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COMPANY WEBSITES

NEW SEC GUIDANCE ON THE USE OF WEBSITES – WHAT IS PUBLIC AND WHAT IT MEANS TO THE PUBLIC COMPANY

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A close friend of mine is an executive officer of a small, publicly-traded technology company. On July 31, 2008, he e-mailed me a link to a technology-based blog. A posting on the blog, dated that day, referenced a speech by Special Counsel to the Securities and Exchange Commission, or the SEC, Kim McManus. The topic of the speech was the then-upcoming new SEC guidance on the use of websites. The author of the blog posting was encouraged by the SEC's anticipated acceptance of the use by issuers of websites, including blogs, to disclose material information. In the posting, the author wrote that "we can now finally kill the press release in its current form."

My friend, who I suspect would be happy to never use pen and paper again and would prefer to use his iPhone and laptop for, well, everything, was very excited to learn that he might be able to eliminate what he believes is an unnecessary burden and expense to his company – dealing with PR professionals, paying for press releases and paying counsel to re-

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view them. He believes that his company's website, and the many blogs and other on-line venues to which he personally posts information, is a superior source of information regarding his company and the markets in which it competes. Similarly, Jonathan Schwartz, the CEO of Sun Microsystems, Inc., has been very vocal regarding his strong preference for corporate websites, blogs and other on-line venues as a source of information regarding public companies over traditional disclosure methods.

THE RELEASE

On August 1, 2008, the SEC published an interpretive release entitled "Commission Guidance on the Use of Company Websites" (the Release), which provides new guidance on the use of company websites. Based on our review of the new guidance provided in the Release, and despite my friend's excitement, we believe that the press release will live to see many more days. We do not anticipate that the new guidance will cause many public companies to change their website policies significantly. In fact, we find the guidance to be, for the most part, a confirmation of the advice that many law firms, including ours, have been giving to their clients over the last ten to fifteen years.

The SEC focused its guidance on the following subjects:

- When information posted on a company website is "public" for purposes of the applicability of Regulation FD;¹
- Company liability for information on company websites – including previously posted information, hyperlinks to third-party information, summary information and the content of interactive websites;
- The types of controls and procedures advisable with respect to such information; and
- The format of information presented on a company website, with the focus on readability, not printability.

DISCLOSURE OF MATERIAL INFORMATION ON WEBSITES

As stated in the Release, company websites, if developed properly and in a manner that complies with federal securities laws, can "serve as

1. Regulation FD (Fair Disclosure) was enacted in 2000 to address the selective disclosure by certain public companies of material, nonpublic information. The regulation generally provides that whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must simultaneously, in the case of intentional disclosures, or promptly, in the case of unintentional disclosures, make public disclosure of that information. The Adopting Release for Regulation FD provides that public companies have the flexibility to either file a Form 8-K or to choose any method or combination of methods to disclose publicly material information as long as the methods are reasonably calculated to make effective, broad and non-exclusionary public disclosure, given the company's particular circumstances.

effective information and analytical tools for investors,” and, therefore, play an integral role in a company’s public profile. Company websites are important to a company’s public profile; they serve an important function in the marketing and commercialization of a company’s products and/or services. In fact, the lack of a website may indicate to the markets that a company is not current with current technological trends. Most public companies include an investor relations section on their websites in order to help investors easily find the most relevant information for their needs.

Despite the desire of many companies, especially technology companies, to reduce the number of required filings, the SEC, at this time, has not provided guidance that allows most companies to substantially increase their reliance on their websites to satisfy disclosure obligations. The SEC recognizes that public companies have been posting a greater amount and type of information on their websites and announced in the Release that it believes that it should provide guidance regarding “the circumstances under which information posted on a website would be considered ‘public’ for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of public information; and (2) satisfaction of Regulation FD’s ‘public disclosure’ requirement.” Accordingly, the Release provides a list of factors which a company may consider in determining, on its own, whether or not the posting of material, nonpublic information on its website would make the information “public” for Regulation FD purposes. According to the guidance, a public company in making such a determination must consider whether:

- A company website is a recognized channel of distribution;
- The posting of information on a company website disseminates the information in a manner that makes it generally available to the securities marketplace; and
- There has been a reasonable waiting period for investors and the market to react to the posted information.

