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1320 RexCorp Plaza
Uniondale, New York 11556
516.227.0700
516.227.0777 facsimile
www.farrellfritz.com

New SEC Guidance on Use of Company Websites to Comply with Regulation FD

The Securities and Exchange Commission has issued a release that provides guidance on company web site disclosures and compliance with Federal securities laws. The Release, titled, “Commission Guidance on the Use of Company Web Sites” (Release No. 34 58288, available at http://www.sec.gov/rules/interp/2008/34_58288.pdf), became effective on August 7, 2008.

Overview

The Release principally provides guidance regarding:

- the applicability and application of Regulation FD to information posted on company web sites;
- the applicability of federal securities law antifraud provisions to information posted on company web sites, such as previously posted information, hyperlinks to third-party information, summary information and content of interactive web sites;
- the applicability of “controls and procedures” to information posted on company web sites; and
- acceptable formats of information presented on company web sites.

Regulation FD

Regulation FD was adopted in 2000 to promote full and fair disclosure of information about publicly-traded companies. It prohibits selective disclosure of material, non-public information to designated persons (including broker-dealers, investment advisers, investment companies, and shareholders) and requires that an issuer publicly disclose any material non-public information that it has selectively disclosed (either intentionally or unintentionally) to those designated persons. Regulation FD provides that public disclosure can be made by (a) filing a Form 8-K disclosing the information or (b) some other method designed to provide broad, non-exclusionary distribution of the information to the public.

The Release addresses:

- (i) When information posted on a company web site is considered “public,” so that an issuer’s disclosure of the information to an FD-designated person would not violate Regulation FD; and
- (ii) Whether posting information on a company web site satisfies public disclosure requirements of Regulation FD.

Public Information – Applicability of Regulation FD

Regulation FD requires the simultaneous or subsequent (depending on whether the disclosure is intentional or unintentional) public disclosure of non-public information that was selectively disclosed to an FD-designated person. A threshold question is whether web site disclosure of information means that it is already public and is no longer considered “non public” for FD purposes.

The Release provides that a determination as to whether information is “public” should be based upon whether:

- (i) A company web site is a recognized channel of distribution;
- (ii) Posting of information on a company web site “disseminates” the information by making it timely and readily available to investors and the securities marketplace in general; and
- (iii) There has been a reasonable waiting period for investors and the market to react to the posted information.

In considering (i) and (ii) above, the Release contains a non-exclusive list of factors:

- Whether and how companies let investors and the markets know that the company has a web site and that they should look at such 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 doing so;
- 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 is readily available to and reported in the 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;
- Steps the company has taken to make both its web site and the information accessible, such as the use of “push” technology like 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 its web site current and accurate;
- Whether the company uses additional methods to disseminate the information and whether and to what extent those other methods are the predominant ones the company uses to disseminate information; and
- The nature of the information.

As to the third factor - - whether a reasonable waiting period to react to the information has been afforded to investors and the market - - the Release stresses that the determination depends on specific facts and circumstances regarding the company and the type of information being disseminated. The Release sets forth the following considerations:

- The size and market of the company;
- The extent to which investor-oriented information on the company web site is regularly accessed;
- The steps the company has taken to make investors and the market aware that it uses its company web site 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 web site, including use of other information distribution channels; and
- The nature and complexity of the information.

The Release recommends further steps to alert investors and the market upon the release of important information. For example, a company could first furnish the information to the SEC on a Form 8-K or issue a press release.

Public Disclosure – Satisfaction of Regulation FD

Regulation FD allows companies to make public disclosure by case methods other than the filing of a Form 8-K if those methods are reasonably designed to provide broad, non exclusionary distribution of the information. Previous SEC guidance stopped short of concluding that disclosure on a company web site would, by itself, be an acceptable means of making public disclosure; however, the Release concludes that this could be acceptable for some companies in certain circumstances.

In considering whether and when web site postings are public disclosure under Regulation FD, the Release cites the factors in (i) and (ii) above. The Release also advises that an issuer consider its web site's capability to meet the simultaneous or prompt timing requirements for public disclosure in the event that selective disclosure has been made.

Note: The SEC guidance reiterates that it is the company's responsibility to evaluate whether a posting on its web site would satisfy the alternative public disclosure provision of Regulation FD. Consequently, for most issuers it will remain advisable to make disclosure through the filing of a Form 8-K in order to ensure compliance with SEC rules.

