SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 271

[Release Nos. 34-58288, IC-28351; File No. S7-23-08]

COMMISSION GUIDANCE ON THE USE OF COMPANY WEB SITES

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; solicitation of comment.

SUMMARY: We are publishing this interpretive release to provide guidance regarding the use of company web sites under the Exchange Act and the antifraud provisions of the federal securities laws. We are soliciting comment on issues relating to company use of technology generally in providing information to investors.

DATES: Effective Date: August 7, 2008.

Comment Date: Comments should be received on or before November 5, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/interp.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-23-08 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-23-08. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's web site (http://www.sec.gov/rules/interp.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jeffrey Cohan, Kim McManus or Mark Vilardo, Special Counsels in the Office of Chief Counsel, Division of Corporation Finance, at (202) 551-3500, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

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I. Introduction and Overview

A. Introduction

In its February 2008 Progress Report, the Federal Advisory Committee on Improvements to Financial Reporting recommended that we provide more guidance as to how companies can use their web sites to provide information to investors in compliance with the federal securities laws, particularly with respect to the Securities Exchange Act of 1934 (the "Exchange Act").[1] Prompted, in part, by this report, we believe that to encourage the continued development of company web sites as a significant vehicle for the dissemination to investors of important company information, it is an appropriate time to provide additional Commission guidance specifically addressing company web sites.[2] While we addressed certain discrete Internet issues relating to the Securities Act of 1933 (the "Securities Act") in 2005,[3] we last provided guidance in 2000 on the electronic delivery of disclosure documents, company liability for web site content, as well as other matters.[4] We noted then that, given the speed at which technological advances are developing, and the translation of those technologies into investor tools, we expected to revisit the guidance provided at that time in order to update and supplement it as appropriate.[5]

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1 See Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting, Release No. 33-8896 (Feb. 14, 2008) ("CIFiR Progress Report"), available at http://www.sec.gov/rules/other/2008/33-8896.pdf.

2 In this release the term "company web site" and the use of the term "web site" in the context of companies refer to public (Internet) company sites, as distinguished from private (intranet) sites. A company web site is maintained by or for the company and contains information about the company.

3 See Securities Offering Reform, Release No. 33-8591 (Aug. 3, 2005) [70 FR 44721] ("Securities Offering Reform Release").

4 See Use of Electronic Media, Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843] ("2000 Electronics Release").

5 See id. at Section II.D.

Given the development and proliferation of company web sites since 2000, and our expectation that continued technological advances will further enhance the quality, not just the quantity, of information delivered and available to investors on such web sites, as well as the speed at which such information reaches the market, we are issuing this interpretive release[6] to provide additional guidance on the use of company web sites with respect to the antifraud provisions and certain relevant Exchange Act provisions of the federal securities laws.[7] Our guidance focuses principally on:[8]

- When information posted on a company web site is "public" for purposes of the applicability of Regulation FD;
- Company liability for information on company web sites – including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites;
- The types of controls and procedures advisable with respect to such information; and
- The format of information presented on a company web site, with the focus on readability, not printability.

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6 We do not view the guidance in this release as a delineation of the outer limits of how technology can or should be used on company web sites.

7 In addition to the Exchange Act, companies must also consider whether their web sites may involve issues under the Securities Act, which we discussed in our 2000 Electronics Release. For example, a company in registration must consider the application of Section 5 of the Securities Act to all of its communications with the public – including information on a company's web site. See 2000 Electronics Release, supra note 4. This consideration is important with regard to any company engaged in offering and selling its securities, including companies engaged in continuous offerings of their securities, such as mutual funds. Because our rules adopted as part of Securities Offering Reform in 2005 answered many of the key issues relating to company web site use under the Securities Act, this release will focus on the antifraud provisions and certain Exchange Act provisions only. See Securities Offering Reform Release, supra note 3; Securities Act Rule 433 [17 CFR 230.433].

8 For purposes of this release generally, we are using the term "company" to refer to entities that are corporations, partnerships and other types of registrants subject to the periodic reporting and antifraud provisions of the Exchange Act, including registered investment companies.

We have long recognized the vital role of the Internet and electronic communications in modernizing the disclosure system under the federal securities laws and in promoting transparency, liquidity and efficiency in our trading markets.[9] Central to the effective operation of our trading markets is the ongoing dissemination of information by companies about themselves and their securities. A reporting company's reports that it files under the Exchange Act and other publicly available information form the basis for the market's evaluation of the company and the pricing of its securities, and investors in the secondary market use that information in making their investment decisions.

Ongoing technological advances in electronic communications have increased both the markets' and investors' demand for more timely company disclosure and the ability of companies to capture, process and disseminate this information to market participants. Indeed, one of the key benefits of the Internet is that companies can make information available to investors quickly and in a cost-effective manner. Recently, we noted that approximately 80% of investors in mutual funds in the United States have access to the Internet in their homes.[10] Investors are turning increasingly to electronic

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9 See, e.g., The Impact of Recent Technological Advances on the Securities Markets (Sept. 1997) (available at http://www.sec.gov/news/studies/techrp97.htm). In this report, we stated that we were mindful of the benefits of increasing use of new technologies for investors and the markets, and have encouraged experimentation and innovation by adopting flexible interpretations of the federal securities laws. We noted that our approach has balanced the goals of promoting the benefits of electronic media, with the need to protect investors and the integrity of the markets from fraud and abuse. We also emphasized the importance of continued coordination with market participants and federal, state and international regulators as technological advances develop. See also Securities Offering Reform Release, supra note 3.

10 See Internet Availability of Proxy Materials, Release No. 34-55146, at Section I (Jan. 22, 2007) [72 FR 4147] ("Internet Proxy Release"). The Investment Company Institute reported that, in 2006, 92% of mutual fund shareholders had Internet access. See Sandra West & Victoria Leonard-Chambers, Ownership of Mutual Funds and Use of the Internet, 2006, Investment Company Institute Research Fundamentals (Oct. 2006), available at http://ici.org/stats/res/fm-v15n6.pdf. In 2005, that figure was at 88%. Additionally, the Investment Company Institute reported that 79% of all U.S. adults had Internet access in 2005. See Sandra West & Victoria

media and to company and third-party web sites as sources of information to aid in their investment decisions, particularly since many types of investment-related company information are available only in electronic form. We believe that the Internet has helped to transform the trading markets by enabling many retail investors to have ready access to company information.[11]

Through the years, we have taken a number of steps to encourage the dissemination of information electronically via the Internet, as we believe that widespread access to company information is a key component of our integrated disclosure scheme, the efficient functioning of the markets, and investor protection. Today, all companies must make their Commission filings electronically through our Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system,[12] and we provide free access to EDGAR on a real-time basis through our Internet web site, www.sec.gov.[13] In addition to our ongoing efforts to improve and modernize EDGAR, we have

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Leonard-Chambers, Mutual Fund Shareholders' Use of the Internet, 2005, Investment Company Institute Research Fundamentals (Feb. 2006), available at http://www.ici.org/pdf/fm-v15n2.pdf. According to the Pew Internet & American Life Project, as of an October-December 2007 survey, 75% of adults use the Internet. See http://www.pewinternet.org/trends/User_Demo_2.15.08.htm.

11 See, e.g., Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports, Release No. 33-8128, at Section II.D.1 (Sept. 5, 2002) [67 FR 58480] ("Accelerated Periodic Report Filing Release") ("Online access to Internet information also helps to democratize the capital markets by enabling many small investors to access corporate information.").

12 A limited number of forms continue to be permitted to be filed in paper. For example, we permit paper filing of Form 1-A [17 CFR 239.90] and Form 144 [17 CFR 239.144]. In addition, SEC registered investment advisers make some of their filings electronically through the Investment Adviser Registration Depository.

