

Securities Update

SEC Issues Guidance Regarding the Use of Company Websites

"Reg FD doesn't recognize the internet, or a blog, as the exclusive vehicle through which the public can be fairly informed. In order to be deemed compliant, if we have material news to disclose, we have to hold an anachronistic telephonic conference call, or issue an equivalently anachronistic press release, so that the (not so anachronistic) *Wall Street Journal* can disseminate the news. I would argue that none of those routes are as accessible to the general public as this blog, or Sun's website. Our blogs don't require a subscription, or even registration, and are available to anyone, across the globe, with an internet connection. Simultaneously."

—*Blog by Jonathan Schwartz, CEO, Sun Microsystems, Inc., October 2, 2006.*¹

Disclosure of information through company websites has long been promoted by the SEC, although only in limited circumstances do corporate websites serve as the sole means for disclosure under SEC rules.² In September 2006, Jonathan Schwartz, CEO of Sun Microsystems, Inc. sent a widely published letter to the Securities and Exchange Commission (the "SEC") regarding the use of corporate websites. That letter started a review process that culminated on August 1, 2008 with the issuance by the SEC of an interpretive release (the "Release") providing guidance to public companies regarding their use of their websites.³ The SEC issued the Release in response to the large amount of information that companies now include on their websites and the increased reliance by investors on company websites for such information.

As a technical matter, the Release clarifies how information posted on a company's website may implicate certain provisions of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In particular, the Release addresses liability under the antifraud provisions of the Exchange Act for certain website content, controls and procedures for information posted on a company's website, and the format of information posted on a company's website. On a policy level, however, the Release is intended to enable issuers to make broader use of their websites as the sole means of disseminating material information to investors. This aspect of the Release may impact significantly the prevailing practice of issuing press releases through newswire services and/or filing them with the SEC under cover of Form 6-K or 8-K, which are currently considered the only certain means of ensuring public dissemination.

¹ Available at http://blogs.sun.com/jonathan/entry/one_small_step_for_the.

² For example, among other things, companies are required to (i) disclose in their annual report on Form 10-K their website address and whether they post Exchange Act reports, and (ii) post Section 16 filings on their website if they maintain one. In addition, companies are permitted to post solely on their websites (i) non-GAAP financial measures and Regulation G required information, (ii) audit, nominating or compensation committee charters, (iii) material amendments to their code of ethics or material waivers of a provision of their code of ethics and (iv) information regarding board member attendance at the annual shareholder meeting.

³ Commission Guidance on the Use of Company Websites, Release Nos. 34-58288, IC-28351 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

The White & Case LLP Securities Update provides a brief overview of some of the latest legislative, regulatory and judicial actions, policy statements and decisions that affect public and private companies.

.....

If you have any questions regarding this Update, please contact the White & Case lawyer with whom you regularly discuss securities matters or any of the following lawyers:

Colin Diamond
Partner, Securities Practice
+ 1 212 819 8754
cdiamond@whitecase.com

N. Adele Hogan
Partner, Securities Practice
+ 1 212 819 8626
ahogan@whitecase.com

Gary Kashar
Partner, Securities Practice
+ 1 212 819 8223
gkashar@whitecase.com

Kevin Keogh
Partner, Securities Practice
+ 1 212 819 8227
kkeogh@whitecase.com

Kenneth Suh
Partner, Securities Practice
+ 1 212 819 8995
ksuh@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
+ 1 212 819 8200

www.whitecase.com

The guidance outlined in the Release is applicable equally to domestic and foreign reporting companies, although as a technical matter, Regulation FD does not apply to foreign private issuers.⁴ The guidance is intended to benefit all reporting companies, although it is likely that the largest companies in the market—those with websites that are most widely and routinely accessed—will benefit more in the short term from the ability to use those websites to disseminate material information. Smaller companies will likely have to review the guidance carefully and consider changes to their practices and websites if they want to benefit fully from the possibilities that it provides.

Please refer to *Appendix A* for a checklist of action items arising from the Release.

