

MEMO# 22783

August 13, 2008

SEC Guidance on the Use of Company Web Sites

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 5-08
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 27-08
SEC RULES COMMITTEE No. 59-08 RE: SEC GUIDANCE ON THE USE OF COMPANY WEB SITES

The Securities and Exchange Commission recently issued interpretive guidance on the use of company web sites under the Securities Exchange Act of 1934 and the antifraud provisions of the federal securities laws. [1] The main areas of focus are: (1) when information posted on a web site is “public” for purposes of the applicability of Regulation FD; [2] (2) company liability under antifraud and other Exchange Act provisions for information on company web sites (including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites); (3) the types of controls and procedures advisable with respect to such information; and (4) the format of information presented on a company web site. The guidance, which is effective as of August 7, 2008, is summarized below.

The Release invites interested parties to comment on “any other approaches or issues involved in facilitating the use of electronic media, including as a result of technological developments, to further the disclosure purposes of the federal securities laws.” Comments are due by November 5, 2008. If there are issues you would like the Institute to consider addressing in a comment letter, please contact Frances Stadler at 202/326-5822 or frances@ici.org by September 8th.

The Release discusses the development and proliferation of company web sites since 2000, when the SEC last issued guidance on the use of electronic media (and when it adopted Regulation FD). [3] It reviews various SEC efforts over the years to encourage the dissemination of information electronically via the Internet. The Release states that

“[t]oday, we have reached a point where the availability of information in electronic form – whether on EDGAR or on a company web site – is the superior method of providing company information to most investors, as compared to other methods.” (Emphasis added.)

Regulation FD

The Release provides guidance as to the circumstances under which information posted on a company web site would be considered “public” for purposes of evaluating the applicability of Regulation FD to subsequent selective disclosure of the posted information. It explains that evaluating whether information is public for this purpose requires an analysis of whether and when: (1) a company web site is a “recognized channel of distribution;” (2) posting of information on a company web site disseminates the information in a manner making it available to “the securities marketplace in general;” and (3) there has been a reasonable waiting period for investors and the market to react to the posted information. The Release provides a non-exclusive list of factors that companies may consider in making this evaluation (see pp. 20-24 of the Release).

The Release states that Rule 101(e) of Regulation FD 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 that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. The company must do so simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. According to the Release, in contrast to its position when Regulation FD was first adopted, the SEC now believes that “technology has evolved and use of the Internet has grown such that, for some companies in certain circumstances, posting of the information on the company’s web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD.” Companies may look to the factors referred to above to evaluate whether the company web site is a recognized channel of distribution and whether the information is “disseminated.” The Release notes that companies also will 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.

Antifraud and Other Exchange Act Provisions

The Release provides guidance on certain issues that arise under the antifraud and other provisions relating to disclosures on company web sites.

Previously Posted Materials or Statements

The Release notes that, in 2005, the SEC addressed the treatment of previously posted information on a company’s web site in the context of registered offerings under the Securities Act of 1933. It states that the SEC believes it is now appropriate to provide clarity with respect to the treatment of such information under the antifraud provisions of the federal securities laws. In this regard, it expresses the SEC’s belief that “the fact that investors can access previously posted materials or statements on a company’s web site does not in itself mean that such previously posted materials or statements have been

reissued or republished for purposes of the antifraud provisions of the federal securities laws, that the company has made a new statement, or that the company has created a duty to update the materials or statements.” If it is “not apparent to the reasonable person” that the posted information speaks as of a date or period earlier than when the person may be accessing it, then previously posted materials or statements should be (1) separately identified as historical or previously posted materials or statements (including, for example, by dating them), and (2) located in a separate section of the company’s web site containing previously posted materials or statements.

Hyperlinks to Third-Party Information

The Release addresses the use of hyperlinks to third-party information in the context of the antifraud provisions. It notes that the new guidance does not affect earlier guidance regarding the use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act. [\[4\]](#) The Release provides further elaboration on how to evaluate whether third-party information to which a company hyperlinks from its web site is attributable to the company based on the so-called “adoption theory” – i.e., whether the company has explicitly or implicitly endorsed or approved the information such that the company should be held liable for that information. It focuses on implicit endorsement or approval.

