SEC Guidance on Use of Company Websites

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Introduction

New SEC guidance recognizes that technological innovations allowing instantaneous communications are a driving force behind the securities markets. (See Release No. 34-58288 (Aug. 1, 2008).) There is no doubt that modern communication technologies make it easier for companies to broadly and swiftly disseminate important information. Issuers can use a variety of new methods to communicate with the market, including the Internet and company websites.

By facilitating rapid and widespread information dissemination, the Internet has had a significant impact on capital-raising techniques and, more broadly, on the structure of the securities industry, and also on SEC regulation. Many if not most public companies are incorporating Internet-based technology into their routine business operations, including setting up their own websites to furnish company and industry information. Some provide information about their securities and the markets in which their securities trade, while others post summary financial information.

For the first time in eight years, the SEC has issued guidance on corporate electronic communications. This guidance is on areas where the convergence of the Internet and federal securities regulation intersect in ways that were unimaginable only a few years ago: Regulation FD, corporate entanglement with analyst reports, summary information, and the use of blogs. (See Release No. 34-58288, above.)

Regulation FD

Adopted in 2000, Regulation FD (17 CFR §243.100 et seq.) is an issuer disclosure rule addressing the practice of selective disclosure. It provides that when a company, or person acting on its behalf, discloses material, nonpublic information to securities market professionals, or company shareholders who may well trade on the basis of the information, the company must make public disclosure of that information. The timing of the required public disclosure depends on whether the selective disclosure was intentional or non-intentional.

If the selective disclosure was intentional, the company must make public disclosure simultaneously, while for a non-intentional disclosure the public disclosure must be made promptly. The company may make the required public disclosure by filing or furnishing a Form 8-K, or by another method reasonably designed to effect broad, non-exclusionary distribution of the information to the public.

Regulation FD is historically one of the more significant regulations the SEC has adopted. It is sweeping in its scope, affecting many different constituencies of the business and regulated communities, including companies, analysts, attorneys, securities professionals, institutional investors, and, of course, individual investors.

Regulation FD leaves companies with unfettered discretion to disclose whatever they choose, subject to existing disclosure requirements. And, while Regulation FD undeniably works a significant change in practice, it does not impose any new substantive disclosure obligations on companies. Unlike most SEC disclosure rules, Regulation FD does not require a company to make known any new item of information, detail of its operations, anticipated event, or emerging risk factor. Regulation FD merely directs that when a company itself elects to disclose material, nonpublic information, it make that disclosure publicly, not selectively.

Rule 101(e) (17 CFR §243.101(e)) defines the type of public disclosure that will satisfy the requirements of Regulation FD. The definition provides great flexibility to companies in determining the most appropriate means of disclosure. Companies can make public disclosure for purposes of Regulation FD by filing or furnishing a Form 8-K, or by disseminating information through another method of disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

In the release proposing Regulation FD, the SEC said that a company's posting of new information on its own website would not by itself be considered a sufficient method of public disclosure. As more investors have access to and use the Internet, however, the SEC believed that some companies, whose websites are widely followed by the investment community, could use such a method. But the SEC also said in 2000 that, despite the rapid expansion of Internet access, a significant number of households do not have access. Moreover, simply putting information on a website does not alert investors that it is available.

In its 2008 guidance, the SEC said that, in view of the pervasive use of the Internet, posting of the selectively disclosed information on the Internet may be a sufficient method of public disclosure to satisfy the mandates of Regulation FD. The key here is that companies will need to consider whether and when postings on their websites are reasonably designed to provide a broad, non-exclusionary distribution of the information to the public.

To help companies, the SEC listed factors to consider, such as whether the company website is a recognized channel of distribution and whether the information is accessible and therefore disseminated. As part of that evaluation, companies also need to consider the capability of their websites to meet the simultaneous or prompt disclosure requirements of Regulation FD once a selective disclosure has been made. For purposes of Regulation FD, a posting on a blog by the company would be treated the same as any other posting on a company's website. The company would have to consider the factors outlined above to determine if the blog posting could be considered public.

In addition to using websites to comply with the simultaneous and prompt public disclosure of previously selectively disclosed information, the SEC provided guidance on when information published on a corporate website could be considered public for the threshold purposes of Regulation FD. This is an important determination because if material information is already public it cannot be selectively disclosed by the company later in violation of Regulation FD.

