

SECURITIES LAW UPDATE

NEWSLETTER OF THE CAPITAL MARKETS PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

The SEC Issues Guidance on the Use of Company Web Sites

[Linda Park](#)

Updating the guidance that the Securities and Exchange Commission (the "SEC") provided in 2000 on the use of the Internet and electronic media, the SEC recently issued guidance on the use of company web sites with respect to antifraud provisions and certain Exchange Act provisions, focusing primarily on the following:

- When information posted on a company web site is "public" for purposes of the applicability of Regulation FD;
- Company liability for information on company web sites—including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites;
- The types of controls and procedures advisable with respect to such information; and
- The format of information presented on a company web site, with the focus on readability, not printability.

A copy of the SEC's guidance may be found [here](#).

Evaluating the "Public" Nature of Information on Company Web Sites

When Is Information "Public" for the Purposes of Regulation FD?

The SEC issued guidance on the circumstances under which information posted on a company web site would be considered "public" for the purposes of evaluating the (1)

NEWSLETTER EDITORS

Blase P. Dillingham

Partner

bdillingham@manatt.com

310.312.4159

James J. Vieceli

Partner

jvieceli@manatt.com

310.312.4246

Mark J. Kelson

Partner

Chair, Capital Markets
Practice Group

mkelson@manatt.com

310.312.4156

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applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD's "public disclosure" requirement.

In evaluating whether information is public for the purposes of assessing whether a subsequent selective disclosure may implicate Regulation FD, companies must consider the following elements:

(1) Whether a company web site is a recognized channel of distribution. Satisfaction of this element depends on the steps the company has taken to alert the market to its web site and its disclosure practices as well as the use by investors and the market of the company's web site.

(2) Whether posting of information on a company web site disseminates the information so that it is available to the securities marketplace in general. The SEC focuses on the manner in which the information is posted on a company web site and the timely and ready accessibility of such information to investors and the markets. Some factors to consider include the following:

- Whether and how companies let investors and the markets know that the company has a web site and that they should look at the company's web site for information;
- Whether the company has made investors and the markets aware that it will post important information on its web site and whether it has a pattern or practice of posting such information on its web site;
- Whether the company's web site is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, 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 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, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following

programs.

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the company involved. The SEC notes that larger companies may know that the market and media will pick up and distribute the disclosures that they make on their web sites, whereas companies with less of a market following, which may include companies with a smaller market capitalization, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's web site;

- The steps the company has taken to make its web site and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels, either to widely distribute such information or advise the market of its availability;
- Whether the company keeps the web site current and accurate;
- Whether the company uses other methods in addition to its web site posting to disseminate information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.

(3) Whether there has been a reasonable waiting period for investors and the market to react to the posted information. The evaluation of this element requires careful consideration of the facts and circumstances of making the disclosure and also the following factors:

- The size and market following of the company;
- The extent to which investor orientation information on the company web site is regularly accessed;
- The steps the company has to take to make investors and the market aware that it uses its company web sites as a key source of important information about the company, including the location of the posted information; and
- The nature and complexity of the information.

The SEC notes that if the information to be disclosed is important, companies should consider taking additional steps

to alert investors and the market to the fact that important information will be posted.

If, after evaluating the disclosure under the foregoing analysis, the information on the company's web site is public, then subsequent selective disclosure of that information would not trigger Regulation FD because such information, even if material, would not be nonpublic.

Can the Public Disclosure Requirement of Regulation FD Be Satisfied by Posting on a Web Site?

Regulation FD, Rule 101(e) requires that once a selective disclosure has been made, the company must file or furnish a Form 8-K or use an alternative method or methods of disclosure to provide broad, non-exclusionary distribution of the information to the public. The SEC acknowledges that technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting information on a company's web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD. Companies will need to consider the first two elements listed in the section above for evaluating whether the information is public. Companies will also need to consider their web sites' capability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made.