13 Since 1983, when the Commission first began to develop an electronic disclosure system, we have been continually improving and modernizing electronic access to companies' Commission filings, as well as requiring more forms to be filed electronically rather than in paper. The pilot program for EDGAR was established in the early 1980s pursuant to a Congressional mandate and the system was fully implemented, effective January 30, 1995. For a summary of the development of EDGAR, see the staff's report, "Electronic Filing and the EDGAR System: A Regulatory Overview," (Oct. 3, 2006), available at http://www.sec.gov/info/edgar/regoverview.htm.

encouraged, and recently proposed requiring,[14] companies to provide financial information on EDGAR in interactive data files, which would make financial information easier for investors to analyze, as well as help automate regulatory filings and business information processing. We also proposed rule amendments requiring mutual funds to provide certain key information from their prospectuses in interactive data format.[15] Interactive data has the potential to increase the speed, accuracy and usability of financial and other disclosure, and eventually to reduce costs.[16]

As we have developed EDGAR to facilitate and promote electronic availability of information, we also have encouraged companies to make their Commission filings and other company information available on their web sites. We believe that company disclosure should be more readily available to investors in a variety of locations and formats to facilitate investor access to that information. Although our rules do not

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[14] On May 30, 2008, we published proposed rule amendments requiring companies to provide their financial statements, including financial statement footnotes and schedules, in interactive data format on EDGAR. The proposed rules would require a company to provide such interactive data in its annual and quarterly reports, transition reports, and Securities Act registration statements. Companies that maintain web sites also would be required to post this new interactive data on their web sites. See Interactive Data to Improve Financial Reporting, Release No. 33-8924 (May 30, 2008) [73 FR 32794] ("Interactive Data Proposing Release").

[15] See Interactive Data For Mutual Fund Risk/Return Summary, Release No. 33-8929 (June 10, 2008) [73 FR 35442] ("Mutual Fund Interactive Data Proposing Release," together with the Interactive Data Proposing Release supra note 14, the "Interactive Data Proposing Releases").

[16] Companies create interactive data files by defining – or "tagging" – their financial statements using elements and labels from a standard list of interactive data tags. Data tagging provides a format for enhancing financial and other reporting data using electronic formats such as eXtensible Mark-Up Language (XML) and its derivatives, such as eXtensive Business Reporting Language (XBRL). General information concerning interactive data is available on our web site at http://www.sec.gov/spotlight/xbrl.shtml. See also XBRL Voluntary Financial Reporting Program on the EDGAR System, Release No. 33-8529 (Feb. 3, 2005) [70 FR 6556]; and Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information, Release No. 33-8823 (July 11, 2007) [72 FR 39290].

require reporting companies to establish or maintain web sites, our rules do promote and, in some cases require, companies to use web sites to make required disclosures.[17]

A company's web site is an obvious place for investors to find information about the company,[18] and a substantial majority of large public companies already provide access to their Commission filings through their web sites.[19] Technological advances, and the reduced costs associated with the implementation of technologies over time, now allow companies to include more "interactive" and current information on their web sites than was the case previously, thereby moving web sites away from the filing cabinet or "static" paradigm to a "dynamic" paradigm, one shaped by the market's desire for more current, searchable and interactive information.[20] We recognize that allowing companies

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17 See Section I.B, infra. See also Exchange Act Section 16(a)(4)(C) [15 U.S.C. 78(p)(a)(4)(C)]. This section was enacted pursuant to the Sarbanes-Oxley Act of 2002 [Pub. L. No. 107-204, 116 Stat. 745 (2002)] and requires that companies post Section 16 reports on their web site if they maintain one. Section 16(a)(4)(C) evidences Congress's recognition of the informational utility of company web sites. While our rules do not require companies to establish web sites, the New York Stock Exchange does require its listed companies, with certain exceptions, to establish and maintain their own web sites. See NYSE Listed Company Manual, Section 303A.14.

18 Since their first appearance on the World Wide Web, company web sites typically have included copies of Commission filings or a hyperlink to the Commission's EDGAR database, along with certain other previously posted historical information, such as earnings releases. Some companies also have provided limited "real-time" information, such as stock data links. For a discussion of the content of company web sites in 1998 and prior years, see generally Robert Prentice et al., Corporate Website Disclosure and Rule 10b-5: An Empirical Evaluation, 36 Am. Bus. L.J.531 ("Prentice"); Howard M. Friedman, Securities Regulation in Cyberspace §10.01 (3rd ed. Supp. 2006) ("Friedman").

19 A 2002 study by our Office of Economic Analysis revealed that approximately 83% of companies with a public float of at least $75 million (other than registered investment companies) provide some form of access to their Commission filings through their web sites, either via a hyperlink with a third-party service providing real-time access to the filings (45%), by posting the filings directly on their web sites (29%) or via a hyperlink to our EDGAR database (15%). See Accelerated Periodic Report Filing Release, supra note 11.

20 For example, web pages created in a "dynamic" format, such as "active server page," are database driven, permitting automatic updating of the content. This differs from the traditional, "static" HTML pages that can only be altered by the webmaster. "Push" technology, such as e-mail alerts or "RSS" feeds, enables the automatic, electronic dissemination of new information on the site to subscribers. "Interactive" investor-related tools and functionality, such as "blogs" and electronic shareholder forums, promote direct communications with companies, their officers and other representatives.

to present data in formats different from those dictated by our forms or more technologically advanced than EDGAR may be beneficial to investors.[21] Indeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws,[22] 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.[23] 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.[24]

B. Overview of Exchange Act Rules on the Use of Company Web Sites

We have issued a series of interpretive releases and rules that promote the use of company web sites as a means for companies to communicate and provide information to

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21 As we noted in a recent release, Shareholder Choice Regarding Proxy Materials, Release No. 34-56135, at Section VI.C.1 (Jul. 26, 2007) [72 FR 42221] ("Shareholder Choice Release"): "Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in. The amendments also will permit shareholders to more easily evaluate data and transfer data using analytical tools such as spreadsheet programs. Such tools enable users to compare relevant data about several companies more easily."

22 See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (explaining that the purpose common to the securities laws was to "substitute a philosophy of full disclosure for the philosophy of caveat emptor").

23 While EDGAR and the Commission's web site continue to serve as the core source of companies' securities-related information online, we recognize that the technological capacities of company web sites may allow for presentation and manipulation of large quantities of data in ways that exceed EDGAR's current capacities. For example, while the recently introduced RSS feed on the Commission's web site allows access to documents in interactive data format in the pilot program, some commercial and company web sites enable users to receive the filings of companies of their choice.

24 In discussing the use of company web sites to provide information in a tiered format, the Federal Advisory Committee on Improvements to Financial Reporting recently observed in its February 2008 Progress Report: "A valuable element of many of such [company] web site presentations is that they present the most important general information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a path into, and thereby obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and its many other areas in which investors and others may have an interest." See CIFiR Progress Report, supra note 1.

investors under the Securities Act and the Exchange Act.[25] A fundamental principle underlying these interpretations and rules is that, where access 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. Further, we have recognized that, in some cases, allowing companies to provide information on their web sites has advantages for investors over mandating that EDGAR serve as the exclusive venue and format for company disclosures.[26] Indeed, today we have reached a point where the availability of information in electronic form – whether on EDGAR or a company web site – is the superior method of providing company information to most investors, as compared to other methods.

Our rules and interpretations that promote the use of web sites generally work in two different respects. First, when delivery of documents is required under the federal securities laws, we have encouraged the delivery in electronic format or recognized that electronic access can satisfy delivery – hence, prospectuses and proxy materials can be delivered or otherwise made available using electronic communications and the Internet in certain circumstances.[27] Indeed with respect to proxy materials, certain companies are

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25 See generally 2000 Electronics Release, supra note 4; Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] ("1995 Electronics Release"); Use of Electronic Media by Broker-Dealers, Release No. 33-7288 (May 9, 1996) [61 FR 24643] ("1996 Electronics Release").

