MINTZ LEVIN

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

A SUMMARY OF

SEC GUIDANCE ON THE USE OF COMPANY WEBSITES

FOR DISCLOSURE PURPOSES

SEC Guidance on the Use of Company Websites for Disclosure Purposes

The Securities and Exchange Commission (the "SEC" or "Commission") has published an interpretive release (the "Release") which provides guidance on the use of company websites within the context of certain relevant provisions of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the federal antifraud provisions of the securities laws.[1/] The guidance is the first from the SEC regarding corporate electronic communications since 2000.

Acknowledging the pervasive use of the internet and the notion that company websites "can serve as effective information and analytical tools for investors," the SEC provided the interpretive guidance to assist companies in their efforts to further develop their websites to adequately and efficiently disseminate information to investors in a manner that is compliant with the federal securities laws. Specifically, the Release discusses the following:

1. the application of Regulation FD to information posted to company websites;
2. company liability for information posted to a website;
3. disclosure controls and procedures with respect to information posted to company websites; and
4. the format and readability of information posted to company websites.

What follows is a discussion of each of the foregoing topics.

The Application of Regulation FD to Information Posted to Company Websites

Regulation FD (Fair Disclosure) under the Exchange Act was adopted by the SEC in 2000 and subsequently amended in 2005 in connection with the promulgation of the Commission's Securities Offering Reform rules. It was implemented in an effort to combat the practice of selective disclosure of material, non-public information by companies, in which "a privileged few gain an informational edge — and the ability to use that edge to profit — from their superior access to corporate insiders, rather than from their skill, acumen, or diligence."[2/] Regulation FD specifically provides that when a company, or person acting on its behalf, discloses material, non-public information to certain enumerated persons (*e.g.*, securities professionals or company shareholders who may effect a trade on the basis of such information), the company must disseminate that information to the public, either simultaneously (in the case of an intentional disclosure) or promptly (in the case of an unintentional disclosure).[3/]

Determining when and whether material information has been publicly disclosed is fundamental to an analysis of whether Regulation FD has been violated. The essential inquiries relevant to such determination in the context of website postings are (i) whether

---

[1/] SEC Guidance on the Use of Company Websites, Release No. 34-58288 (August 1, 2008).
[2/] See Selective Disclosure and Insider Trading, Release No. 33-7881, at Section II.A (August 15, 2000).
[3/] Rule 100(b)(1) of Regulation FD.

the material information that is the subject of the selective disclosure is already public by virtue of its having been posted previously on the company's website, and (ii) if the information is not already public, whether the posting of such information on the company's website constitutes broad, non-exclusionary distribution of the information to the public for purposes of Regulation FD. In the event the information is already public, the issuer would be free to disclose such information (selectively or otherwise) without fearing the applicability of Regulation FD because the regulation applies solely to the selective disclosure of material, *non-public* information. Conversely, if such information is not already public, then selective disclosure of that information may result in a breach of Regulation FD unless it is publicly disclosed simultaneously or promptly (depending on the circumstances) in accordance with Regulation FD, or the regulation is not otherwise applicable.[4/]

Whether and When Information Posted on a Company's Website is considered "Public" for purposes of Regulation FD

A central focus of the Release is to provide further clarity regarding whether information posted on a company's website may be considered "public" in accordance with Regulation FD. The Release is also, in part, a response to the views of reporting companies and other commentators who believe that the increased use and acceptance of technological advances in electronic communication will continue to improve the quality of investor access to information, and that the securities laws, including Regulation FD, should recognize this reality by embracing formal use of the internet for disclosure purposes. The internet allows companies to capture process and disseminate information to their various stakeholders in a timely and cost-efficient manner. Critics of the existing disclosure system contend that the internet has rendered telephone conference calls and press releases anachronistic, and that Regulation FD should recognize the internet as an exclusive vehicle through which the public can be fairly informed.

