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# Corporate Websites: Best Practices For Website Disclosure

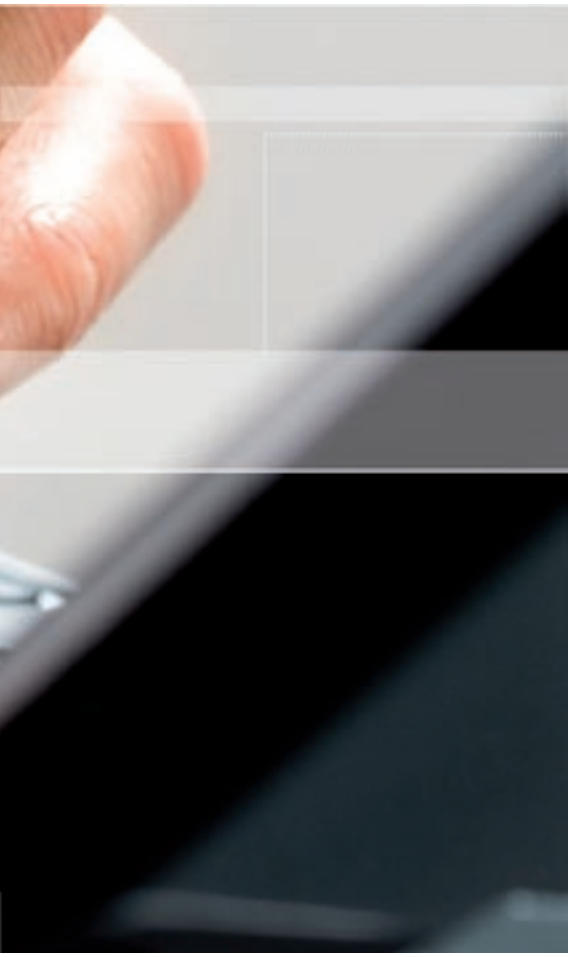
Corporate websites are perhaps the most effective disclosure tool for a company's investor relations team. The team can manage the company's message, in multiple formats and languages, and update relevant disclosure quickly and inexpensively. Increasingly, regulators and stock exchanges are also concluding that corporate websites can be an effective means of required disclosure for material events, including in lieu of the more traditional means of press releases to the major wire services.

At the same time, reasonable concerns still exist about whether posting to a website should be permitted as the sole means of providing timely disclosure. In light of the passive and decentralized nature of individual corporate websites, the question is: "How will investors know to look there?" Finally, regulators continue to be mindful of the risk of misleading information posted to corporate websites. While this problem is far from unique to websites, both the long-term storage capabilities and the increasingly interactive nature of websites lead to certain distinct disclosure concerns and considerations.

Since the Internet first caught the attention of the U.S. Securities and Exchange Commission (the SEC) over a decade ago, the SEC has sought to keep pace with its development, recognizing both the

**1** This article was prepared in May 2009 and is intended to be a general summary of the law. It does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation. The authors wish to thank Benjamin Danner for his assistance in the preparation of this article.

**The New York Stock Exchange has subsequently amended its own policy with respect to the immediate release of material information... This can result in significant cost savings**



benefits and risks associated with the ease and accessibility of investor access. On August 1, 2008, the SEC issued its most recent interpretive release about the Internet, providing guidance to companies regarding the application of the federal securities laws to information posted on company websites. In the interpretive release, the SEC states: "we have reached a point where the availability of information in electronic form - whether on EDGAR or a company website- is the superior method of providing company information to most investors, as compared to other methods." The release also provides useful guidance regarding steps that companies can take to reduce their liability for information posted on websites under the antifraud provisions of the federal securities laws.[2]

The companies most affected by the SEC's new interpretive release are U.S. public companies, which are subject to Regulation Fair Disclosure, known as Reg FD. Reg FD provides that when a company (or persons acting on its behalf) discloses material nonpublic information to certain persons (such as securities market professionals or the company's securityholders), the company must make that information "public", to ensure a level playing field for all investors. For an intentional disclosure, the timing must be made public simultaneously; for unintentional disclosure, it must be made "promptly." The release provides guidance on when information posted on a company website would be considered "public" for purposes of evaluating the applicability of Reg FD to subsequent private discussions or disclosure of the posted information and satisfaction of Reg FD's "public disclosure" requirement.