I. Regulation FD

Regulation FD prohibits companies from selectively disclosing material nonpublic information to certain enumerated categories of persons. The question of when information is publicly disclosed arises in two contexts under Regulation FD. First, selective disclosure of information that is already public will not violate Regulation FD's prohibitions. Second, a company is required to make public disclosure of information that it discloses selectively. Rule 101(e) under Regulation FD provides that information may be publicly disclosed either by means of a Form 8-K or by means of "another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the

information to the public." Previously, SEC guidance provided that mere posting on a website was insufficient to satisfy the second means.⁵ The Release now provides that posting on the websites of certain companies will constitute public disclosure for the purposes of Regulation FD. The Release provides principles-based guidance to determine when a website meets the necessary requirements. Ultimately, the SEC expects that adoption of its guidance will reduce the number of Form 8-Ks filed and the number of press releases issued through newswire services, as well as eventually reduce costs.

In determining whether posting information on a company's website constitutes public disclosure, a company should consider whether: (i) the website is a recognized channel of distribution, (ii) posting information on the website disseminates the information in a manner calculated to reach the securities marketplace in general and (iii) there has been a reasonable amount of time for investors and the market to react to the information.

The determination of whether a website is a recognized channel of distribution and disseminates information effectively ultimately depends on the steps that a company takes to alert investors to its website and the actual use of the website by investors. We have listed below the non-exclusive factors that the SEC believes a company should consider in making its determination, together with steps that are advisable to maximize website recognition and effectiveness of dissemination:

⁴ Foreign private issuers are excluded from the coverage of Regulation FD pursuant to the definition of "issuer" in Rule 101(b) thereof. However, in the Adopting Release for Regulation FD, the SEC stated "[W]e remind foreign private issuers of their obligations to make timely disclosure of material information pursuant to applicable SRO rules and policies, and our expectation that the markets will enforce these obligations. Also, while Regulation FD will not apply, foreign issuers in their disclosure practices remain subject to liability for conduct that violates, and meets the jurisdictional requirements of, the antifraud provisions of the federal securities laws" (see *Selective Disclosure and Insider Trading*, Release Nos. 33-7881, 34-43154, IC-24599, at Section II.B.5 (August 15, 2000), available at <http://www.sec.gov/rules/final/33-7881.htm>). Accordingly, foreign private issuers should generally conform their practices to the requirements of Regulation FD.

⁵ See *Selective Disclosure and Insider Trading*, Release No. 33-7881, 34-43154, IC-24599, at Section II.B.4.b (Aug. 15, 2000), available at <http://www.sec.gov/rules/final/33-7881.htm>.

Factor	Steps Recommended to Satisfy Factor
Whether and how companies let investors and the markets know that the company has a website and that they should look at the company's website for information.	<p>Include the address of the websites in Forms 10-K, 10-Q and 20-F, and in all press releases.</p> <p>State in each of those documents that the company routinely posts all material information to the website.</p> <p>Consider referring attendees at investor conferences to the website.</p>
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.	<p>Post all press releases and other important information consistently to the website.</p> <p>Disseminate or post advance notice of the date of earnings releases and calls, and other material events known in advance.</p>
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.	<p>Ensure that the investor relations portion of the website is readily accessible. This can present a challenge for companies whose websites are used primarily for sales; however, it is now important to ensure that the investor relations link is easily located.</p> <p>Redesign investor relations pages so that all recent press releases are immediately visible without having to click to a separate news page.</p> <p>Ensure that different categories of press release are appropriately segregated (e.g., earnings releases should be separate from business/commercial releases).</p>
The extent to which information posted on the company's website 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 of the company involved.	<p>The websites of large-cap companies are likely to be better followed by the media than those of small-cap companies. Small and medium cap companies should consider continuing to disseminate advance notice of earnings releases by press release; however, the earnings release itself can then be posted on the website and not disseminated by newswire services.⁶</p>
The steps the company has taken to make its website 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.	<p>Consider using "push" technology, such as RSS feeds or e-mail alerts, as it is one factor that may be considered in evaluating the accessibility of the information.</p> <p>If "push" technology is implemented, ensure that company information, such as press releases, is distributed via the push technology.</p>
Whether the company keeps its website current and accurate.	<p>Companies should ensure that all releases are posted promptly to their websites.</p> <p>Companies should archive press releases, on a rolling basis, after a certain period so that the website is uncluttered and material information is easily accessible.</p>

⁶ Note that an earnings release will in any event need to be filed with the SEC pursuant to Item 2.02 of Form 8-K.