The SEC replied to these criticisms by issuing the Release. In particular, the Release adopted the following three-pronged test to determine the circumstances under which information posted on a company's website would be deemed "public" for purposes of Regulation FD:

- the company's website must be a recognized channel of distribution;
- the information must be disseminated via the website in a manner that makes it available to the securities marketplace in general; and
- there has been a reasonable waiting period for investors to react to the posted information.

We examine each of these concepts below.

Recognized Channel of Distribution. Whether a company's website is a "recognized channel of distribution" of information will depend on (i) the steps that the company has taken to inform the market of its website and disclosure practices, and (ii) the manner in which investors and the market use the company's website.

[4/] Regulation FD does not apply to disclosure made (i) to a person who owes a duty of trust or confidence to the company (such as an attorney, investment banker or accountant), (ii) to a person who expressly agrees to maintain the disclosed information in confidence, (iii) to a credit agency, provided the information is disclosed solely for the purpose of developing a credit rating and such rating is publicly available or (iv) in connection with certain registered securities offerings.

Dissemination. Because companies of all sizes now have the capacity to present information on their websites to all investors on a broadly accessible basis, and because investors correspondingly have the capability to easily find and retrieve information about a company by searching the Web, the SEC analyzes the concept of dissemination through a changed lens. The Release expresses the SEC's recognition that news is currently disseminated in an electronic world — one in which accessibility to information is not limited to reading a newspaper. As a result, within the framework of a company website that is known by investors as a source for important company information, the appropriate approach to evaluating the concept of dissemination for purposes of Regulation FD is to focus on:

- the manner in which information is posted on a company's website; and
- the timely and ready accessibility of such information to investors.

Set forth below is a list of *non-exclusive* factors that the SEC believes a company should consider when assessing whether its website is a "recognized channel of distribution" and whether the company information on such website has been "disseminated." Also presented in the chart below are action items we suggest to maximize website recognition and effectiveness of dissemination for companies that wish to rely on their websites as a means of communicating information in a Regulation FD-compliant manner.

Non-Exclusive Factor	**Action Items Suggested to Satisfy Factor**
• Whether and how a company lets investors and the markets know that the company has a website and that they should look at the company's website for information.	• Include the address of the company's website in periodic reports filed under the Exchange Act. • Insert in each such report a statement declaring that the company routinely posts important information on its website.
• Whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting such information on its website.	• Post all press releases and other material information on the company website. • Provide advance notice of particular postings, including the date and time of such postings, in press releases or other public communications.
• Whether the company's website 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 website 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.	• Make certain that the "Investor Relations" portion of the website is easily identifiable and accessible. • Ensure that the "Investor Relations" page reveals current press releases immediately and without a need to click to a separate news page. • Audit website and "Investor Relations" page to confirm that it is user-friendly.
• The extent to which information posted on the website is regularly picked up by the market	• Companies with large market capitalizations typically know that information posted on their

Non-Exclusive Factor	Action Items Suggested to Satisfy Factor
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. • The size and market following of the company involved.	websites will be well-followed by the market and the media and that the market and the media will pick up and further distribute the disclosures. Conversely, companies with less of a market following, which typically include those with smaller market capitalizations, may need to take affirmative steps to ensure that investors and others know that information is or has been posted on the company's website and that they should look at the website for current information concerning the company. Such steps might consist of (i) directing attendees at investor conferences to the company's website and (ii) referring investors to the website for advance notice of the dates and times of earnings releases and calls.
• The steps the company has taken to make its website and the information accessible, including the use of "push" technology,[5/] such as RSS feeds, or other distribution channels, either to widely distribute such information or advise the market of its availability.	• Consider using push technology or email alerts consistently in order to disseminate information. • Companies should ensure that their internet infrastructure can accommodate spikes in traffic volume that may accompany a major company announcement.
• Whether the company keeps its website current and accurate.	• Make certain that press releases and other material information are timely posted on the website, and that information is updated periodically as necessary after posting. • Regularly archive press releases that are no longer current in a separate and well-labeled sub-section of the "Investor Relations" portion of the website.
• Whether the company uses other methods in addition to its website to disseminate information and whether and to what extent those other methods are the predominant methods the company uses to disclose information.	• Companies that want information posted on their websites to be deemed "public" for purposes of Regulation FD should comply with the guidance set forth in the Release. • Where desired and applicable, make the website the company's primary vehicle for information dissemination. For example, although a company must file an earnings release with the SEC pursuant to Item 2.02 of Form 8-K, it should also post such release on

