# FREQUENTLY ASKED QUESTIONS ABOUT LIABILITY OF PUBLIC COMPANIES AND COMPANIES IN REGISTRATION FOR WEBSITE AND SOCIAL MEDIA CONTENT

## Understanding a Company's Potential Liability under the Securities Laws for Website Content

These FAQs address the ways in which company websites and social media platforms can give rise to securities law liability, and how companies can protect themselves by instituting comprehensive policies and procedures. The Securities and Exchange Commission (the "SEC") has acknowledged the role of company websites and social media platforms, such as Twitter, Facebook and YouTube (as well as their many competitors) (collectively, "social media"), in communicating with investors (*e.g.*, for purposes of addressing Regulation Fair Disclosure, or "Regulation FD"). When we refer to "web content" herein, we are referring to the company's website, as well as any content the company publishes via social media. These FAQs do not address the special concerns applicable to registered broker-dealers or registered investment advisers in their use of social media.

***When may a company be liable under the securities laws for the contents of a particular website or social media posting?***

A company may, in certain cases, be liable for material misstatements in, or omissions from, its web content if investors rely upon such information in making an investment decision regarding the company's securities. Companies also may be liable for web content under Regulation FD if the content contains material information that is available to analysts and other similar market participants and the website or social media channel is not deemed "public" for Regulation FD purposes. A public company is exposed to such liability when the website (or social media site) is established. Many public companies implement policies that impose an internal corporate approval process before web content is published or modified as part of their corporate communications policy or as part of their general Regulation FD policy, as well as to manage their exposure to liability. Issues may arise when business units create web content without the approval of their company's senior management or outside of a corporate policy. A company's general counsel should monitor web content created by business units.

More problematic is web content created by an employee without the authorization of his employer that displays the company's name, logo and/or other marks. It is likely that such companies will have redress against such an employee for trademark infringement, contract violations and other claims, but companies are subject to the risk of being found liable under the securities laws to third parties who reasonably believed that the content was owned or authorized by the company and relied on such information in making their investment decisions regarding the company.

***What other legal risks is a company exposed to in connection with its web content?***

In addition to potential liabilities under the securities laws, there are numerous types of potential risks, many of which are state law actions, including:

- defamation or libel;
- trade secrets;
- stock manipulation;
- breach of fiduciary duty;
- breach of contract; and
- copyright or trademark infringement.

***Is a company exposed to securities law liability for all of the content on its website or social media platforms?***

Not likely, but a company may be surprised to find that it has securities law liability for web content that is not necessarily investor-oriented. A company's web content should be scrutinized just as carefully as communications made in traditional off-line media. In an interpretive release entitled "Use of Electronic Media," (SEC Release No. 33-7856 (May 4, 2000), the SEC stated (*see* footnote 11) that liability under the federal securities laws is applied equally to electronic and paper-based media. This interpretative release is referred to herein as the "May 2000 Release."

According to the SEC in the May 2000 Release (*see* Section II(B)(1)), a company may be subject to the anti-fraud provisions of the federal securities laws for any page on its website if the page "reasonably could be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet." Depending on the circumstances, it is possible that a social media posting could satisfy this standard as well and therefore be subject to the anti-fraud provisions.

A company should assume that all or substantially all of its web content may expose it to liability under the securities laws. Material misstatements or omissions in web content may be violations of Rule 10b-5 under the Securities Exchange Act of 1934 (the "Exchange Act"). In addition, as the definition of the term "offer" in Section 2(a) of the Securities Act of 1933 (the "Securities Act") is interpreted broadly, many web pages, including web pages intended to serve market or promotional functions, might be considered to contain an offer under the Securities Act. However, it is likely that a court would more closely scrutinize the content on the investor relations pages of a website than other web content because investors are more likely to rely on that content in making investment decisions. Nevertheless, SEC guidance does not distinguish between investor relations pages and other website pages in this context.

*Source*: Examples of cases that held that misleading product and service information can be the basis for Rule 10b-5 liability include *In re Apple Computer Sec.*

*Litig.*, 886 F.2d 1109 (9th Cir. 1989) and *In re Carter-Wallace Sec. Litig.* 150 F.3d 153 (2d Cir. 1988).

***Can a company use marketing information for its products and services in its web content without being exposed to securities law liability?***

Probably, as long as the marketing information is not misleading. However, it is likely that a company will be subject to anti-fraud liability for the marketing information. *See "Is a company exposed to securities law liability for all of the content on its website or social media platforms?"*

A company's marketing department may aggressively use the company's website or social media platforms to promote the company's products and services. Product and service descriptions do not need to be bland, but shouldn't be untrue or wildly exaggerated. Courts may uphold traditional promotional content as allowable "puffery," but a company should ensure that this information is not misleading or untrue.

If a company is conducting an offering, it should ensure that the marketing or promotional web content is consistent with the type of marketing efforts engaged in by the company in the past (and, perhaps, ensure that the pages do not link to third-party marketing content or, if they do, ensure that appropriate disclaimers are in place). Promotional materials should be designed to arouse interest in the company's products or services.

As a precaution, companies should use disclaimers or legends to attempt to shield themselves from securities law liability for marketing or promotional information or materials. Preferably, such disclaimers or legends should appear on each web page containing marketing or promotional content. To the extent applicable, such disclaimers or legends should state that the content was provided by a third party. However, the SEC has made it clear that disclaimers do not necessarily insulate a company from liability. *See* the May 2000 Release, footnote 61 and the related text.

*Source*: Courts have found puffery relating to a company's products and services non-actionable under the securities laws in many instances. *See In re Stratosphere Corp. Sec. Litig.*, 1998 Lexis 4759 (D. Nev. April 7, 1998). Cases that held misleading product and service information to be the basis for Rule 10b-5 liability include *Warshaw v. Xoma*, 74 F.3d 955 (9th Cir. 1996); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109 (9th Cir. 1989); and *In re Carter-Wallace Sec. Litig.*, 150 F.3d 153 (2d Cir. 1988).

***Is a company liable for web content provided by a third party?***

It can be. The SEC stated clearly in the May 2000 Release that companies (and other market participants) can be liable under Section 10(b) and Rule 10b-5 for third-party information under certain circumstances. A company may be liable for third-party information that is hyperlinked from the company's website under the "entanglement" or "adoption" theories. Under the entanglement theory, third-party information may be attributed to a company depending on the level of pre-publication involvement by the company in the preparation of the information. Under the adoption theory, third-party information may be attributed to a company if the company explicitly or implicitly endorses or approves the information. The SEC repeated its guidance regarding hyperlinked information in an interpretive release entitled "Commission Guidance on the Use of Company Websites," which was published by the SEC on

August 1, 2008 (SEC Release No. 34-58288 (August 1, 2008)). This interpretive release is referred to herein as the "August 2008 Release." Increased caution is necessary with respect to "framed" third-party contact. Framing occurs when a web page becomes accessible within the four corners of another web site, the host website. Framed content increases the potential for investor confusion because the website user may not recognize that the framed content is not the content of the host website. Even if the website user is aware that he or she is accessing framed content, it is not unreasonable for the investor to think that the framed website is affiliated with the host website. In either case, the risk is that the company will be deemed to have adopted the framed content and, accordingly, be potentially liable for any material misstatements or omissions therein. *See* the May 2000 Release.

According to the August 2008 Release, third-party information may be attributed to a company if the company involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the third-party information. In determining whether a company has adopted third-party information that is hyperlinked to its website, the SEC will consider the following factors, among others:

- context of the hyperlink;
- risk of confusing investors; and
- presentation of the hyperlinked information.

In general, the SEC will assume that a company has posted a hyperlink because it believes the linked information will be of interest to the users of its website (*see* Section II(B)(2) of the May 2000 Release)

. Accordingly, companies are advised to provide written disclosure explaining why they are providing the hyperlink. Such disclosure may serve to make it clear to the user of the website that the company is not adopting the hyperlinked information. Companies also should consider other methods to explain the usage of hyperlinked information, such as "exit notices" or "intermediate screens." The exit notices or intermediate screens should contain language that informs the website user that it is leaving the company's website and is entering into 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.

The risk of liability under the securities laws may be allocated contractually if there is an agreement governing the provision of the information. For example, a company can impose an indemnification obligation on the third party that created the content. However, indemnification may not provide sufficient protection, if at all, for such potential liability. *See "Can a company be liable for a third-party link even if it is silent about the third-party information?"*

An important exception to the foregoing relates to a company that is engaged in a securities distribution. There is a strong inference that a company that is engaged in a securities distribution has adopted the hyperlinked information on its website if such information meets the definition of "offer to sell," "offer for sale" or "offer" under Section 2 of the Securities Act, and, accordingly, a company is subject to liability therefor under the federal securities laws. Presumably, this strong inference extends to other social media platforms as well. For other qualifications relating to offering materials, *see "Can a company link from offering materials on its website to third-party content?"*

As a precaution, companies should use disclaimers or legends to attempt to shield themselves from securities law liability for marketing or promotional information or materials. Preferably, such disclaimers or legends should appear on each web page containing marketing or promotional content, and, to the extent applicable, such disclaimers or legends should state that the content was provided by a third party. However, the SEC has made it clear that disclaimers do not necessarily insulate a company from liability; if the facts and circumstances indicate that the company has adopted the information, the company will remain exposed to liability notwithstanding the use of a legend.

