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COMPANY WEB SITES AND THE SECURITIES LAWS

The proliferation of company web sites and instant Internet access to information have fundamentally altered the landscape for corporate disclosure and investor relations. Myriad companies have tapped the technologies of the digital revolution to promote transparency and efficiency in the preparation and distribution of corporate information. These changes have raised legal questions, however, as to the permissible parameters of web-based disclosure under the federal securities laws.

In a recent interpretive release titled "*Commission Guidance on the Use of Company Web Sites*," the Securities and Exchange Commission answers some of these questions, and, in the process, delivers perhaps its strongest statement to date in support of "the continued development of company web sites as a significant vehicle for the dissemination to investors of important company information."¹ The Release provides guidance on a number of key issues involving the role of web sites in corporate disclosure, including

- when information posted on a company web site may be considered "public" or publicly distributed for purposes of rules against selective disclosure under Regulation FD,
- the liability framework for various types of electronic data (including historical or archived data, information on third-party web sites, summary information, blogs and shareholder forums),
- disclosure controls and procedures for web content, and
- printability requirements.

The Release comes by direct invitation of the SEC's own Advisory Committee on Improvements to Financial Reporting ("CIFiR"). In its final report presented on the same day as the Release,² CIFiR recommended, among other things, that the SEC address the use of

¹ *Commission Guidance on the Use of Company Web Sites*, Rel. No. 34-58288, at 4 (Aug. 1, 2008), ("Release"). References to page numbers in the Release refer to the page numbers in the PDF version of the release that is available on the SEC's web site at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

² *Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission* (Aug. 1, 2008), avail. at <http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf>.

company web sites for the disclosure of corporate information.³ The SEC was receptive to this urging, having been mindful of Internet issues for some time. In 2000, for instance, the agency addressed electronic delivery of documents and related matters,⁴ and, in 2005, it spoke to Internet issues relating to offerings under the Securities Act of 1933.⁵ And, hardly a month has gone by during the term of the current SEC chair, Christopher Cox, that he and other members of the SEC's senior staff have not made information technology a headline of current efforts to modernize the SEC's own electronic filing system, EDGAR. Indeed, in May of this year, the SEC proposed that extensible business reporting language or, XBRL, be phased in as a mandatory reporting tool.⁶

Taken with prior and current rulemakings and general interest in enhancing the SEC's use of technology, the Release shows an emerging sense of confidence that the SEC can leverage new technologies to further its regulatory objectives, including to stimulate enhanced public company disclosure.⁷ This is a far cry from days, not long ago, when issues on this subject within the agency were burdened by debate over the width of the "digital divide."

Guidance

Context for Guidance

The Release provides important context for its guidance, laying out a framework for future, and likely frequent, consideration of technology issues, that rests on three footings.⁸

- Where access to information is freely available to all, use of electronic media is *at least equal* to other methods of delivering information or making it available to investors and the market.
- Allowing a company to provide information on its web site *may be better* for investors than requiring that EDGAR be the exclusive venue and format for company disclosures.

³ *Id.* at 108. CIFI's recommendation reads, in part, as follows:

Recommendation 4.2: The SEC should issue a new comprehensive interpretive release regarding the use of corporate web sites for disclosures of corporate information, which addresses issues such as liability for information presented in a summary format, treatment of hyperlinked information from within or outside a company's web site, treatment of (non-GAAP financial disclosures and GAAP reconciliations, and clarification of the public availability of information disclosed on a reporting company's web site.

⁴ *Use of Electronic Media*, Rel. No. 33-7856 (Apr. 28, 2000) (the "2000 Electronics Release"), *avail. at* <http://www.sec.gov/rules/interp/34-42728.htm>.

⁵ *Securities Offering Reform*, Rel. No. 33-8591 (Jul. 19, 2005), *avail. at* <http://www.sec.gov/rules/final/33-8591.pdf>.