The SEC has long held that, in order to make information public, it must be disseminated in a manner calculated to reach the market through recognized channels of distribution; and investors must be afforded a reasonable waiting period to react to the information. Thus, in evaluating whether information is public for purposes of Regulation FD, companies must consider whether and when their website is a recognized channel of distribution and whether the posting of information on it will disseminate the information widely to the market with a reasonable waiting period for investors to react to the posted information.

The SEC believes that that a company's website can be a valuable channel of distribution for information about a company and its financial condition. A great deal will depend on the steps that the company has taken to alert the market to its website and disclosure practices, as well as by how investors use the website.

With respect to the question of what "disseminated" means in the context of website disclosure, the SEC recognizes that news is disseminated in an electronic world in which the accessibility to the information is not limited to reading a newspaper. There are now many different channels of distribution of information that account for the rapid dissemination of news today; and also the corresponding capacity for rapid trading based on such information.

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 companies by searching the Internet, the SEC has analyzed the concept of dissemination through a changed lens. Thus, in the context of a company website that is known by investors as a location of company information, the appropriate approach to analyzing the concept of dissemination for purposes of Regulation FD is to focus on the manner in which information is posted on a company website and the timely and ready accessibility of such information to investors.

The SEC set forth a laundry list of non-exclusive factors for companies to consider in evaluating if their websites are recognized channels of distribution and whether the corporate information is posted and accessible. An important threshold factor is whether the company tells investors that it has a website that they should go to for information. For example, the Commission wants companies to disclose in their periodic reports and in their press releases that they have a website for posting important information; and give the site's address. Another factor looked at by the SEC is whether the company keeps its website current and accurate. Companies must also be aware of the extent to which their Internet infrastructure can accommodate spikes in traffic volume that may accompany a major corporate development.

More granularly, the SEC will look at whether the company prominently displays important information for investors on its website in a readily accessible location consistently used for such disclosures. Another factor in deciding if the information has been disseminated is the company's use of push technology, such as RSS feeds. The use of push technology is not determinative of dissemination, said the SEC, but it is a one factor to be considered.

Another element used to evaluate whether information on a corporate website is public for purposes of Regulation FD is whether investors have been afforded a reasonable waiting period to react to the information. What constitutes a reasonable waiting period depends on the circumstances of the dissemination which, in the context of company websites, includes the size and market following of the company; the extent to which investor-oriented information on the website is regularly accessed; and the complexity of the information. Similar to the dissemination test, the SEC will also consider the steps the company has taken to make investors aware that it uses the company website as a key source of important information about the company.

Ultimately, however, determining whether there has been a reasonable waiting period is a facts and circumstances test. What may be a reasonable waiting period after posting information on a company website for one company may not be one for another company. For example, a large company that frequently uses its website as a key resource for providing information and has made investors aware of this may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation.

The SEC advised companies to consider additional steps to alert investors to the fact that important information will be posted by, for example, issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors aware of the future posting of information and thereby facilitate the broad dissemination of the information.

The question of what constitutes a reasonable waiting period has been frequently litigated in the context of insider trading. The Commission said that the cases in this area may provide guidance to companies for purposes of Regulation FD.

The SEC has cautioned companies that deviating from their usual practice for making pubic disclosure may affect a judgment on whether the chosen method was reasonable. For example, if a company typically discloses its quarterly earnings results in regularly disseminated press releases, the Commission might view skeptically a company's claim that a last minute webcast of quarterly results, made at the same time as an otherwise selective disclosure of that information, provided a broad, non-exclusionary public disclosure of the information.

Road to Internet Usage

The SEC guidance on using company website disclosure to comply with Regulation FD is the culmination of years of growing frustration with the failure to comport Regulation FD with the use of the Internet to disseminate information. It began one year after the regulation's adoption with an SEC roundtable that explored, among other things, using the Internet to comply with the regulation's mandates. The study that resulted from the roundtable urged the SEC to embrace technology to expand opportunities for issuers to disseminate information online. Panelists urged the Commission to clarify that options such as adequately noticed website postings, fully accessible webcasts and e-mail alerts would satisfy Regulation FD. (See Special Study of Regulation FD (December 2001), http://www.sec.gov/news/studies/regfdstudy.htm#P160_9462.)