Note that in the May 2000 Release, footnotes 53-55 and the accompanying text, the SEC addresses the application of the "adoption" theory, but not the "entanglement" theory, to linked information on third-party websites.

*Source*: The SEC addressed these issues in Section II(B) of the May 2000 Release and in Section II(B)(2) of the August 2008 Release.

***May a company be indemnified for liabilities that arise from third-party web content?***

Yes, but not always. Congress and the SEC have had long-standing policy objections regarding specific disclaimers in respect of anti-fraud liability, including a position that indemnification of such liability is contrary to the federal securities laws and public policy. In fact, companies are required to provide an undertaking regarding the SEC's position regarding indemnification when they file a registration statement, and certain registration statements require the registrant to include an acknowledgment of the position. *See* Item 510 of Regulation S-K and the undertaking set forth in Item 512(h) of Regulation S-K.

***What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?***

In the August 2008 Release, the SEC provides a non-exhaustive list of factors that influence the analysis of whether a company has "adopted" hyperlinked materials. The non-exclusive factors include:

- 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.

*Source*: The SEC's link framework was originally discussed in Section II(B) of the May 2000 Release and was restated by the SEC in Section II(B)(2) of the August 2008 Release.

***How do a company's statements about a third party render the third-party content attributable to the company?***

If a company expressly or implicitly approves, endorses or supports third-party content, the content is likely to be considered attributable to the company. In addition, subtler statements also may lead to attribution. This is commonly referred to as the adoption theory.

Accordingly, a company must be careful about what it says about third-party content.

The SEC has provided examples of statements that indicate that a company is endorsing hyperlinked information, such as - "XYZ's website contains the best description of our business that is currently available," An example of a company supporting hyperlinked information may involve the hyperlink being accompanied by a statement such as the following: "As reported in Today's Widget, our company is the leading producer of widgets worldwide." *See* Section II(B)(1)(a) of SEC Release No. 33-7856 (May 4, 2000).

*Source*: The examples are in Section II(B)(1)(a) of the May 2000 Release. *See also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997), in which a company was found to adopt and endorse an analyst's projections by stating at a securities analysts' conference that it was "comfortable" with analyst's earnings forecasts within a certain range. The *Burlington* case may be contrasted with *Malone v. Microdyne Corp.*, 26 F.3d 471 (4th Cir. 1994) in which the chairman/president of a company stated that he was comfortable with an analyst's earnings estimate for his company and the court held that the statement was not actionable. *See also* Section II(B)(2) of the August 2008 Release.

***Can a company be liable for a third-party link even if it is silent about the third-party information?***

Yes. The context of a third-party link on a company's website may imply that the linked content is attributable to the company. In the May 2000 Release, the SEC notes that in situations where a wealth of information is available regarding a particular matter, but the material accessible by hyperlinks on a company's website is not representative of the available information, the accessibility of the hyperlink may be deemed an endorsement by the company of the hyperlinked information. Another example provided in the release involves selectively establishing and terminating hyperlinks to a third-party website depending on the nature of the information about the company on a particular website or websites. Such conduct may be viewed as an attempt to control the flow of information to investors. In both of these examples, by being selective regarding the hyperlinks, a company may be found to adopt the hyperlinked information. In the August 2008 Release, the SEC provided an example of a company that posted on its website a hyperlink to a news article that was highly laudatory of the company's management. Absent explanatory language to the contrary, the SEC warns that there may be an inference that the company is commenting on, or even approving the accuracy of, the news article, or that the company was involved in its preparation. Further, if, for example, a company posts a link to only one of a number of analysts' reports, especially if it is the only analyst report that is positive, then, absent other efforts, it may be inferred that the company has approved or endorsed the report, and, hence, the company may be found liable for the contents of the report. Lastly, any attempt by a company to distinguish a particular hyperlink from other hyperlinks on its website may be deemed to be the adoption or endorsement of the linked content. Companies should avoid distinguishing one hyperlink from others, and all hyperlinks on a website should have the same prominence, color, size and, if practical, location.

*Source*: The SEC specifically noted this in Section II(B)(1)(c) of the May 2000 Release. *See also* Section II(B)(2) of the August 2008 Release.

For social media platforms like Facebook and Twitter, this analysis is more complex. A company doesn't have a static website on which it can share many hyperlinks, with equal prominence and at the same time. It has a "feed" or a "timeline" that is constantly updating and, by its nature, ranks some items as more prominent (because they are more current) than others. Companies must therefore be even more diligent in sharing third-party information via social media so they are not accused of selective linking to positive information about the company. *See also "May a company be selective regarding the information to which it hyperlinks from its web content?"*

***May a company be selective regarding the information to which it hyperlinks from its web content?***

Yes, but it will increase the company's potential exposure to liability under the securities laws. Selective linking is a circumstance that the SEC advises companies to consider in their analysis of whether a company should be liable for third-party content and may be used against a company in this context. According to SEC guidance, the degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information may be indicative of the company's view or opinion of the linked information. For example, if a company selects only a small portion of information on a particular subject for which there is a wealth of information, the SEC may deem such link to be an endorsement of the hyperlinked information. In addition, if a company selectively links, or terminates links, based on the nature of the information contained in the hyperlinked websites, the SEC may deem such conduct to be an attempt to control the flow of information that is available to investors and, accordingly, the adoption by the company of such information. *See "What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?" See also "Can a company be liable for a third-party link even if it is silent about the third-party information?"* and "*Should a company list which analysts cover it on its website?*"

*Source*: The SEC's selective linking discussion is contained in Section II(B)(1)(c) of the May 2000 Release. *See also* the August 2008 Release.

***How does the "envelope theory" apply to links in the SEC's link framework?***

In an interpretive release entitled "Use of Electronic Media for Delivery Purposes," which release is referred to herein as the "1995 Release," the SEC provided guidance regarding a company's ability to post documents on a website to satisfy the delivery requirements of the Securities Act. With some exceptions, under the federal securities laws, in a registered offering, sales literature may not be delivered to a proposed investor unless the applicable registration statement has been declared effective and a prospectus accompanies or precedes the sales literature. According to the guidance set forth in the 1995 Release, documents that are located in close proximity to each other on a website are considered to be delivered together. In addition, documents that are hyperlinked to each other are considered to be delivered together as if hard copies of the same documents were contained in the same envelope. The premises underlying the foregoing are commonly referred to as the "envelope theory." The

1995 Release provides the following examples to explain the envelope theory:

- If a company that is engaged in a distribution posts a final prospectus on a website, supplemental sales literature may be posted on the same website as long as the final prospectus remains posted for the entire period that delivery is required. The sales literature and the final prospectus must be accessible from the same menu (or the "buttons" that a user must click to access the documents must be in close proximity to each other), be clearly identified and appear in close proximity to each other. In this example, since the documents are accessible from the same menu (or if the "buttons" a user clicks to access them are in close proximity to each other), they are deemed to be delivered together. A company relying on this example to deliver sales literature should ensure that the methods of accessing the final prospectus and the sales literature are posted in close proximity to each other and that the final prospectus is not buried in the website. Note though that the sales literature may be accessed before the final prospectus is viewed or downloaded. *See* the 1995 Release, example 14.

- A company that is engaged in a distribution may post sales literature anywhere on a website (for example, in a discussion forum), if the literature contains a hyperlink to the company's final prospectus. As long as a reader that accesses the sales literature can click a button marked "final prospectus" and be hyperlinked to the company's final prospectus, the sales literature is deemed to have been delivered with the final prospectus. *See* the 1995 Release, example 15.

- During the waiting period, a company engaged in a distribution posts a copy of a preliminary prospectus on its website, and its website contains a hyperlink to a research report published by a brokerage firm. The accessibility of the research report is deemed to be an offer in violation of Section 5(b) of the Securities Act. *See* the 1995 Release, example 16.

The envelope theory provides that all content on a website is deemed to be delivered with a prospectus that appears on a website. Information on a website is only deemed part of a Section 10 prospectus if the company that maintains the website (or someone on its behalf), acts in a manner that makes the information part of the prospectus. *See* "Website Content During Registration."

*Source*: The SEC confirmed that the "envelope theory" is alive and well in just the delivery context in Section II(A)(4) of the May 2000 Release and that examples 14, 15 and 16 from the 1995 Release are still good precedents for electronic delivery. It is worth noting that a company that is in registration must still search its website(s) for impermissible free writing. Even if content is not deemed part of a posted prospectus, it may still be impermissible free writing.

***Can a company link from offering materials on its website to third-party content?***

Yes, but it increases the company's potential liability. In addition to the general guidance regarding third-party content set forth in these FAQs, according to the SEC, if a company includes a hyperlink within a Section 10 prospectus, or any other document required to be filed or delivered under the federal securities laws, the linked content becomes part of the prospectus or other document. Accordingly, rarely, if ever, should a company include a hyperlink in offering materials.

If third-party materials become part of a company's prospectus, the company will have liability under the securities laws for such materials and will have to file and/or deliver the linked content (depending on whether the offering materials that contain the link need to be filed or delivered). This also raises other issues, such as whether the third party needs to consent to have its content filed or delivered, as well as if the materials constitute an impermissible prospectus under the securities laws.