Factor	Steps Recommended to Satisfy Factor
Whether the company uses other methods in addition to its website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information.	Companies that wish their websites to meet the SEC’s requirements should take steps within these guidelines to make their websites the primary source of information for investors.
The nature of the information.	Routine information will be more amenable to website dissemination. Particularly for small and medium cap companies, extraordinary, material events, such as acquisition announcements, Chapter 11 filings, etc., should generally continue to be disseminated using a newswire service or Form 8-K filing.

The SEC also provides a non-exclusive list of factors for a company to consider when determining if a reasonable amount of time has passed for the market to absorb information posted to its website: (i) the size and market following of the company; (ii) the extent to which investor-oriented information on the company website is regularly accessed; (iii) the steps 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; (iv) 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 of information; and (v) the nature, complexity and materiality of the information.

The SEC refers to insider-trading case law for guidance on what constitutes a reasonable waiting period for purposes of Regulation FD requirements. Under this case law, a reasonable waiting period requires a facts and circumstances determination of when the market has fully absorbed, and the investing public has stopped reacting to, the information. As such, for a company that is closely followed or for information that is highly material, the market will likely absorb the information in a relatively short time. For thinly traded companies or less material information, a reasonable period will be longer. The common practice historically has been to allow at least one full trading day to pass after the release of information by larger companies, and two full trading days in the case of small and medium companies.

II. Antifraud Liability for Information on Company Websites

The information posted on a company’s website is subject to the antifraud provisions of the federal securities laws in the same way as other statements by the company.⁷ Antifraud concerns regarding information posted on a company’s website include “reissuance” of historical information and the duty to update such information, liability for hyperlinked third party information, summary information and the content of company-sponsored interactive user forums such as blogs. The SEC provides guidelines regarding these concerns to help companies avoid running afoul of the antifraud rules.

Historical Information

One antifraud concern regarding information on a company’s website is that previously posted, or historical, materials and statements may be considered “reissued” or “republished” every time they are accessed. If this is the case, the company may have a duty to update the information to ensure the total mix of information on the website is not misleading.

In the Release, the SEC states unequivocally that the mere fact that investors can access historical materials or statements does not automatically mean that such materials are republished or reissued for purposes of the antifraud provisions of the federal securities laws or that the company has a duty to update those

⁷ Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder impose liability for material misstatements and omissions made with scienter in connection with the purchase or sale of securities. A misstatement or omission is considered material if disclosure of the misstated or omitted fact would be viewed by a reasonable person as having altered the total mix of information available.

materials or statements. The SEC recommends that companies take the following steps to ensure that investors understand the material is historical and may be outdated:

- Separately identify the materials and statements as historical statements, such as by dating them.
- Locate historical materials or statements in a separate section of the website (such as in an archive).

Hyperlinks to Third Party Information

Another area of concern regarding information available through a company's website is the use of hyperlinks to information on a third-party's website. A company may be liable for hyperlinked information under the antifraud provisions if the information can be "attributable" to the company, such as where the company was involved in the preparation of the information (the "entanglement" theory), or explicitly or implicitly approved the information (the "adoption" theory). Since explicit approval is generally evident, the SEC has provided guidance on when a company may be found to have given implicit approval.

