

The Lawyer's Brief

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Informal Corporate Disclosure in the Age of Twitter*

by David A. Cifrino, Thomas P. Conaghan, Amar Murugan, and Stephen E. Older**

I. Introduction

For public companies listed on the New York Stock Exchange (NYSE), the long-standing mandatory use of press releases as a means of disseminating material company information has finally given way to the immediacy and near-ubiquity of the Internet. Effective May 7, 2009, NYSE-listed companies are no longer required to use press releases to distribute material information, but are only encouraged to do so. Instead, the amended NYSE Immediate Release Policy provides that, subject to certain conditions, material information required to be released promptly can be disclosed by means of any Regulation FD-compliant method.¹

Considered long overdue by many—the Nasdaq Stock Market made a similar change several years ago—the change is most notable for removing a relatively minor but symbolically significant obstacle to broader use of advanced technologies by public companies in their communications with investors and the public at large.

The change to the NYSE's Immediate Release Policy is consistent with guidance (the Website Guidance²) issued in 2008 by the U.S. Securities and Exchange Commission (SEC) on how company Web sites can be primary vehicles for communicating with investors without violating the SEC's general antifraud rule, Rule 10b-5, or Regulation FD, which proscribes the selective disclosure of material nonpublic information. The Website Guidance, in which the SEC

encouraged the use of company Web sites for disclosure, is not considered a change in SEC regulation, but it is rather a principles-based interpretation of existing relevant law and regulation applied to the challenges and opportunities faced by emerging technologies.

Whether the legal framework articulated in the Website Guidance is sufficient to address the accelerating adoption by millions of corporate and individual users of communications tools and social networking sites, such as Twitter, blogs, LinkedIn, and Facebook, remains to be seen, but it is essential that public companies appreciate and appropriately manage the legal risks associated with the use of these activities, and those still to emerge, in the distribution of material information to investors.

II. Evolving Communications Practices and Regulatory Background

“To tweet or not to tweet—For execs that is the question” read the front page headline of the *Boston Business Journal* on May 15, 2009. On April 27, 2009, the *Wall Street Journal* reported that 81 Fortune 500 companies sponsor public blogs, 23 of which link to corporate Twitter accounts. The article also reported that companies are starting to allow stockholders to ask questions via the Internet during their annual meetings.

It is far from clear that Twitter, which allows a company to publish messages of up to 140 characters to a group of “followers” and other Twitter users,

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is a productive use of executive time or will become a vital and lasting part of a company's general corporate communications or investor relations practices. Its current popularity, however, does highlight the degree to which Internet communication technologies have become essential business tools. This development presents challenges for public companies to mitigate disclosure risks associated with inaccurate, misleading, incomplete, or summary information or, notwithstanding Web posting, selective disclosure of material nonpublic information in violation of Regulation FD.

In addition, companies may need to take steps to ensure that any projections of future results or other forward-looking statements are accompanied by meaningful cautionary language within the statutory "safe harbors" set forth in the federal Private Securities Litigation Reform Act of 1995, or as suggested by court cases promulgating the "bespeaks caution" doctrine, and that any non-GAAP information is accompanied by a reconciliation to the most comparable GAAP information as required by the SEC's Regulation G. Web site communications with stockholders in advance of a stockholder's meeting require consideration of the SEC's substantive and filing rules regarding the solicitation of proxies.

Companies are responding to these risks. The *Wall Street Journal* article cited above reported that one corporate blogger working at a Fortune 500 company had sent out dozens of apparently unmonitored tweets from his mobile phone during a prior earnings call. The blogger now includes standard securities disclaimers in the event that his blogs or tweets during earnings calls contain or concern forward-looking statements or non-GAAP financial measures, and his tweets are reportedly limited to repeating word-for-word executive statements made during the call. The fact that it apparently takes at least four separate tweets³ to cover the appropriate disclaimers (inclusive of hyperlinks to further cautionary information) is indicative of how little room there is to negotiate within narrow safe harbors when communications come in micro-sized bites of information.

More fundamentally, the SEC's rulemaking continues to recognize and encourage the use of corporate Web sites and

the Internet generally as a critical component of effective communications with investors.

The issuance of the Website Guidance by the SEC was one of several recommendations made by an SEC Advisory Committee on Improvements to Financial Reporting (the Advisory Committee) that was formed in July 2007 with a mandate to suggest improvements to financial reporting by public companies, both in SEC filings and otherwise.