Company Liability for Information on Company Web Sites

The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company. These include postings on and hyperlinks from company web sites.

Effect of Accessing Previously Posted Materials or Statements on Company Web Sites

The SEC does not believe that companies maintaining previously posted materials or statements on their web sites are reissuing or republishing such materials or information for the purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. This alleviates the concern that companies may have a duty to update the previously posted materials or statements if they are considered to be a new statement by being "republished" each time the materials

or statements are accessed on the web site. Antifraud provisions do apply to statements when they were initially made or when the company restates or reissues the statements.

When it is not apparent to a reasonable person that the statements are historical, companies should clarify by:

- Separately identifying the posted materials or statements as being historical or previously posted; and
- Locating previously posted materials or statements in a separate section of the company's web site.

Hyperlinks to Third-Party Information

Under Section 10(b) of the Exchange Act and Rule 10b-5, a company can be held liable for third-party information to which it hyperlinks from its web site and which could be attributable to the company. As the SEC has explained previously, the following factors influence the analysis on whether the company has adopted the hyperlinked information:

- Context of the hyperlink—what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- Risk of confusing the investors—the presence or absence of precautions against investor confusion about the source of information; and
- Presentation of the hyperlinked information—how the hyperlink is presented graphically on the web site, including the layout of the screen containing the hyperlink.

The SEC has provided further guidance by stating that a company faces potential antifraud liability if the context of the hyperlink (including where the company has placed the hyperlink on its web site) and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information. The SEC recommends that, to avoid potential confusion, the company should consider explaining the context of the hyperlink (e.g., explicit endorsement of the hyperlink or a note that the third-party web site contains information that may be of interest to the reader). The SEC also suggests using "exit notices" or "intermediate screens" to denote that the hyperlink is to third-party information. However, the SEC notes that the use of these notices and screens does not absolve a company from

antifraud liability if the facts and circumstances are sufficient to infer that the company has approved or endorsed the third-party information. Furthermore, the SEC notes that a disclaimer alone is not sufficient to insulate a company from antifraud liability for hyperlinking to information that it knows, or is reckless in not knowing, is materially false or misleading.

Summary Information

The SEC strongly suggests that, when using summaries or overviews on their web sites, companies should consider ways to alert readers to the location of the detailed disclosure from which such information is derived or upon which such overview is based, as well as to other information about a company on a company's web site. The SEC recommends the following techniques:

- Use of appropriate titles;
- Use of additional explanatory language;
- Use and placement of hyperlinks (i.e., placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived); and
- Use of "layered" or "tiered" format (i.e., organizing web site presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links to the more detailed information).

Interactive Web Site Features

The SEC has taken this opportunity to provide the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

- The antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums. Even though the forums may be informal and conversational in nature, statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other company statements.
- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.

Disclosure Controls and Procedures

A company's principal executive officer and principal financial officer must certify as to the effectiveness of disclosure controls and procedures. They must disclose their conclusions with respect to information that is posted as an alternative to being provided in an Exchange Act report, but need not disclose their conclusions regarding other disclosures of information on a company's web site.

Format of Information and Readability

The SEC commented that it does not think it is necessary that information appearing on company web sites satisfy a printer-friendly standard unless the SEC rules explicitly require it.

Conclusion

Companies should review the content in their web sites, the context and location of important information, historical information and hyperlinks, and their system of disclosure controls and procedures for web site publication in consideration of the suggestions and recommendation made by the SEC in this recently published guidance.

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FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

[Linda Park](#) Ms. Park is an associate with the Corporate & Finance practice group in the Los Angeles office. Her practice focuses on representing underwriters and corporate issuers in public and private offerings of high-yield debt, equity and convertible securities. She has also represented issuers in tender and exchange offers. Ms. Park provides counsel on general corporate matters, such as Sarbanes-Oxley compliance, Rule 144A/Regulation S sales, information statements, and corporate governance matters.