*Source*: *See* the May 2000 Release.

***Can a company be held liable under the securities laws for content provided by the company to a third party to be posted on the third-party's website?***

Yes, but this risk of liability can be reduced if the company shifts the risk to the third party through a contractual agreement.

However, the parties may not be able to shift all risks. For example, a company may contract with third parties to post its offering materials on third-party platforms. In such a case, the company remains liable under the securities laws for the offering materials.

If the content contributed by a company to a third party is not offering material or an "offer," courts may analyze whether investors could reasonably believe that content on a third-party's platform is the company's content. Under this analysis, the fact that content is not labeled as coming from the company may persuade a court.

***Can a company be liable if one of its social media platforms is "hacked" and misleading content is posted?***

Perhaps. There have been cases where companies were held liable for not preventing foreseeable intervening criminal acts. Failing to have adequate security could fall within that realm.

In the electronic delivery context, the SEC has stated that companies must take reasonable precautions to ensure the integrity and security of the information delivered electronically. *See* the May 2000 Release. However, under the anti-fraud provisions of Rule 10b-5 under the Exchange Act, a company must be reckless to be held liable; mere negligence is not actionable.

***Are companies being sued for their website content?***

Yes. The plaintiffs' bar recognizes that corporate websites can be sources for actionable statements in connection with securities class actions. They look for overly optimistic statements or forward-looking information on web pages that companies may overlook when scrubbing their websites, such as the "About Us" or "President's Message" sections.

## Disclaimer Use in Corporate Web Content

***Can a disclaimer protect a company from liability for links to third-party content?***

Yes, but not completely. The SEC has made it clear that disclaimers cannot provide full protection from liability. The SEC is concerned that unscrupulous companies may use a disclaimer as a shield from liability for making false or misleading statements.

The adequacy of a disclaimer is determined on a facts and circumstances basis. According to the SEC's guidance in the May 2000 Release (footnote 61), the use of a disclaimer is one factor that may be considered in determining whether a company is liable for linked content. The SEC repeated this guidance in Section II(B)(2) of the August 2008 Release. However, the SEC has made it clear that disclaimers do not completely insulate a company from liability, for links or otherwise. Disclaimers should be drafted in a manner that is specific to the applicable risks.

On social media platforms, companies have less control over the interface, and less "room" to include recommended disclaimers, so they must be even more careful not to include or link to content that could give rise to liability.

*Source*: The SEC's statement that disclaimers cannot guarantee that companies will not be liable is in footnote 61 and accompanying text of the May 2000 Release. The SEC repeated this guidance in the August 2008 Release.

***How do companies typically provide web disclaimers?***

With a "Terms and Conditions" or a "Legal" link on their home pages that generally is in small print at the bottom of the pages. In many cases, the "Terms and Conditions" or "Legal" link is a static link, meaning that it appears on each page of the website. Often, the link itself is not descriptive, and visitors are not urged to click it.

If a link to a disclaimer is merely called "Terms and Conditions," it may not be reasonable to expect investors to know that the linked page contains disclaimers. Accordingly, companies are advised to post disclaimers in locations and in a manner that will attract a reader's attention. For example, disclaimers can be located in text boxes on applicable web pages or in pop-up boxes that are activated when the website user clicks on specified content.

Disclaimers for third-party content should be part of exit notices or intermediate screens that appear when the user is directed to the linked content.

In the August 2008 Release, the SEC provided that a company may post summary information on its website and cautioned companies to use explanatory language to warn the reader of the summary, overview or abbreviated nature of the content. Such explanatory language may be provided in the form of a disclaimer.

***How many web pages within a corporate website typically contain web disclaimers?***

In many websites, disclaimers are limited to the home page and/or the investor relations page. However, many websites post disclaimers in a static link, meaning they appear on each page on the website, usually on the bottom of the page. This is the safer course of action. Links on a website that do not link to the home page ("deep links") should have disclaimers accessible from each web page. Otherwise, an investor (or other website visitor) arguably may not have knowledge, whether constructive or otherwise, that the disclaimers exist.

## Updating Website Content

***Does a company have a duty to update web content?***

Maybe. Outside of the web context, courts have disagreed for quite some time over whether companies have a duty to update statements made by a company that were true when made. Some commentators have applied the same arguments to websites because website content is continuously available. In other words, the website content is continuously "published" and "alive" and, consequently, the line between information that was misleading when "made" and information that becomes misleading after subsequent events have come to pass is blurred. *See* "*For how long does a company have a duty to update (if such a duty exists)?*" According to SEC Release No. 34-58288, Section II(B)(1), the maintenance of previously posted materials or statements on a company's website is not deemed to be the reissuance or reposting of such materials or information solely because they remain accessible to the public, nor is there a duty to update such information.

A company should make it apparent to the users of its website that posted materials or statements speak to a certain date or to an earlier period. The SEC has stated that if such distinctions are not apparent to the reasonable person, the posted materials should be separately identified as historical or previously posted materials or statements and located in a separate section of the company's website containing previously posted materials or statements. Of course, the foregoing analysis does not apply if a company affirmatively restates or reissues a statement. Generally, reissued or restated information should be accurate when reissued or restated.

It seems likely that in the case of Facebook or Twitter postings, which by their nature are updates as of a particular time, the SEC would be more likely to find that a reasonable person would understand that the posting speaks only as of a certain time.

It is worth noting that Congress specifically did not impose a duty to update forward-looking information when it passed the Private Securities Litigation Reform Act of 1995, or the PSLRA. Section 27A(d) of the Securities Act and Section 21E(d) of the Exchange Act, enacted under the PSLRA, state that a duty to update doesn't necessarily arise merely by making a forward-looking statement. However, there clearly is a duty to update a company's SEC reporting disclosure if the company is conducting an offering, otherwise has an SEC filing obligation or voluntarily makes a filing. Accordingly, a company should reconsider and review its web content if it is conducting an offering or intends to do so.

*Sources*: For purposes of website content, *see* the August 2008 Release. With respect to the duty to update outside of the website context, since *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990), courts have been divided as to whether there is a duty to update disclosure that subsequently becomes misleading. For example, the following courts found a duty to update (at least to some extent): *In re Omnicare, Inc. Securities Litig.*, 769 F.3d 455 (6th Cir. 2014); *In re IBM Corp. Securities Litig.*, 163 F.3d 102 (2nd Cir. 1998); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3rd Cir. 1997); *Weiner v. Quaker Oats, Inc.*, 129 F.3d 310 (3rd Cir. 1997); and *Shaw v. Digital Equipment*, 82 F.3d 1194 (1st Cir. 1996). Note, however, that in the *Shaw* case, the First Circuit held that cautiously optimistic comments may not create a duty to update in certain cases.

On the other hand, the following courts did not find a duty to update: *Finnerty v. Stiefel Laboratories, Inc.*, 756 F.3d 1310 (11th Cir. 2014); *Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997); *San Leandro*

*Emergency Med. Plan v. Phillip Morris Cos.*, 75 F.3d 801 (2d Cir. 1996); *Gross v. Summa Four, Inc.*, 93 F.3d 987 (1st Cir. 1996); *Stransky v. Cummins Engine Co.*, 51 F.3d 1329 (7th Cir. 1995); and *Hillson Partners v. Adage Inc.*, 42 F.3d 204 (4th Cir. 1994). The 9th Circuit's position on the duty to update is ill defined and unclear.

***Does a company have a duty to correct web content?***

It depends. Most courts find that a company has a duty to correct information if it discovers the information was misleading or inaccurate when stated. *See "Should a company have an investor relations web page?"* Following this theory, as the anti-fraud provisions of the federal securities laws apply to web content, companies should correct web content that was misleading or inaccurate when posted, particularly if the content may be deemed to be material to an investor.

In certain circumstances, regulations allow a company to post certain documents on its website rather than filing the documents on EDGAR. A material misstatement or omission in any such document would be deemed a violation of the regulations relating to such document. Accordingly, material misstatements or omissions in such documents should be corrected to the same extent that a company would correct a document filed on EDGAR.

*Source*: The SEC stated in Release No. 33-6084 (August 2, 1979) that, depending on the circumstances, companies have a duty to correct information in SEC filings that was misleading from the outset or that was made misleading by subsequent events. *See also Ross v. A.H. Robbins Co.*, 465 F. Supp. 904, 908 (S.D.N.Y. 1979), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1975), *cert. denied*, 446 U.S. 946 (1980); *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 169 (2d Cir. 1998).

With respect to Exchange Act filings made on a website, *see* the August 2008 Release.

***Does a company have a duty to update information which it did not have a duty to disclose?***

Probably not. Case law indicates that there is no duty to update statements that are not made in an SEC filing and do not contain material information. The argument is that the information is not material, so there is no duty (or need) to update the information. However, it is quite difficult to know with certainty whether information is "material," since a determination regarding materiality is based on a facts and circumstances test and likely will only be made in hindsight.

*Source*: In *US v. Schiff*, 602 F.3d 152 (3d Cir. 2010); *Hillson Partners L.P. v. Adage*, 42 F.3d 204 (4th Cir. 1994); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993) *cert. denied*, 511 U.S. 1017 (1994); and *Gross v. Summa Four Inc.*, 93 F.3d 987 (1st Cir. 1996), the courts did not find a duty to update for predictions that were not material under the federal securities laws.