The New York Stock Exchange has subsequently amended its own policy with respect to the immediate release of material information by NYSE-listed companies, allowing these companies to forego traditional means of releasing information to the market - release through major wire services - if they release the information through Reg FD compliant means, such as by filing a Form 8-K with the SEC or through another method of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. This can result in significant cost savings compared to the use of the wire services, which charge companies for press releases based on the length of the release.

Foreign companies - which generally are not subject to Reg FD- should also be mindful of the policies behind Reg FD as a matter of "best disclosure practices" and continue to adhere to applicable rules of relevant stock exchanges (such as the NYSE and Nasdaq) that require immediate release of material information. These companies should also be mindful of the recent NYSE rule changes, which could result in significant cost savings for companies that use Reg

**2** *See* Release No. 34-58288 (August 1, 2008), *Commission Guidance on the Use of Company Websites*, available at http://www.sec.gov/rules/interp/2008/34-58288.pdf

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FD compliant disclosure means to release material information. Foreign companies that are also SEC reporting companies or which sell securities in the United States must also be mindful that they remain subject to liability for conduct (including misleading disclosure or manipulative practices) that violates the antifraud provisions of the U.S. federal securities laws.

## Regulation FD Guidance

The SEC's interpretive release does not provide "bright-line" rules regarding under what circumstances a U.S. reporting company can rely on website disclosure to satisfy Reg FD reporting obligations. Rather, the SEC's principles-based guidance puts the burden on a company to determine if information posted on its website will be considered "public" for Reg FD purposes based on the company's own evaluation of a non-exclusive list of suggested criteria.

The SEC's principles-based guidance covers the following areas, which are summarized below:

- when information posted on a company website will be considered "public" for Reg FD purposes;
- liability for information on company websites, including previously posted information, hyperlinks to third-party information or websites, summary information and interactive websites;
- the types of controls and procedures advisable with respect to such information; and
- the format of information presented on company websites.

When a company intentionally discloses material information, it must do so publicly and not selectively. Reg FD requires that once a selective disclosure has been made, the company must file or furnish a Form 8-K with the SEC or use an alternative method or methods of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. The disclosure must be made simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure.

Whether information disclosed on a company website would constitute "public" disclosure is one of the main interpretive questions affected by the SEC's new interpretive release. First, if the information is already on the website, would it already be "public", and therefore by definition could not be "selectively disclosed"? And *second*, if non-public information was disclosed, would its disclosure on the website be sufficient to constitute "broad, non-exclusionary distribution of the information"?

When the SEC issued Reg FD in 2000, the adopting release stated that as a general matter acceptable methods of public disclosure for Reg FD purposes would include the following means:

- press releases distributed through a widely circulated news or wire service, or
- announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephonic transmission, or by other electronic transmission (including use of the Internet).

The Reg FD release also provided that the public must be given adequate notice of the conference or call and the means for accessing it. Reg FD does not require use of a particular method, or establish a "one size fits all" standard for disclosure; rather, it leaves the decision to the issuer to choose methods that are reasonably calculated to make effective, broad, and non-exclusionary public disclosure, given the particular circumstances of that issuer[3]. Therefore, if information on a company website would be deemed to be "public," then any subsequent disclosure of the information, such as to a securities analyst or institutional investor, would not be considered "selective" and therefore not trigger Reg FD.