26 See, e.g., Regulation G [17 CFR 244.100]; Instruction 2 to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)]; Exchange Act Rule 12d-2(c)(2)(iii) [17 CFR 240.12d-2(c)(2)(ii)]. See generally Accelerated Periodic Report Filing Release, supra note 11, at Section IV.B.1.

27 See Securities Act Rule 172 [17 CFR 230.172]; Securities Offering Reform Release, supra note 3; Internet Proxy Release, supra note 10; Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8861 (Nov. 30, 2007) [72 FR 67790] ("Mutual Fund Summary Prospectus Proposing Release") (proposing to permit funds to satisfy their prospectus delivery obligations by sending or giving key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet web site).

required to post their proxy materials on a specified, publicly accessible Internet web site (other than EDGAR) and provide record holders with a notice informing them that the materials are available and explaining how to access those materials.[28] Second, where disclosure of information is required under the Exchange Act, we have allowed companies to make such information available to investors on their web sites with their web sites serving, depending on the circumstance, as a supplement to EDGAR, as an alternative to EDGAR, or as a stand-alone method of providing information to investors independent of EDGAR.

When a company web site serves as a supplement to EDGAR, company information is available both on EDGAR and on the company's web site. We have promoted this supplemental use of web sites by requiring, for example, that:

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[28] See Shareholder Choice Release, supra note 21. While large accelerated filers, not including registered investment companies, are currently required to comply with these rules, starting January 1, 2009, these rules will apply to all filers and other soliciting parties. Perhaps the most significant change effected by this rulemaking is the shift whereby electronic availability can serve as the default means of delivery, with shareholders having to "opt out" to receive paper delivery. The requirement that any shareholder lacking Internet access, or preferring delivery of a paper copy of the proxy materials, can make a permanent request to receive a paper copy of the proxy materials (and all future proxy materials) at no charge mitigates concerns about Internet access. In adopting these notice and access model rules, we recognized that "[a]s technology continues to progress, accessing the proxy materials on the Internet should increase the utility of our disclosure requirements to shareholders. Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in." Id. at Section VI.C.1. It is significant to note that these rules neither require, nor permit, solicitations pursuant to the notice and access model with respect to business combination transactions. Based on statistics compiled by Broadridge, a proxy distribution service provider , beneficial owner (which include retail investors) participation in proxy voting has diminished since the adoption of the notice and access model rules. See Broadridge, Notice & Access: Statistical Overview of Use with Beneficial Shareholders as of May 31, 2008, available at http://broadridge.com/notice-and-access/NAStatsStory.pdf.

- Companies disclose their web site addresses in annual reports on Form 10-K and state whether their Exchange Act reports are available on their web sites;[29]
- Mutual funds disclose in their prospectuses whether shareholder reports are available on their web sites, and if not, why not;[30]
- Companies make their Exchange Act reports available on their web sites as a condition to incorporating by reference previously filed reports into prospectuses filed as part of registration statements on Form S-1 or Form S-11;[31]
- Companies post on their web sites, if they have one, all beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Exchange Act;[32] and
- Companies post on their web sites, if they have one, notice of their intent to delist or deregister their securities.[33]

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29 Accelerated filers and large accelerated filers are required to disclose this information. Non-accelerated filers are encouraged to do so. See Item 101(e) of Regulation S-K [17 CFR 229.101(e)].

30 See Item 1(b) of Form N-1A. See also Item 1.1.d. of Form N-2 (providing a similar requirement for closed-end funds).

31 See Form S-1, General Instruction VII.F [17 CFR 239.11]; Form S-11, General Instruction H.6 [17 CFR 239.18]. In the adopting release for the Form S-11 amendments, we noted that companies could satisfy this requirement by "including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party web site where the reports or other materials are made available in the appropriate timeframe and access to the reports or other materials is free of charge to the user." See Revisions to Form S-11 to Permit Historical Incorporation by Reference, Release No. 33-8909, at Section I.B.1(a) (Apr. 10, 2008) [73 FR 20512].

32 See Exchange Act Section 16(a)(4)(C) and Rule 16a-3(k) [17 CFR 240.16a-3(k)]. See also Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release No. 33-8230 (May 7, 2003) [68 FR 25787].

33 See Exchange Act Rule 12d2-2(c)(2)(iii) [17 CFR 240.12d2-2(c)(2)(iii)]. See also Exchange Act Rule 12d2-2(c)(3) [17 CFR 240.12d2-2(c)(3)] (imposing a similar requirement on a national securities exchange to post on its web site any notice it receives from a company indicating the

In addition, we have proposed in the Interactive Data Proposing Releases that companies that maintain web sites be required to post their interactive data files on their web sites.[34]

In some situations, we have given companies the choice and flexibility of satisfying an Exchange Act disclosure requirement either by filing the disclosure on EDGAR or by making it available on the company's web site, thereby using company web sites as an alternative to EDGAR. For example:

- A company may disclose non-GAAP financial measures and Regulation G required information on its web site;[35]
- An asset-backed issuer may post disclosure of static pool data on its web site rather than filing it on EDGAR;[36]
- A company may provide its audit, nominating or compensation committee charters on its web site as an alternative to providing them in its proxy or information statement;[37]

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company has determined to withdraw a class of securities from listing and/or registration on the exchange).

34 See Interactive Data Proposing Release, supra note 14; and Mutual Fund Interactive Data Proposing Release, supra note 15.

35 See Conditions for Use of Non-GAAP Financial Measures, Release No. 33-8176 (Jan. 22, 2003) [68 FR 4819]. In that release, we recommended that companies provide ongoing web site access to this information for a period of at least 12 months. Although we understand that some companies may be reducing such web site access to a single quarter, we continue to believe that companies should retain the information on their web sites for 12 months. We believe such a retention time period is appropriate to enable quarter-to-quarter comparisons. Financial information disclosed on web sites is still subject to the limitations on disclosure of non-GAAP financial information set forth in Regulation G. See id.

36 See Asset-Backed Securities, Release No. 33-8518, at Section III.B.4.b. (Dec. 22, 2004) [70 FR 1505] ("Asset-Backed Release") (discussing the ability to post disclosure of static pool data that is required in registered sales of asset-backed securities on web sites rather than filing it on EDGAR, subject to certain conditions). In this context, we resolved the potential conflict between the need to include material information in a prospectus offering asset-backed securities and the technical limitations of EDGAR that may have limited the ability of asset-backed issuers to provide that information in the format most useful for investors by adopting an alternative accommodation via which the information posted on a web site will be deemed to be included in the prospectus when done in compliance with Item 312 of Regulation S-T [17 CFR 232.312].

- A company may disclose a material amendment to its code of ethics, or a material waiver of a provision of its code of ethics, by posting the information on its web site rather than filing a Form 8-K;[38] and
- A company may provide information regarding board member attendance at the annual shareholder meeting on its web site rather than in its proxy statement.[39]

Finally, we have recently recognized that, in very limited circumstances, a company's web site can even serve as a standalone method of providing information to investors wholly independent of EDGAR. We have permitted certain foreign private issuers to use their web sites as the primary or stand-alone source of information about the company as a basis for maintaining an exemption from Exchange Act registration and reporting requirements, under certain circumstances.[40]

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37 See Instruction 2 to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)]. As we noted above, the New York Stock Exchange has also implemented rules that recognize the value of company web sites as an important source of corporate governance information. See, e.g., NYSE Listed Company Manual, Sections 303A.10 and 303A.14 and note 17 supra.