The Advisory Committee's final report, dated August 1, 2008,⁴ made recommendations to address the substantive complexity of financial information presented in SEC reports, the accounting standards-setting process, and the audit process and to improve the delivery of financial information generally. With regard to the delivery of financial information, the Advisory Committee made the following recommendations:

- The SEC should issue an interpretive release encouraging more robust use of corporate Web sites (which led to the Website Guidance).
- The SEC should require companies to furnish versions of their financial statements in an interactive data format to the SEC and to post that data on their Web sites (as further discussed in this article, rules enacting this recommendation were adopted by the SEC in December 2008).⁵
- Industry groups, such as the National Investor Relations Institute, Financial Executives International, and the CFA Institute, should update their best practices for earnings releases.
- Periodic reports filed with the SEC should include an executive summary providing a roadmap to key disclosure in the report.
- The SEC should encourage more disclosure of key performance indicators of a company's business that provide significant insight into the sources of a company's value—in effect, extending financial reporting to business reporting more generally.

Under the SEC's rules that will require public companies to provide to the SEC an additional version of their financial statements in an interactive data format using eXtensible

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Business Reporting Language (XBRL), companies will also be required to post the same XBRL data on their corporate Web sites. The data must be posted for at least 12 months, and it must be posted not later than the end of the calendar day on which the report or registration statement was filed, or was required to be filed, with the SEC, whichever is earlier. Companies are not permitted to satisfy this requirement by including a hyperlink to the documents available electronically on the SEC's Web site. The rules will be phased in over a three-year period beginning with approximately 500 of the largest companies for fiscal periods ending after June 14, 2009.

The SEC expects that the open-standard feature of the XBRL format will facilitate the development of applications and software that give investors additional ways to view and analyze a company's financial information. Because financial statements in interactive data format are intended to be processed by software applications, the unprocessed data are not readable by humans. Thus, viewers are necessary to convert or "render" the interactive data file to human-readable format. Some viewers are similar to Web browsers used to read HTML files. The SEC's Web site currently provides links to viewers to demonstrate the capability of software to present interactive data in human-readable form and to provide open-source software for developers. Public companies will have an interest in understanding how their financial data is processed by third-party software applications and how that information is disseminated and absorbed by securities markets.

In addition, all public companies subject to the SEC's proxy requirements must now comply with its electronic proxy (e-proxy) delivery rules. The e-proxy rules require that a company's proxy materials—i.e., the proxy statement, a proxy card, the "glossy" annual report to shareholders, and any other soliciting materials—be posted in a reader-friendly format on an Internet Web site (other than the SEC's Web site). The Web site where the proxy materials are located must not contain any technology, such as cookies, that would compromise the anonymity of shareholders.⁶

Finally, in 2008, the SEC launched an internal project known as the 21st Century Disclosure Initiative, which includes a review of all existing SEC forms and reporting requirements. The stated aim of the initiative is to "outline the attributes of the disclosure system for the future that incorporates technology, the new ways in which investors get their information, and recent developments in how companies compile and report the information in their SEC-mandated disclosures."⁷

It is too soon to know to what extent, if at all, the SEC, led by Obama-appointed Mary Schapiro as chair, will further pursue the 21st Century Disclosure Initiative or the Advisory Committee's recommendations, as she has indicated that these are low priorities for her in the current environment of economic and market turmoil.⁸ In

the meantime, regardless of whether there is any further SEC action in this area, the shift from static information sparingly distributed by public companies to streams of interactive Web-based communications continues to accelerate, and companies should look to the Website Guidance and best practices to effectively communicate with investors and to avoid disclosure problems.

III. The SEC's Website Guidance

The Website Guidance was issued partly in response to a recommendation made by the Advisory Committee to provide clarity on issues arising in connection with SEC rules against selective disclosure of material nonpublic information.

Given that the Internet has changed significantly since 2000, when the SEC had last issued guidance on the use of Web sites and electronic media, the SEC stated that it believed that new guidance was necessary. The Website Guidance is also intended to encourage the continued development of corporate Web sites as important means of disseminating corporate information to investors.

The Website Guidance is divided into four parts, each of which is summarized here.

A. Regulation FD

The Website Guidance clarifies how information posted on a corporate Web site can be considered "public," and it provides guidance to help companies comply with public disclosure requirements under Regulation FD. Disclosure of information on a corporate Web site will be deemed to make such information "public" if the following conditions are satisfied:

- The corporate Web site is a "recognized channel of distribution."
- The posting of such information disseminates it in a manner so as to make it "available to the securities marketplace in general."
- Such information is posted for a sufficient period of time so as to allow for its absorption by the market.

The Website Guidance provides a nonexclusive summary of factors that companies should consider in determining whether these conditions have been satisfied. In determining whether the disclosure of information via a corporate Web site in lieu of filing a Form 8-K with the SEC satisfies the requirements of Rule 101(e) of Regulation FD's alternative method of public disclosure, companies will need to assess whether such disclosure "is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."

