

# DechertOnPoint

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A legal update from Dechert's Corporate Finance Group

## SEC Issues Guidance on Use of Company Websites

With a view to encouraging the continued development and use of company websites as a "significant vehicle for the dissemination to investors of important company information," effective August 7, 2008, the Securities and Exchange Commission (the "SEC") issued interpretive guidance regarding the use of company websites under the Securities Exchange Act of 1934 (the "Exchange Act") and the antifraud provisions of the federal securities laws.<sup>1</sup> Recognizing the company website as an "obvious place" for company information, the increased demand for rapid company disclosure and the "significant technological advances and pervasive use of the Internet by companies, investors and other market participants," the SEC's guidance focuses on the following four areas:

- whether and when information on a company website is public under Regulation FD;
- federal antifraud liability for information on company websites (previously posted information, third-party hyperlinks, summary information and interactive information, such as "blogs");
- disclosure controls and procedures with respect to website content; and
- the format and readability of website information.

### Regulation FD and "Public" Information

Regulation FD provides in general that a company may not selectively disclose material nonpublic information to securities market professionals or to holders of the company's securities who may trade on the basis of the information.<sup>2</sup> If the company selectively discloses such information, it is required under Regulation FD to simultaneously (or promptly, in the case of non-intentional disclosures) make public disclosure of such information either in a Form 8-K or by using any method "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."<sup>3</sup> The SEC's guidance addresses two aspects of public disclosure under Regulation FD: (1) whether and when information on a company's website is considered public so that subsequent selective disclosure by the company of that information is permitted, and (2) if a company selectively discloses material nonpublic information, whether the posting of that information on the company's website is sufficient to fulfill its obligations to make the information public under Regulation FD.

<sup>2</sup> "Information is nonpublic if it has not been disseminated in a manner making it available to investors generally." Final Rule: Selective Disclosure and Insider Trading, SEC Release No. 33-7881, at Section II.B.2 (Aug. 15, 2000).

<sup>3</sup> Rule 101(e)(2) of Regulation FD.

<sup>1</sup> SEC Release Nos. 34-58288, IC-28351 (the "Website Release").

### ***Whether and When Information Is “Public” Under Regulation FD***

In analyzing whether information is public for purposes of determining whether subsequent selective disclosure is prohibited under Regulation FD, the SEC staff sets forth three elements for a company to consider:

1. Whether the company’s website is a “recognized channel of distribution.” This analysis will depend upon:
  - the degree to which the company has alerted the market to its website and the disclosures available on its website; and
  - the level of use of the company’s website by investors and the market.
2. Whether posting the information on the company’s website makes it available to the securities marketplace in general and if it can be considered “disseminated.” In analyzing whether information has been “disseminated” for these purposes, the company should focus on:
  - the manner in which the information is posted on the company’s website; and
  - the timely and ready accessibility of the website information to investors and the markets.
3. Whether there has been a “reasonable waiting period” from when the information is disclosed on the company’s website in order for investors and the market to react to the information. In determining what constitutes a “reasonable waiting period,” the company should consider, among other things:
  - the size and market following of the company, since it may take longer for information relating to a smaller company to be picked up by investors;
  - the extent to which investor-oriented information on the company’s website is regularly accessed;
  - the steps the company has taken to make investors and the market aware that it uses its website as a key source of information (including the location of the posted information);

- whether the company has taken steps to actively disseminate the information or the availability of such information; and
- the nature and complexity of the information, with information that is more important requiring less time in the marketplace.

In helping a company determine whether its website is a “recognized channel of distribution” and whether the information on its website is accessibly posted and “disseminated” under the first two elements described above, the SEC staff has offered some non-exclusive factors that a company might consider. These factors include:

- if the company discloses to investors that it has a website, for instance, in its filings with the SEC, and if the company has made the market aware that it will be posting material information on its website;
- if the company’s website has been designed to lead the investors and the market to the information and if the information is prominent (for instance, if headlines of press releases appear on the home page of the company’s website);
- if the information on the company’s website is regularly picked up by the market and readily available media, and reported in the media, which may depend on the level of the company’s media following;
- if the company keeps its website current and accurate;
- if the company uses other methods in addition to its website to disseminate the information, or if the company uses other means to direct investors to its website, such as RSS feeds or email alerts; and
- the nature of the information.

### ***Whether the Posting of Selectively Disclosed Material Nonpublic Information on a Company’s Website Is Sufficient to Satisfy the Public Disclosure Requirement of Regulation FD***

Until now, the SEC staff has taken the position that posting of information on a company’s website would not by itself constitute sufficient public disclosure under

Regulation FD.<sup>4</sup> As articulated in the Website Release, the staff now believes that for some companies, in certain circumstances, the posting of information on a company website by itself may indeed satisfy the public disclosure requirement of Regulation FD. In determining whether posting of selectively disclosed material nonpublic information on a company's website would be sufficient for this purpose, a company should evaluate whether its website is a "recognized channel of distribution" and whether the information on its website would be considered disseminated as described above. In addition, a company will need to consider whether its website is capable of meeting the simultaneous or prompt timing requirements under Regulation FD.