[5/] Push technology, or server push, describes a type of internet-based communication where the request for the transmission of information originates with the publisher or central server. It is contrasted with pull technology, where the request for the transmission of information originates with the receiver or client. The Release notes that the use of push technology may be one factor to consider in evaluating accessibility to the information posted on a website, but it is not an explicit requirement.

Non-Exclusive Factor	Action Items Suggested to Satisfy Factor
	its website.
• The nature of the information.	• The dissemination of routine information through a website will probably not violate Regulation FD. Nevertheless, small and medium cap companies should generally continue to disclose non-routine, material information via newswire services or Form 8-K filings.

Reasonable Waiting Period. The last factor to be analyzed in connection with determining whether information posted on a company's website will be deemed "public" for purposes of Regulation FD is whether investors and the market have been afforded a reasonable waiting period to absorb the information. Ultimately, what constitutes a reasonable waiting period depends on the circumstances of the dissemination. According to the Release, a company should evaluate the following non-exclusive elements when assessing whether a reasonable amount of time has elapsed:

- the size and market following of the company;
- the extent to which investor-oriented information on the company website is regularly accessed by investors and other stakeholders;
- the steps that the company has taken to make investors and the market aware that it uses its company website as a key source of important information about the company, including the location of the posted information;
- whether the company has taken steps to actively disseminate the information or the availability of the information posted on the website, including using other channels of distribution; and
- the nature and complexity of the information.

The Release emphasized that companies must consider the particular facts and circumstances surrounding the posted information when determining whether the reasonable waiting period element is satisfied. What may be a reasonable waiting period after posting information on a company website for a particular company and a particular type of information may not be reasonable for other companies or other types of information. For example, a large company that frequently uses its website as a central resource for providing information, has made investors and the market aware of this, and reasonably believes that its website is well-followed by investors and other market participants, may decide to use a shorter waiting period than would be necessary for a company that is not in the same situation.

In the Release, the SEC looked to insider-trading case law for direction on what constitutes a reasonable waiting period in the Regulation FD context. Pursuant to the line of cases cited, to assess whether a reasonable waiting period has elapsed, a facts-and-circumstances analysis must be employed that focuses on when the market has fully absorbed, and the investing public has stopped reacting to, the disclosed information. Accordingly, for an issuer that is tracked carefully by the market or for disclosure relating to an event that is easily

understood, the market can be expected to absorb the disclosure relatively quickly. On the other hand, for issuers with thinly traded securities or for disclosure pertaining to subject matter that is complex and difficult to comprehend, a reasonable waiting period would be longer. The rule of thumb has been to let one full trading day elapse after disclosure by large issuers, and two full trading days elapse in the case of disclosure made by small and medium-sized companies.

Whether and When Disclosure Via a Website Equals "Broad, Non-Exclusionary Distribution"

Regulation FD provides that when a company selectively discloses material, non-public information, the company must also disseminate that information to the public. This public disclosure requirement can be satisfied by furnishing to or filing with the SEC the selectively disclosed information on a Form 8-K or by utilizing an alternative disclosure method (or combination of methods) that is reasonably designed to provide "broad, non-exclusionary distribution of the information to the public."[6/] In either case, the disclosure must be "simultaneous" in the event of an intentional disclosure, and "prompt" in the event of an unintentional or inadvertent disclosure.[7/]

When the SEC adopted Regulation FD in 2000, it discussed in the associated release the role of company websites in satisfying the alternative public disclosure provisions of the regulation (*i.e.*, a means other than filing or furnishing a Form 8-K). At that time, the SEC declined to conclude that disclosure on a company website would, by itself, be an acceptable method of "public disclosure" of material, non-public information for purposes of Regulation FD compliance. However, it did observe that as technology evolved and as more investors gained access to and used the internet, posting material, non-public information to a website could become a feasible alternative to Form 8-K for effecting broad, non-exclusionary distribution of information in a simultaneous or prompt manner, as the case may be, under Regulation FD. In the Release, the Commission acknowledged that, in light of the pervasive use and growth of the internet, for some companies, posting on a website may be utilized as a sole method for such broad, non-exclusionary dissemination of information.