B. Company Liability for Information Presented on a Corporate Web Site

The Website Guidance clarifies the nature of the liability framework for information presented on a corporate Web site, including the manner in which companies can provide access to archived and historical data as well as how to hyperlink to third-party information. As a general matter, the SEC notes that companies are liable for statements made on the Internet under the federal securities laws, including the antifraud provisions, in the same way that companies are liable for statements made by or on behalf of a company—including postings accessed via hyperlinks from a corporate Web site to a third-party Web site—unless proper precautions are taken. The guidance clarifies the SEC’s view of four specified areas of information:

- **Previously Posted Information.** Historical or archived information made available on a corporate Web site will not be deemed to be republished or reissued for purposes of the antifraud provisions of the federal securities laws simply because such information remains available to the public. Provided a company does not affirmatively restate or reissue such historical or archived information, the guidance clarifies that there is also no duty to update such information.
- **Links to Third-Party Information.** Companies will not be liable under the antifraud provisions of the federal securities laws for third-party information accessed via a hyperlink on a corporate Web site if companies provide an explicit explanation of the rationale for the hyperlink being made available on its corporate Web site and companies use the appropriate “exit screen notices” or “intermediate screens” to denote that the hyperlink is to third-party information. Whether or not these steps are taken, companies are not immune from antifraud liability for hyperlinks to third-party information that a company knows or should know is materially false or misleading.
- **Summary Information.** Companies that disclose summary information should alert readers to the summary nature as well as the context of such information so as to decrease the potential that such information will violate the antifraud provisions of the federal securities laws.
- **Interactive Web Site Features.** Companies that use their corporate Web sites to blog or otherwise interact or communicate with various stakeholders, including stockholders, should take steps to implement appropriate controls and procedures to monitor statements made by or on behalf of the company through such media, as such statements are subject to the antifraud provisions of the federal securities laws. However, companies are not responsible for

statements made by third parties through such media and are not obligated to respond to or correct any misstatements made by third parties through such media.

C. Disclosure Controls and Procedures

The Website Guidance clarifies that disclosure controls and procedures that are required with respect to the company’s SEC filings are not generally applicable to disclosures made on corporate Web sites, except in a few instances where disclosure on a corporate Web site (such as a waiver from a code of ethics) is allowed to be made on a website instead of in an SEC-filed document. However, the SEC notes that it is advisable for companies to consider adopting appropriate procedures for making disclosures on corporate websites since such disclosures are subject to the antifraud provisions of the federal securities laws.

D. Formatting and Presentation of Information on a Corporate Web Site

The Website Guidance makes it clear that information presented on corporate Web sites need not be printer-friendly unless otherwise explicitly required by the rules and regulations of the SEC, as is the case with regard to the SEC’s e-proxy rules.

The Website Guidance has been criticized for not breaking new legal ground, and to date there are only a few examples of substantial public companies using their Web sites as a primary means of delivering information that is only marginally material. Instead, companies tend to use blogs and other Internet methods as a way of providing investors with additional information, not to replace other modes of disclosure. Some companies appear to be preparing for a time when their corporate Web site may be used as a primary disclosure vehicle. One leading company has recently included the following statement in its SEC filings regarding its results of operations, apparently for the purpose of eventually establishing its Web site as a “recognized channel of information distribution”:

[XYZ’s] web site ([www.\[xyz\].com](http://www.[xyz].com)) contains a significant amount of information about [XYZ], including financial and other information for investors ([www.\[xyz\].com/investor/](http://www.[xyz].com/investor/)). [XYZ] encourages investors to visit its various web sites from time to time, as information is updated and new information is posted.

As an interpretive release, the Website Guidance does not create any new laws or regulations, but it does articulate the SEC’s views and interpretations of existing laws and regulations. Accordingly, as a result of the Website Guidance, companies may act with greater certainty as to the use of their corporate Web sites for disclosing information and have a better understanding of how to avoid the

potential antifraud liability that may arise as a result of such disclosure.

IV. Compliance Recommendations

Public companies should consider taking one or more of the following steps to ensure continued compliance with laws and regulations that are applicable to its Web site and other informal and formal corporate disclosures.

Review, update, and recirculate as necessary the company's Regulation FD and corporate communications policies. The company's policy and practices with regard to Regulation FD should include at a minimum the following:

- Limit the number of persons authorized to speak—or blog or tweet—on behalf of the company and establish recognized spokespersons.
- Ensure that authorized spokespersons know what is and what is not already public, what they are authorized to communicate, and when.
- Make (to the fullest extent possible) interactions with analysts, stockholders, and other market participants into public events.
- Select the most suitable methods or combinations of methods for public disclosure of both routine and unexpected matters, which must in the case of the disclosure of material nonpublic information be “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”
- Keep a record of public disclosures.
- Keep track of marketplace information about the company.
- Use safe-harbor meaningful cautionary statements if making or affirming forward-looking statements.