⁶ *Interactive Data to Improve Financial Reporting*, Rel. No. 33-8924 (May 30, 2008), *avail. at* <http://www.sec.gov/rules/proposed/2008/33-8924.pdf>.

⁷ *See, e.g.*, Release at 10.

Indeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws, we wish to continue to encourage companies to develop their web sites in compliance with the federal securities laws so that they can serve as effective information and analytical tools for investors. Enhanced company web site presentation of information can benefit investors of all types by enabling them to gather information about a company at a level of detail they believe is satisfactory for their purposes. [*Footnotes omitted*]

⁸ *Id.* at 11.

- The availability of information in electronic form (whether on EDGAR or a company web site) *is the superior method* of providing information to most investors, as compared to other methods.

Regulation FD

Whether and When Information is Public for Purposes of Regulation FD

Regulation FD prohibits selective disclosure of material non-public information.⁹ The question of whether information posted on a web site can be deemed public for purposes of Regulation FD has gained prominence with increased reliance by companies on web sites. Until now, the SEC had side-stepped direct guidance on this issue. The Release ends that temporization, saying quite specifically that there are circumstances under which information posted on a company web site may be considered “public” under Regulation FD. Those circumstances, the Release notes, are based on three considerations—whether and when (1) a company web site is a recognized channel of distribution, (2) posting of information on a company web site disseminates the information in such a manner as to make it available to the securities marketplace in general, and (3) there has been a reasonable waiting period for investors and the market to react to the posted information.

Information posted to a company web site will satisfy the first two considerations, the “channel of distribution” and “dissemination” requirements, when a company has taken sufficient steps to alert the market to its web site and disclosure practices (as evidenced by the fact that investors and the market actually use the company’s web site) and the information posted thereon is timely and appropriately accessible. The Release enumerates the following specific factors that would contribute to the determination that a company’s web site is a recognized channel of distribution and that the information posted there has been properly disseminated.

- *Web Site Awareness.* Whether and how a company lets investors and the market know that the company has a web site and that it should be looked to for information about the company (such as by including the company’s web site address in SEC filings and press releases).
- *Posting Practices.* Whether the company has made investors and the market aware that it will post important information on its web site, and whether it has a pattern or practice of regularly doing so.
- *Web Site Design.* Whether the company’s web site is designed to lead to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the web site in a known location routinely used for such disclosures and whether the information is presented in a format readily accessible to the public.

⁹ 17 C.F.R. § 243.100-103 (2005).

- *Media Awareness.* Whether information posted on the web site is regularly picked up by the market and the media, or whether a company has advised newswires or the media about such information, with the expectation that companies with lower profiles and smaller market capitalizations may need to take more affirmative steps to call attention to information.
- *"Push" Technology.* The steps the company has taken to make its web site and the information posted there accessible, including through the use of "push" technology, such as RSS feeds (a format for publishing frequently updated content on the Internet) or releases through other channels to distribute such information widely or advise the market of its availability.
- *Accuracy.* Whether the company keeps its web site current and accurate.
- *Other Dissemination Methods.* Whether the company uses other methods in addition to the web site postings to disseminate the information, and the extent to which those other methods are predominant.
- *Type of Information.* The nature of the information.¹⁰

The third consideration in determining whether posted information is public for purposes of Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information. The Release sets out the following circumstances that should be considered in evaluating the reasonableness of the waiting period.

- *Market Size.* The size and market following of the company.
- *Web Site Access.* Whether investor-oriented information on the web site is regularly accessed.
- *Marketing Effects.* The steps the company has taken to make investors and the market aware that the company uses its web site as a key source of important information about the company, including the location of the posted information.
- *Dissemination Steps.* Whether the company has taken active steps to disseminate the information or the availability of the information posted on the web site, including using other channels of distribution information.
- *Type of Information.* The nature and complexity of the information.