The SEC has provided the following non-exclusive factors for companies to consider in evaluating whether their website is a recognized channel of distribution and whether the information on such site is “posted and accessible” and therefore “disseminated”:

- Whether and how the company lets investors and the markets know that the company has a website and that investors should look at the company’s website for information;
- Whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting such information on its website;
- Whether the company’s website 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 website 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 website is regularly picked up by the market and readily available media, and reported in, such 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;
- The steps the company has taken to make its website and the information accessible, including the use of “push” technology, such as 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 website current and accurate;
- Whether the company uses other methods in addition to a website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.

As mentioned above, the last factor in determining whether and when information posted on a company’s website would be “public” for purposes of Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information. With respect to this factor, the SEC has provided a list of circumstances for companies to consider in deciding whether their dissemination of information through their website satisfies the factor. The list, which is also non-exclusive, is as follows:

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

In the release, the SEC states that the posting of information on a company’s website in a location and format readily accessible to the general public would not be “selective” disclosure for purposes of Regulation FD. There may be other implications to the disclosure of previously undisclosed material information on a website and not in any other manner.

Accordingly, public companies should confer with counsel if they have a practice of disclosing previously undisclosed material information on their websites without including the same information in other filings and or reports.

The Release provides similar guidance to the second part of Regulation FD, Rule 101(e). Rule 101(e) of Regulation FD provides that a company may make selective disclosure of material nonpublic information as long as the information is filed or furnished on a Form 8-K or is disseminated 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. To determine whether a website provides broad, non-exclusionary distribution of the information to the public, a company must look to the factors discussed above regarding the first two elements of the analysis – whether the company website is a recognized channel of distribution and whether the information is “posted and accessible” and, therefore, “disseminated.” In performing such an evaluation, it is the company’s responsibility to also evaluate whether the posting of information on its website meets the simultaneous or prompt timing requirements of Rule 101(e) for public disclosure once a selective disclosure has been made.

The factors presented by the SEC, and the circumstances provided to test the factors, are considerably subjective and lacking in definition, absent review of the specific facts and circumstances in the courts or before the SEC. It is possible that certain large, well-known companies may determine that their dissemination of material information on their websites satisfies the factors. However, rather than risking a violation of Regulation FD, most companies are best served by continuing to disclose previously undisclosed information through press releases and the filing of Form 8-Ks, as opposed to relying solely on their websites for the disclosure of material nonpublic information. It is noteworthy that Sun Microsystems has not ceased issuing press releases through Business Wire. On November 13, 2008, Thomas J. Kim, Chief Counsel and Associate Director of the SEC’s Division of Corporation Finance, answered a question on this topic at the Practising Law Institute’s 40th Annual Institute on Securities Regulation. When questioned why a company’s use of RSS technology is not necessarily sufficient to make the information distributed by the RSS feed public, Mr. Kim likened the question to the old riddle: if a tree falls in a forest and no one is there to hear it, does it make a sound? In this case, if a company discloses information through an RSS feed but no one subscribes to it, is the information public? According to the guidance in the Release, no. Although comments by the SEC’s staff do not necessarily represent the formal position of the SEC, Mr. Kim’s answer is informative.

For the foregoing reasons, we do not expect the new guidance to cause a noticeable decrease in the use of press releases and Form 8-Ks. The filing of a Form 8-K not only ensures that the material information

has been made public for purposes of Regulation FD, the Form 8-K also serves as the basis for the incorporation by reference of information into certain registration statements. This is an important concern for many companies that are in the market or have registration statements in place in connection with their stock compensation plans. Public companies also may choose to continue to issue press releases to satisfy disclosure obligations of the national securities exchanges. We note that the Disclosure Advisory Board of PR Newswire issued a press release on August 25, 2008 in which it predicted that “[m]ost companies are unlikely to make significant immediate adjustments to their communications practices” as a result of the guidance provided in the Release. This prediction is consistent with the expectations we have expressed in this article. Of course, this organization might have its own interests to preserve in this regard.