At the time of Reg FD's adoption in 2000, the SEC stopped short of concluding that disclosure on a company website would of itself be an acceptable method of "public disclosure" of material non-public information for purposes of Reg FD. However, the SEC now believes that technology has evolved and the use of the Internet has sufficiently increased so that, "for *some companies in certain circumstances*, posting of the information on the company's website, in and of itself, may be a sufficient method of public disclosure" under Reg FD. However, the SEC did not establish bright line rules to help in making that determination. The SEC

**3** See "Final Rule: Selective Disclosure and Insider Trading," Release No. 34-43154(Aug. 15, 2000).

**4** The SEC states, "we now believe that technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting of the information on the company

**5** However, the SEC emphasized that while Reg FD gives an issuer considerable flexibility in choosing appropriate methods of public disclosure, it also places a responsibility on the issuer to choose methods that are, in fact, "reasonably designed" to effect a broad and non-exclusionary distribution of information to the public. See Release No.34-43154 (Aug. 15, 2000).

stated that companies will need to consider whether and when postings on their websites are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[4]

While there are no bright line rules, the interpretive release does provide guidance regarding when information posted on a company website may be considered "public" for purposes of Reg FD. To evaluate if information is public, a company must consider whether:

- the company's website is a "recognized channel of distribution,"
- posting information on the company website disseminates the information in a manner making it available to the securities marketplace in general, and
- if there has been a reasonable waiting period for investors and the market to react to the information.

Because the company has the responsibility for evaluating whether a method or combination of methods of disclosure would satisfy the alternative public disclosure provision of Reg FD, it remains the company's responsibility to evaluate whether a posting on its website would satisfy these requirements.[5]

With respect to the first two elements of this analysis, the SEC provides a non-exclusive list of factors a company should consider in evaluating whether its website is a "recognized channel of distribution" and whether the information on the site is "posted and accessible" and therefore "disseminated." These factors include:

- whether the company informs investors and markets that it has a website and that they should look at the company's website for information (*e.g.*, does the company include disclosure in its periodic reports (and in its press releases) of its website address and 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;
- whether the company's website is designed to lead investors and the market efficiently to information about the company, including

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information specifically addressed to investors, whether 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;[6]

» 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;[7]

» whether the company keeps it website current and accurate;

» whether the company uses other methods in addition to website posting to disseminate 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.

With respect to the third element of the analysis, the SEC advised that what constitutes a reasonable waiting period for investors and the market to react to the information depends on the circumstances of the dissemination, including:

» 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 on the website, including using other channels of distribution of information; and

» the nature and complexity of the information.

At the time the SEC adopted the new interpretive release, many companies listed on the New York Stock Exchange or Nasdaq did little or nothing in response because the rules of these exchanges limited the ability of listed companies to rely solely on posting information on a company website to meet disclosure obligations. While the submission of a Form 8-K would satisfy SEC requirements for Reg FD, under the rules of the NYSE listed issuers were still required to issue a press release through major wire services under the NYSE's immediate release policy.

Under this NYSE policy, set out in Sections 202.05 and 202.06 of the NYSE Listed Company Manual and in the NYSE's standard form listing agreement,[8] listed companies are required to release quickly to the public by the fastest available means any news or information that might reasonably be expected to materially affect the market for their securities. To insure adequate coverage, the Listed Company Manual has stated that releases requiring immediate publicity should be made by press release to major wire services Dow Jones & Company, Inc., Reuters Economic Services and Bloomberg Business News. Annual and quarterly earnings, dividend announcements, mergers, acquisitions, tender offers, stock splits, major management changes, and any substantive items of unusual or non-recurrent nature are examples of news items that should be handled on an immediate release basis.

However, the NYSE recently modified its rules in light of the SEC's interpretive guidance. On April 8, 2009, New York Stock Exchange LLC filed with the SEC a proposed rule change to amend its immediate release policy to allow NYSE-listed companies to comply with the policy by disseminating the information by any Reg FD compliant method or combination of methods, no longer requiring press releases through major wire services.[9] The proposed amendments became effective immediately upon release, on April 8, 2009. (Although the

**6** In evaluating accessibility to posted information, companies that are widely 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. However, companies with less of a market following, including many companies with smaller market capitalizations, may need to take additional affirmative steps so that investors and others know that information is or has been posted on the company's website and that they should look at the company website for current information about the company.