¹⁰ Particularly with respect to important information, the Release encourages companies to consider taking additional steps to alert investors and the market to the fact that information will be posted, such as furnishing such information to the SEC, issuing a press release with the information or providing adequate advance notice about an upcoming posting.

The SEC has not adopted any bright line tests in determining whether information posted to a company web site is public for purposes of Regulation FD, indicating instead that this requires a facts and circumstances analysis. This is a good thing, as prescriptions in this area would only inhibit the very kind of continued development the SEC is seeking to encourage.

Public Distribution Requirements of Regulation FD

Regulation FD requires that in order to avoid impermissible *selective* disclosure of material non-public information, a company should provide that information on a Form 8-K to the SEC or, alternatively, disseminate it “through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”¹¹ The SEC has heretofore been reluctant to find that a web site posting, in itself, would be an acceptable method of distribution to the public under Regulation FD.¹² That reluctance also has now ended.

According to the Release, the SEC believes technology has evolved and the use of the Internet has grown such that,

for some companies in certain circumstances, posting of the information on a company’s web site, in and of itself, may be a sufficient method of public disclosure [under Regulation FD].¹³

Whether a web site posting satisfies the public distribution requirement of Regulation FD will depend on whether a web site is a recognized channel of distribution and whether information is posted and sufficiently accessible to be deemed “disseminated.” This analysis, in turn, will be based on facts and circumstances and the kinds of factors outlined above in the discussion of when information is deemed public under Regulation FD. However, a company still must consider its ability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made.¹⁴

Liability Issues

Company statements made on the Internet are subject to the antifraud provisions of the federal securities laws, including the general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities, in the same manner as any other statement made by, or attributable to, a company.¹⁵ In the Release, the SEC discusses steps companies can take in a variety of contexts to affect whether information located on or hyperlinked from their web site raises issues under antifraud rules and whether companies can disclose information exclusively on their web sites. The

¹¹ 17 C.F.R. § 243.101(e).

¹² See, e.g., *Selective Disclosure and Insider Trading*, Rel. No. 33-7881 (Aug. 15, 2000), avail. at <http://www.sec.gov/rules/final/33-7881.htm> and Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations (Fourth Supplement), avail. at <http://www.sec.gov/interps/telephone/phonesupplement4.htm>.

¹³ Release at 25.

¹⁴ 17 C.F.R. § 243.100(a).

¹⁵ Release fn 62, at 26.

essential principle underlying the steps outlined in the Release is whether the information in question can reasonably be regarded as part of the “total mix” of information being analyzed for antifraud purposes.

Effect of Accessing Previously Posted Materials or Statements on Company Web Sites

The SEC uses the Release to clarify that a company may maintain previously posted materials on its web site in such a way as not to be reissuing or republishing those materials for antifraud purposes.¹⁶ To do this, a company will want to assure that historical materials would be understood to be such by a reasonable person by separately identifying them (perhaps by date) or locating the materials in a separate section of the company’s web site containing previously posted materials or statements.

Hyperlinks to Third-Party Information

In the 2000 Electronics Release, the SEC noted that a company is liable for third-party information to which it hyperlinks if such information could be attributable to the company. Such attribution may occur when the company has either involved itself in the preparation of the information, known as the “entanglement” theory of liability, or endorsed or approved the information, known as the “adoption” theory of liability.¹⁷

The Release provides further guidance on the latter by focusing on the avoidance of implicit adoption of third-party information through the use of hyperlinks. The key question in determining whether a company has “adopted” a hyperlink, the Release explains, is whether the context of the hyperlink, together with the hyperlinked information, creates a reasonable inference that the company has approved or endorsed the hyperlinked information. Because any form of hyperlinking runs the risk of implied endorsement, it will always need careful rebuttal both through language and presentation.

