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10. 22 U.S.C. §§ 2778-2799.
11. 22 C.F.R. §§ 120-130.
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## Corporate Governance Feature: Guidelines for Using the Company Web Site for Regulation FD Compliance

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In August 2008, the Securities and Exchange Commission issued interpretive guidance<sup>1</sup> on the use of company web sites for compliance with Regulation FD (Fair Disclosure) requirements. This release represents the SEC's continued efforts to promote the use of company web sites as a vehicle for the dissemination of information to investors in order to bring SEC disclosure requirements in line with the twenty-first century technology and communication methods.

If a company chooses to utilize its web site for Regulation FD purposes, additional care is necessary to ensure that information contained there is accurate and not outdated. The use of the company web site for Regulation FD purposes may result in the web site becoming the "go to" place for the most current information about the company that can be used in connection with due diligence in a merger or acquisition context to a greater extent than it is currently utilized. This article discusses steps that a public company should take to use its web site for Regulation FD disclosures.

### The SEC Has Updated Its View on Web Site Disclosures for Regulation FD Purposes

Regulation FD was originally adopted by the SEC in 2000 to address abuses that arose in connection with public company officers' or other company representatives' selective conversations with analysts regarding earnings estimates and other nonpublic matters concerning the company. Generally, under Regulation FD, if a company or any person acting on its behalf makes selective disclosure of material nonpublic information regarding the company or its securities, then the company must make public disclosure of such information. Public disclosure of information can be achieved by filing a current report of Form 8-K containing such information with the SEC or by disseminating the "information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."<sup>2</sup>

Regulation FD provides sufficient flexibility to companies in terms of which method of public disclosure should be used. However, the SEC stated in the Regulation FD adopting release that posting of information on a company web site was not, *by itself*, a "sufficient means of public disclosure," but only a "component of an effective disclosure process."<sup>3</sup> This statement effectively limited the usefulness of the web site for Regulation FD purposes and companies typically elected to utilize the Form 8-K to disclose information required by Regulation FD.

In the new web site release, the SEC has changed its position on exclusive web site disclosure for Regulation FD purposes. The SEC has clarified in the web site release that if the information on the company

web site is deemed public, then subsequent selective disclosure of that information to an analyst would not trigger Regulation FD public disclosure requirement. In addition, should a company make selective disclosure of nonpublic material information, the web site release indicates that subsequent posting of such information on the company web site could satisfy the simultaneous (in the case of intentional disclosure) or prompt (in the case of unintentional disclosure) public disclosure requirement under Regulation FD and serve as an alternative to filing a current report on Form 8-K or using other methods of disclosure designed to provide broad distribution of information to the public.

## Evaluating Whether the Web Site Is a Recognized Channel of Distribution and the Posted Information is Broadly Disseminated

If a company intends to utilize its web site disclosures to satisfy Regulation FD requirements, it should evaluate carefully whether its web site is a recognized channel of distribution and whether the posted information is broadly disseminated. For information to be “public” for purposes of using the company web site to comply with Regulation FD requirements, (i) a company web site should be a recognized channel of distribution, and (ii) posting of information on a company web site should disseminate the information in a manner making it available to the securities marketplace in general.<sup>4</sup> These factors are used to determine both whether a selective disclosure can be made after publicly posting information on a web site as well as whether the web site can serve as a sole method of public disclosure after a company intentionally or unintentionally makes a selective disclosure of information.

To determine whether a company web site is a recognized channel of distribution that broadly disseminates the information posted on it, the company should be able answer “yes” to the following questions:

- Has the market been effectively alerted to the fact that the company posts important information on the company web site?
- Is the material information about the company timely and prominently disclosed on the web site in the manner that makes the information

readily accessible to investors and the market in general?

- Do investors and other market participants regularly use the company web site to obtain important information about the company?

## Web Site Disclosure of Investor Information

To be able to conclude that the market has been effectively notified about the company’s web site disclosures, a company should systematically disclose in its periodic reports filed with the SEC and press releases not only the fact that the company has a web site and give the web site address of its home page, but also the fact that investors can obtain the most current and accurate information about the company from its web site on a regular basis. To facilitate broad dissemination of information posted on a web site, a company may consider filing a Form 8-K or issuing a press release with the date and time when specific important information will be posted on the company web site to further alert investors about the addition of new information.

Information posted on the web site for Regulation FD purposes should be timely and prominently disclosed in a specific section of the web site designated for such purpose, for example, under the heading “Important Investor Information.” The notification in the periodic reports and press releases should provide the address of such specific web page ([www.xyzcompany.com/investorinfo](http://www.xyzcompany.com/investorinfo)), and the home page of a company web site should provide a link to the specific web page on which important investor information is disclosed so that such page were easily accessible to the public.

## Use of Company Web Site By Investors

Whether a company web site is extensively utilized by investors to retrieve information about the company is largely outside of the company’s control. Although the company can of course track visitors of its web site, it may be difficult to stimulate investors to visit the company’s web site. It would be problematic in this analysis if the company concludes that its web site is not frequently used by investors to obtain information about the company. Large companies that are well-followed by the market will likely be able determine that the market

uses its web site to obtain most current information about the company. Smaller and not well-followed companies may have a more difficult time making such determination, particularly if such information is not further distributed by the market and media. Smaller companies may have to increase the use of their web sites by investors which is something that will likely require input from the marketing staff of such companies or marketing consultants.

### **Investors Should Be Given Reasonable Waiting Period to React to Information Posted on the Web Site**

In addition to evaluating whether the company web site is a recognized channel of distribution in order to be able to make selective disclosure of information previously publicly posted on a web site, the company should give investors a reasonable waiting period to react to the posted information.

In the absence of the SEC guidance with respect to what time frame for the waiting period is adequate, the determination of whether the time period to react to the information posted on the company web site is reasonable, will likely depend on specific facts and circumstances related to the dissemination of the information, which include, among other factors:

- The size of the company;
- The market following the company;
- The extent to which investor information is regularly accessed on the company web site, and;
- The level of complexity in the information.

Historically, it was recommended that two business days was a sufficient amount of time to wait to ensure that the information was absorbed by the market. However, since the use of the Internet has increased the speed with which information is disseminated into the market, in some instances one business day may be sufficient for such a waiting period.

### **Conclusion**

The extensive use of the Internet resulted in a shift in the SEC position on the use of a company web site as a securities law compliance tool. Prior to using the company web site to comply with Regulation FD, a company should perform a careful analysis of its investor base and the market following the company to make sure that it has taken all appropriate steps to notify the market of posting information on the web site for the Regulation FD purposes and to broadly disseminate such information in line with the SEC guidance.

Finally, when utilizing the web site as a Regulation FD compliance mechanism, diligent and frequent review of the web site is necessary to check the accuracy of the web site information and to archive information that is no longer current.

#### **NOTES**

1. See *Commission Guidance on the Use of Company Web Sites*, Exchange Act Release No. 34-58288 (eff. August 7, 2008) ("Commission Guidance").
2. 17 CFR § 243.101(e).
3. *Selective Disclosure and Insider Trading*, Exchange Act Release No. 34-43154 (eff. October 23, 2000).
4. See *Commission Guidance*.