In a blog dialogue with the CEO of Microsystems, SEC Chairman Christopher Cox said, on November 2, 2006, that, assuming the SEC were to embrace the suggestion that the widespread dissemination requirement of Regulation FD can be satisfied through web disclosure, among the questions that would need to be addressed is whether there exists effective means to guarantee that a corporation uses its website in ways that assure broad non-exclusionary access, and the extent to which a determination that particular methods are effective in that regard depends on the particular facts. More broadly, the chairman went on to say that he strongly believes that the Internet is a powerful tool that can be used effectively by corporations to provide information to the market and investors. The Internet can empower investors to obtain and evaluate information about companies, and its potential has not yet been fully exploited.

Republished Materials

The new SEC guidance also focused on a company's liability for Internet postings and hyperlinks on company websites to other unrelated websites, such as those of securities analysts. The SEC has long held that the liability provisions of the federal securities laws apply equally to electronic and paper-based media. Thus, the antifraud provisions apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company. There are two main areas where the specter of liability is raised. First, there is the effect of accessing previously posted materials on a company's website. Second, there is the issue of whether a hyperlink to, for example an analyst's report, has entangled the company with that report or has effectively adopted the report as the company's own.

Companies are concerned that they may have a duty to update previously posted materials or statements if they are considered to be a new statement by being republished each time an investor accesses them on the company's website. In effect, they feared that a statement may be considered to be republished each time it is accessed by an investor or each day that it appears on the website, with the concomitant specter of liability under Exchange Act Rule 10b-5 (17 CFR §240.10b-5).

In its guidance, the SEC assured companies that maintaining previously posted materials or statements on their websites is not a republishing of such materials for purposes of the antifraud provisions of the federal securities laws just because the materials remain accessible to the public. The antifraud provisions would apply, however, to statements contained in posted materials when such statements were initially made. Similarly, the antifraud provisions would apply to such statements when the company restates or reissues the statement.

This affirmative restatement may create a duty to update the statement so that it is accurate as of the date it is restated. As a general matter, said the SEC, the fact that investors can access previously posted materials or statements on a company's website 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.

When it is not apparent to the reasonable person that the posted materials speak as of a certain date or earlier period, then to assure that investors understand that the posted materials or statements speak as of a period earlier than when the investor may be accessing the posted materials, the SEC believes that previously posted statements that have been put on a company's website should be separately identified as historical statements, including, for example, by dating the posted materials and locating them in a separate section of the company's website.

Hyperlinks to Third-Party Information

Securities analysts play an integral role in ensuring that information flows to investors, who acquire useful information about companies from sources other than SEC-mandated disclosure. One such source is research reports that the analysts prepare. As the SEC has long acknowledged, and the Supreme Court recognized in *Dirks v. SEC* (US Sup Ct 1983), 1982-1983 CCH Dec. ¶99,255, analysts fill an important function by keeping investors informed. While it is true that companies can use a variety of new methods to communicate with the market, including live transmissions of annual meetings and news conferences on the Internet, analysts remain a vital part of the markets and the securities industry.

The relationship between securities analysts and company officers and directors has been described as "fraught with peril" and indeed it can lead company management into an entangled relationship ending in liability for securities fraud.

As a general matter, a company cannot be held liable for the independent statement of a third party. The federal securities laws require a company to speak truthfully to investors, but they do not require the company to police statements made by third parties for inaccuracies, even if the third party attributes the statement to the company. (See *Raab v. General Physics Corp.* (CA-4 1993), 1993 CCH Dec. ¶97,713.)

However, as the federal securities laws developed, companies have become subject to liability for false or misleading statements made by outside securities analysts. First, a company may be held liable directly for providing false or misleading information to third-party analysts. This liability is based on the principle that a company cannot escape liability simply because it carries out its fraud through the public statements of third parties. (See *Cooper v. Pickett* (CA-9 1997), 1997 CCH Dec. ¶99,508.) Second, a company could involve itself in the preparation of the hyperlinked information to such an extent that it becomes entangled with the third-party information. Third, the company could adopt the hyperlinked information by endorsing it after its publication.

In evaluating a company's antifraud liability under the adoption theory for hyperlinks to third-party information, the SEC believes that the focus should be on whether the company has explicitly or implicitly approved or endorsed the statement such that the company should be liable for that statement. Because an explicit endorsement would be plainly evident, reasoned the Commission, the analytical scrutiny is on the circumstances or conditions under which a company impliedly endorsed the analysts' statement by hyperlinking to it.