One potential advantage provided by the new guidance relates to the size of Form 8-Ks filed by public companies. Despite the guidance, a public company may decide to file a Form 8-K to announce a material event but, rather than attaching related materials to the Form 8-K as exhibits, the company may refer the reader to the company’s website to review related materials. A company should only consider doing so if it intends to keep the materials posted on the website. Unlike the exhibits to a Form 8-K, a company cannot incorporate materials that are posted on a website by reference into a registration statement so this methodology may not be useful to certain companies in registration. On the other hand, it is another way to increase the visibility of the company website.

We note that in other contexts, the SEC has demonstrated that it recognizes the information advantages of the Internet and that the Internet can be used to enhance the disclosure practices of public companies. According to the federal proxy rules, a shareholder proposal must not exceed five hundred words, among other qualifications, to be included in a company’s proxy statement. According to Staff Legal Bulletin No. 14 (July 13, 2001), the inclusion of a website address in a shareholder proposal counts as one word. The staff will only agree to the removal by a company of a website address from an otherwise valid shareholder proposal if the content of the applicable website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise violates the federal proxy rules. The staff’s position allows a shareholder to leverage the information resources of the Internet when it makes a proposal to shareholders in a company’s proxy.

WEBSITE MAINTENANCE

As stated above, two out of the three factors a company should consider in determining whether information that is posted on a website is public for purposes of Regulation FD are whether the website is a recognized channel of distribution and if the posting of information on the website disseminates the information in a manner that makes it available to the securities market generally. Accordingly, companies should imple-

ment measures intended to publicize the existence of their websites in order to increase the public's awareness of the websites. Doing so will help ensure that they can take advantage of the current SEC guidance. More importantly, doing so may put a company in a stronger position if the SEC provides additional guidance in the future that makes it easier to determine that a company website is an acceptable medium for public dissemination of information for purposes of Regulation FD. In any event, it will help develop a website as a tool for shareholders and the market. These measures may include, but are not limited to, the following:

- disclosure of the website URL in press releases, public filings and other materials;
- disclosure of the website URL on product packaging, company promotional materials and in advertisements;
- disclosure of the website URL in any other public venue in which the company has an opportunity to post or display materials;
- regularly posting material information about the company on its website, including all press releases;
- regularly posting notice of scheduled events and other releases of material information;
- informing the public that it posts important information on its website from time to time; and
- providing interactive sections on the website that allow the company to electronically deliver materials to interested persons and implementing other "push" technology.

These suggestions and others are repeated with more detail at the end of this article.

Companies should also take steps to ensure that investors will find their websites easily and often when performing relevant web searches. The company's URL should be as similar to the company name as possible. In addition, if a company is commonly referred to by a shorter name, nickname or trademark, it should consider having multiple URLs based on the common references that direct the user to the company's home page. Popular product or service names may also be used as URLs if they help direct investors to the company website. We have seen companies with a website URL based on their ticker symbol. This may be a good idea if the same website is accessed by a URL based on the company name. If it is the sole URL, it will not help establish the visibility of the applicable website. Companies should perform searches on their own company name or names through popular search engines. If the searches do not result in hits to the company websites on a high enough priority or at all, the company should try to understand why that is the case and consider changes to the website to remedy the situation. There are consultants that specialize in ensuring that URLs are picked up in Internet searches. The company's goal should be to make sure its website is as visible to the public as possible.

ADDITIONAL LESSONS FROM THE RELEASE

Previously Posted Information on a Website

Although we find the guidance in the Release to be limited, it is important with respect to a company's day-to-day website maintenance. The Release includes guidance with respect to the status of information that is posted on a website. Courts have disagreed for some time whether a public company has a duty to update statements made by a company if the statements were true when made. In the past, certain practitioners questioned whether website content, since it is continuously available, should be deemed to be continuously "published" and "alive" as long as it appears on the website. If information on a website is deemed to be continuously published or alive as long as it is available on a company's website, a company may, out of caution, act as if there is a duty to update such information if the information becomes misleading after the passage of time, which is a substantial burden on the company.