The Release indicates that one important factor is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink. It suggests that companies consider explaining the context for a hyperlink, thereby making explicit why the hyperlink is being provided. As examples, it notes that a company could explicitly endorse the hyperlinked information or suggest that the information supports a particular assertion on the company’s web site. Alternatively, the company could note that the third-party web site contains information that may be of interest or of use to the reader.

Another consideration in deciding how to explain the context for a hyperlink is the nature and content of the hyperlinked information. According to the Release, “[t]he degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information likely will indicate the extent to which the company has a positive view or opinion about that information.” The Release discusses several examples involving hyperlinks to news articles. [\[5\]](#)

The Release also discusses the use of “exit notices” or “intermediate screens” to denote that a hyperlink is to third-party information. It acknowledges that such devices help to avoid confusion as to the source of the third-party information but states that no one type of “exit notice” or “intermediate screen” will absolve companies from antifraud liability for third-party information. The Release further indicates that the SEC does not view a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors, whether through a hyperlink or otherwise. Therefore, a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading, even if the company uses a disclaimer and/or other features designed to indicate that it has not adopted the false or misleading information to which it has provided the hyperlink.

Summary Information

The Release addresses the use of summaries or overviews to present information on companies' web sites. It states that the guidance does not supersede more specific requirements covering the use of summaries or their content that are or may be contained in SEC rules, citing as an example the pending mutual fund summary prospectus proposal. The Release expresses the view that using summaries or overviews on web sites can be helpful to investors. It advises companies that do so to consider ways to alert readers to the location of the detailed disclosure from which summary information is derived or upon which an overview is based, as well as to other information about the companies on their web sites. The Release also suggests several techniques that companies may wish to consider to highlight the nature of summary or overview information, including (1) use of appropriate titles, (2) use of additional explanatory language, (3) use and placement of hyperlinks to more detailed information, and (4) use of a "layered" or "tiered" format that allows viewers to follow a logical path to more detailed information.

Interactive Web Site Features

The Release provides guidance for companies hosting or participating in blogs or electronic shareholder forums. It states that the antifraud provisions of the federal securities laws apply to these interactive web site features and specifically to statements made there by a company or a person acting on the company's behalf. It further indicates 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 (e.g., by requiring users to agree not to make investment decisions based on the blog's or forum's content or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum). The Release makes clear that a company is not responsible for the statements that third parties post on a web site the company sponsors (unless the company adopts, endorses, or approves the statement), nor is a company obligated to respond to or correct misstatements made by third parties.

Disclosure Controls and Procedures

The Release notes that SEC rules permit companies to satisfy certain Exchange Act disclosure requirements by posting information on their web sites. [\[6\]](#) It states that if a company elects to do so, its disclosure controls and procedures and related officer certification requirements (pursuant to SEC rules implementing the Sarbanes-Oxley Act) would apply to that information.

Format of Information and Readability

The Release states that information on company web sites need not satisfy a "printer-friendly" standard, [\[7\]](#) unless required by SEC rules. In this regard, it cites the SEC's rules requiring that electronically posted proxy materials must be presented in a format "convenient for both reading online and printing on paper." The Release further notes that, under the mutual fund summary prospectus proposal, the same "convenient for both reading online and printing on paper" requirement would apply to a statutory prospectus that is provided online in accordance with the proposal.

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endnotes

[1] SEC Release Nos. 34-58288, IC-28351 (Aug. 1, 2008) (“Release”), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>. The Release states that it uses the term “company” to refer to entities that are subject to the periodic reporting and antifraud provisions of the Exchange Act, including registered investment companies.

[2] The Release notes that Regulation FD applies to closed-end investment companies but does not apply to other investment companies.

[3] The SEC’s 2000 electronic media guidance is available at <http://www.sec.gov/rules/interp/34-42728.htm>.

[4] See id.

[5] The Release cautions registered investment advisers to carefully consider the applicability of the advertising provisions of the Investment Advisers Act of 1940, noting that Section 206(4) of that Act provides that it is a fraudulent act for an adviser to refer to testimonials in its advertisements.

[6] For example, a company (including an investment company) may disclose a material amendment to its code of ethics, or a material waiver of a provision of its code of ethics, by posting the information on its web site.

[7] The Release defines “printer-friendly” to mean a version of a web page that is formatted for printing.