**7** Push technology describes a type of Internet-based communication where the request for transmission of information originates with the publisher or central server. It differs from pull technology, where the request for the transmission of information originates with the receiver or client. The SEC states that it does not believe that push technology must 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. *See* Release No. 34-58288, supra n. 1 at p. 21. Although most companies do not currently use RSS feeds to push out information to interested persons, current practice may change as a result of the SEC's guidance.

**8** A copy of the standard form NYSE listing agreement can be found at http://www.nyse.com/about/listed/1111491853070.html.

**9** See Exchange Act Release No. 34-59823, SR-NYSE-200940, available at http://www.sec.gov/rules/sro/nyse/2009/34-59823.pdf.

SEC has the authority to summarily abrogate the rule change within 60 days, this is unlikely given that the changes bring the NYSE rules into conformity with the new SEC guidance.)

The NYSE's rule changes also apply to listed foreign issuers. Even though foreign companies are generally exempt from Reg FD, and thus the SEC's recent guidance release as it pertained to Reg FD was generally of little interest to them, NYSE-listed foreign issuers can significantly benefit from the loosening of the NYSE's immediate release policy. Once a foreign issuer is comfortable that its website would otherwise be Reg FD compliant (in other words, it is a "recognized channel of distribution" and the information on the site is "posted and accessible," and therefore "disseminated"), it would no longer be required to issue its press releases through major wire services (which charge fees for the dissemination of press releases based on the length of the release).

Nasdaq OMX Stock Market Rules generally permit Nasdaq-listed issuers to disclose material information promptly to the public through any Reg FD compliant method of disclosure or a combination of methods, but a descriptive summary of the material information to be announced may need to be furnished to Nasdaq in advance.[10] In addition, Nasdaq interpretations currently state that the posting of information on a company's website "is not by itself considered a sufficient method of public disclosure under Reg FD, and as a result, under Nasdaq rules."[11] Companies must also consider whether their websites may involve issues under the Securities Act of 1933 (Securities Act) in addition to the Securities Exchange Act of 1934 (Exchange Act). For example, a company in registration must consider the application of Section 5 of the Securities Act to all public communications, including information on its website. Also, companies undertaking offerings in the United States under Rule 144A or outside the U.S. under Regulation S must consider whether such information would be deemed a "general solicitation" or "directed selling efforts". This is an important consideration for any company engaged in offering or selling securities, including companies engaged in continuous offerings.

Practical considerations, such as the extent to which a company's Internet infrastructure can accommodate spikes in traffic volume that may accompany a major company development, would also need to be considered before a company attempts to use only website disclosure to meet its Reg FD obligations.

**The SEC's guidance may begin a movement toward the use of company websites as recognized channels to disseminate material information on a widespread basis, even if companies initially continue to rely on traditional disclosure methods for disclosing material events.**

**10** Regardless of the method of disclosure used, Nasdaq-listed companies are required to notify the Nasdaq MarketWatch Department of the release of material information that involves certain specified events prior to its release to the public. Nasdaq recommends that issuers provide such notification at least ten minutes before such release. When a company chooses to utilize a Reg FD compliant method for disclosure other than a press release or Form 8-K, the company will be required to provide prior notice to the MarketWatch Department of: (1) the press release announcing the logistics of the future disclosure event; and (2) a descriptive summary of the material information to be announced during the disclosure event if the press release does not contain such a summary. See IM-5250-1 and Rule 5250(b)(1) of The Nasdaq OMX Stock Market Rules.

**11** See IM-5250-1 of The Nasdaq OMX Stock Market Rules.

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## Liability concerns

The antifraud provisions of the federal securities laws, including the provisions of Section 10(b) and Rule 10b-5 of the Exchange Act, apply to company statements made on the Internet in the same way they apply to any other statement made by or attributable to a company. These provisions contain a general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities. The SEC provides useful guidance regarding the application of the antifraud provisions of the federal securities laws to the following information posted on a company website:

- previously posted (historical) information,
- hyperlinked information (to third parties),
- summary information, and
- interactive website features.