Review the company's policy to prevent insider trading and “tipping” to ensure that it is clear that Web site information, social and business networking tools, and communication technologies are within its scope.

Review and update as necessary the company's Web site structure and disclaimers, especially safe-harbor statements with regard to forward-looking information.

Date all documents and move older materials to an archive section; include a disclaimer of any duty to update historical information.

Take the following action in order to avoid the risk that the company be deemed to have adopted any linked information:

- Ensure that the context for the link is provided, and explicitly state why the link is being provided.

- Consider using “exit notices” to notify Web site visitors that they are leaving the company's Web site and entering a third party's Web site.

If the company seeks to establish its Web site as a recognized channel of distribution, it should consider taking the following steps:

- Establish an appropriate waiting period before information posted to the Web site can be considered to have been sufficiently absorbed by the market to be repeated in a private setting.
- Include the URL for the company's Web site in SEC filings and press releases, indicating the kinds of information that can be found on the Web site and a statement declaring that the company routinely posts important information on its Web site.
- Post all press releases and other material information on the company Web site.
- Provide advance notice of particular postings, including the date and time of such postings.
- Ensure that the investor relations portion of the Web site is easily identifiable, accessible, and generally user-friendly.
- Ensure that the investor relations page reveals current press releases immediately and without a need to click to a separate news page.
- Consider using “push” technologies consistently in order to disseminate information.
- Ensure that the Web site can accommodate spikes in traffic volume that may accompany a major company announcement.
- Ensure that press releases and other material information are timely posted to the Web site and that information is updated periodically as necessary after posting.

In preparation of the issuance of a company's financial statements in XBRL format, take the following actions:

- Consider the potential use of such data by investors and other third parties and how the company will respond and maintain maximum control over its strategic message.
- Determine whether the company should adopt any permissible data tag extensions for any nonstandard financial statement line items where useful in order to enhance comprehension of the company's financial results and condition.
- Determine whether to outsource XBRL compliance.
- Consider providing links to XBRL viewers and other software tools that the company finds acceptable.

ENDNOTES

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** David A. Cifrino can be contacted by telephone at (617) 535-4034 or by e-mail at dcifrino@mwe.com. Thomas P. Conaghan can be contacted by telephone at (202) 756-8161 or by e-mail at tconaghan@mwe.com. Amar Murugan can be contacted by telephone at (650) 815-7488 or by e-mail at amurugan@mwe.com. Stephen E. Older can be contacted by telephone at (212) 547-5649 or by e-mail at solder@mwe.com.

1. See McDermott’s On the Subject dated May 6, 2009, entitled “NYSE Amends Rules Regarding Procedures for Release of Material Information by Listed Companies,” available at <http://www.mwe.com/info/news/ots0509b.htm>.

2. See “Commission Guidance on the Use of Company Websites,” dated August 1, 2008, and available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

3. According to IRWebReport.com, one set of disclaimers issued via Twitter included the following:

Tweet 1: “Important information about the nature of this session. Forward-looking statements and non-GAAP financial

measures. Click here:” **Tweet 2:** “This session will contain non-GAAP financial measures.” **Tweet 3:** “The presentation of this financial information is not intended to be considered in isolation or as a substitute for GAAP financial measures.” **Tweet 4:** “A reconciliation of these measures to the nearest comparable GAAP measures can be found by clicking on the following link:”

4. Available at <http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf>.

5. See McDermott’s On the Subject dated February 2, 2009, entitled “SEC Adopts Final Rules Requiring Interactive Financial Data in XBRL Format,” available at <http://www.mwe.com/info/news/ots0209b.htm>.

6. The e-proxy rules also permit but do not require a company to deliver a Notice of Internet Availability of Proxy Materials in lieu of mailing the materials to shareholders, although hard copies of the proxy materials must be delivered to any shareholder who requests them.

7. See the SEC press release dated June 24, 2008, entitled “SEC Announces ‘21st Century Disclosure Initiative’ to Fundamentally Rethink the Way Companies Report and Investors Acquire Information,” available at <http://www.sec.gov/news/press/2008/2008-119.htm>.

8. See McDermott’s Hot Topic dated April 6, 2009, entitled “SEC Chair Sets Forth Broad Regulatory Agenda,” available at <http://www.mwe.com/sec0409/>.