***Is there a difference between a duty to update and a duty to correct?***

Yes. Most courts find that companies have a duty to correct incorrect statements, but it is uncertain if companies have a duty to update statements that were not accurate when made.

A duty to correct applies to facts that are misleading or inaccurate when made. A duty to update applies to facts that become misleading or inaccurate by virtue of the passage of time or due to subsequent events.

As a practical matter, since courts often are not clear about the difference between these two duties, companies are advised to continuously monitor their disclosures, and to consider updating or correcting information on a case by case basis. On the other hand, companies should be careful not to indicate to the market that they have assumed or otherwise adopted a duty to update.

*Source*: *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997), in which the court noted a difference between the two duties.

***For how long does a company have a duty to update (if such a duty exists)?***

For as long as the fact is "alive."

Unfortunately, there is no bright line test to determine the lifespan of a fact. Courts apply a facts and circumstances test. Generally, a fact may be deemed "alive" as long as the market could reasonably rely on the fact. A legend disclaiming the duty to update may help a company argue that a prior statement is not "alive."

With respect to information posted on a company's website, the SEC has stated that the maintenance of previously posted materials or statements on a company's website is not deemed to be the reissuance or reposting of such materials or information solely because the materials remain accessible to the public, nor is there a duty to update such information, absent other factors. *See* the August 2008 Release.

*Source*: In *A.H. Robins*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980), the court noted that one of the "facts and circumstances" to consider was "whether subsequent similar types of information are available (*e.g.*, a two-year old annual report is stale if a more recent report is available). *See also City of Edinburgh Council v. Pfizer, Inc.*,754 F.3d 159 (3d Cir. 2014); *Winnick v. Pac. Gateway Exch. Inc.* (9th Cir. 2003); the August 2008 Release Section II(B)(1).

***How can a company avoid creating a duty to update information posted to the web?***

A company should take care to ensure that it does not act in a manner that is deemed to affirmatively restate or reissue a statement made on one of its web platforms. If a company affirmatively restates or reissues a statement, the company may create a duty to update the statement so that it is accurate as of the date it is reissued or restated. In addition, a company should make sure that, to the extent applicable, its web content is presented in a manner that makes it apparent to the reasonable person that the content speaks as of a certain date or earlier period.

A company should actively manage its web content through the following activities, among others:

- Empowering the company's disclosure committee or similar body to monitor web disclosures.
- Creating a separate "archive" web page for historical or previously-posted information (with an "archive" label in the title of the page).
- Clearly dating content that is posted, particularly for time-sensitive material (including dating content that has been moved to an "archive" section). *See "What are the best ways to date content on a website?"*
- Designating one or more employees (including someone from the legal department) to be responsible for the process of dating information or moving information to a section

identified as historical or containing previously-posted information.

- Regularly verifying that content remains accurate and timely, and if it is not, removing or archiving the content. Offering materials should be promptly removed after the prospectus delivery period ends so that investors trading in the company's securities on the open market can't claim that they relied on the disclosure in these materials.
- Regularly verifying that links are active and that third-party content does not impose additional liability risks. *See "Is a company liable for web content provided by a third party?"*

Some companies expressly disclaim a duty to update statements on their websites. It is not clear that these disclaimers are effective, but they likely would not be deemed effective by a court if a company were reckless in not updating its content. In other words, a mere disclaimer might not be enough to protect a company. Companies are advised to regularly monitor their websites as discussed herein, rather than relying on the use of disclaimers.

Social media sites like Twitter and Facebook operate more or less like timelines, so the dating of content is automatically imposed. Likewise, media sharing sites like YouTube display the date that material was posted. As a result, social media content typically presents a less significant dating problem than traditional website content.

***What are the best ways to date content on a website?***

A company should date materials on its website in a manner that makes it apparent to the reasonable investor that the materials or statements are made as of the identified date or as of an earlier period. A company should also use terminology that does not suggest or imply that the company actively updates the content on the website and avoid acting in a manner that suggests it has adopted a practice of updating such information. For example, some practitioners advise that a website should state that content was "last posted on March 31, 2008" rather than stating "last updated March 31, 2008." Similarly, a common caption on IR web pages is "Current SEC Filings," but it is better to use the label "Recent SEC Filings."

Companies should not rely solely on the date in a press release byline as a dating practice. *See "Is a date in the byline of a posted press release sufficient to avoid a duty to update?"* Companies should have a special archival section on IR web pages for older press releases or otherwise organize the press releases by date. A date should also be included in the link that leads to the press release (so that it is clearly visible even before the press release is accessed and puts an investor on notice as to its "freshness").

***Is a date in the byline of a posted press release sufficient to avoid a duty to update?***

It should be. *See "What are the best ways to date content on a website?"*

***Does similar content with a later date automatically update other content on a company's website?***

There is no clear answer to this question. Accordingly, companies should include dates on all documents posted on their websites and should regularly move older documents to an "archive" section for historical or previously-posted documents. Some commentators argue that documents should be read in the context of other documents posted on the website and that more recent online disclosures should automatically be considered to update the older content. *See "Does a company have a duty to update web content?"*

*Source*: In its August 9, 2000, comment letter on the May 2000 Release, the Committee on Federal Regulation of Securities of the Business Law Section of the ABA noted that lack of a date on a posted document should not be used against a company.

## Investment Advice on Corporate Websites

***Can a company's web content be considered investment advice?***

If a company's web content contains or links to media articles or other information relating to its future financial performance, the company may be deemed to be providing investment advice under either the adoption or entanglement theories.

A disclaimer may help a company avoid investment adviser status, but likely will be effective only if the web content truly does not provide investment advice. *See* "Understanding a Company's Potential Liability under the Securities Laws for Website Content."

## Developing a Corporate Website

***What should be counsel's role in developing web content?***

Company counsel should have an active role under the powers created by a company's web content development policy. Company counsel should also play a role in creating the web content development policy and in amending and supplementing the policy from time to time, as appropriate. In addition, company counsel should participate in formulating a policy or process relating to public communications, or a Fair Disclosure Policy, that would include periodic website (and social media presence) maintenance.

Ideally, company counsel should review all content before it is posted on, or linked to, a company's website or social media accounts. Counsel should ensure that there is a process to regularly monitor content for continued accuracy and relevance.

Counsel should also encourage the company's investor relations department (rather than the marketing department) to prepare the IR web page of the company website, if such a page is maintained. IR professionals are more likely to be sensitive to securities law matters than marketing personnel. If a service provider creates or maintains a company's IR web page, counsel should be actively involved to ensure undue risks are not taken.

As a practical matter, review by counsel of content prior to its posting or linking may not be feasible, particularly in larger or technology-oriented companies that have multiple web platforms. At a minimum, company counsel should regularly review all investor relations or corporate web content.

As part of its review, counsel should draft disclaimers that are tailored for specific content and consider drafting risk factors for the IR web page. A company might describe the same risk factors it describes in its SEC filings (with a disclaimer that it was drafted as of the filing date), providing any necessary updates on an ongoing basis, or the company might simply provide a link to the risk factors section in the latest SEC filing.

***What should be counsel's role in developing an intranet?***

Just as with a website, company counsel should pre-screen or at least regularly review intranet content. To the extent feasible, company counsel should treat the content of an intranet the same as counsel treats the content on the website. *See "What should be counsel's role in developing web content?"*

Counsel should review disclaimers used on the intranet. Disclaimers should be used on intranets because employees (who also are stockholders or option holders in many cases) and others who have intranet access can bring claims based on the intranet content. Disclaimers may help limit liability, but are subject to the limitations discussed in these FAQs.

***What is a web content development policy?***

A web content development policy provides internal guidance as to what type of content can be posted on a company's web platforms (including its intranet) and describes the process for approving content before it is posted. The web content development policy goal should be to create a uniform web strategy for the company and to reduce the risk of liability under the securities or other laws. Larger companies may have numerous websites and social media accounts created by distinct business units which can result in conflicting content of disparate quality. A company's webmasters should have limited control over the substance of content to reduce the risk of liability under the securities or other laws.

***What should be included in a web content development policy?***

A web content development policy should contain a clear description of who should preapprove and monitor content for a company's web platforms (including its intranet). Counsel, either in-house or outside, should play an active role in the approval and monitoring process. However, it probably isn't necessary for counsel to approve each kernel of information, particularly if counsel played a role in drafting that information (*e.g.*, SEC filings and press releases). *See "What should be counsel's role in developing web content?"*

The web content development policy also should prescribe how the web content should be monitored to correct, archive, or remove content to reduce the risk of creating a duty to update, and require disclaimers that are tailored for specific content. For example, forward-looking information should have a disclaimer either linked to it or near it.

The policy also should require that the company maintain records describing the precise content of the company's web content at regular intervals. This enables the company to demonstrate what was posted at any given time (although this information could be harmful in a lawsuit if content is not properly managed).

