

Legal Alert

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SEC TO PROVIDE GUIDANCE ON FEDERAL SECURITIES IMPLICATIONS OF COMPANY WEBSITES

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On August 1, 2008, the Securities and Exchange Commission (the "SEC") issued an interpretive release concerning the securities law implications of company websites. The SEC provided guidance in 2000, but considering the speed at which technology has advanced and the creation of company websites as an investing tool, the SEC felt the need to provide further guidance. The interpretive release explains the legal benefits and responsibilities that are associated with the maintenance of a company website. The SEC provided guidance on how securities law directly affects your company's website content in four areas.

Regulation FD

- The SEC provided guidance that companies may be able to meet the "public" information requirement of two aspects of Regulation FD when the necessary information is posted on a company website. First, The SEC provided guidance as to the circumstances under which information posted on a company website would be considered public for the purposes of evaluating the application of Regulation FD to subsequent private discussions or disclosure of the posted information. For the information to be public for the purposes of subsequent discussions and disclosures:
 - 1) The company's website should be a "recognized channel of distribution;"
 - 2) Information on the website should be disseminated in a manner available to the securities marketplace in general; and
 - 3) A reasonable time has passed from the posting date for the market to react.

Second, the SEC addressed circumstances when information posted on a company website could meet the public disclosure requirement that is typically met by filing a Form 8-K or press release under Regulation FD. As an alternative to filing a Form 8-K, companies may satisfy the Regulation FD public disclosure requirement with their company website. To satisfy this requirement, companies need to consider whether postings on their websites are reasonably designed to provide "broad, non-exclusionary distribution of information to the public." To do so, companies should look to the first two elements outlined above, whether the website is a "recognized channel of distribution" and the information is "posted and accessible" and therefore disseminated.

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Anti-Fraud

- The SEC provided guidance regarding a company's possible fraud liability for posting information on a website. The SEC reiterated that companies should be mindful that they "are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made including the Internet." However, the SEC does not believe that companies maintaining previously posted materials on their websites are reissuing or republishing such information unless the company affirmatively restates or reissues a statement.
- When posting a link to a third party website, anti-fraud liability is evaluated on whether the company has explicitly or implicitly approved or endorsed the statement of the linked third party. If the company has explicitly or implicitly approved or endorsed the statement by the third party, the company could be held liable for any fraudulent statement by the third party. **A disclaimer alone is not sufficient to insulate a company from responsibility for information that it makes available to investors.** The SEC also addressed ways a company can reduce liability by clearly designating when information is summary in nature and where website users may obtain more detailed information.
- The SEC stated the anti-fraud provisions of the federal securities laws apply to blogs and electronic shareholder forums, and companies are responsible for statements made by them or their representatives. In addition, companies cannot require investors to waive protections under federal securities laws as a condition to entering into or participating in an interactive website.

Disclosure Controls

- The SEC guidance stated that "disclosure controls and procedures" of the Sarbanes-Oxley Act do not generally apply to information that is posted on a company website, unless that information is posted on a company website as an alternative to filing an Exchange Act report.

Format of Information

- Finally, with the understanding that websites are becoming more interactive, content of a company website does not need to be in a printer-friendly format unless SEC rules (for example, the notice and access model for electronically posted proxy materials) specifically require the website content to be in a printer-friendly format.

The SEC interpretive release will become effective upon publication in the Federal Register. The current version of the SEC interpretive release is available at <http://www.sec.gov/rules/interp.shtml>.

For more information on the SEC guidance, please contact our office at 717.731.1700 or:

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