To determine whether posting selectively disclosed information on a company's website is a method of public disclosure that is sufficient to satisfy the directives of Regulation FD, companies must again look to see if the website is a "recognized channel of distribution" and whether the information has been "disseminated."

Despite such guidance, the Release does not offer a bright-line test regarding whether Regulation FD has been satisfied through the application of a single method other than the filing or furnishing of a Form 8-K.[8/] In addition, even with the more liberalized view

---

[6/] Rule 101(e)(1) of Regulation FD.

[7/] "Prompt" in the context of Regulation FD means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next trading day on the New York Stock Exchange), following the time that a senior official of the company learns that there has been a non-intentional disclosure of information by or on behalf of the company, which the senior official knows, or is reckless in not knowing, is both material and non-public.

[8/] However, the SEC recognizes that a widely disseminated press release, or announcements made through press conferences or conference calls, would also provide broad, non-exclusionary disclosure. See Selective Disclosure and Insider Trading, Release No. 33-7881, at Section II.A (August 15, 2000).

surrounding the permissible use of a company website to publicly disseminate material, non-public information, simply posting such information to the website does not meet the explicit securities law mandates for disclosure of material information via a specific form or periodic report under the Exchange Act, such as a Form 8-K or Form 10-K. As a result, if information is explicitly required by a particular Exchange Act form or report, then companies must satisfy the requirements of such form or report regardless of the ability to make a disclosure via a website for Regulation FD purposes.

Company Liability for Information Posted to a Website

The Release reaffirms the SEC's long-standing position that the antifraud provisions of the federal securities laws apply to company statements made using electronic media in the same way they would apply to any other statement made by, or attributable to, a company. Companies must always be mindful of the applicability of the antifraud provisions of the federal securities laws, including Exchange Act Section 10(b) and related Rule 10b-5, to company statements contained on websites. These provisions prohibit making misstatements and omissions of material facts in connection with the purchase or sale of securities. The Release provides guidance regarding the specter of liability that could arise in the following contexts:

A. Previously Posted Information;

B. Hyperlinks to Third-Party Information;

C. Summary Information; and

D. Blogs and Other Interactive Communication Forms.

Each context is addressed in further detail below.

Previously Posted Information. The guidance assuages concerns that previously posted materials or statements on a company's website that are accessed at a later time will be considered new statements as of that later time, with the attendant possibility of securities law liability. In the Release, the SEC states explicitly that companies that maintain historical information on their websites are not "reissuing" or "republishing" such information for purposes of the antifraud provisions of the federal securities laws just because the information continues to be available to the public. Thus, a company is not exposed to liability resulting from a user accessing the company's historical information on its website. The Release also maintains that a company with historical information on its website does not automatically have a duty to update such information. The antifraud rules do, however, apply to company statements when they are initially made, as well as if and when the company affirmatively restates or reissues a historical statement. In the latter scenario, the company would have a duty to update the historical statement at the time of its restatement or reissuance if it had become inaccurate since its initial issuance.

To ensure that investors clearly understand that certain posted materials or statements are historical and may be outdated, such previously posted materials or statements should be:

- separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and
- placed in a separate section of the company's website that contains, and is labeled as containing, previously posted materials or statements.