According to the Release, the SEC does not believe that the maintenance of previously posted materials or statements on a company's website, for purposes of the antifraud provisions of the federal securities laws, should be deemed to be the re-issuance or re-posting of such materials or information solely because the materials or information remain accessible to the public, nor is there a duty to update such materials or information. Accordingly, companies are advised to date the content of their websites and to otherwise make it apparent to the users of their websites that posted materials or statements speak as of a certain date or refer to an earlier period. In circumstances where it is not apparent to the reasonable person that posted materials or statements speak as of a certain date or earlier period, the postings should be separately identified as historical or previously posted materials or statements and located in a separate section of a company's website containing previously posted materials or statements. Of course, this analysis does not apply if a company affirmatively restates or reissues a statement that is posted on its website. If a company affirmatively restates or reissues a statement, the restated or reissued statement must be accurate when made.

Hyperlinks to Third-Party Information

The Release provides guidance regarding the steps a public company should take in order to avoid liability for third-party information which is available on the company's website through a hyperlink. As stated in the Release, a company may be liable under Section 10(b) of the Securities Exchange Act of 1934, or the Exchange Act, and Rule 10b-5 promulgated thereunder, for third-party information to which it hyperlinks from its website and which could be attributable to the company. Third-party information hyperlinked to a company's website may be deemed attributable to the company if the company has involved itself in the preparation of the information or explicitly or implicitly endorsed or

approved the information. The SEC provides the following non-exhaustive list of factors that influence the analysis of whether a company has adopted hyperlinked materials:

- Context of the hyperlink – what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- Risk of confusing investors – the presence or absence of precautions against investor confusion about the source of the information; and
- Presentation of the hyperlinked information – how the hyperlink is presented graphically on the website, including the layout of the screen containing the hyperlink.

Summary Information

The Release provides guidance regarding the posting of summary information by a public company on its website. According to the SEC, a company's use of summaries or overviews of more complete information located elsewhere on a company's website can be helpful to investors. However, the SEC warns that summaries or overviews should contain explanatory language notifying the user of the website that the information is only a summary or an overview. The SEC advises that summary information and overviews should be accompanied by features designed to alert the users of the website to the location of the detailed disclosure from which the summary information is derived or upon which such overview is based, as well as to other information about the company on its website.

The SEC has provided the following techniques that a company should consider to highlight the nature of summary or overview information relating to more complete information located elsewhere on the company's website:

- Use of appropriate titles – an appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
- Use of additional explanatory language – companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
- Use and placement of hyperlink – placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based may help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed; and
- Use of “layered” or “tiered” format – in addition to providing hyperlinks to more complete information, companies can organ-

ize their website presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a logical path into, and thereby obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.

Interactive Website Features

A discussion regarding the hosting of blogs, electronic shareholder forums or other interactive website features is beyond the scope of this article. The SEC has provided guidance on electronic shareholder forums in a different release. However, it should be noted that the SEC did provide guidance in the Release with respect to the hosting of, or participation in, blogs, electronic shareholder forums and other interactive website features. According to the SEC, the antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums and companies cannot require investors to raise protections under federal securities laws as a condition to entering or participating in a blog or forum.

Disclosure Controls and Procedures

In recent years, the SEC has adopted a number of rules that permit a public company to satisfy certain Exchange Act disclosure obligations by posting information on its website as an alternative to providing the information on an Exchange Act report. When a company elects to do so, the company's disclosure controls and procedures must apply to the posted information because it is information that is required to be disclosed in Exchange Act reports. The failure to make those disclosures on the company's website results in an incomplete Exchange Act report. The SEC also made clear that disclosure controls and procedures do not apply to other information posted on the company's website.

SECURITIES ACT LIABILITY

Except for specific instances discussed herein, the new guidance is generally relevant only to the extent that a company is not in the process of distributing securities under the Securities Act of 1933, or the Securities Act. The Release specifically applies to anti-fraud provisions and certain Exchange Act provisions. It is silent with respect to the Securities Act, and all of the guidance provided by the SEC and other commentators regarding the use of websites by a company in registration remains unchanged. If material posted on a company website is deemed an "offer" under the SEC's broad definition of such term, the company may be lia-

ble under the Securities Act for any misstatements in that material, or for issuing a non-compliant “prospectus.” Accordingly, companies conducting a distribution must continue to take steps to protect themselves from liability under the Securities Act. For example, companies must monitor their websites to make sure that the content does not constitute a general solicitation or “condition the market” in connection with an offering (i.e., “gun-jumping”). Any prospectus or other offering materials posted on a website must be updated and corrected. Last, if a prospectus links to a website, the content of the website becomes part of the prospectus, and, accordingly, a potential source of liability to the company.