The SEC, in a prior interpretive release, listed the following factors to use in determining if hyperlinked information is implicitly adopted by the company: (i) the context of the hyperlink, (ii) the risk of confusing investors as to the source of the information and (iii) how the hyperlink is presented graphically on the website. In the Release, the SEC notes that provision of a hyperlink indicates that the company considers the information on the third-party website to be of some interest to website users. The SEC therefore recommends as follows:

- The company should consider stating explicitly the purpose of the hyperlink (e.g., that the company endorses the information, that it supports a particular statement, that it is provided for interest only, etc.).
- To the extent that the company hyperlinks selectively to favorable news articles, it should explain the source and

why the company is providing the hyperlink. The less selective that a company is in providing such hyperlinks, the more general the explanation can be because the risk of liability for endorsing a particular article is reduced.

- The company should consider using "exit notices" or "intermediate screens" to alert investors that they are leaving the company's website in order to avoid confusion as to the source of the information.

The SEC believes that disclaimers stating that the company has not adopted the hyperlinked information are not sufficient on their own to protect a company from liability if it knew or was reckless in not knowing that the hyperlinked information was false or misleading. We nonetheless believe that disclaimers are still advisable when hyperlinking to third-party websites, but are not a substitute for reviewing that website or relevant webpage in order to confirm that the content is not materially misleading or incorrect.

Summary Information

Summary information contained on a company website which does not clearly indicate that it is a summary or does not direct a reader to where they can find detailed information is another concern in the antifraud context. The SEC suggests the following guidelines when using summaries on a website:

- Use appropriate titles and headings to indicate the nature of the information.
- Use explanatory language to identify the summary information.
- Use hyperlinks to the detailed information on which the summary is based.
- Use a "layered" format so that investors can follow a logical path from the summary to more detailed information.

Blogs and E-Forums

Blogs and electronic forums have proliferated rapidly on company websites. Companies use them to enhance communications with customers, suppliers and investors. In some cases, the blogs and electronic forums foster discussion among those parties and can serve as a resource to others. However, since all communications by a company to investors are covered by the antifraud provisions of federal securities laws, statements by the company representatives on company-sponsored blogs or on third-party blogs raise antifraud concerns.

The SEC has provided the following guidelines for companies hosting or contributing to blogs or electronic forums:

- A company will be responsible for statements made by or on behalf of the company and the antifraud provisions will apply to such statements.
- A company cannot avoid liability by having employees speak in their “individual” capacities.
- A company cannot require users to agree not to make investment decisions based on a blog’s or electronic forum’s content to waive antifraud protections to participate in the blog or electronic forum.
- A company is not responsible for third party statements on blogs that it sponsors and has no duty to correct misstatements made by a third party. We believe, however, that this conclusion may change to the extent that a company selectively edits or deletes blog entries other than on the basis of some preestablished, nondiscriminatory procedures (e.g., removal of material that is offensive, etc.)

The SEC’s guidelines are in line with other US laws governing electronic forums, such as the Communications Decency Act (the “CDA”),⁸ which provides immunity from liability to web hosts and other providers of online services for statements or information posted by third parties, subject to certain conditions. Under the CDA, a company will not be immune from liability for

posts by employees, whose statements are presumptively on behalf of the company.

Companies should consider carefully whether it is advisable for them to officially sponsor, host or contribute to any blog or electronic forum. Should a company determine that a blog is beneficial, it should establish policies governing which employees may represent the company in contributing to the blog and the content that such employees are permitted to post. In addition, it should adopt carefully drafted terms of use to limit liability and should set up the hosting website in such a way that users are required to affirmatively accept such terms of use by clicking through to the next screen.

III. Disclosure Controls

As discussed above, the SEC has permitted companies to satisfy certain Exchange Act disclosure requirements by posting the information on their websites instead of filing the information with the SEC.⁹ The Release highlights that if a company elects to post required disclosures on its website, its certifications regarding disclosure controls and procedures will include such information because it is information that is required to be included in Exchange Act reports. The SEC notes that this only applies to the specific information that is permitted or required to be disclosed on a company’s website pursuant to SEC rules, and not to the company’s entire website.