Hyperlinks to Third-Party Information. Another area that raises liability concerns resulting from information available on a company's website involves the use of hyperlinks to third-party information. A company can be held liable for third-party information to which it hyperlinks if such information is "attributable" to the company. Whether third-party information is attributable to a company depends upon whether the company has (i) involved itself in the preparation of the information (the "entanglement" theory), or (ii) explicitly or implicitly endorsed or approved the information (the "adoption" theory).[9/]

The Release does not discuss the entanglement theory. It focuses solely on the adoption theory within the context of *implicit* endorsement because, the SEC reasoned, explicit endorsement is plainly evident. Thus, the analytical scrutiny is placed on the circumstances or conditions under which a company can fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to such information. The key question in this regard is whether the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information. The SEC, in a prior release, provided the following non-exclusive list of factors that may influence the analysis:

- the context of the hyperlink (*i.e.*, what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink);
- the risk of confusing the investors (*i.e.*, the presence or absence of precautions against investor confusion about the source of the information); and
- the presentation of the hyperlinked information (*i.e.*, how the hyperlink is presented graphically on the website, including the layout of the screen containing the hyperlink).

As a fundamental matter, the SEC affirmed in the Release that in considering the context of the hyperlink, it assumes that providing a hyperlink to a third-party website indicates that the company believes the information on the third-party website may be of interest to the website user. To avoid any confusion about the company's adoption of the hyperlinked information, the SEC recommended the following practices:

- The company should consider explaining the context of the hyperlink and explicitly state why the hyperlink is being provided (*e.g.*, the company endorses the information, the hyperlinked information supports a company assertion, or the information may simply be of interest).
- In the event the company makes a selective choice to hyperlink to positive news, it should provide the source of the news and state why the company is providing the hyperlink. Generally, the more selective the company is regarding hyperlinks, the greater the need for a detailed explanation, because the potential for liability rises due to a higher likelihood of perceived endorsement.

[9/] The Commission has stated, "[i]n the case of hyperlinked information, liability under the 'entanglement' theory would depend on an issuer's level of pre-publication involvement in the preparation of the information. In contrast, liability under the 'adoption' theory would depend upon whether, after its publication, an issuer, explicitly or implicitly, endorses or approves the hyperlinked information." See Use of Electronic Media, Release No. 33-7856, at Section II.B (April 28, 2000).

- The company should consider using "exit notices" or "intermediate screens," to notify investors that they are leaving the company's website and entering a third-party's website.

In the Release, the SEC reiterated its view that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws and cautioned that disclaimers stating that a company has not adopted hyperlinked information are inadequate by themselves to shield a company from blame for information that it makes available to investors, whether through a hyperlink or otherwise. As a result, a disclaimer would not insulate a company from liability if the company knew, or was reckless in not knowing, that the hyperlinked information was materially false or misleading. Thus, although disclaimers are advisable generally when hyperlinking to third-party websites, they are not sufficient and should not be relied upon in lieu of a careful review of the third-party website so as to ensure that the content is not materially misleading or incorrect.

Summary Information. The Release also offers guidance regarding how a company can avoid antifraud liability when it posts summaries or overviews of information on its website. The SEC noted that despite the utility of summary information, especially when it relates to lengthy and complex material, summaries and overviews standing alone could be misleading because they may not be read in the context of the complete information being summarized. In the Release, the SEC urges companies to consider ways to alert readers to the location of the detailed disclosure from which the summary or overview was derived. Toward this end, the SEC recommended the following techniques to highlight the fact that certain information is in summary form only:

- use appropriate titles or headings to prevent unnecessary confusion;
- use additional explanatory language to identify the text as a summary or overview and to highlight the location of the more detailed information;
- place summaries or overviews near hyperlinks to the more detailed information to which the summary or overview relates; and
- use a "layered" or "tiered" format such that the most important summary or overview is on the opening page, and insert links that enable a reader to access more detailed information by clicking on the link.

Blogs and Other Electronic Forums. Given the increasing use of blogs and electronic forums by companies wanting to interact with their stakeholders, the SEC thought it wise to reaffirm the concept that all communications made by or on behalf of a company, including those contained in a company blog or electronic forum, are subject to the antifraud provisions of the federal securities laws. Consequently, in the Release, the SEC set forth the following guides for companies hosting or participating in blogs or electronic forums:

- Statements made in a blog or electronic forum by a company (or by a person acting on behalf of the company) will not be treated differently from other company statements when it comes to antifraud liability.
- Companies cannot dodge responsibility for statements contained in blogs or e-forums by requiring that employees speak in their "individual capacities."

- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or e-forum.
- Companies are generally not responsible for the statements that third parties post on a website the company sponsors, and are not obligated to respond to or correct misstatements made by third parties. However, liability may arise under an entanglement or adoption theory.

A company should consider carefully whether the benefits of a blog or other form of electronic forum outweigh the risk of potential liability. If a company determines that hosting, sponsoring or otherwise contributing to a certain blog or forum is useful, then it should identify a select number of employees to speak on its behalf, and establish a well-defined set of policies governing how the blog is to be used and the scope of any submission to the blog. Moreover, a company should implement and consistently enforce terms of use and ensure that the infrastructure of the blog or forum contains a mechanism that requires a user to affirmatively accept such terms of use each time the blog or forum is accessed.

Disclosure Controls and Procedures

The Release also provides guidance regarding how the posting of information on a company's website may implicate Exchange Act rules governing certification obligations relating to disclosure controls and procedures.[10/] Pursuant to these rules, a company's principal executive officer and principal financial officer must certify, among other things, that they are responsible for establishing and maintaining disclosure controls and procedures, that such controls and procedures have been designed to ensure that they are provided with all material information relating to the company, that they have evaluated the effectiveness of the disclosure controls and procedures as of the end of the reporting period, and that they have disclosed in the company's periodic report for that reporting period their conclusions about the effectiveness of those controls and procedures.

As mentioned in the Release, companies may satisfy certain Exchange Act disclosure requirements by posting responsive information on their websites in lieu of providing the information in an Exchange Act report.[11/] In the event that a company opts to comply with such disclosure obligations by posting the information on its website, disclosure controls and procedures would apply to such information because it is information required to be disclosed by the company in Exchange Act reports. Any failure to make those disclosures on the company's website would result in an incomplete Exchange Act report. However, the SEC also notes in the Release that disclosure controls and procedures and the related

---

[10/] Exchange Act Rules 13a-15(e) and 15d-15(e) define "disclosure controls and procedures" as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is:

(1) "recorded, processed, summarized and reported, within the time periods specified in the [SEC's] rules and forms," and

(2) "accumulated and communicated to the company's management…as appropriate to allow timely decisions regarding required disclosure."

[11/] Examples of disclosure that a company is permitted by SEC rules to make on its website as an alternative to filing such disclosure in an Exchange Act report include (i) information concerning the use of non-GAAP financial measures, (ii) audit, nominating or compensation committee charters, (iii) material amendments to its code of ethics or a material waiver of a provision of its code of ethics and (iv) information regarding board member attendance at the annual shareholder meeting.

officer certifications do not apply to the contents of a company's website generally, but only to those controls and procedures pertaining to information that is posted there as an alternative to being provided in an Exchange Act report.

Format and Readability of Information Posted to Company Websites

Realizing that there has been a shift away from "the filing cabinet or 'static' paradigm to a 'dynamic' paradigm, one shaped by the market's desire for more current, searchable and interactive information," the Release provides that information appearing on a company's website need not satisfy a printer-friendly standard unless explicitly required by SEC rules.[12/] The principles articulated in the Release emphasize the readability of information posted on a company's website above an ability for such information to be presented in an easily printed format. Consequently, with respect to the narrow issue of printability, companies have creative freedom to arrange the information in any manner they deem best.

* * * * *

Please contact one of the attorneys listed below or the Mintz Levin attorney with whom you work if you have any questions regarding this Securities Law Advisory.

Darin P. Smith
(617) 348-3002
DPSmith@mintz.com

Cynthia J. Larose
(617) 348-1732
CJLarose@mintz.com

Jonathan L. Kravetz
(617) 348-1674
JLKravetz@mintz.com

Megan N. Gates
(617) 348-4443
MNGates@mintz.com

Daren Graham
(617) 348-1754
DGraham@mintz.com

[12/] For example, the proxy rules require that proxy materials delivered via a company's website be presented in a format convenient for both reading online and printing on paper.