38 See Item 406(d) of Regulation S-K [17 CFR 229.406(d)]; Item 5.05(c) of Form 8-K [17 CFR 249.308].

39 See Instruction to Item 407(b)(2) of Regulation S-K.

40 We recently adopted new Exchange Act Rule 12h-6 [17 CFR 240.12h-6] and accompanying rule amendments to extend the Exchange Act Rule 12g3-2(b) [17 CFR 240.12g3-2(b)] exemption to a foreign private issuer and prior Form 15 filer immediately upon its termination of reporting under Rule 12h-6. To maintain that exemption, the company must publish specified home country documents in English on its Internet web site or through an electronic information delivery system generally available to the public in its primary trading markets. See Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55540 (Mar. 27, 2007) [72 FR 16933]. The purpose of these provisions, and the additional changes that have been proposed to the availability of the exemption from registration pursuant to Rule 12g3-2(b), is to provide U.S. investors with Internet access to ongoing material information about a foreign private issuer that is required by its home country following its termination of reporting under Rule 12h-6. See Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-57350 (Feb. 19, 2008) [73 FR 10101]. We also recently proposed rules that would permit exchange-traded funds to be actively managed provided certain conditions are met, including that fund composition information is maintained every business day on a publicly accessible web site, with such web site posting being the

II. Application of Certain Provisions of the Federal Securities Laws to Information Presented on Company Web Sites

A. Evaluation of "Public" Nature of Information on Company Web Sites

As we note above, there has been a dramatic increase in the use of company web sites since our 2000 Electronics Release and the adoption of Regulation FD.[41] Companies are providing greater amounts and types of information on their web sites, which, as a result, are increasingly viewed by investors as key sources of information about the company.[42] As companies use their web sites to a greater extent to provide comprehensive information about themselves, some have raised questions as to the treatment of information posted on a company web site under the federal securities laws.[43] We note that such questions have numerous implications under the federal securities laws.[44]

Although we have not addressed the question of whether and when information on a company's web site is considered public for purposes of determining if a subsequent selective disclosure of such information may implicate Regulation FD, we believe that in view of the significant technological advances and the pervasive use of the Internet by companies, investors and other market participants since 2000, it is now an appropriate

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standalone method of providing such information to the public. See Exchange-Traded Funds, Release No. 33-8901 (Mar. 11, 2008) [73 FR 14618].

41 See Selective Disclosure and Insider Trading, Release No. 33-7881, at Section II.B.2 (Aug. 15, 2000) [65 FR 51715] ("Regulation FD Adopting Release").

42 See Section I, supra. There also has been significant growth in the use of the Internet by the public. As noted in the Internet Proxy Release, research submitted to the Commission during the comment period indicated that approximately 80% of mutual fund investors in the United States have access to the Internet in their homes. See Internet Proxy Release, supra note 10, at Section I.

43 The Federal Advisory Committee on Improvements to Financial Reporting requested that the Commission clarify this point in its CIFiR Progress Report. See CIFiR Progress Report, supra note 1, at Chapter 4, Section III.

44 See 2000 Electronics Release, supra note 4.

time to provide additional guidance regarding the public nature of disclosures on company web sites for purposes of Regulation FD. Accordingly, we are providing guidance as to the circumstances under which information posted on a company web site (whether by or on behalf of such company) would be considered "public" for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD's "public disclosure" requirement.[45]

1. Whether and When Information Is "Public" for Purposes of the Applicability of Regulation FD

Evaluating whether and when information posted on a company web site is public so that a subsequent disclosure of that information to an enumerated person in Regulation FD is not a disclosure of non-public information implicates many of the same issues that Regulation FD itself was adopted to address.[46] In particular, Regulation FD was adopted to address the problem of selective disclosure of material information by companies, in

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[45] We are not addressing issues relating to insider trading that may be implicated by disclosures on company web sites. In addition, our guidance is not intended to modify the positions we have expressed regarding the Securities Act implications of disclosures on company web sites, including when such disclosures may constitute offers or the implications for private offerings. For example, in the 2000 Electronics Release, we discussed the extent to which a company's use of an Internet web site could constitute a "general solicitation." See 2000 Electronics Release, supra note 4, at Section II.C.2.

Our guidance also is not intended to address issues under Securities Act Rule 144(c) [17 CFR 230.144(c)]. We note, for example, that the concept of "public information" for non-reporting companies contained in Rule 144(c)(2) is based on access. We believe that non-reporting companies should focus on the availability of information required by Rule 144 rather than on dissemination of that information as further discussed in this section. Likewise, under Rule 144A(d)(1)(i) [17 CFR 230.144A(d)(1)(i)], sellers and persons acting on their behalf may look to publicly available financial statements for a prospective purchaser; and under Rule 144A(d)(4)(i), certain companies are required to provide access to specified company information to security holders and prospective purchasers. As with Rule 144, the concept of dissemination as we discuss in this section is not a condition to reliance on Rule 144A.

Regulation FD applies to closed-end investment companies but does not apply to other investment companies. Exchange Act Rule 101(b) [17 CFR.243.101(b)(definition of issuer for purposes of Regulation FD).

[46] See Regulation FD [17 CFR 243.100 et seq.].

which "a privileged few gain an informational edge – and the ability to use that edge to profit – from their superior access to corporate insiders, rather than from their skill, acumen, or diligence."[47] We must, therefore, keep that in mind when providing guidance on when information is considered public for purposes of assessing whether a subsequent selective disclosure may implicate Regulation FD.

"In order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information."[48] Thus, in evaluating whether information is public for purposes of our guidance, companies must consider 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 a manner making 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.

With respect to the first element of this analysis, as we have noted above, we believe that a company's web site can be a valuable channel of distribution for information about a company, its business, financial condition and operations.[49] As we discuss below, whether a company's web site is a recognized channel of distribution of information will depend on the steps that the company has taken to alert the market to its

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47 See Regulation FD Adopting Release, supra note 41at Section II.A. In the Regulation FD Adopting Release, we stated our belief that Regulation FD struck an appropriate balance. It established a clear rule prohibiting unfair selective disclosure and encouraged broad public disclosure. We also believed that Regulation FD should not impede ordinary course business communications. See id. at Section II.A.4.

48 Faberge, Inc., 45 S.E.C. 249, 255 (1973). See also Regulation FD Adopting Release, supra note 41, at Section II.B ("Information is nonpublic if it has not been disseminated in a manner making it available to investors generally.").

49 See Section I.B, supra. See Interactive Data Proposing Release, supra note 14.

web site and its disclosure practices, as well as the use by investors and the market of the company's web site.

With respect to the second element of the analysis, the question of what "disseminated" means in the context of web site disclosure, we recognize that, today, news is disseminated in an electronic world – one in which the accessibility to the information is not limited to reading a newspaper or the "broad tape." There are now many different channels of distribution of news and other information which account for the rapid dissemination of news today (and also the corresponding capacity for rapid trading based on such information). Because companies of all sizes now have the capacity to present information on their web sites to all investors on a broadly accessible basis, and because investors correspondingly have the capability to easily find and retrieve information about companies by searching the World Wide Web, we now analyze the concept of "dissemination" through a changed lens. Consequently, we believe that, in the context of a company web site that is known by investors as a location of company information, the appropriate approach to analyzing the concept of "dissemination" for purposes of the "public" test as it relates to the applicability of Regulation FD to a subsequent disclosure should be to focus on (1) the manner in which information is posted on a company web site and (2) the timely and ready accessibility of such information to investors and the markets.[50]

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[50] In our recent proposals regarding interactive data, we stated that we believed that "web site availability of the interactive data would encourage its widespread dissemination." Interactive Data Proposing Release, supra note 14, at Section II.B.5. In that release, we recognized the increasing role that company web sites perform in supplementing the information filed electronically with the Commission by delivering financial and other disclosure directly to investors. Id.