CONCLUSION

In conclusion, we do not believe that the guidance in the Release will result in a significant change in the manner in which public companies disclose material information. Most companies will be best served by continuing to disclose material information through press releases and Form 8-Ks. The factors presented in the Release with respect to determining whether a website is public for purposes of Regulation FD may serve as a best practices framework for a public company to effectively manage and utilize its website. Accordingly, companies should consider adopting new website policies based upon the factors discussed in the Release. The adoption of such policies may not serve to eliminate the need to use press releases and Form 8-Ks to disclose material information at this time for purposes of Regulation FD but it will increase the visibility and utility of the website. The increased reliance on websites and the Internet as a research tool for investors is unquestionable and it is in the best interest of most public companies to maintain a well-developed investor relations site for the benefit of their shareholders and potential investors. The more a company’s website is used by the public, the more visible the website will be to the public. Consequently, over time, a company may find that it has reached a level of public visibility that satisfies the factors provided by the SEC in the Release. In addition, to the extent the SEC provides additional guidance in the future, or the factors become better defined by the SEC or the courts, a company may be in a better position to determine that information disseminated on its website is public for purposes of Regulation FD. Notwithstanding the guidance in the Release, companies must remain mindful of their exposure to potential liabilities under the Securities Act that may arise from the content of their websites when they are conducting a distribution.

PRACTICE POINTS FOR WEBSITE MAINTENANCE

A public company should have a written website policy that outlines or provides guidelines for the maintenance of its website. The policy should specify the persons that are authorized to add, delete or move content on the website and, preferably, should provide that company counsel is involved in website management. Set forth below are sugges-

tions that should be incorporated into a company's existing website policy based upon the new guidance.

General Website Maintenance

The URL of the company website should be designed to attract the public to the correct website.

- The URL of a company's website should be as similar to the company name as possible. In addition, if a company is commonly referred to by a shorter name, nickname or trademark, it should consider having multiple URLs based on the common references that direct the user to the company's home page. Popular product or service names may also be used as URLs if they help direct investors to the company website.
- A company should perform searches on its name or names through popular search engines. If the searches do not result in hits to the company websites on a high enough priority or at all, the company should try to understand why that is the case and consider changes to the website to remedy the situation. There are consultants that specialize in ensuring that URLs are picked up in Internet searches.

Disclosure of the website URL in press releases, public filings and other materials.

- A company should ensure that its disclosure includes a statement that the company posts material information on its website from time to time. For example, Sun Microsystems included the following disclosure regarding its website in the introduction to its business description in its last Form 10-K:

We periodically webcast company announcements, product launch events and executive presentations which can be viewed via our Investor Relations website. Additionally, we provide notifications of our material news including SEC filings, investor events, press releases and CEO blogs as part of the Official Investor Communications section of our Investor Relations website. The contents of these websites are not intended to be incorporated by reference into this report or in any other report or document we file and any references to these websites are intended to be inactive textual references only.

Any disclosures in Exchange Act reports regarding a company's website should include a disclaimer that is similar to the last sentence of the preceding legend.

- Sun Microsystems voluntarily included the URL address under the company phone number on the cover page of its last Form 10-K (the address and telephone number of the principal execu-

tive offices of the registrant are required to be included on the cover page of a Form 10-K, as well as on many other filings).

Disclosure of the website URL on product packaging, company promotional materials and in advertisements.

- The more people that are exposed to a company's website, the stronger the argument that the website is a public medium. Note that many television commercials now include the advertiser's website.

Disclosure of the website URL in any other public venue in which the company has an opportunity to post materials.

- A company's website URL should be prominently displayed when the company appears in public. For example, if a company participates in trade shows, scientific conferences, industry conferences, investor conferences or in other, similar events, the company's website URL should be displayed in an easily readable manner on the company's booth.

Posting material information about the company on its website, including all press releases.

