink. It may endorse the information or, more likely, note that it believes the information will be of interest or use to its readers. The SEC notes that, because companies can have different target-audiences for different pages on their web sites, a third-party hyperlink on a customer-oriented page has different implications from a securities law perspective than a hyperlink to a research analyst's report on an investor-oriented page.
- *The risk of confusing investors based on nature and content.* The nature and content of the hyperlinked information should be considered in deciding how to explain the hyperlink. The more selective the registrant's choice to hyperlink to a specific piece of third-party information, the more likely it will seem that the registrant has a positive view

or opinion about that information. Specific hyperlinked information may need more explanation than general information.

- *Presentation of the hyperlinked information.* In this regard, the SEC suggests that registrants consider using “exit notices” or “intermediate screens” to indicate that the hyperlink is to third-party information. This may help avoid confusion as to the source of hyperlinked information. The SEC cautions that such techniques will not absolve a registrant from antifraud liability, for example, where it is selective in presenting only positive information (by hyperlinking to the one positive research report) and neglects to mention any negative information (*i.e.*, the many negative research reports issued during the same period); it may create an inference that it has adopted the positive report despite the use of such techniques.

Finally, the SEC highlights that, in general, the use of disclaimers alone does not insulate registrants from the application of the antifraud provisions. For example, a disclaimer would not negate liability for hyperlinked information that a registrant knows, or is reckless in not knowing, that the hyperlinked information is materially false or misleading. The SEC reminds registrants that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.

***Summary and overview information.*** The SEC notes that summary or overview information can be helpful to investors. Registrants presenting summary and overview information on web sites are encouraged to use:

- appropriate titles to make clear the abbreviated nature of the information;
- additional explanatory language to identify the text as a summary or overview information and to identify the location of the more detailed information;
- hyperlinks to more detailed information in close proximity to the summary or overview section to make clear the context in which the summarized information should be viewed; and
- a “layered” or “tiered” format for the information presented that allows readers to “drill down” to more detailed information as needed.

***Interactive web site features: blogs and electronic shareholder forums.*** While the SEC acknowledged the utility of interactive web features such as company-sponsored blogs and electronic shareholder forums, it cautioned that the antifraud provisions of the federal securities laws apply to statements made through interactive web site features to the same extent as communications made via traditional channels. These types of communications are covered by the general rule that statements made by or on behalf of a registrant are subject to the antifraud provisions of the federal securities laws. The fact that they appear as part of interactive web site communications does not alter the result.

While a registrant will not be liable for the statements posted on its web site by third-parties, particular attention should be paid to employees participating in such communications as any statements they make “while acting as representatives” of a registrant are likely to be attributed to the registrant, even when any such employee purports to be made in an employee’s individual capacity. In addition, registrants cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or a forum. Finally, while the registrant remains liable for its own statements (and statements made on its behalf), it is not liable for third-party statements and it does not have an obligation to respond or correct third-party misstatements.

***Disclosure Controls and Procedures.*** Registrants may satisfy certain Exchange Act disclosure requirements by posting information on their web sites instead of filing that information with the SEC. Where a registrant elects to do so, it should be aware that the Exchange Act rules on disclosure controls and procedures (and the related certification requirements) apply to that information that is posted on the registrant's web site. The Release confirms that disclosure controls and procedures, however, would not apply to any other information on a corporate web site.

***Format of Information and Readability.*** The SEC has clarified that registrants are not required to make information on their web sites available in a format comparable to paper-based information, such as a printer-friendly format, unless SEC rules explicitly so require, as is the case, for example, for proxy materials.

The foregoing interpretative guidance is effective upon publication in the *Federal Register*.

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