***Must documents posted on a company's website be posted in a printer-friendly format?***

Not necessarily. For purposes of federal securities laws, materials posted by a company on its website need to be posted in a printer-friendly format only if expressly required by applicable rules and regulations. For example, with respect to the availability of proxy materials on the Internet, Rule 14a-16(c) under the Exchange Act requires proxy materials to be presented in a format convenient for both reading online and printing on paper when delivered electronically. A company should also consider whether any state corporate laws are relevant to this question.

*Source*: The August 2008 Release.

## Regulation FD and Company Web Content

Regulation FD 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 same information. Enumerated persons covered by Regulation FD are limited to securities market professionals such as brokers, investment advisors, investment managers, buy-side and sell-side analysts and shareholders who it is reasonably foreseeable would trade on the basis of the information. There are many exceptions and qualifications to Regulation FD which will not be described in these FAQs.

To be diligent regarding its web content and compliance with Regulation FD, a company should consider whether the content is "public" for purposes of Regulation FD. If not, the posting of material nonpublic information may be deemed to be selective disclosure to enumerated persons unless the same information is made public in another manner that complies with Regulation FD. In addition, if a company discloses material nonpublic information to an enumerated person, can the simultaneous or prompt posting of the same information on the company's website ensure that the disclosure is compliant with Regulation FD? These considerations are the subject of the following FAQs.

In the following FAQs, there is discussion of certain factors provided by the SEC for companies to use in determining, on their own, whether they meet certain criteria relating to the "public" nature of web content. These factors are considerably subjective and, absent testing of the facts and circumstances before the SEC or the courts, one cannot be certain how to interpret the tests. There are no safe harbors to rely on.

***Are materials that are posted on a company's website public for purposes of Regulation FD?***

It depends. The August 2008 Release answers a number of questions regarding Regulation FD, including how a company may evaluate whether and when information posted on its website is public so that the disclosure of that information to an enumerated person will not be a violation of Regulation FD. According to the SEC, companies should consider the following factors:

- whether the posting of information on a company website disseminates the information in a manner that makes it available to the securities marketplace in general; and
- whether there has been a reasonable waiting period for investors and the market to react to the posted information.

*Source*: The August 2008 Release

***Are materials that are posted to (or linked from) social media platforms public for purposes of Regulation FD?***

Just as with the Company's website, the answer is that it depends. On April 2, 2013, the SEC issued guidance providing that social media platforms may be used by companies to disseminate material information, without running afoul of Regulation FD.[1] The SEC emphasized that companies should apply the August 2008 Release's guidance regarding the disclosure of material information on company websites when analyzing whether a social media channel is in fact a "recognized channel of distribution," including that investors must be provided with notice of the specific channels that a company will use in order to disseminate material nonpublic information.

The SEC confirmed that Regulation FD applies to social media and other emerging means of communication used by companies in the same way that it applies to company websites. The SEC indicates that every situation must be evaluated on its own and that disclosure of material nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the social media site may be used to disseminate information about the company, is unlikely to qualify as an acceptable method of disclosure.

At this point in time, it is likely best for companies to utilize social media as a supplement to, and not a replacement for, the more traditional means for disseminating material non-public information.

***How can a company determine whether its web content is a recognized channel of distribution and whether posting information on the website properly disseminates the information for purposes of Regulation FD?***

The determination of whether a particular company's website is a recognized distribution channel will depend on the steps that the company has taken to alert the market to the existence of its website and its disclosure practices, as well as the use by investors and the market of the company's website. To analyze the dissemination question for purposes of Regulation FD, a company should focus on the manner in which information is posted on the company's website, and the timely accessibility of such information to investors and the markets. The SEC has provided the following non-exclusive factors for companies to consider in evaluating whether their websites are recognized distribution channels and whether company information on such sites is "posted and accessible," and therefore, "disseminated:"

- Whether and how a company lets investors and the markets know that the company has a website and that they should look at the company's website for information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its website address and disclose that it routinely posts important information on its website;
- 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;

[1] The SEC issued the guidance in the form of a Report of Investigation under Section 21(a) of the Exchange Act. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69729 (April 2, 2013) (the "21(a) Report") available at http://www.sec.gov/litigation/investreport/34-69279.pdf.

- 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. For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their websites. On the other hand, companies with less of a market following, which may include companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's website and that investors should look at the company website for current information about the company;
- 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. The SEC states that it does not believe, however, that it is necessary that push technology be used in order for the information to be disseminated, although that may be one factor to consider in evaluating the accessibility to the information;
- Whether the company keeps its website current and accurate;
- Whether the company uses other methods in addition to its 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.

*Source*: The August 2008 Release.

Although social media is being more broadly used, it may still be too early to conclude that it is a recognized channel of distribution. While this is an evolving area, most people interested in finding investment-related information would likely not first turn to a company's Facebook or Twitter account. Instead investors are more likely to visit a company's website or the SEC's EDGAR website. Companies have also not routinely listed their social media addresses in periodic reports or press releases; rather, these alternative addresses are more likely to be found in promotional materials for a company's products or services. Following the release of the 21(a) Report, a number of companies identified various social media sites through which they intended to disseminate information; however, practices are still evolving.

As a tool to disseminate information, social media has both significant advantages and disadvantages over a traditional website. Social media is far more advanced in utilizing push technology to communicate. Unlike a traditional website, a Twitter message or Facebook posting can be pushed instantaneously to all followers or friends. A company utilizing social media does not have to wait for an investor to affirmatively check its website, but can notify its followers immediately when new information is posted. This instantaneous mode of communication comes with a significant downside, however, as the amount of information that can be transmitted is limited. Unlike a website that can deliver multiple pages of information with embedded files and tables, most social media outlets can only communicate a fraction of that amount of information. In addition, social media requires that, in most cases, individuals must sign up and be accepted in order to participate in the communication, so it is not a mechanism for communication that is generally open to the public.

The evaluation of whether there has been a reasonable waiting period for investors to react to information provided through social media will ultimately depend on the popularity of each company's social media presence. For example, with companies such as Google and Coca Cola that each have millions of followers, a message sent over their Twitter or Facebook accounts would likely be considered adequately publicly disseminated within a short period of time after being transmitted. By contrast, for companies with far fewer followers, there may need to be a longer time lag after the information is communicated before the information could be considered adequately publicly disseminated.

***How can a company determine whether investors and the market have been afforded a reasonable waiting period to react to information posted on its website for purposes of Regulation FD?***

The determination depends on the particular facts and circumstances of the dissemination of the information in question. The SEC has provided the following factors that a company may consider in making the determination:

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

The SEC advises that if information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted. For example, prior to posting the information on the website, the company should consider filing or furnishing such information to the SEC or 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 and the market aware of the future posting of information, and will, thereby, facilitate the broad dissemination of the information.

The SEC also advises that case law relating to the waiting period in the context of insider trading may provide guidance to companies for purposes of Regulation FD.

Companies should keep in mind that although posting information on a company's website in a location and format readily accessible to the general public would not be "selective" disclosure, the information may not be "public" for purposes of determining whether a subsequent selective disclosure implicates Regulation FD. Accordingly, if, based on the analysis discussed herein, information on a company's website is not public, then subsequent selective disclosure of that information, if material, may be a violation of Regulation FD if not remedied accordingly.

*Source*: The August 2008 Release.

***For purposes of Regulation FD, may a company use its website to provide a broad, non-exclusionary distribution of information to the public that was the subject of selective disclosure?***

Maybe. Generally, under Regulation FD, a company must file or furnish a Current Report on Form 8-K or use an alternative method or methods of disclosure that are reasonably designed to provide broad, non-exclusionary distribution of the information to the public: simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. According to the SEC, due to the current usage of the Internet, the posting of information on a company's website may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD for some companies in certain circumstances (and, hence, avoid the need to file a Form 8-K). The analysis must be made by a company on an individual basis.

In undertaking this analysis, a company must first consider whether its website is a recognized distribution channel and whether the information is "posted and accessible" and, therefore, "disseminated." The factors to be considered with this analysis have been described in these FAQs. *See "Are materials that are posted on a company's website public for purposes of Regulation FD?" See also "How can a company determine whether its web content is a recognized channel of distribution and whether posting information on the website properly disseminates the information for purposes of Regulation FD?"* and *"How can a company determine whether investors and the market have been afforded a reasonable waiting period to react to information posted on its website for purposes of Regulation FD?"* The company's ability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made must also be part of that analysis. Lastly, according to Regulation FD, the requirement to provide "broad, non-exclusionary distribution of information" may be satisfied through more than one medium, so the analysis may consider the attributes of the website combined with other means used by the company to distribute information to the market.

*Source*: The August 2008 Release.

## What Are Companies Posting on their IR Web Pages?

***Should a company have an investor relations web page?***

Yes. Although a company is not required by law to maintain a website, the use of websites by public companies is encouraged by the SEC, most of the national securities exchanges and market participants. The New York Stock Exchange requires that its listed companies maintain a website, subject to certain exceptions. *See* Item 307.00 of the NYSE's Listed Company Manual. However, none of the other national securities exchanges expressly requires the maintenance of a website. The lack of an IR web page on a public company's website, or the lack of a website, may project a negative view of the company. Over the last few years, IR web pages have become an important resource for market participants.