Some factors, though certainly non-exclusive ones, for companies to consider in evaluating whether their company web site is a recognized channel of distribution and whether the company information on such site is "posted and accessible" and therefore "disseminated," include:

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

- Whether the company has made investors and the markets aware that it will post important information on its web site and whether it has a pattern or practice of posting such information on its web site;

- Whether the company's web site is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the web site 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 web site is regularly picked up by the market and readily available media, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved. For example, in evaluating accessibility to the posted information, companies that

are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their web sites. On the other hand, companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's web site and that they should look at the company web site for current information about the company;

- The steps the company has taken to make its web site and the information accessible, including the use of "push" technology, [51] such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability. We do not believe, however, that it is necessary that push technology be used in order for the information to be disseminated, although that may be one factor to consider in evaluating the accessibility to the information;[52]

- Whether the company keeps its web site current and accurate;

- Whether the company uses other methods in addition to its web site posting to disseminate the information and whether and to what extent those other

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[51] Push technology, or server push, describes a type of Internet-based communication where the request for the transmission of information originates with the publisher or central server. It is contrasted with pull technology, where the request for the transmission of information originates with the receiver or client.

[52] Companies should also consider the extent to which their Internet infrastructure can accommodate spikes in traffic volume that may accompany a major company development.

methods are the predominant methods the company uses to disseminate information; and

- The nature of the information.

The third element in evaluating whether and when information posted on a company's web site would be public for purposes of evaluating whether a subsequent selective disclosure may implicate Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information. What constitutes a reasonable waiting period depends on the circumstances of the dissemination, which, in the context of company web sites, may include:

- the size and market following of the company;
- the extent to which investor oriented information on the company web site is regularly accessed;
- the steps the company has taken to make investors and the market aware that it uses its company web site as a key source of important information about the company, including the location of the posted information;
- whether the company has taken steps to actively disseminate the information or the availability of the information posted on the web site, including using other channels of distribution of information; and
- the nature and complexity of the information.[53]

[53] See Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (noting that "where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination").

We emphasize that companies must look at the particular facts and circumstances in determining whether the reasonable waiting period element is satisfied. What may be a reasonable waiting period after posting information on a company web site for a particular company and a particular type of information may not be one for other companies or other types of information. For example, a large company that frequently uses its web site as a key resource for providing information, has taken steps to make investors and the market aware of this, and reasonably believes that its web site is well-followed by investors and other market participants, may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation.

If the information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted – for example, prior to such posting, filing or furnishing such information to us or issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will thereby facilitate the broad dissemination of the information.

The question of what constitutes a reasonable waiting period has been frequently litigated in the context of insider trading.[54] While we are not addressing when

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[54] See SEC v. Ingoldsby, No. 88-1001-MA, 1990 U.S. Dist. LEXIS 11383 (D. Mass. May 15, 1990); SEC v. MacDonald, 568 F.Supp. 111, 113 (D.R.I. 1983), *aff'd*, 725 F.2d 9 (1st Cir. 1984); SEC v. Materia, No. 82 Civ. 6225, 1983 U.S. Dist. LEXIS 11130 (S.D.N.Y. Dec. 5, 1983); DuPont Glore Forgan, Inc. v. Arnold Bernhard & Co., Inc., No. 73 Cov. 3071, 1978 U.S. Dist. LEXIS 20385 (S.D.N.Y. Mar. 6, 1978). See also In re Apollo Group Inc. Sec. Litig., 509 F.Supp. 2d 837, 846 (D. Ariz. 2007) (In this securities-fraud class action, the Court declined to adopt a bright-line rule presuming an immediate market reaction, based on the efficient market theory, and instead focused on the specific facts of each case.); In re Crossroads Sys., Inc., 2002 U.S. Dist. LEXIS 26716, (W.D. Tex. Nov. 22, 2002), aff'd, Greenberg v. Crossroads Sys., Inc., 364 F.3d 657,

information is "public" for purposes of insider trading, the cases in this area may provide guidance to companies for purposes of Regulation FD. As we have noted, what constitutes a reasonable waiting period is a facts and circumstances determination.

Hence, under the foregoing analysis, if information on a company's web site is public, then subsequent selective disclosure of that information – such as to an analyst in a private conversation – would not trigger Regulation FD because such information, even if material, would not be non-public.[55] It is important to note that, although posting information on a company's web site in a location and format readily accessible to the general public would not be "selective" disclosure, the information may not be "public" for purposes of determining whether a subsequent selective disclosure implicates Regulation FD. If, however, under the foregoing analysis, information on a company's web site is not public, then subsequent selective disclosure of that information, if material, may trigger the application of Regulation FD.

2. Satisfaction of Public Disclosure Requirement of Regulation FD

Rule 101(e) of Regulation FD requires that once a selective disclosure has been made, the company must file or furnish a Form 8-K 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 – simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure.[56] In adopting Regulation FD in 2000, we discussed the role of company web sites in satisfying the

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660-661 (5th Cir. 2004) (In this securities-fraud class action, the Court employed a two-day window, concluding that an efficient market will digest unexpected new information within two days of its release.).

55 The standard to satisfy "public disclosure" in Regulation FD following a selective disclosure is governed by Rule 101(e).

56 See Rules 100(a) and 101(e) of Regulation FD.

alternative public disclosure provisions of the regulation. At the time, we stopped short of concluding that disclosure on a company web site would, itself, be an acceptable method of "public disclosure" of material non-public information for purposes of compliance with Regulation FD, but we recognized that web site disclosure and webcasting could constitute integral parts of a model method of disclosure in satisfaction of the regulation. With regard to disclosure solely via a company web site, we stated that "[a]s technology evolves and as more investors have access to and use the Internet…we believe that some companies, whose web sites are widely followed by the investment community, could use such a method."[57]

As we stated above in the context of whether information posted on a company web site would be "public" so that a subsequent selective disclosure would not implicate Regulation FD, 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's web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD. Companies will need to consider whether and when postings on their web sites are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[58] To do so, companies can look to the factors we have outlined above regarding the first two elements of the analysis – whether the company web site is a recognized channel of distribution and whether the information is "posted and accessible" and, therefore, "disseminated."[59] As

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57 See Regulation FD Adopting Release, supra note 41, at Section II.B.4.b.

58 See Rule 101(e)(2) of Regulation FD.

59 Under Regulation FD, when an issuer makes a selective disclosure, it must also provide general public disclosure, either simultaneously or promptly. Thus, the third element of the public test we discuss above — whether investors and the market have been afforded a reasonable waiting period

part of that evaluation, companies also will need to consider their web sites' capability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made.[60] 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 Regulation FD, it remains the company's responsibility to evaluate whether a posting on its web site would satisfy this requirement.[61]

B. Antifraud and Other Exchange Act Provisions

The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company.[62] This includes postings on and hyperlinks from

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to react to the information — does not apply in analyzing whether the general public disclosure requirements of Regulation FD have been satisfied.

60 For purposes of Regulation FD, a posting on a blog, by or on behalf of the company, would be treated the same as any other posting on a company's web site. The company would have to consider the factors outlined above to determine if the blog posting could be considered "public."

61 We recognized in Regulation FD that "the issuer may use a method 'or combination of methods' of disclosure, in recognition of the fact that it may not always be possible or desirable for an issuer to rely on a single method of disclosure as reasonably designed to effect broad public disclosure." "[A]n issuer's methods of making disclosure in a particular case should be judged with respect to what is 'reasonably designed' to effect broad, non-exclusionary distribution in light of all the relevant facts and circumstances." Regulation FD Adopting Release, supra note 41.