IV. Format of Information

Information posted on a company’s website does not need to satisfy a printer-friendly standard (where the format of the website makes it easy to print the information contained on the site) or mirror the paper filings. The only exception to this requirement is where SEC rules specifically require a printer-friendly format, as is the case with proxy materials that are delivered electronically.¹⁰ As such, a company may format information on its website in the manner it sees fit.

⁸ 47 U.S.C. § 230(c)(1).

⁹ See footnote 2 above.

¹⁰ See Exchange Act Rule 14a-16(c).

Appendix A: Website Action Items List

Regulation FD

- Determine whether the company's website is currently a recognized channel of distribution and disseminates information effectively under the SEC's guidelines.
- If so, consider whether to use the website as a means to disseminate certain information to investors.
- If not, determine whether the company wishes the website to fulfill this role and implement the steps outlined in the table contained in Part I of this memorandum.
- Adopt procedures to address (i) what types of news release require prior notice before posting on the website (e.g., earnings releases, etc.), and (ii) what the waiting period is after posting before different types of information are considered publicly disseminated.

Historical Information

- Materials and statements posted on the company's website should be clearly dated.
- Historical or non-current information should be removed or located in a separate section of the website. This section should indicate, through headings, descriptions and disclaimers that the information is historical and may not be current.
- The website should be monitored to ensure that non-current information is moved to the "archive" section of the website, or is removed completely.

Hyperlinks to Third Party Information

- Companies should review their websites and take an inventory of third party hyperlinks.
- Review hyperlinked information to confirm that the content is not materially misleading or incorrect in the context it is being provided to website users.

- Consider including statements regarding the purpose of the hyperlink and, if applicable, the company's position regarding the hyperlinked information (e.g., that the company endorses the information, that it supports a particular statement, that it is provided for interest only, etc.).
- Selective hyperlinking to favorable information (especially when credible, but unfavorable, information is available) should be clearly explained.
- Use exit notices or intermediate screens to alert investors that they are leaving the company's site in order to avoid confusion as to the source of the information.
- Review existing disclaimers to ensure that they do not purport to exclude liability from the antifraud provisions of the federal securities laws.
- Add disclaimers when hyperlinking to third party information (e.g., the information was not prepared by the company, the company does not adopt or endorse the information).

Summary Data

- Identify any summaries on the company's website and determine whether the summary contains material information.
- Include the word "summary" or "overview" in the title where appropriate. Include any other language that identifies the text as a summary.
- Include an embedded hyperlink in particular sections of the summary that link to more detailed explanations.
- Include a note on summary pages that certain information on the page is provided in summary form only. The note could contain a hyperlink to a separate page which in turn has hyperlinks to the key sections of the issuer's Forms 10-K, 10-Q and 8-K by topic.

Appendix A: Website Action Items List (cont'd)

Blogs

- Consider carefully the benefits of establishing a company-sponsored blog. Ensure that the blog relates to the company's products and services to the extent possible and does not provide a general forum to discuss the company's results and prospects.
- Establish policies and procedures for the company to edit or change blog entries. The basis for making such edits or changes should be limited and nondiscriminatory to avoid the company adopting the content of the blog.
- Include appropriate disclaimers and terms and conditions of use that are binding on the user. Users should be required to affirmatively accept such terms of use by clicking through to the next screen. In addition, if the company collects personally identifiable information from those who post comments, the company should post, and adhere to, a privacy policy.
- Check carefully any waivers that blog participants must click through before using the blog. Participants cannot be asked to agree to make investment decisions not based on the blog or to waive federal securities law claims based on their use of the blog.
- Establish policies and procedures regarding employee participation in (i) any company blogs, and (ii) any third party blogs. The company's code of conduct, for example, should prohibit company representatives from commenting on company products or its securities in third party blogs without consent from the appropriate supervisor.

Format

- Notwithstanding the SEC's position that website information does not need to be printer-friendly, consider at a minimum reviewing key documents (e.g., earnings releases, corporate governance documents, etc.) to ensure they are printer-friendly.

This Securities Update is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Update should not be acted upon in any specific situation without appropriate legal advice, and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own, and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Securities Update is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.