There are numerous reasons why a public company would maintain an IR web page. An IR web page is the appropriate place to post documents, or links to documents, that are required or suggested to be made available on the company's website. For example, Items 101(e)(3) and (4) of Regulation S-K, depending on the type of issuer, either encourage or require companies to disclose in various public filings the URL of their websites if they have one, and provide that if a public company does not post its periodic reports, including amendments to such reports, on its website, it must disclose that fact in certain reports and other filings and state its reasons for not doing so. Similarly, the instructions to many forms of registration statements include a provision that directs the registrant to provide the URL of its website, if available. In addition, if a public company maintains a corporate website, it is required to post on the website all of the Section 16 filings made by the company's officers, directors, and 10% stockholders with respect to the company. Finally, in certain circumstances, a public company has the choice to satisfy certain Exchange Act filing requirements by posting the information exclusively on the company's website instead of filing the information on EDGAR. For example, public companies may post their board committee charters on their websites rather than providing the charters in a proxy or information statement. In addition, public companies may disclose non-GAAP financial measures and information required by Regulation G on their websites. There are other examples. *See* SEC Release No. 34-58288, Section II(B).

Since 2009, issuers have also begun complying with the SEC's requirement that public companies provide access to their financial statements in an interactive, online format (compliance has been phased in, first for larger issuers, increasingly for all issuers).

IR web pages are also useful for the posting of materials in compliance with the rules and regulations of national securities exchanges. For example, under Rule 5250 of the Nasdaq Manual, a company listed on Nasdaq may satisfy its obligation to make annual or interim reports available to its shareholders by posting the reports on its website together with an undertaking to provide shareholders with a hard copy of the reports upon request, free of charge. IR web pages may also be used as the location for dissemination of public information for purposes of Regulation FD. *See "For purposes of Regulation FD, may a company use its website to provide a broad, non-exclusionary distribution of information to the public that was the subject of selective disclosure?"*

The uses for an IR web page are expanding. In January 2007, the SEC adopted universal E-Proxy rules that require certain public companies to post proxy materials on a website (other than EDGAR). Large Accelerated Filers were required to do so as of January 1, 2008. Other categories of filers have been required to do so since January 1, 2009. An IR web page is an obvious location for such postings. Many public companies now have entire web pages devoted to their annual meeting of shareholders or otherwise devote a significant portion of their websites to annual meeting materials.

An IR web page may be used to host an electronic shareholder forum or a blog. E-forums and blogs facilitate the exchange of information about a company. Many companies have one or more blogs that are accessible directly from their websites. Many blogs may be accessed directly from a company's investor relations section. Many companies post links to Twitter or Facebook and mirror content posted to those platforms. On February 25, 2008, certain amendments to the federal proxy rules, which were adopted to facilitate the use of e-forums, became effective.

***What are the implications of using an IR web page to post information?***

As mentioned above, there are circumstances in which a public company may satisfy certain Exchange Act filing obligations by posting information exclusively on its website rather than on EDGAR. A public company's disclosure controls and procedures would apply to such information, as its disclosure is required under the Exchange Act. Accordingly, a public company that elects to make use of its website to satisfy Exchange Act filing obligations must make sure that its disclosure controls and procedures address such website disclosures.

Public companies are now required to provide financial statement information in a form, commonly referred to as XBRL, that can be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software and used with investment models in other software formats. The rule requires that each filer covered by the rule provide the financial data on its corporate website, if it has one. Filers are not able to satisfy this obligation by providing a hyperlink to the same documents on the SEC's website.

IR web pages are useful to help investors easily find the type of information they desire. Moreover, if all investment-related information is grouped in one place, the company may gain some protection from securities law liability for the other content on the website on the grounds that such content does not relate to investment decisions. Note that the converse argument is likely to be made by the plaintiffs' bar: that since content on an IR web page was directed toward investors, all of the content on the IR web page should be subject to the securities laws.

With these considerations in mind, IR web pages are not the place for hype or other promotional content due to the anti-fraud provisions of the federal securities laws. It may even be wise to place the "President's Message" from a glossy annual report on the company's home page rather than the IR page, although detaching it from the rest of a posted annual report is not a good idea. (SEC-mandated documents should appear online as they do off-line, unless two different versions are filed with the SEC.)

***What materials are commonly included on IR web pages?***

Relatively common documents included on an IR web page include:

- earnings releases and other press releases;
- corporate governance policies or guidelines;
- the company's charter documents;
- the company's code of ethics;
- SEC filings, either directly or by linking to an EDGAR database;
- stockholder meeting information;
- glossy annual reports;
- analyst conference call announcements, webcasts, or scripts;
- stock prices and stock price data (often delayed 20 minutes);
- frequently asked questions about obtaining IR-related information;
- financial statements carved out from SEC filings (this could be risky since they are not complete documents; however, *see* "*Can a company post summary information on its website?*");
- XBRL data;
- management speeches or presentations;
- corporate profiles;
- whistleblower contact details; and
- transfer agent information.

Most of these items also should include appropriate disclaimers, particularly if they contain forward-looking information.

***Can a company post summary information on its website?***

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

The SEC has provided the following techniques that a public company should consider to highlight the nature of summary or overview information related 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 could 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 organize 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.

*Source*: The August 2008 Release, Section II(B)(3).

***What are the implications for a company if it hosts blogs or electronic shareholder forums on its website?***

A public company may be liable for statements made by or on behalf of the company on a blog or an electronic shareholder forum. All communications made by or on behalf of a public company are subject to the anti-fraud provisions of the federal securities laws. This is the case whether or not the blog or forum is hosted by the public company.

The SEC has acknowledged the utility of blogs and electronic shareholder forums and has stated that it wants to promote the use of blogs and electronic shareholder forums as they are important means for companies to maintain a dialogue with their various constituencies. If companies host blogs or electronic shareholder forums on their websites, they must keep in mind that the content thereof is subject to the anti-fraud provisions of the federal securities laws. A company should designate specific persons within the organization to post information on the blogs and/or forums and should restrict all other officers, directors, employees, consultants and contractors from posting any information on such blogs or forums, to the extent possible. Preferably, the company should adopt a written policy for the designated persons to follow with respect to their postings. The designated persons should be well trained in the legal, business and marketing implications of the statements made and have ready access to the company's internal and external counsel. In addition, such persons should be aware of limitations on disclosure outside of the federal securities laws that are specific to their industry or industries. For example, pharmaceutical companies want to limit some of the information they disclose about their regulatory progress as doing so may run afoul of FDA regulations or otherwise cause a problem with the FDA. The company should make it clear to its designated persons that they are not allowed to post information on behalf of the company in a manner that is not compliant with the company's policy. Companies should consider implementing controls and procedures to monitor statements made by or on behalf of the company on blogs and electronic shareholder forums.

Public companies should also be aware that they cannot require investors to waive any of the protections of the federal securities laws as a condition to entering into or participating in a blog or a forum. Any term or condition of a blog or electronic shareholder forum 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 is inconsistent with the federal securities laws and, according to the SEC, may violate the anti-waiver provisions of the federal securities laws.

***Can a company be liable for stock prices posted on its website?***

Yes, although it is unlikely. One possible claim is that a posted stock price was inaccurate and an investor relied on it to place a trade order.

Many public companies post recent stock price quotes on their websites. The stock price data is provided by a third party, and a 20-minute delay is typical. Companies should make sure that a disclaimer accompanies the stock price data warning users of the website that the data is provided by a third party and may be inaccurate, and that the company is not responsible for the data.

Many of these disclaimers also state that the third parties that provide the data do not have liability for the data, even though they would appear to be more culpable if the data were inaccurate. Companies should attempt to negotiate their contracts with third parties to ensure that they are indemnified if the third party provides incorrect data. *See "Is a company liable for web content provided by a third party?"*

***Can a company be liable for linking to a website that has incorrect stock prices?***

Not likely. Based upon SEC guidance and provided that the company followed the guidance set forth herein regarding hyperlinked information and the use of disclaimers, it would appear that there would have to be unusual circumstances, such as the fact that the company was aware that the stock price data would be incorrect, for the company to be liable for such a link. *See "What is the SEC's analytical framework to determine if companies are liable for third party hyperlinked content?"*

Nevertheless, companies should disclaim responsibility for the third-party information, and the disclaimer should contain a warning that the stock price data may be delayed and does not include real-time quotes (if true). *See "Is a company liable for web content provided by a third party?"*

***May a company selectively choose which press releases it includes on its website?***

Probably, but it is not advisable. There is no duty to post any of a company's press releases on its website, nor is there a duty to post all of them if some are posted. Some companies choose to post only investor-oriented press releases on their websites, or all press releases except for press releases relating to relatively insignificant matters. However, unless a company has a compelling rationale to selectively choose which press releases it includes on its website, and the selection criteria does not result in disclosure that is misleading to investors, a company should post either all or none of its press releases on its website.

If a company chooses to post only some of its press releases, it is advisable not to disclose its selection criteria. That would diminish the company's flexibility in making such decisions and allow others to question its application of the criteria. The company should also make sure it is clear to the website user that the website contains "selected" press releases, not all press releases.

## What Types of Web Content are "Offers"?

***Can web content inadvertently be considered an offer to sell or solicitation to buy securities?***

Yes. The term "offer" is interpreted broadly under the federal securities laws. The definition of the term "offer" is interpreted to include any communication that conditions the market or arouses public interest in a company's securities, even if the company does not believe that this information involves an "offer" of its securities. This interpretation may include web-based promotional product and services information generated by a company.