To clarify that it does not intend to adopt or endorse a particular hyperlink, a company should consider, the SEC recommends, explaining the context of the hyperlink, in order to make explicit its intentions for providing the linked information. This will involve a consideration of the nature and the context of the hyperlinked information itself. The degree to which a company is making a selective choice, and what choices it makes, about the hyperlinks it posts will indicate the extent to which the company has a positive view of, and perhaps approved the information.¹⁸ A company that provides links only to news articles that rave about the company, for instance, will more likely be viewed as adopting those reviews than the company that links to every news article in which the company’s name appears.¹⁹

¹⁶ The SEC notes, however, that the antifraud provisions would still apply to information set forth in those materials when initially disclosed or if a company affirmatively restates or reissues the information.

¹⁷ See 2000 Electronics Release at Section II.B.1.

¹⁸ See Release at 35.

¹⁹ *Id.*

Finally, a company may also decide to use “exit notices” to indicate that a hyperlink is to third-party information. The SEC notes, however, that having an exit notice will not always absolve a company from being deemed to have implicitly endorsed the third-party hyperlinked information. Again, if the company only provides links to positive analyst reports, an exit notice will not eliminate the appearance of adoption. Moreover, regardless of any disclaimer, a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in failing to know, is materially false or misleading.

Summary Information

The SEC generally views a summary introduction to disclosure positively (in some cases requiring such a summary), as a tool that gives the reader a roadmap to a particular disclosure document. Companies have been concerned, however, about the treatment of summary or overview information on their web sites under the antifraud provisions of the federal securities laws.²⁰ The Release encourages the use of summary information by companies on their web sites but notes that companies should consider ways to alert readers to the location of the detailed disclosure from which summary information is derived or upon which such overview is based. A summary or overview standing alone and which a reasonable person would not perceive as a summary could result in investors not understanding that the statements should be read in the context of the broader disclosure being summarized.²¹ Just as with hyperlinks, companies should consider using explanatory language to identify summary information as such. The SEC suggests the following techniques.

- *Title/Heading.* An appropriate title or heading can convey the abbreviated nature of the information and help to avoid unnecessary confusion.
- *Explanatory Language.* Explanatory language can appropriately identify material as summary in nature and identify the location of the more detailed information.
- *Hyperlinks.* Placing a summary in close proximity to hyperlinks to the more detailed information or upon which the summary is based could help an investor understand the appropriate scope of the summary and clarify the context in which the summary should be viewed.
- *Layered Disclosure.* In addition to providing hyperlinks to more complete information, companies can organize their web site presentations so 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.

²⁰ *Id.* at 37.

²¹ *Id.* at 38.

Interactive Web Site Features

The Release further clarifies the application of antifraud provisions to interactive web site features. This builds on prior rulemaking in 2008 involving electronic shareholder forums.²²

The SEC confirms that a company will not be responsible for third party statements posted on a web site sponsored by the company. Nor is a company obligated to respond to or correct misstatements made by third parties.²³

On the other hand, if a statement is made on a blog or shareholder forum (even one sponsored by a third party) by or on behalf of the company, that statement is subject to the antifraud provisions of the federal securities laws. For that reason, the SEC suggests putting in place controls and procedures to monitor such statements. Employees should be made aware of the risks of liability from participating in these forums, which cannot be avoided simply by an employee's claim to be speaking in his or her "individual" capacity.²⁴ The determination of whether an employee is speaking or acting on behalf of the company will always depend on the particular facts and circumstances.

Disclosure Controls and Procedures

The Release states that disclosure controls and procedures *do not* apply generally to information posted on a company's web site.²⁵ This means that the CEO and CFO will not be disclosing their conclusions regarding the effectiveness of any controls that a company may have in place regarding its web site, other than those controls which cover information posted as an alternative to being provided in an Exchange Act report.²⁶ The SEC notes, however, that when a company elects to satisfy certain Exchange Act disclosure obligations by posting the information on its web site (as permitted under certain Exchange Act rules), disclosure controls and procedures would apply to such information, and the failure to make those disclosures on the company's web site would result in an Exchange Act report being incomplete.