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We recommend that in making a determination whether information on its website is "public" for purposes of Regulation FD, a company should undertake, with the assistance of its counsel, a comprehensive review of its website, including measurement of the traffic to the company's website and the number of clicks on particular pages containing material information about the company. In addition, a company should monitor media coverage to determine whether, how quickly, and how often the media picks up information from its website. All of this should be viewed in the context of the company's other disclosures, including references to website in its filings with the SEC and press releases, and whether the company discloses the information on its website through other means. In any event, if the information is significant, a company should consider using a means of dissemination that is more likely to have greater publicity to avoid any questions regarding whether the information has been made "public."

## **Liability for Omissions or Misstatements of Information on Company Websites**

A company is subject to the antifraud provisions of federal securities laws for information on its website just as it is for other statements made by or attributable to the company. The SEC's guidance clarifies the application of antifraud liability to four types of website information: (i) historical or previously posted information; (ii) hyperlinks to third-party information; (iii) summary information; and (iv) interactive website features such as blogs and electronic shareholder forums.

<sup>4</sup> Final Rule: Selective Disclosure and Insider Trading, SEC Release No. 33-7881 at Section II.B.4.b.

## ***Previously Posted Information***

The SEC's guidance clarifies that the mere continued inclusion or accessibility of previously posted, or historical, information on a company's website does not mean that such information is automatically deemed reissued or republished for the purposes of antifraud liability under federal securities laws. This assuages any concerns that a company would have to update old information on its website, unless of course the company affirmatively restates or reissues such information. If it is not apparent to the reasonable person that the posted information speaks as of a certain date, the SEC staff believes that, in order to assure that the investor understands that the statement is historical:

- the information should be identified as historical or previously posted materials or statements (for example, by dating the materials); or
- the information should be placed in a separate section of the website and referred to as "archives" or a similar term.

## ***Hyperlinks***

Consistent with prior SEC staff guidance, a company is subject to antifraud liability for hyperlinked information if the third-party information can be attributable to the company. Whether information can be attributable to the company depends upon whether the company was involved in preparing such information, or whether the company either explicitly or implicitly approved the information. In prior guidance, the SEC staff identified three (non-exhaustive) factors to be considered in determining whether a company has implicitly approved third-party hyperlinked information: (i) the context of the hyperlink (for example, what the company says about the hyperlink); (ii) the risk of confusing investors about the source of the information; and (iii) the presentation of the hyperlinked information (for example, the layout of the screen containing the hyperlink). In the Website Release, the SEC staff provides some recommendations for companies to consider with respect to hyperlinked information. A company should consider:

- explicitly explaining the context for the hyperlink (for example, that the information is provided for interest only, that the company endorses the information, or that the information supports other information on the company's website);

- explaining the source and reason for a hyperlink; and
- using an “exit notice” indicating that the information is contained on a third-party website in order to avoid confusion as to the source of the information (although simply providing an exit notice will not absolve a company of antifraud liability).

#### ***Summary Information***

The Website Release provides guidance for posting summary information on a company's website. When providing a summary or overview information on its website, a company should indicate that the information is a summary, and direct a reader to where more detailed information can be found. Suggestions offered by the SEC staff in this regard include:

- using appropriate titles or explanatory language to convey the summary or abbreviated nature of the information; and
- organizing the presentations so that there are links to the more detailed information either embedded in or near the summary information.

#### ***Interactive Information such as Blogs and Electronic Forums***

In the Website Release, the SEC staff acknowledges the utility of interactive information such as blogs and electronic shareholder forums, and their ability to allow management and shareholders to engage in discussions. The staff provides the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

- the antifraud provisions of federal securities laws reach statements made by companies, or on their behalf, on blogs and electronic shareholder forums;
- antifraud liability cannot be avoided by an employee purporting to speak in his or her “individual” capacity; and
- a company cannot require a user to waive federal antifraud protections as a condition to entering or using the blog or electronic shareholder forum.

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In order to protect a company against potential liability arising from information on its website, we recommend

that a company, with the assistance of counsel, evaluate or consider implementing procedures regarding who may post information on its website, what information is posted, and the format of posted information.

#### ***Disclosure Controls and Procedures***

If a company elects to satisfy certain of its Exchange Act disclosure obligations by posting such information on its website rather than providing the information in the appropriate Exchange Act report, then disclosure controls and procedures under the Sarbanes-Oxley Act of 2002 would continue to apply to that information. Otherwise, disclosure controls and procedures generally do not apply to other information disclosed on a company's website.

#### ***Format of Information and Readability***

The SEC staff's view is that the inability to print information that is designed for reading electronically and not outside the electronic context does not generally take away from its readability. Therefore, the Website Release provides that is not necessary for information on a company's website to be “printer-friendly” unless it is specifically required by SEC rules.

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The SEC has requested comments on the guidance contained in the Website Release. The comment period will end on November 5, 2008.

The Internet continues to serve a greater and more vital role in the dissemination of information to investors and the market. As SEC Chairman Christopher Cox noted, the website guidance issued by the SEC “clarifies the rules of the road so investors can gain—quickly and in a cost-effective manner—the benefits of Internet disclosure of the latest information on the companies they own or are considering buying.” With the SEC's newly issued guidance, companies should consider further developing their corporate websites as an efficient disclosure tool.

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