*Previously Posted Information.* In its 2000 release, the SEC stated that information previously posted on a company website and available to be accessed at a later time may be considered "republished" by the company at that later date, with attendant securities law liability, thereby providing that companies would have a duty to update the previously posted materials or statements. In the latest release, the SEC clarifies that the fact that investors can access previously posted materials or statements on a company website does not in itself mean that such previously posted materials or statements have been reissued or republished for purposes of the antifraud provisions or that the company has made a new statement or created a duty to update the materials or statements. However, where it is not apparent to a reasonable person that the posted materials or statements speak as of a certain date or earlier period, the SEC states that materials on a company's website should be:

- separately identified as historical or previously posted materials or statements, including, for example, by posting a date on the posted materials or statements; and
- located in a separate section of the company's website containing previously posted materials or statements (for example, an "Archives" section).

*Hyperlinked Information.* Under Rule 10b-5 of the Exchange Act, a company can be liable for third party information that is hyperlinked to its website if the information can be attributable to the company. Third-party information is attributable to a company under two theories:

» *Entanglement:* if the company has involved itself in the preparation of the information (the "entanglement theory") or
» *Adoption:* has explicitly or implicitly endorsed or approved the information (the "adoption theory").

This risk is particularly acute where the company website provides hyperlinks to the reports of outside analysts or rating agencies, such as if the company selectively chooses which analysts it links to (by providing a hyperlink to the favorable analyst report of Bank A, but not to the unfavorable analyst report of Bank B). The SEC suggests several ways that a company can reduce its exposure to liability for the content of hyperlinked third party information under antifraud provisions,[12] including:

» explaining the context of the hyperlink, and making explicit why the hyperlink is being provided in order to avoid the inference that the company is commenting on or approving its accuracy. [13]
» the company should use exit notices or intermediate screens to denote that the hyperlink is to third party information, although this will not necessarily absolve companies from antifraud liability; and
» the company should avoid providing a hyperlink to information it knows, or is reckless in not knowing, is materially false or misleading. A disclaimer alone is not sufficient to insulate a company from responsibility for information that it makes available to investors, whether through a hyperlink or otherwise.

*Summary Information.* Use of summaries or overviews to present information, particularly financial information, on company websites can be helpful to investors by highlighting information. However, because such summaries or overviews do not contain the more detailed information from which they are derived or upon which they are based, companies have expressed concerned that inclusion of such information may lead to liability. The SEC's new guidance suggests that companies consider ways to alert readers as to where more detailed information is located, as well as to other information about a company on the company's website.

The SEC encourages companies to use the following disclosure techniques to highlight the nature of the summaries and minimize investor confusion, including:

» using appropriate titles and providing additional explanatory language to identify the text as a summary or overview and the location of more detailed information ;
» placing a summary or overview section in close proximity to hyperlinks to more detailed information from which it is derived or based; and
» using layered or tiered formats so the most important summary or overview information is on the opening page, with embedded links to more detailed information.

*Interactive website features.* The SEC acknowledges that companies are increasingly using their websites to communicate with various constituencies, taking advantage of the latest interactive technologies such as blogs and electronic shareholder forums. Because the antifraud provisions of the federal securities laws apply to all communications made by or on behalf of a company, whether such communications appear on the company website or on third party websites, companies should put controls and procedures in place to monitor statements made by or on behalf of the company in blogs and electronic forums.

Employees, acting as representatives of the company, should be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their "individual capacities." However, the SEC states that a company is not responsible

**12** The SEC's interpretive guidance does not affect the SEC's interpretations regarding the use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act.

**13** The SEC's interpretive guidance states that the degree to which a company makes a selective choice to hyperlink to a specific piece of third-party information likely will indicate the extent to which the company has a positive view or opinion about the information. For example, if a company includes a hyperlink to a news article that highly praises management, it should consider explanatory language about the source and explain why the company is providing the hyperlink in order to avoid the inference that the company is commenting on or even approving its accuracy, or was involved in its preparation. Conversely, if the hyperlinked information is more general or broad-based, the company may consider a more general explanation. For example, if a company has a media page that simply provides hyperlinks to recent news articles, both positive and negative, about the company, the risk that a company may have liability regarding a particular article or that it endorses or approves of each and every news article may be reduced. In this case, a title such as "Recent News Articles" may be the only explanation that a company may determine is needed to avoid being considered to have adopted the materials. See Release No. 34-58288, supra n. 1 at p. 35.

for the statements that third parties post on a company-sponsored website, nor is a company obligated to respond to or correct misstatements made by third parties. The SEC also states that companies cannot require investors to waive protections under the federal securities laws in order to enter or participate in a blog or shareholder forum.