Format of Information and Readability

Finally, the Release confirms that the SEC does not think it necessary for information on a company's web site to be printer-friendly, unless securities rules (such as Notice and Access (described below)) explicitly require otherwise.

²² Earlier this year, the SEC amended its proxy rules to facilitate the use of electronic shareholder forums or bulletin boards, making communications via such means exempt from proxy rules under conditioned circumstances. See *Electronic Shareholder Forums*, Rel. No 34-57172 (Jan. 18, 2008), avail. at <http://www.sec.gov/rules/final/2008/34-57172.pdf>.

²³ Of course, as the Release points out, a company may not require a stockholder to waive protections under the federal securities laws as a term or condition of entering or participating in a blog or forum.

²⁴ Release at 43.

²⁵ *Id.* fn 99, at 43. Under Exchange Act Rules 13a-15 and 15a-15, the term "disclosure controls and procedures" involves those controls and procedures designed to ensure that information required to be disclosed by the company in its Exchange Act reports is recorded, processed, summarized and reported within specified time periods and accumulated and communicated to management as appropriate to allow timely decisions regarding required disclosure.

²⁶ Release at 45.

The Future

Although the Release does a nice job of confirming the SEC's current view of the law in this area, it is of limited scope. Of course, any interpretive release that breaks much new ground is likely to break administrative law in the process. And this one in particular confesses to a narrow objective, indicating that it passes over some issues and awaits the emergence of others with the steady march of technological change.

The Release does not, for instance, touch much on issues under the Securities Act of 1933. In that pass, the SEC dodges once again the question of when a posting on a company web site might constitute a "general solicitation" for purposes of relying on Regulation D as an exemption from registration under the Securities Act. Deeming such a posting to constitute a general solicitation would be the logical result of underscoring the public nature of web sites but also would further frustrate private offerings with the risk of losing "safe harbor" protection through unrelated web site postings.

Moreover, the Release doesn't reach far with its interpretations. It notes that technological advances allow more interactive and current information than was the case previously and affirmatively recognizes a movement toward current, searchable and interactive information.²⁷ These are both salutary expressions. But, none of the interpretations is that ambitious in this context, particularly those involving liability for hyperlinking which barely move the needle.

In thinking forward, it may be instructive to find explicit direction more from current rulemakings than the Release. As the Release chronicles, the SEC has taken a number of actions in the technology area in recent years that constitute an impressive agenda to increase the use of information technology as a tool to implement regulatory policy. Indeed, enhanced use of technology has become a policy in and of itself. From this standpoint, the recent guidance on company web sites, while important, is a small piece in a much larger puzzle. In that regard, there are three agenda items that are likely to reveal much more about the emerging picture in this area than the Release—notice and access, interactive data and the "21st Century Disclosure Initiative."

Notice and Access

In 2007, the SEC adopted amendments to its proxy rules under the Exchange Act that provide an alternative method for issuers to furnish proxy materials to shareholders by posting them on the Internet and providing notice thereof to shareholders.²⁸ Under these so-called notice and access, or e-proxy, rules, issuers and other soliciting persons generally are required to choose one of two alternative models of delivery to conduct proxy solicitations: the "notice only" model, or the "full set delivery" model, which allows issuers to deliver paper copies of proxy materials, but also requires them to post a copy of such materials

²⁷ *Id.* at 9.

²⁸ *Internet Availability of Proxy Materials*, Rel. No. 34-55146 (Jan. 22, 2007), *avail. at* <http://sec.gov/rules/final/2007/34-55146>.

to an Internet web site. In its adopting release, the SEC noted that the amendments would take advantage of the growth of the Internet and electronic communications. These regulations became mandatory for “large accelerated filers” on January 1, 2008.²⁹ Registered investment companies, persons other than issuers, and issuers that are not large accelerated filers have until January 1, 2009 to comply.