Another issue is whether promotional product and services information posted by a company is considered a "general solicitation or advertisement" with respect to any offering. If it is, the posting of such information would cause the company to be ineligible to rely on certain exemptions from registration under the federal securities laws set forth in Regulation D, the exemptions from registration that companies typically rely on in connection with private placements, or require that the company undertake additional investor verification or other steps.

***How can a company avoid "inadvertent" offers?***

The safest way to avoid an inadvertent offer is to have counsel review content, either before it is posted or regularly thereafter, and to avoid statements that essentially encourage investors to buy the company's stock. In addition, a company should take particular care to ensure that it does not post misleading information about the company or its products or services.

Rules 168 and 169 under the Securities Act provide non-exclusive safe harbors that allow public companies to disclose certain factual information or forward-looking statements without being deemed to be engaging in an "offer." Generally, to be protected by either safe harbor, the information must not relate to an offering, and the type of information disclosed must be similar to that which the company has previously disclosed in the ordinary course of its business. By complying with either rule, a company may post certain information without being deemed to have made an "offer."

Rule 433 under the Securities Act provides guidance with respect to the posting of, or linking to, historical information of a company during an offering. According to Rule 433(e), historical information that is identified as such and located in a separate section of a company's website containing historical information (which has not been incorporated by reference or otherwise included in a prospectus) and has not been otherwise used or referred to in connection with an offering, will not be considered a current offer or a free writing prospectus. Accordingly, if a company has not already done so, it should clearly mark historical information on its website as such in a clear manner.

For discussion regarding marketing efforts during an offering, *see "Can a company use marketing information for its products and services in its web content without being exposed to securities law liability?"*

Note that well known seasoned issuers (WKSIs) have less of a concern in this regard. Rule 163 under the

Securities Act allows WKSIs to make certain offers as long as they are made with a free writing prospectus, subject to certain terms and conditions. Such free writing prospectuses must contain certain legends and must be filed with the SEC, subject to certain exceptions. If a WKSI complies with these rules, its website may be changed to include a free writing prospectus that makes an offer of securities.

***Can an issuer use its own website in order to conduct intrastate offerings pursuant to the Section 3(a)(11) exemption?***

In a C&DI, the Staff of the SEC noted that Securities Act Rule 147 does not prohibit general advertising or general solicitation. Any such general advertising or solicitation, however, must be conducted in a manner consistent with the requirement that offers made in reliance on Section 3(a)(11) and Rule 147 be made only to persons resident within the state or territory of which the issuer is a resident.

In its guidance the Staff of the SEC notes that, "Although whether a particular communication is an 'offer' of securities will depend on all of the facts and circumstances, using such established Internet presence to convey information about specific investment opportunities would likely involve offers to residents outside the particular state in which the issuer did business." The guidance contemplates that issuers may be able to implement technological approaches to limit their communications of any offers only to residents of a particular state.

*Source*: *See* Question 141.03; 141.05, Securities Act Rules, Questions of General Applicability, available at https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

***Can an issuer use an internet-based portal in order to promote an offering to residents of a single state in accordance with a state statute or regulation intended to enable securities crowdfunding within that state?***

In a series of C&DIs, the Staff of the SEC noted that, assuming the issuer met the other conditions of Rule 147, use of the internet would not be incompatible with a claim of exemption under Rule 147 if the portal implements adequate measures so that offers of securities are made only to persons resident in the relevant state or territory. In the context of an offering conducted in accordance with state crowdfunding requirements, such measures would include, at a minimum, disclaimers and restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law, and limiting access to information about specific investment opportunities to persons who confirm they are residents of the relevant state (for example, by providing a representation as to residence or in-state residence information, such as a zip code or residence address).

*Source*: *See* Question 141.04, Securities Act Rules, Questions of General Applicability

***Has the SEC provided a definition of a "general solicitation"?***

It has always been understood that the SEC would view the types of communications that qualify as a "general solicitation" broadly. For example, any communication concerning an offering of securities that is not made to persons with whom the issuer or an agent acting on the issuer's behalf does not have a pre-existing substantive relationship and is not bilateral likely would be viewed as a "general solicitation." In C&DI guidance, the Staff of the SEC has stated that the use of an unrestricted, publicly available website constitutes a general solicitation and is not consistent with the prohibition on general solicitation and advertising in Rule 502(c) if the website contains an offer of securities.

The Staff of the SEC also has reiterated that factual business information that "does not condition the public mind or arouse public interest in a securities offering is not an offer and may be disseminated widely."

***In the absence of having a pre-existing substantive relationship with the offeree, are there certain communications about a securities offering that would not be viewed as a "general solicitation"?***

Recently, the Staff of the SEC clarified that there are "long-standing practices where issuers and persons acting on their behalf are introduced to prospective investors who are members of an informal, personal network of individuals with experience investing in private offerings." The guidance relates principally to networks of angel investors; however, the guidance also notes that it continues to regard the determination of whether a communication constitutes a "general solicitation" as a fact-specific assessment. In its guidance, the Staff notes that "the greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation."

***How can an issuer or an agent acting on its behalf establish a substantive relationship with potential offerees prior to any offering? Can an entity other than the issuer or a registered broker-dealer establish a pre-existing substantive relationship?***

Over the years, the Staff of the SEC has issued a number of no-action letters that have addressed the types of inquiries and activities that must be undertaken by a broker-dealer and also by a non-broker-dealer operator of an internet-based platform in order to establish a pre-existing substantive relationship. In its more recent guidance, issued in the form of C&DIs, as well as in a no-action letter, the SEC Staff largely restates its prior views. Citing to a 1985 no-action letter, a C&DI states that, "a 'pre-existing' relationship is one that the issuer has formed with an offeree prior to the commencement of the securities offering or, alternatively, that was established through either a registered broker-dealer or investment adviser prior to the registered broker-dealer or investment adviser participation in the offering." The Staff also notes that a registered investment adviser, acting on an issuer's behalf, may establish a pre-existing substantive relationship with potential offerees. In order for a relationship to be deemed "substantive" the issuer (or a person acting on its behalf) must have obtained sufficient information to evaluate, and must, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in order to determine the offeree's status. The Staff of the SEC also issued a no-action letter in which it passed upon certain methods used by a platform-based sponsor in order to establish a substantive relationship with potential investors in venture capital funds. The no-action letter is significant in that it extends the prior guidance relating to reliance by an issuer on the pre-existing relationship formed by a broker-dealer with its clients to a registered investment adviser. Also, the letter makes clear that in order to establish a pre-existing substantive relationship, a registered person or other intermediary must not only obtain information about a prospective investor's financial sophistication and status, but it also must have the means to, and must, verify this information.

*Source*: *See* Compliance and Disclosure Interpretations, questions 256.29 to 256.32, Securities Act Rules, available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#256.23; Citizen VC, Inc. (Aug. 6, 2015), available at https://www.sec.gov/divisions/corpfin/cf-noaction/2015/citizen-vc-inc-080615-502.htm.

## Website Content During Registration

***What should a company do in connection with its web content before filing a registration statement?***

Under the Securities Act, a company is prohibited from making a public offer of its securities before it files a registration statement, subject to certain exceptions. Under the federal securities laws, the term "offer" is defined broadly. *See "What Types of Website Content are 'Offers'?"* Companies should not post any information about an offering unless the type of information posted is consistent with Rule 135 under the Securities Act. It should be noted that WKSIs have greater flexibility with respect to communications or "offers" prior to the filing of a registration statement and, consequently, may have more flexibility with regard to website communications. Subject to certain terms and conditions, Rule 163 under the Securities Act allows a WKSI to make an offer through a free writing prospectus, which could include the posting of materials on a website, prior to the filing of a registration statement. Rule 433 under the Securities Act provides further guidance with respect to the offer of a company's securities on the company's website. Among other terms, the free writing prospectus must generally contain certain legends and a copy must be filed with the SEC.

Before filing a registration statement, to the extent a company has historical information posted on its website, it should confirm that the information is identified as such and posted in the appropriate section of the company's website. In addition, companies should ensure that their content does not "condition the market" (often referred to as "gun jumping").

Because impermissible communications in connection with an offering can have significant consequences for the company and offering participants, social media use should be subject to special controls by companies contemplating a public offering. In some cases, companies contemplating an initial public offering have stopped making postings on company-sponsored Twitter accounts. Ongoing monitoring of social media communications is necessary to avoid concerns that written offers are being made other than by means of a prospectus or other permitted communications. This means that company counsel or other appropriate company personnel should review all of the content on the company's websites, social media platforms and intranets (not just the IR web pages), as well as all sites belonging to its affiliates and strategic partners. All of these sites should be "scrubbed" so that any content that may possibly be deemed an "offer" or gun jumping is removed or revised. Note that the scrubbing itself may signal the market that the company intends to offer securities, so the scrubbing should be as inconspicuous as possible. If anyone notices (which easily can be tracked with online "spiders" that report when web content is revised) and asks questions, it is prudent to follow a "no comment" policy.

Scrubbing web content should include removing all hyperlinks that relate to financial information, analysts' reports, or any information or communications that may be considered improper during an offering.

