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SEC Releases Guidance on Using Company Websites to Disclose Information

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The SEC has published an interpretive release discussing how companies can use their websites to disseminate information while complying with the antifraud and certain other provisions of U.S. securities law.¹ The SEC's guidance aims to encourage the development of company websites as significant vehicles for disseminating important company information. In Canada, National Policy 51-201 also encourages companies to use their websites for this purpose and provides some specific guidance on their content. The notable similarities and differences between NP 51-201 and the SEC's release are described below.

The SEC's release focuses primarily on

- the public nature of information posted on company websites for purposes of Regulation FD; and
- company liability for information on websites, including historical information, hyperlinked information, summary information and information disclosed through blogs or other interactive tools.

Websites and Selective Disclosure

Regulation FD prohibits selective disclosure of material, non-public information.² If a company selectively discloses this type of information, it must simultaneously (or promptly, if the selective disclosure was unintentional) file the same information with the SEC or use an alternative method of public disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

The SEC's view is that posting information on a company's website may be an acceptable alternative to an SEC filing for Regulation FD purposes if the website is a recognized channel of distribution, if posting the information makes it available to the market in general and if a reasonable waiting period is provided for investors to react to the information.

This contrasts with Canadian securities regulators' position in NP 51-201, in which they state that posting material on a website is not acceptable as the sole means of satisfying a legal requirement to "generally disclose" information.³

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¹ The release is directed at periodic disclosure under the Securities Exchange Act of 1934 (Exchange Act) and not public offerings under the Securities Act of 1933.

² Foreign private issuers, including Canadian MJDS issuers, are not subject to Regulation FD, but Canadian securities law similarly prohibits selective disclosure of material, non-public information, commonly known as "tipping."

³ NP 51-201 also states that Canadian regulators will be reconsidering this policy as technology evolves.

To decide whether website disclosure is sufficient under Regulation FD, a company should consider all the surrounding facts and circumstances, including the following:

- the company's historical pattern of posting information on its website, and the currency and accuracy of posted information;
- the prominence, user-friendliness and convenience of the postings, including, for example, the use of RSS feeds or other methods to alert the market that disclosure is available on the website;
- the extent to which the company's website postings are regularly picked up by the market and media (which will partly depend on the company's size and market following, meaning that companies with a small market following may need to take affirmative steps to inform the market about their website postings); and
- the steps the company takes to alert the market to its website and its disclosure practices (for example, by alerting the media to its postings and by stating in its periodic reports and news releases that the company routinely posts information on its website).

Company Liability for Information on Websites

Rule 10b-5 under the U.S. Exchange Act is a general antifraud provision that prohibits companies from making material misstatements or omissions in connection with the purchase or sale of securities. Rule 10b-5 applies to company information posted on its website to the same extent that it applies to any other company information that can reasonably be expected to reach the market – that is, the medium through which company statements are made is irrelevant.

This is consistent with Ontario's regime of civil liability for secondary market disclosure, under which information in electronic form is subject to the same liability for misrepresentations as information in written documents.

In its release, the SEC provides some specific guidance on companies' potential liability under Rule 10b-5 for the following kinds of website postings.

1. Historical Information

Information on a company's website may naturally become incorrect or otherwise out of date over time. This raises the question whether companies have a duty to update stale information. The SEC stated that, generally, the mere fact that investors can access historical statements on a company's website does not mean that the company continues to be liable indefinitely for those statements. The same is true under Canadian law.⁴ In both jurisdictions, historical information on company websites should be separately identified as historical (for example, by dating the information) and should be located in a separate section of the website.

2. Hyperlinks to Third-Party Information

The SEC also provides guidance on companies' potential liability under Rule 10b-5 for hyperlinks to third-party information. Companies may be responsible for the content of hyperlinked information even if their websites include an exit notice, disclaimer or other form of warning to investors that the information comes from a third party. Generally speaking, companies may be liable for third-party information to

⁴ This analysis assumes that a company is otherwise complying with its continuous disclosure obligations, such as the requirement to update its financial outlook in MD&A under NI 51-102.

which their websites hyperlink if they involve themselves in the preparation of the information or explicitly or implicitly endorse or approve it.

By comparison, under Ontario securities law, a company may be subject to statutory liability for a misrepresentation in any written or electronic document that it makes available to the public even if the company did not author or explicitly endorse the information it contained.

To avoid confusion, companies should explain the context of their hyperlinks and be explicit about why they are being provided. This is especially true if the company is selective about its hyperlinks – for example, if its website includes a hyperlink to a single favorable news article or analyst’s report. On the other hand, if a company has a media page and simply provides hyperlinks to all recent news articles, both positive and negative, the risk of liability for a particular item, and the need to explain its context or justify its inclusion, is reduced.

This more conservative approach of not discriminating among third-party hyperlinks is consistent with NP 51-201, in which Canadian regulators state that if a company elects to post the name of an analyst who covers the company and/or the analyst’s recommendation, the same information should be posted for all analysts.

3. Summary Information

Another area of the SEC guidance relates to companies’ use of summaries or overviews on their websites to present information to investors, particularly financial information. To mitigate the risk of liability for summary or overview information, companies should consider using appropriate headings to identify the information as summary in nature and providing access to the more detailed information.

4. Blogs and Shareholder Forums

The SEC has acknowledged the utility of interactive website features such as blogs and shareholder forums. Although these tools tend to be informal and conversational in nature, information provided by the company through them is not treated differently from other information under the antifraud provisions of securities law. Companies are urged to employ their disclosure controls and procedures to ensure the quality of any statements made by or on behalf of the company. Furthermore, companies may not require investors to waive any rights under securities law as a condition of entering a blog or forum.

By contrast, NP 51-201 is more conservative than the SEC’s guidance in this area. It states that companies should not participate in, host or link to interactive forums such as chat rooms or bulletin boards. **1**