The key question here 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. An important factor in making that determination is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink.

Companies can have different audiences for different pages on their websites. For example, a consumer products company may have customer-oriented pages, or supplier-oriented pages, on its website, as well as investor-oriented pages, such as an investor relations page. Because of its context, a third-party hyperlink on a customer-oriented page, for example, the company manufactures laundry detergent and provides a link to a third-party clothing care website, has different implications from a securities law perspective than a hyperlink to a research analyst's report on an investor-oriented page.

In considering the link's context, the SEC assumes that linking to information on a third-party website indicates that the company believes the information may be of interest. Otherwise, why provide the link? To avoid potential confusion about the company's opinion of the hyperlinked information, the SEC urges the company to explain the context for the hyperlink and thereby make explicit why the link is being provided.

For example, a company might expressly endorse the hyperlinked information or suggest that the hyperlinked information supports a particular assertion on the company's website. Alternatively, a company might simply note that the third-party website contains information that may be of interest to the reader.

The nature and content of the hyperlinked information also should be considered in deciding how to explain the context for the hyperlink. The degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information will indicate the extent to which the company has a positive view about that information. For example, a company including a hyperlink to a news article that is highly laudatory of management should consider explanatory language about the source and why the company is providing the hyperlink in order to avoid the inference that the company is commenting on or even approving its accuracy, or was involved in its preparation.

Conversely, when the hyperlinked information is more broad-based, the company should provide a more general explanation. For example, if a company has a media page and simply provides hyperlinks to recent news articles, both positive and negative, about the company, the risk that a company may have liability regarding a particular article or that it endorses each and every news article may be reduced. In this case, a title such as “Recent News Articles” may be all the explanation that a company needs to avoid being considered to have adopted the materials.

A further explanation may be necessary depending on the manner by which a company limits the sources of its recent news articles. For example, if a company only includes recent news articles published by bullish industry journals, the limited nature of the sources should be clear and the company should explain why it selected the sources identified.

In addition to an explanation of why a particular hyperlink is being included on its website, a company may also use other methods, including exit notices or intermediate screens, to denote that the hyperlink is to third-party information. While the use of exit notices or intermediate screens helps avoid confusion as to the source of the third-party information, no one type of exit notice or intermediate screen will absolve companies of antifraud liability for third-party hyperlinked information.

For example, if there is only one analyst report out of many that provides a positive outlook on the company’s prospects, and the company provides a hyperlink to the one positive analyst report and to no other, and does not mention the fact that all the other analyst reports are negative on the company’s prospects, then even the use of an exit notice or intermediate screen or explanatory language may not be sufficient to avoid the inference that the company has approved or endorsed the one positive analyst’s report. The SEC also pointed out that the failure to use exit notices or intermediate screens does not automatically result in a determination that a company has adopted third-party information.

It has long been true that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws. 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. Thus, a company would not be shielded from antifraud liability for linking to information it knows, or is reckless in not knowing, is false or misleading. This would be the case even where the company uses a disclaimer indicating that it has not adopted the false or misleading information that it linked to.

Under the entanglement theory, a company can be liable for inaccuracies in a research report published by an analyst if it sufficiently entangles itself with such information so as to render the statements attributable to the company. The company can be liable even for statements that do not purport to be direct quotes. (See *Elkind v. Liggett & Myers, Inc.* (CA-2 1980), 1980 CCH Dec. ¶97,716.)

Similarly, a company may be liable for false statements contained in a third-party analyst report if it adopts, expressly or impliedly, the statements after they are published, even if management had no role in preparing the reports. Such adoption occurs when a company conveys the suggestion that the analysts' forecasts are accurate or at least in accordance with its views. (See *Presstek, Inc.* (SEC 1997), 1997 CCH Dec. ¶74,512.)

The advent of corporate websites has given rise to fundamental issues affecting website content. With regard to analysts and the entanglement theory, a compelling issue centers on company responsibility for hyperlinked information under the antifraud provisions of the federal securities laws. More specifically, there is a question of what consequences may ensue when a company's website provides hyperlinks to analysts' research reports.

Generally, companies 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. Whether third-party information is attributable to a company depends on whether the company has involved itself in preparing the information or has expressly or impliedly endorsed or approved it.