- A company's website policy should include a consistent policy regarding the posting of information on its website. For example, a company should adopt a policy that all press releases are to be posted on its website as soon as practical after their release. The company should avoid selectively posting certain releases. Similarly, a company may choose to post webcasts of presentations, the slides used in presentations or both. In such cases, the company decision should be to post all of such materials as they become available, not to pick and choose from available materials. An exception can be made for duplicative materials.

Posting notice of scheduled events and other releases of material information.

- If the public has prior notice that materials are to be posted on a website, the company has a stronger argument that the materials, once posted, are in the public domain. For example, companies should consider giving the public advance notice that audio or video broadcasting of earnings calls or other similar events are going to be posted on a website if they don't do so already.

Informing the public that it posts important information on its website from time to time.

- See "Disclosure of the website URL in press releases, public filings and other materials" for an example.

Maintenance of a separate Investors Relations section on the website.

- It is important that all materials that might be relevant to investors be posted in a consistent location within the website.
- Many company websites have a "Recent News" or similarly titled box on the home page of the website in which the company posts links to recent press releases. The links are often on an

active scroll which attracts the web user's attention. The use of such boxes is advisable as a supplement to the posting of press releases in an investor relations or similar section of the website. If a company elects to use such boxes, the press releases should also be posted in a designated section within the Investor Relations section of the website and the website policy should include a consistent guideline regarding how long a link should appear in the box.

Maintenance of a separate archive area within the Investors Relations section.

- The website policy should include a consistent guideline regarding how long material information, including press releases, should be posted generally in the Investor Relations section of the website. Once the designated amount of time has passed, the information should remain available in an archive section of the website.

Title and date material information.

- To the extent possible, material information on a website should have a title and be dated. Dating material information will help keep the website content current and accurate.

Provide interactive sections on the website that allow the company to electronically deliver materials to interested persons and other "push" technology.

- It is advisable to conform websites to enable the Internet-based communications technology, such as RSS and other push technology, that allow the company to transmit information to users.
- Many Investor Relations sections allow people to sign up for e-mail delivery of notices regarding the issuance of press releases, the filing of documents on EDGAR, the posting of investor presentations, etc.

Policies Related to Hyperlinks

Provide written disclosure explaining the context of the hyperlink.

- Such disclosure should be drafted in a manner that makes it clear to the user of the website that the company is not adopting the hyperlinked information.
- Avoid language that implies that the company endorses the hyperlinked information.

Avoid selective linking to specific pieces of third-party information.

- The degree to which a company selectively chooses to post a hyperlink to a specific piece of third-party information will likely indicate the extent to which the company has a positive view or opinion about that information. In the Release, the SEC provides an example of a company including a hyperlink to a news article that is highly laudatory of management. According to the SEC, the company should consider explanatory language about the

source of the information 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.

Use exit notices or intermediate screens.

- Exit notices and intermediate screens should contain language that informs the website user that it is exiting the company's website and entering a third-party site, that the content on the third-party site is the responsibility of the third-party, not that of the company, and that the company disclaims liability for the linked content.

Avoid distinguishing a particular hyperlink from other hyperlinks on the website.

- Companies should avoid distinguishing one hyperlink from others, and all hyperlinks on a website should have the same prominence color, size and location, to the extent practical.

Include disclaimers on the website to indicate that the company is not adopting the third-party information and is not responsible for false or misleading information to which it has provided a hyperlink.

- The SEC has clearly stated that a disclaimer will not protect a company from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading. Nevertheless, use of a disclaimer does present some advantages.

Review hyperlinks in the event that the company files a registration statement or otherwise engages in an offering.

- The Release provides guidance with respect to liabilities under the Securities Exchange Act of 1934, not the Securities Act of 1933. Any information hyperlinked to offering materials on a website will be deemed part of the prospectus. A company will also be exposed to liability under the securities laws if it links to an offer of its securities on a third-party website.

If a company decides to host or participate in blogs, electronic shareholder forums or other interactive website features, it will need to implement robust policies to protect the company from potential liabilities. At a minimum, the company should ensure that proper notices are in place to indicate that the postings include materials from third-parties and are not necessarily provided by the company. In addition, the company should set guidelines regarding employee, director and other company personnel participating in such features. Any person posting information on behalf of the company should have detailed guidelines dictating the nature of the information he or she may post and the person should be well versed in the implications of the federal securities laws with respect to the posting of information on such forums.