Results of the first proxy season under these notice and access rules have been mixed. Many issuers have achieved measurable cost savings. Most issuers, however, have also seen a pronounced drop-off in retail shareholder voting. On top of that have come other procedural bugs relating to the time period required for notice and confusion with the process. Some of these bugs will be ironed out, but it is not clear which way voting participation will trend, particularly as the rules become applicable to all issuers starting next year. The SEC will certainly consider developments under the notice and access proxy rules as it continues to expand its thinking in this area. Notwithstanding continued uncertainty as to technical issues under these rules, however, as well as whatever may be their eventual appeal for companies, one thing seems assured. Notice and access as a means of delivering information is becoming a key tool for the SEC as it shapes its disclosure policies.

Interactive Data

XBRL

Extensible business reporting language is programming language that turns financial disclosures into interactive data, improving investors’ ability to analyze companies by using digitally tagged data fields in financial reports for simplified cross-company analysis. In May, the SEC voted to propose that XBRL be phased in as a mandatory reporting tool. The new requirements would become mandatory for large accelerated filers with a common equity public float in excess of \$5 billion in December 2008, and in December 2009 for all other large accelerated filers.³⁰ Other U.S. GAAP filers and foreign private issuers will have until December 2010 to comply. Comments on the proposed rules were due by August 1, 2008.

The required tagged disclosures would include companies’ primary financial statements, notes, and schedules. Unlike HTML, XBRL can be read and processed by a variety of computer applications, facilitating the ability of shareholders and securities analysts to compare financial data across periodic reports of a particular issuer and among issuers. The SEC has proposed that the interactive data be provided as an exhibit to periodic reports and registration statements in addition to traditional-format financial statements, footnotes and schedules. Under the proposal, interactive data provided under the XBRL rules would not be incorporated by reference into Securities Act registration statements and prospectuses, but would be subject to anti-fraud provisions of the federal

²⁹ *Shareholder Choice Regarding Proxy Materials*, Rel. No. 34-56135 (Jul. 26, 2007), *avail. at* <http://sec.gov/rules/final/2007/34-56135>.

³⁰ *Interactive Data to Improve Financial Reporting*, Rel. No. 33-8924 (May 30, 2008), *avail. at* <http://www.sec.gov/rules/proposed/2008/33-8924.pdf>.

securities laws, such as Rule 10b-5.³¹ Proposed Sections 405 and 406 of Regulation S-T include the content, format, submission and web posting requirements for the XBRL-format exhibit.

The comment period for this rulemaking has ended with over 80 submissions so far. The adoption of final rules will likely occur this Fall with transition periods as indicated above. What the actual experience of the filer community, the SEC staff and the investing public will be with this programming language is still an open matter. There will be new costs, and the additional step to prepare and file newly tagged information will challenge already accelerated filing schedules. But, given the SEC's experience with its voluntary XBRL program and the reaction to the proposed mandatory system, it is likely that a transition to this enhanced disclosure system will be relatively smooth. This could hold enormous potential for future innovation on company web sites.

IDEA

On August 19, 2008, the SEC unveiled what it calls a "successor" to its EDGAR system. The new system is called IDEA, which is short for Interactive Data Electronic Applications.³² While plans for this new system are sketchy, it appears that at first it will allow the public to access and use the tagged data proposed to be required as part of the XBRL rulemaking discussed above. Next, the SEC says IDEA should replace EDGAR as the primary source for all SEC filings. Finally, in the longer term, Chairman Cox sees the potential to revamp the SEC's information collection function so that it revolves not around "filings" but around direct submission of information to the IDEA system. Here, too, much remains to be seen in the future. Certainly, however, if the SEC were to move away from static, form-based submissions and towards a system of direct collection of, and accessibility to, flows of information, company web sites could well become a critical focal point in such a new disclosure regime.