In the case of hyperlinked information, liability under the entanglement theory would depend on a company's level of pre-publication involvement in the preparation of the information. In contrast, liability under the adoption theory would depend on whether, after its publication, the company either expressly or impliedly endorsed or approved the hyperlinked information.

Historically, the SEC considers three factors as relevant in deciding if a company has adopted information on a third-party website to which it has established a hyperlink: (1) the context of the link; (2) the risk of confusion; and (3) the presentation of the linked information. Although the factors do form a useful framework of analysis, they are neither exclusive nor exhaustive. The SEC does not have a "bright line" mechanical test. In addition, no single factor, standing alone, either would or would not dictate the outcome of the analysis. (See Release No. 34-42728 (SEC 2000), 2000 CCH Dec. ¶86,304.)

Context of Hyperlink

Whether third-party information to which a company has established a hyperlink is attributable to it will be influenced by what the company says about the hyperlink or what is implied by the context in which the company places the link. A company might expressly endorse the hyperlinked information. For example, a hyperlink might be incorporated in or accompany a statement such as

"XYZ's website contains the best description of our business that is currently available." (See Release No. 34-42728, above, Part II.B.1.a.)

Similarly, a hyperlink might be used to suggest that the linked information supports a particular assertion on a company's website. For example, the hyperlink may be incorporated in or accompany a statement such as, "As reported in Today's Widget, our company is the leading producer of widgets worldwide." Moreover, even when a company remains silent about the hyperlink, the context nevertheless may imply that the hyperlinked information is attributable to the company

In the context of a document required to be filed or delivered under the federal securities laws, the SEC believes that when a company embeds a hyperlink to a website within the document, the company should always be deemed to be adopting the hyperlinked information. In addition, when a company is in registration, if the company establishes a hyperlink, that is not embedded within a disclosure document, from its website to information that constitutes an "offer to sell" or "offer" under Securities Act Section 2(a)(3), a strong inference arises that the issuer has adopted that information for purposes of Rule 10b-5.

Statements about a company press release by an analyst on a third-party website were not attributed to the company under the entanglement theory since the company neither adopted the statement reported on the website nor placed its imprimatur on the statement, nor was any specific company source for the statement identified. The statement could plausibly be read as the website's own interpretation of the press release. The mere fact that the company's former CEO had written for the website at some time or another was not enough to demonstrate entanglement between the company and the analysts *with respect to the statements at issue* (emphasis added). (See *Zouras v. Hallman*, (SD NH 2004), 2004 CCH Dec. ¶92,923.)

A statement about a company published by an industry website could have entangled the company because it directly quoted a named employee, a company regional sales manager. But the entanglement theory was not applicable because there was no evidence that the quoted employee was aware of the alleged production and performance issues that were said to have rendered optimistic sales projections false, much less that the quoted employee had such knowledge at the time he made the statement reported on the analyst website. (See *Zouras v. Hallman*, above.)

Risk of Confusion

Another factor in determining if an issuer has adopted hyperlinked information is the presence or absence of precautions against investor confusion about the source of the information. Hyperlinked information on a third-party website may be less attributable to a company if the company makes the information accessible only after a visitor to its website has been presented with an intermediate screen that clearly and prominently indicates that the visitor is leaving the company's website and that the subsequent information is not the company's. (See SEC Release No. 34-42728, Part II.B.1.b.)

Similarly, there may be less likelihood of confusion about whether a company has adopted hyperlinked information if it ensures that access to the information is preceded or accompanied by a clear and prominent statement from the company disclaiming responsibility for the information. In contrast, the risk of investor confusion is higher when information on a third-party website is framed or inlined.

Framing is a form of hyperlinking under which information from a separate website is imported into the website that is being used and is displayed within a constant on-screen border or frame. In this case, information from a company's website and the hyperlinked site would be visible at the same time. The user may not be aware that the displayed material is actually from a different site. Inlining is similar to framing but does not result in a visible border. As with framing, information from a company's website and the hyperlinked site would be visible at the same time. Also, as with framing, a website user may not be aware that the displayed material is actually from a different site.

Presentation of Information

The presentation of hyperlinked information is also relevant in determining whether the company has adopted the information. For example, a company's efforts to direct an investor's attention to particular information by selectively providing hyperlinks is a relevant consideration in determining whether the information so hyperlinked has been adopted by the company. (See Release No. 34-42728, Part II.B.1.c.)