62 See, e.g., 1995 Electronics Release, supra note 25, at n. 11 ("The liability provisions of the federal securities laws apply equally to electronic and paper-based media. For instance, the antifraud provisions of the federal securities laws as set forth in Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5] thereunder would apply to any information delivered electronically, as it does to information delivered in paper."); 1996 Electronics Release, supra note 25, at Section I, n. 4 ("The substantive requirements and liability provisions of the federal securities laws apply equally to electronic and paper-based media. For example, the antifraud provisions of the Exchange Act and Rule 10b-5 thereunder . . . apply to information delivered and communications transmitted electronically, to the same extent as they apply to information delivered in paper form."); 2000 Electronics Release, supra note 4, at Section II.B. ("It is important for companies . . . to keep in mind that the federal securities laws apply in the same manner to the content of their web sites as to any other statements made by or attributable to them.").

company web sites that satisfy the relevant jurisdictional tests.[63] As we noted in the 2000 Electronics Release, companies should be mindful that they "are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet."[64]

Accordingly, a company should keep in mind the applicability of the antifraud provisions of the federal securities laws, including Exchange Act Section 10(b) and Rule 10b-5, to the content of its web site.[65] These provisions contain a general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities.[66]

In the Rule 10b-5 context, to satisfy the materiality requirement, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[67] Whether information posted on a company's web site is considered part of

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63 See 2000 Electronics Release, supra note 4, at Section II.B.

64 See 2000 Electronics Release, supra note 4, at Section II.B.1.

65 Rule 10b-5 [17 CFR 240.10b-5] makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" (emphasis added). See 2000 Electronics Release, supra note 4. In addition, Securities Act Section 17(a) [15 U.S.C. 77q(a)] applies to the offer and sale of securities. See also Prentice, supra note 18, at 542 (noting that the Commission's antifraud legal regime under Section 10(b) and Rule 10b-5 applies to all manner of electronic disclosure).

66 Section 10(b) and Rule 10b-5 have a scienter requirement, unlike some other provisions in the federal securities laws. See, e.g., Securities Act Section 17(a)(2)[15 U.S.C. 77l(a)(2)]. For cases discussing the scienter requirement of Section 10(b) and Rule 10b-5, see, e.g., SEC v. McNulty, 137 F.3d 732 (2d Cir. 1998), cert. denied, 525 U.S. 931 (1998); Lanza v. Drexel & Co., 419 F.2d 1277 (2d Cir. 1973); Hollinger v. Titan Capital, Inc., 914 F.2d 1564, 1569 (9th Cir. 1990); Aaron v. SEC, 446 U.S. 680 (1980).

67 TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448-449 (1976). See also Basic v. Levinson, 485 U.S. 224, 231 (1988). In Basic v. Levinson, the U.S. Supreme Court "expressly adopt[ed] the TSC Industries standard of materiality for the §10(b) and Rule 10b-5 context." Id. at 232.

the "total mix" for purposes of analyzing materiality is a facts and circumstances determination. As we discuss below, we believe that companies can take certain steps that affect whether information located on or hyperlinked from a company's web site is part of such "total mix" of information.[68] In this release, we are providing guidance regarding certain issues that arise under the antifraud provisions relating to disclosures on company web sites.

In addition, under certain of our rules, companies may disclose information exclusively on their web sites rather than filing such disclosures or materials on EDGAR. While the provisions of Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 12b-20 apply to Exchange Act filings made by companies with the Commission, such provisions generally do not apply to disclosures on company web sites. However, if a company fails to satisfy a web site disclosure option that is an alternative to filing or furnishing an Exchange Act report, an action could be brought under the Exchange Act reporting provisions based on the company's failure to file the report.[69]

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

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68 In this regard, we believe the "buried facts" doctrine applies to electronic disclosures. Under this doctrine, a court would consider disclosure to be false and misleading if its overall significance is obscured because material information is "buried," for example, in a footnote or appendix. We have addressed the application of the buried facts doctrine in the context of an introduction or overview section of Item 303 of Regulation S-K – Management's Discussion and Analysis of Financial Condition and Results of Operations and summary disclosure in plain English. In addition, in the context of the use of summary information in the electronics disclosure context we discuss in Part II.B.3 below, we note that the failure to include every material disclosure that is being summarized should not automatically trigger the "buried facts" doctrine. See Commission Guidance Regarding Management's Discussion and Analysis, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056] ("MD&A Release"); Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370].

69 See, e.g., Exchange Act Section 13(a) [15 U.S.C. 78m] (requiring companies with a class of securities registered under the Exchange Act to file reports prescribed by the Commission) and Exchange Act Rule 13a-1 [17 CFR 240.13a-1] (requiring such companies to file an annual report with the Commission).

In our 2000 Electronics Release, we discussed liability concerns arising from accessing previously posted materials or statements on a company's web site.[70] Since the publication of our 2000 Electronics Release, we understand that some companies continue to be concerned about whether previously posted materials or statements on their web site that are accessed at a later time will be considered "republished" at that later date, with attendant securities law liability.[71] We understand that companies may continue to be concerned that they may have a duty to update the previously posted materials or statements if they are considered to be a new statement by being "republished" each time the materials or statements are accessed on the web site.[72] In 2005, we addressed the treatment of previously posted (which we called historical) information on a company's web site in the context of registered offerings under the Securities Act.[73] We believe it is now appropriate to provide clarity with respect to the treatment of such previously posted materials or statements under the antifraud provisions of the federal securities laws.

We do not believe that companies maintaining previously posted materials or statements on their web sites are reissuing or republishing such materials or information

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70 See 2000 Electronics Release, supra note 4, at Section II.D.

71 See id. at Section II.D.5. As discussed in the 2000 Electronics Release, "a press release disseminated over a wire service or through other customary means is considered to have been 'issued' once, and thereafter is not recirculated to the marketplace. The same press release posted on a company's web site potentially has a longer life because it provides a record that can be accessed by investors at any time and upon which investors potentially could rely when making an investment decision without independent verification. In effect, a statement may be considered to be 'republished' each time that it is accessed by an investor or, for that matter, each day that it appears on the web site. Commentators have suggested that if a statement is deemed to be republished, it may potentially give rise to liability under Section 10(b) of the Exchange Act and Rule 10b-5." Id.

72 Specifically, if previously posted information is considered republished, companies may be concerned that even if the information was accurate when initially posted or issued, it may no longer be current or accurate when it is accessed at a later date.

73 See Securities Offering Reform Release, supra note 3, at Section III.D.3.b.iii.(E)(2).

for purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. Of course, the antifraud provisions would apply to statements contained in posted materials when such statements were initially made. If a company affirmatively restates or reissues a statement, the antifraud provisions would apply to such statements when the company restates or reissues the statement. This affirmative restatement or reissuance may create a duty to update the statement so that it is accurate as of the date it is restated or reissued. As a general matter, we believe that the fact that investors can access previously posted materials or statements on a company's web site does not in itself mean that such previously posted materials or statements have been reissued or republished for purposes of the antifraud provisions of the federal securities laws, that the company has made a new statement, or that the company has created a duty to update the materials or statements.

In circumstances where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, then to assure that investors understand that the posted materials or statements speak as of a date or period earlier than when the investor may be accessing the posted materials or statements, we believe that previously posted materials or statements that have been put on a company's web site should be:

- Separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and

- Located in a separate section of the company's web site containing previously posted materials or statements.[74]

2. Hyperlinks to Third-Party Information

Another area we addressed previously that continues to raise questions involves the use of hyperlinks to third-party information.[75] Companies include on their web sites hyperlinks to third-party information for a variety of reasons, including as part of their ongoing communications to their customers, investors and the markets. In our 2000 Electronics Release, we discussed the implications for the use of hyperlinks from company web sites to third-party information in the context of both the Securities Act and the antifraud provisions of the federal securities laws. While we believe that the treatment of hyperlinks for purposes of the Securities Act is clear from our prior interpretation, we understand that companies continue to be concerned about their liability for hyperlinks to third-party information included on their web sites as part of their ongoing communications to the public, including investors and the markets.[76] In light of these concerns, we believe it is appropriate to provide additional guidance to companies as to the circumstances under which they may have liability for posted information outside the context of the offer and sale of securities under the Securities Act.