21st Century Disclosure Initiative

On June 24, 2008, the SEC announced an internal study called the "21st Century Disclosure Initiative," which will review all existing SEC forms and reporting requirements with a "special focus on needless redundancy."³³ The goal of the study is to produce action items for an SEC Advisory Committee, still to be chartered, with eventual recommendations to the SEC for improving the usefulness and timeliness of disclosure for investors and streamlining and modernizing the collection of disclosure from companies and regulated entities, including through the use of XBRL. The press release announcing the initiative noted that "[e]ssential to the study will be the determination of how to match the capabilities of today's information technology with the SEC's regulatory aims and the needs of investors."

³¹ *Id.*

³² Press Release, U.S. Securities and Exchange Commission, SEC Announces "Successor to EDGAR Database "IDEA" Will Make Company and Fund Information Interactive" (Aug. 19, 2008), *avail. at* <http://www.sec.gov/news/press/2008/2008-179.htm>.

³³ Press Release, U.S. Securities and Exchange Commission, SEC Announces "21st Century Disclosure Initiative" to Fundamentally Rethink the Way Companies Report and Investors Acquire Information (Jun. 24, 2008), *avail. at* <http://sec.gov/news/press/2008/2008-119.htm>.

Chairman Cox has made the improvement and modernization of disclosure materials a priority. In an address to the CFA Institute Conference on Next Generation Asset Management on June 12, 2008, he noted "For our part, the SEC is committed to the complete overhaul and ultimate replacement of the EDGAR model with a reporting system that is centered around interactive data."³⁴

This initiative comes in the waning moments of regime change in Washington and transition at the SEC of Commissioners and senior staff. It is thus hard to handicap what may be intended, much less what will come, of this project. Certainly, however, it has all the early indicators of putting much up for grabs in terms of the current disclosure system. This would result in further development of some of the SEC's thinking that underpins the Release.

Conclusion

With its new interpretive guidance, the SEC has sent a strong signal of encouragement to public companies to make greater and more creative use of their web sites to enhance the provision of company information to investors. Despite this clear message, however, lingering legal concerns are likely to cause companies to proceed with caution in expanding the use of their web sites to disseminate company information beyond that which is in their SEC filings.

Fundamentally, these concerns swirl around questions of liability. For example, a company that wishes to expand the scope of investor-oriented web site content beyond simply linking to historical press releases or reports filed with the SEC, will need to grapple with the issue of staleness and find a way to ensure that web site content is either updated as necessary and/or clearly captioned to indicate its "publication" date. In addition, as investor-focused web site content expands beyond simply linking to historical documents, it becomes important to ensure that such content is appropriately contextualized so that a web site visitor has clear access to the "whole picture" of the company's disclosure package. This may involve, by way of example, clear and conspicuous legends making reference to the company's reports filed with the SEC, links to pertinent disclosures such as risk factors, and appropriate "forward-looking statement" safe harbor language. Further, the Release fails to provide meaningful new guidance in several specific areas where there is likely to be lingering concern, including the use of corporate blogs (such as investor relations blogs and CEO blogs), hyperlinks to third-party web sites, and when postings on corporate web sites might give rise to "general solicitation" concerns.

Beyond these issues, there are also questions related to how people wish to receive information and, as importantly from an investor protection standpoint, how methods of making information available bear on actual decision-making that is to be enhanced by such information. If the SEC wants to embrace company web sites as a surrogate for filings with the SEC or, even more boldly, a primary point of access to information, it will need to build a firmer consensus surrounding

³⁴ Address to the CFA Institute Conference on Next Generation Asset Management, Washington, D.C. (Jun. 12, 2008), *avail. at* <http://www.sec.gov/news/speech/2008/spch061208cc.htm>.

the virtues of a delivery model that relies on investors to be proactive in asking for and finding the information they need. In this context, the Release is best viewed as another point on the curve, one that confirms rather than defines a trend.

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