Where a wealth of information as to a particular matter is available, and where the information accessed by the hyperlink is not representative of the available information, a company's creation and maintenance of the hyperlink could be an endorsement of the selected information. Similarly, a company that selectively establishes and terminates hyperlinks to third-party websites may, depending on the nature of the information about on a particular site, be seen as attempting to control the flow of information to investors. Again, this suggests that the company has adopted the information during the periods that the hyperlink is operative.

Finally, the layout of the screen containing a hyperlink is relevant in determining whether a company has adopted hyperlinked information. Any action to differentiate a particular hyperlink from other hyperlinks on a company's website, through its prominence, size or location, or to draw an investor's attention to the hyperlink, may suggest that the company favors the hyperlinked information over other information available to the investor on or through the site.

For example, a particular hyperlink might appear in a different color, type font, or size from other hyperlinks on a company's website. When the method of presenting the hyperlink influences disproportionately an investor's decision to view third-party information, the hyperlinked information is more likely attributable to a company.

Summary Information

The SEC also provided guidance to companies that post summary financial information on their websites. Generally, the Commission believes that summary information on corporate websites can help investors, particularly when it relates to complex or lengthy information. The SEC cautioned, however, that a stand-alone summary that a reasonable person would not perceive as a summary, and that does not provide additional information to alert a reader as to where more detailed information is located, could result in investors not necessarily understanding that the statements should be read in the context of the information being summarized.

Thus, companies using summaries on their websites should tell readers where the underlying detailed information can be found. Also, companies must consider the context in which the information is presented. Explanatory language should be employed to identify the information as a summary. For example, the SEC suggested that the summary page on a website could be identified and presented in a manner similar to an introductory page in a glossy annual report, with graphs and charts illustrating key performance metrics derived from financial statements found later in the same document. A failure to identify summaries as such may confuse readers, said the SEC, who may fail to appreciate that the information is not complete.

The SEC encouraged companies that use summaries of more complete information located elsewhere on their websites to consider employing disclosure and other techniques designed to highlight the nature of summaries or overviews in order to help minimize the chance that investors would be confused as to the level of incompleteness inherent in these disclosures. To this end, the SEC suggested a number of techniques that may highlight the nature of summary or overview information. In addition to explanatory language, companies should employ a heading that conveys the nature of the summary.

Also, the summary should be placed in close proximity to hyperlinks to the underlying detailed information. The SEC analogized the use of hyperlinks in this fashion to the envelope theory under which documents hyperlinked together are considered delivered together as if they were paper documents being delivered in the same envelope.

Blogs

The SEC also provided guidance on a company’s use of Internet blogs, including CEO blogs and investor relations blogs. First off, the Commission emphasized that the antifraud provisions apply to company sponsored blogs. That said, the SEC granted that companies can use blogs for a variety of purposes, including the exchange of opinions and ideas between management or employees and various stakeholders. The open format of blogs makes them an attractive forum for ongoing communications between and among companies and their clients, customers, suppliers, shareholders and other stakeholders.

For example, a manufacturing company could sponsor a blog for its staff tasked with designing, developing and troubleshooting products. Vendors and end-users likely would find such a forum helpful. Shareholders also may welcome the opportunity to view or join a discussion of the uses of a company’s existing products to better understand one of the means a company derives revenues, especially with the front-line employees responsible for those products.

But companies hosting or participating in blogs must always be aware that, while blogs can be informal and conversational in nature, statements made there by the company or by a person acting on behalf of the company will not be treated differently from other company statements when it comes to the antifraud provisions of the federal securities laws. Moreover, employees acting as representatives of the company must be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their individual capacities.

Importantly, the SEC said that companies cannot require investors to waive the protections of the federal securities laws as a condition to participating in a blog. Any term or condition of a blog requiring users to agree not to make investment decisions based on the blog’s content or disclaiming liability for damages of any kind arising from the use or inability to use the blog is inconsistent with the federal securities laws and violates the anti-waiver provisions of the federal securities laws.

But the SEC assured that, while a company is responsible for its own statements on a blog, it is not responsible for the statements that third parties post on a website the company sponsors, nor is it obliged to respond to or correct misstatements made by third parties. But the SEC did caution that the company may be held responsible under the adoption or entanglement theories if it adopts or endorses a third-party statement made on the blog.

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