Title I of the Jumpstart Our Business Startups Act (the "JOBS Act"), titled "Reopening American Capital Markets to Emerging Growth Companies," establishes a new category of issuer, an "emerging growth company," for which certain disclosure and other requirements will be phased in over time following a company's initial public offering. The JOBS Act amends the Securities Act and the Exchange Act, to add a definition of an "emerging growth company." An emerging growth company is defined as: an issuer with total gross revenues of less than $1.07 billion (adjusted from $1 billion in March 2017, and subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. A company remains an "emerging growth company" until the earliest of: (A) the last day of the fiscal year during which the issuer has total annual gross revenues in excess of a $1.07 billion (subject to inflationary indexing); (B) the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act; (C) the date on which such issuer has, during the prior three-year period, issued more than $1 billion in non-convertible debt; or (D) the date on which the issuer is deemed a "large accelerated filer." An issuer will not be able to qualify as an emerging growth company if it first sold its common stock in a registered offering prior to December 8, 2011.

An emerging growth company may submit a draft registration statement to the SEC for confidential nonpublic review prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the SEC no later than 21 days prior to the issuer's commencement of a road show. Emerging growth companies may engage in oral or written communications with qualified institutional buyers, or QIBs, and institutional accredited investors (as defined in Rule 501 of the Securities Act) in order to gauge their interest in a proposed initial public offering either prior to or following the first filing of the registration statement. While these provisions provide increased flexibility around communications for emerging growth companies prior to and after filing a registration statement for an initial public offering, the requirement that communications only take place with QIBs and institutional accredited investors substantially limits the availability of more broadly accessible social media as a means for making any such communications.

*Source*: In the May 2000 Release, the SEC clarified that its guidance regarding which corporate communications can be made during the pre-filing and waiting periods applies equally to companies going public. *See also "How can a company avoid 'inadvertent' offers?"*

***What should a company do in connection with its web content after filing a registration statement but before the registration statement is declared effective?***

During the pre-effective period, a company should continue to ensure that historical information is posted in compliance with Rule 433 and that its web content, and that of its affiliates or strategic partners, does not "condition the market" or constitute "gun jumping." Only ongoing routine business communications should be posted. Preferably, such content should be in compliance with either of Rules 168, 169 or 433. Generally, a company may continue to advertise its products or services in a manner consistent with past practice.

No mention of the offering should be made other than in the form of a Section 10(a) prospectus or a tombstone ad type announcement since a company cannot make a "written" offer during this period. A company that posts a tombstone ad should ensure that it does not contain too much information. The SEC Staff strictly construes the information that can be included in tombstone ads and routinely looks at a company's website (and general online "presence") as part of its review process. Rules 134 and 135 under the Securities Act provide guidance as to the type of information that may be disclosed under various circumstances. Companies may expand the type of information they disclose to the public after the filing of a registration statement by including the information in a free writing prospectus and complying with applicable rules regarding the use of legends and the filing of a free writing prospectus with the SEC, among other terms and conditions. *See* Rules 164 and 433 under the Securities Act.

It is best not to modify a website in a dramatic manner until after the offering is closed. Any website facelifts during the waiting period may be deemed to be related to the offering and, accordingly, need to be justified as not being part of an effort to condition the market, which may be difficult to do. On the other hand, many companies continuously revise their web presence in the ordinary course of business. A historical pattern of frequent changes may support an argument that a revision during the waiting period is not conditioning the market, but the company should discuss its plans with the SEC Staff in advance, depending on the circumstances.

In the May 2000 Release, the SEC stated (*see* Section II(B)(2)) that a company going public that contemporaneously establishes a new website may have a problem. A company that establishes a new website may need to apply the guidance more strictly when evaluating web content since it does not have an established history of ordinary-course business communications, and the mere creation of a website may condition the market.

***Can material from a website be incorporated by reference into a registration statement?***

No. Certain registration statements allow materials from other SEC filings to be incorporated by reference. Incorporation by reference may apply to historical filings and/or to future filings, depending on the type of form. Such registration statements do not allow the registrant to incorporate materials by reference from other documents. This is an important concern for any company that has an effective registration statement and is relying on incorporation by reference to keep the related prospectus updated. Even if the company felt comfortable that its website was "public" for purposes of Regulation FD, the company should still need to file Form 8-Ks to announce new information to make sure that the information is deemed part of the prospectus.

## Analysts' Reports and Webcasts

***Can a company be liable for an analyst's research report if it links to it?***

It depends. A company can be liable under the securities laws for the content of an analyst's report under the "entanglement" theory if it had a sufficient level of pre-publication involvement in the preparation of the report. A company may also be liable under the securities laws under a post-publication adoption theory if the company endorses or approves the linked report, explicitly or implicitly. Lastly, if a company posts a link to only some of the analyst reports available, especially if linked reports are the only ones that are positive, then, absent other efforts, it may be inferred that the company has approved or endorsed the report and, hence, is liable for its contents. It is worth noting that most practitioners advise against links to analysts' reports. *See "Is a company liable for web content provided by a third party?"*

***Should a company post analysts' conference call transcripts on its website?***

Only if the appropriate disclaimer for written forward-looking information accompanies the forward-looking information in the transcript, since a transcript is a written communication.

Of course, a transcript makes it easier for the plaintiffs' bar to find materials to use against a company in connection with securities litigation, particularly if the transcript contains projections. The plaintiffs' bar reviews a company's websites closely to identify statements to cite in complaints.

Overall, companies have been reluctant to post transcripts of analysts' conference calls on their websites and very few have done so, probably due to these incremental risks compared to audio webcasts.

***How can a company invoke the safe harbor for forward-looking information in webcast conference calls?***

Companies should invoke the safe harbor for forward-looking information in webcasts as they would for any written communication.

A webcast that is broadcast live is deemed not to be a graphic communication. Accordingly, it may be deemed an oral communication under the PSLRA and should open with a verbal disclaimer. A webcast that is archived or otherwise made available after the live transmission is deemed a graphic communication and, therefore, a written communication under the securities laws. Most companies that broadcast their webcasts will also make archival copies of the webcast available. Accordingly, companies should be prepared to treat their webcasts as written communications. Note that disclaimers for forward-looking written statements should be longer and more detailed than disclaimers for oral forward-looking statements. In either case, meaningful cautionary language should accompany the forward-looking information in the webcasts, and companies should include an appropriate form of disclaimer for forward-looking statements.

It is a best practice to ensure that the disclaimers included in webcasts include factors that note how actual results may vary from the forward-looking information in the Webcast and include meaningful cautionary language that "accompanies" the information.

***How can a company invoke the safe harbor for forward-looking information for conference call slide shows or scripts posted on a website?***

A company can invoke the safe harbor for forward-looking information in a conference call presentation by posting its form of legend on the slide show or script that is tailored to the applicable forward-looking information. Textual content on a website, including conference call slides or scripts, are graphic communications as defined in Rule 405 under the Securities Act, and, accordingly, are written communications, as defined in Rule 405 of the Securities Act. Accordingly, they are subject to the safe harbor for forward-looking statements.

If a script is posted on a company's website, the company should be careful to tailor the safe harbor to answers during the call's "Q&A." The script should not be posted until company counsel has had time to review the script after the call. Companies should archive or delete a script after a relatively short period of time to minimize the risk that outdated information is deemed "alive."

Note that it is unclear if a link to cautionary language satisfies the "accompany" requirement for the safe harbor for forward-looking statements.

***Should a company list which analysts cover the company on its website?***

A mere list of the analysts covering a particular company probably does not constitute entanglement. However, companies should avoid posting links to reports or posting actual reports on their websites, as doing so may be viewed as entanglement.

Selective listing by a company of only a number of the analysts that cover it may be viewed as misleading, especially if the analysts who are omitted did not favorably cover the company. If the list includes all applicable analysts, a disclaimer should accompany the list indicating that the company believes the list is complete, but that there are no assurances that the company did not miss any other covering analyst.

A disclaimer should also state that the company:

- does not review analysts' reports (or if a company does review them for factual accuracy, indicate that it does not review for substance); and
- does not endorse any analysts' reports.

The list should include the date it was created (although the company should try to keep the list updated) and indicate that it is a list of known analysts who have covered the company since a specified date (but also disclose that there is a possibility that other analysts cover the company).

The list may include each analyst's phone number or e-mail address. However, as a courtesy, companies may want to get permission from each analyst before posting such information.

Note that links to analyst reports can be problematic and should be avoided. *See "Can a company be liable for an analyst's research report if it links to it?"*

***Should a company post or link to First Call consensus estimates?***

Probably not. Although investors may find such information to be useful, it is the type of forward-looking information that often is wrong and can expose the company to a lawsuit.

By posting these estimates, companies may encounter other problems. For example, a company may believe that a consensus estimate is wrong after having posted it on its website. A company may incur liability under a post-publication adoption theory or for selective disclosure if it attempts to have an analyst revise its estimates.

Rather than post the estimates on their websites, some companies merely link to First Call consensus estimates. If a company does provide such a link, it should post a disclaimer adjacent to the information or use an exit notice for a link and consider meeting the other factors in the SEC's link framework so that it does not inadvertently adopt the estimates. *See "What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?"*

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