Antifraud and Other Exchange Act Provisions

The federal securities law antifraud provisions apply to web site postings just as they apply to other statements made by, or attributable to, a company. Accordingly, in considering their web site content, companies must consider the general prohibition against making material misstatements and omissions of fact in connection with the purchase or sale of securities, as set forth in Exchange Act Section 10(b) and Rule 10b 5. The guidance provided in the Release seeks to address liability concerns resulting from (i) previously-posted information, (ii) hyperlinks to third-party information, (iii) the use of summary information and (iv) statements made on interactive web site forums.

Previously Posted Materials

The Release guidance provides that the continued accessibility of previously posted materials is not considered a reissuing of the materials. Rather, the antifraud provisions apply to statements when they were initially made, as well as upon a company's affirmative restatement or re issuance of a statement. Such restatement or re issuance may also create a duty to update the statement so that it is accurate as of the date it is restated or reissued.

In order to make clear to investors that posted documents or statements speak as of a particular date, the Release recommends that such statements or materials should be:

- Separately identified as historical or previously-posted materials or statements, including, for example, by dating the posted materials or statements; and
- Located in a separate section of the company's web site containing previously-posted materials or statements.

Hyperlinks to Third Party Information

The Release supplements previous guidance relating to hyperlinks from company web sites to third party information. Prior SEC guidance explained that attributing third party information to a company depends on whether the company has (i) involved itself in the preparation of the information (entanglement theory) and (ii) explicitly or implicitly endorsed or approved the information (adoption theory).

The SEC reiterates previous guidance with respect to the adoption theory, which established the following as potentially relevant factors: (1) the context of the hyperlink; (2) the risk of confusing investors; and (3) the presentation of the hyperlinked information. The key question is whether the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has endorsed the hyperlinked information.

Note: The Release recommends that a company consider explicitly explaining the reason the information is being provided. For example, a company might, depending on the facts, explicitly endorse hyperlinked information or suggest that the hyperlinked information supports a particular assertion on the company's web site. For general information, a company may determine that it is enough to include hyperlinks under the heading "Recent News Articles."

The Release discusses other methods, such as "exit notices" and "intermediate screens," by which to specify that the hyperlink is to third-party information. The failure to use "exit notices" or "intermediate screens" should not automatically result in a determination that a company has adopted third-party information. However, while exact notes and intermediate screens may avoid confusion as to the source of third party information, they will not absolve companies from resulting antifraud liability for hyperlinking to information a company knows, or is reckless in not knowing, is materially false or misleading.

Summary Information

The Release provides guidance regarding companies' use of summaries or overviews on their websites. To ensure that investors understand that the summaries are just that, the Release advises companies to alert readers to the location of the detailed disclosure and other company information on its website.

Note: Companies are advised to include explanatory language, clearly identifying summary or overview information.

The following techniques are acceptable to identify summary information:

- Use of appropriate titles conveying a summary, overview or abbreviated nature of information;
- Use of additional explanatory language identifying the text as a summary or overview and the location of more detailed information;
- Use and placement of hyperlinks to more detailed information from which the summary or overview is derived; and
- Use of “layered” or “tiered” format such that the web site presents the most important summary or overview information about a company on the opening page, with embedded links that lead to more detailed information.

Interactive Web Site Forums

The Release provides guidance regarding the use of interactive technologies, such as blogs and shareholder forums, for communicating over the Internet.

Note: The Release explicitly states that the antifraud provisions of the federal securities laws apply to all communications made by or on behalf of a company, and that companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.

As a result of the Release guidance, companies should ensure that employees acting as company representatives are aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their “individual” capacities. The Release provides that a company is not, however, responsible for statements by third parties, nor is the company obligated to correct misstatements made by third parties.

Disclosure Controls and Procedures

If a company chooses to satisfy certain Exchange Act disclosure obligations (i.e., disclosure of certain committee charters or of a material amendment to a company’s code of ethics) by posting the information on its web site, disclosure controls and procedures (about which a company’s principal executive and financial officers must certify) apply. Disclosure controls and procedures do not apply to other disclosures on a company’s web site.

Note: Disclosure controls and procedures should address web site disclosure of such information.

Format and Readability

The Release clarifies that companies are not required to ensure that information posted on a company’s web site satisfy a printer-friendly standard, unless SEC rules otherwise require. For example, under the SEC’s notice and access model, electronically-posted proxy materials must be presented in printer-friendly format.

This advisory was written by Nancy D. Lieberman, partner, and Chris D. Krimitsos, associate, of Farrell Fritz’s corporate practice group. If you have questions relating to this advisory, please contact:

*Nancy Lieberman (516) 227-0638 nlieberman@farrellfritz.com
Chris Krimitsos (516) 227-0619 ckrimitsos@farrellfritz.com*

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