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74 These considerations mirror those found in Rule 433(e)(2) under the Securities Act [17 CFR 230.433(e)(2)].

75 A "hypertext link," or "hyperlink," is an electronic path often displayed in the form of highlighted text, graphics or a button that associates an object on a web page with another web page address. It allows the user to connect to the desired web page address immediately by clicking a computer-pointing device on the text, graphics or button. See 2000 Electronics Release, supra note 4, at n. 7 (citing Harvey L. Pitt & Dixie L. Johnson, Avoiding Spiders on the Web: Rules of Thumb for Companies Using Web Sites and E-Mail, in Practising Law Institute, Securities Law & the Internet, No. 1127 (1999), at 107-118, n. 5).

76 See CIFiR Progress Report, supra note 1, at Chapter 4, Section III.

Under Section 10(b) of the Exchange Act and Rule 10b-5, a company can be held liable for third-party information to which it hyperlinks from its web site and which could be attributable to the company. As we explained in the 2000 Electronics Release, whether third-party information is attributable to a company depends upon whether the company has: (1) involved itself in the preparation of the information, or (2) explicitly or implicitly endorsed or approved the information.[77] In the case of company liability for statements by third parties such as analysts, the courts and we have referred to the first line of inquiry as the "entanglement" theory and the second as the "adoption" theory.[78] While we are addressing the use of hyperlinks to third-party information in the context of the antifraud provisions, this guidance does not affect our interpretation regarding the use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act.[79]

Our focus in the 2000 Electronics Release was to help companies understand what factors may be relevant in determining whether they have adopted hyperlinked

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77 See 2000 Electronics Release, supra note 4, at Section II.B. Of course, as stated in the 2000 Electronics Release, "in the context of a document required to be filed or delivered under the federal securities laws, we believe that when a company embeds a hyperlink to a web site within the document, the company should always be deemed to be adopting the hyperlinked information. In addition, when a company is in registration, if the company establishes a hyperlink (that is not embedded within a disclosure document) from its web site to information that meets the definition of an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act, a strong inference arises that the company has adopted that information for purposes of Section 10(b) of the Exchange Act and Rule 10b-5." But see Exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act for Registered Investment Companies, Release No. 33-7877 (Jul. 27, 2000) [65 FR 47281] at notes 18-24 and accompanying text (clarifying how this guidance applies to mutual funds).

78 See generally 2000 Electronics Release, supra note 4 at Sections II.A.4. and II.B.1. As we stated in the 2000 Electronics Release, "[i]n the case of hyperlinked information, liability under the "entanglement" theory would depend upon a company's level of pre-publication involvement in the preparation of the information. In contrast, liability under the "adoption" theory would depend upon whether, after its publication, a company, explicitly or implicitly endorses or approves the hyperlinked information."

79 See Securities Offering Reform Release, supra note 3, at Section III.D.3.b.iii.(E); 2000 Electronics Release, supra note 4 , at Section II.B.1.; Securities Act Rule 433.

information.[80] We explained that the following, non-exhaustive list of factors may influence that analysis:

- Context of the hyperlink – what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- Risk of confusing the investors – the presence or absence of precautions against investor confusion about the source of the information; and
- Presentation of the hyperlinked information – how the hyperlink is presented graphically on the web site, including the layout of the screen containing the hyperlink.[81]

We understand that some companies may still wish for further elaboration of some of the issues addressed regarding the application of the adoption theory. Accordingly, we are providing further guidance on these issues as they relate to the adoption theory.

In evaluating the potential antifraud liability of a company under the adoption theory with respect to third-party information to which the company provides a hyperlink in the context of providing information about the company and its business, we believe the focus should be on whether a company has explicitly or implicitly approved or endorsed the statement of a third-party such that the company should be liable for that statement. Because an explicit approval or endorsement is, by definition, plainly evident, the analytical scrutiny is on the circumstances or conditions under which a company can

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[80] Some commenters on the 2000 Electronics Release criticized the "facts-and-circumstances" approach we adopted, arguing that it leads to uncertainty and could result in companies providing less useful information to investors. See, e.g., comment letters from The Bond Market Association and Fidelity Investments, which are publicly available at http://www.sec.gov/rules/interp/s71100.shtml or at our Public Reference Room at 100 F Street, NE, Washington D.C. 20549 in File No. S7-11-00.

[81] See 2000 Electronics Release, supra note 4, at Section II.B.1.

fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to that information. The key question in the hyperlinking context, therefore, is: Does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?

We believe that in evaluating whether a company has implicitly approved or endorsed information on a third-party web site to which it has established a hyperlink, one important factor is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink.[82] In considering the context of the hyperlink, we begin with the assumption that providing a hyperlink to a third-party web site indicates that the company believes the information on the third-party web site may be of interest to the users of its web site. Otherwise, it is unclear to us why the company would provide the link. To avoid potential confusion or misunderstanding about what the company's view or opinion is with respect to the information to which the company has provided a hyperlink, the company should consider explaining the context for the hyperlink – and thereby make explicit, rather than implicit, why the hyperlink is being provided. For example, a company might explicitly endorse the hyperlinked information or suggest that the hyperlinked information supports a particular assertion on the company's web site. Alternatively, a company might simply note that the third-party web site contains information that may be of interest or of use to the reader.

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[82] We note that companies can have different audiences for different pages on their web sites. For example, a consumer products company may have customer-oriented pages, or supplier-oriented pages, on its web site, as well as investor-oriented pages, such as an investor relations page. Because of its context, a third-party hyperlink on a customer-oriented page – for example, the company manufactures laundry detergent and provides a link to a third-party clothing care web site – has different implications from a securities law perspective than a hyperlink to a research analyst's report on an investor-oriented page.

The nature and content of the hyperlinked information also should be considered in deciding how to explain the context for the hyperlink. The degree to which a company is making 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 that information. For example, a company including a hyperlink to a news article that is highly laudatory of management should consider explanatory language about the source and 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, the more general or broad-based the hyperlinked information is, the company may consider providing a more general explanation. For example, if a company has a media page and 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 all the explanation that a company may determine is needed to avoid being considered to have adopted the materials.[83]

In addition to an explanation of why a company is including particular hyperlinks on its web site, a company also may determine to use other methods, including "exit

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[83] Of course, a further explanation may be necessary depending on the manner by which a company limits the sources of its recent news articles. For example, if a company only includes recent news articles published by bullish industry journals, the limited nature of the sources should be clear and the company should explain why it selected the sources identified.

In addition, any SEC-registered investment adviser (or investment adviser that is required to be SEC registered) that includes, in its web site or in other electronic communications, a hyperlink to postings on third-party web sites, should carefully consider the applicability of the advertising provisions of the Investment Advisers Act of 1940 ("Advisers Act"). Under the Advisers Act, it is a fraudulent act for an investment adviser to, among other things, refer to testimonials in its advertisements. See Section 206(4) of the Advisers Act [15 U.S.C. 806-6(4)]; Rule 206(4)-1(a)(1) [17 CFR 275.206(4)-1(a)(1)].

notices" or "intermediate screens," to denote that the hyperlink is to third-party information. While the use of "exit notices" or "intermediate screens" helps to avoid confusion as to the source of the third-party information, no one type of "exit notice" or "intermediate screen" will absolve companies from antifraud liability for third-party hyperlinked information.[84] For example, if there is only one analyst report out of many that provides a positive outlook on the company's prospects, and the company provides a hyperlink to the one positive analyst report and to no other, and does not mention the fact that all the other analyst reports are negative on the company's prospects, then even the use of an "exit notice" or "intermediate screen" or explanatory language may not be sufficient to avoid the inference that the company has approved or endorsed the one positive analyst's report.