## Disclosure controls and procedures

The SEC guidance clarifies that generally information posted on a company website is not necessarily subject to a company's disclosure controls and procedures certification requirements under Section 302 of the Sarbanes-Oxley Act. However, the SEC states that if a company elects to satisfy certain Exchange Act disclosure obligations by posting that information on its website as an alternative to providing that information in an Exchange Act report (as the SEC permits under certain circumstances), then the disclosure controls and procedures certification requirements would apply to information posted to the company website to the same extent as information included in the company's Exchange Act reports. On the other hand, the SEC clarified that the disclosure controls and procedures certifications would not apply to other disclosures of information on the company's website, meaning that in signing the required Section 302 certifications in connection with its periodic reports, the principal executive officer and principal financial officer would not be disclosing their conclusions regarding the effectiveness of any controls that the company may have in place regarding its website disclosure of information, other than those controls with respect to information that is posted as an alternative to being provided in an Exchange Act report.

## Formatting of online information

Recognizing that online information is increasingly interactive and not static, the SEC clarified that information appearing on a company website does not have to satisfy a "printer-friendly" standard unless explicitly required by SEC rules. This means that companies may focus on on-screen readability rather than printability of documents.

## Conclusion

The SEC's interpretive release represents a move in the right direction, in that it permits certain companies in certain circumstances to satisfy reporting obligations by posting information on their websites. However, the release's effectiveness is hampered by a lack of bright-line rules regarding under what circumstances a company can rely on website disclosure to satisfy Reg FD reporting obligations and by putting the burden on each company to determine, based on its own evaluation of a non-exclusive list of suggested criteria, if information posted on its website will be considered "public" for Reg FD purposes.

The SEC's release was also hampered by NYSE and Nasdaq rules that limited its overall benefit. However, the NYSE's proposed rule change to amend its immediate release policy to allow NYSE-listed companies to comply with the policy by disseminating the information by any Reg FD compliant method or combination of methods should enhance the usefulness of the SEC release and its likely implementation by NYSE -listed companies.

Few companies are in a position to rely solely on posting information on their websites to meet Reg FD disclosure obligations. Even many companies with comprehensive website-based disclosure may be understandably reluctant to move quickly in this area, given the high level of scrutiny the SEC uses in enforcing Reg FD cases. Therefore, we expect that most companies will "wait and see" how the landscape develops, and otherwise continue their existing Reg FD disclosure practices through the use of press releases and Form 8-K filings.

The SEC's guidance may begin a movement toward the use of company websites as recognized channels to disseminate material information on a widespread basis, even if companies initially continue to rely on traditional disclosure methods for disclosing material events. Larger cap U.S. companies with significant market following may want to take steps to establish their websites as "recognized channels of distribution," by maintaining their company website with current and accurate information, making investors and the markets aware that the company will post important information on its website, and establishing a pattern or practice of posting such information on the website. Smaller companies should take steps to improve their website disclosure practices, and monitor whether larger cap U.S. companies are adjusting over time to a web-based disclosure model and are benefiting from its convenience and cost-saving

possibilities. For foreign issuers, we recommend that they take a fresh look at the SEC's interpretive release in the light of the recent change to the NYSE's immediate release policy, as well as continuing to heed the recommendations of the SEC with respect to avoiding selective disclosure of material information.

And all companies should carefully review the SEC's guidance with respect to avoiding potential federal securities law liability for website disclosure. To reduce these liability risks, companies should examine the guidance regarding how companies may reduce liability with respect to information previously posted on a website, hyperlinked information to third parties, summary information, and interactive website features.

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