With regard to the use of disclaimers generally, as we noted in the 2000 Electronics Release, we do not view a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise.[85] Accordingly, a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading. This would be the case even where the company uses a disclaimer and/or other features designed to indicate that it has not adopted the false or misleading information to which it has provided the hyperlink. Our concern is that an alternative approach could result in unscrupulous companies using disclaimers as shields from liability for making false or misleading statements. We again remind companies

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[84] We do not believe that the failure to use "exit notices" or "intermediate screens" should automatically result in a determination that a company has adopted third-party information.

[85] See 2000 Electronics Release, supra note 4, at Section II.B.1.a. and n. 61.

that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.[86]

3. Summary Information

A third area in which we are providing guidance is with respect to companies' use of summaries or overviews to present information, particularly financial information, on their web sites.[87] We understand that some companies may be concerned as to the treatment of summary or overview information contained on their web sites under the antifraud provisions of the federal securities laws.[88] By definition, these summaries or overviews do not, without more, include the more detailed information from which they are derived or on which they are based.

We have encouraged and, in some cases, required the inclusion of summaries or overviews in prospectuses and in Exchange Act reports to highlight important information for investors.[89] We believe that summary information can be particularly

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86 See id.

87 Our discussion is intended to provide guidance generally regarding a company's use of summarized information. This guidance does not supersede more specific requirements covering the use of summaries or their content that are or may be contained in our rules. See e.g., Mutual Fund Summary Prospectus Proposing Release, supra note 27.

88 See CIFiR Progress Report, supra note 1, at Chapter 4, Section III.

89 We have encouraged or required summaries or overviews in the following contexts:

- We have suggested that Management's Discussion and Analysis disclosures could benefit from an introductory section or overview providing context for the more detailed information following it and thereby facilitating a reader's understanding of the disclosures. See MD&A Release, supra note 68. In that release, we also encouraged companies to consider using other means of providing clearer disclosure, such as tabular presentations and the use of section headings to assist readers in following the flow of the MD&A. We have also encouraged companies to use a "layered" approach in their MD&A disclosures.
- We adopted the Compensation Discussion and Analysis section in Regulation S-K Item 402 to provide a narrative, analytical overview to executive compensation disclosure. See Executive Compensation and Related Person Disclosure, Release No. 33-8732A, at Section I (Aug. 29, 2006) [71 FR 53158].

appropriate and helpful to investors, such as when it relates to lengthy or complex information. For similar reasons, we believe the use of summaries or overviews on web sites can be helpful to investors. We note, however, that summaries or overviews standing alone and which a reasonable person would not perceive as summary, and which do not provide additional information to alert a reader as to where more detailed information is located, could result in investors not necessarily understanding that the statements should be read in the context of the information being summarized. Consequently, when using summaries or overviews on web sites, companies should consider ways to alert readers to the location of the detailed disclosure from which such summary information is derived or upon which such overview is based, as well as to other information about a company on a company's web site.

In presenting information in a summary format or as part of an overview, companies should consider the context in which such information is presented. Just as with hyperlinks to third-party information, companies should consider using appropriate explanatory language to identify summary or overview information. As an example, a summary page on a company web site that is identified and presented in a manner similar to an introductory page in a "glossy" annual report – with graphs and charts illustrating key performance metrics derived from financial statements contained in later pages of the same document – would likely be viewed as a summary. Conversely, where summary

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- We require prospectuses to include a plain English "summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful." See Item 503(a) of Regulation S-K [17 CFR 229.503(a)].
- We recently proposed rules that would require key information to appear in a summary section at the front of mutual fund prospectuses. See Mutual Fund Summary Prospectus Proposing Release, supra note 27.

information is not identified as such, the reader may be confused and fail to appreciate that the information is not complete.

We encourage companies that use summaries or overviews of more complete information located elsewhere on their web sites to consider employing disclosure and other techniques designed to highlight the nature of summaries or overviews in order to help minimize the chance that investors would be confused as to the level of incompleteness inherent in these disclosures. To this end, companies may wish to consider the following techniques that may highlight the nature of summary or overview information:

- Use of appropriate titles. An appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
- Use of additional explanatory language. Companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
- Use and placement of hyperlinks. Placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based could help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed;[90] and

[90] We believe this approach is analogous to the "envelope" theory, which describes how and when information from different sources may be deemed to have been delivered together. In the 1995 Electronics Release, supra note 25, we explained that documents appearing in close proximity to each other on the same web page and documents hyperlinked together will be considered delivered

- Use of "layered" or "tiered" format. In addition to providing hyperlinks to more complete information, companies can organize their web site presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links.[91] In this way, viewers can follow a logical path into, and thereby obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.

4. Interactive Web Site Features

We believe that it is important to provide guidance that will promote robust use by companies of their web sites. One example of such robust use is making the company web site interactive. We note that companies are increasingly using their web sites to take advantage of the latest interactive technologies for communicating over the Internet with various stakeholders, from customers to vendors and investors. These communications can take various forms, ranging from "blogs" to "electronic shareholder forums." Since all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, companies should consider taking

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together, analogizing it to delivery of the information in paper form in the same envelope. Id. at Questions 15 and 16. Similarly, providing hyperlinks to the complete information from which the summary is derived or upon which an overview is based can lead to this information being considered to be provided together or, at a minimum, directing the reader to the location of the more detailed information.

91 We have taken a similar approach in our proposed rules regarding prospectus delivery for open-end mutual funds. See the Mutual Fund Summary Prospectus Proposing Release, supra note 27.

steps to put into place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums.[92]

Company-sponsored "blogs," which can include CEO blogs and investor relations blogs, among others, are recent additions to company web sites.[93] Companies can use these for a variety of purposes, including allowing for the exchange of opinions and ideas between a company's management or certain other employees and its various stakeholders.[94] The open format of blogs makes them an attractive forum for ongoing communications between and among companies and their clients, customers, suppliers, shareholders and other stakeholders.

Similar to blogs, electronic shareholder forums can serve as a means for investors to communicate with companies and each other and to provide investor feedback on various issues in a real-time basis, and we have adopted rules to encourage their use.[95]

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92 Whether an individual is acting on behalf of a company will, as always, be a facts and circumstances determination. We note that companies generally have policies on who may speak on behalf of the company and on maintaining the confidentiality of company information for purposes of Regulation FD compliance and insider trading and tipping liability.

93 A "blog" has been defined as "[a] Website (or section of a Website) where users can post a chronological, up-to-date e-journal entry of their thoughts. [I]t is an open forum communication tool that, depending on the Website, is either very individualistic or performs a crucial function for an organization or company. There are three basic varieties of blogs: those that post links to other sources, those that compile news and articles, and those that provide a forum for opinions and commentary." See http://www.netlingo.com/lookup.cfm?term=blog.

94 For example, a manufacturing company could sponsor a blog for its staff tasked with designing, developing and troubleshooting products. Vendors and end-users likely would find such a forum helpful. Shareholders also may welcome the opportunity to view and/or join a discussion of the uses of a company's existing products to better understand one of the means a company derives revenues, especially with the "front-line" employees responsible for those products.

95 See Electronic Shareholder Forums, Release No. 34-57172 (Jan. 18, 2008) [73 FR 4450] ("Shareholder Forum Release"). In this release, we adopted amendments to the proxy rules to clarify that participation in an electronic shareholder forum that could potentially constitute a solicitation subject to the proxy rules is exempt from most of the proxy rules if all of the conditions to the exemption are satisfied. In addition, the amendments state that a shareholder, company, or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum. The amendments did not provide an exemption from Rule 14a-9 [17 CFR 240.14a-9], which prohibits

These forums are designed to promote interactive communication – between and among the company and its various stakeholders and with the public at large.

We acknowledge the utility these interactive web site features afford companies and shareholders alike, and want to promote their growth as important means for companies to maintain a dialogue with their various constituencies. As we noted in the Shareholder Forum Release, companies may find these forums "of use in better gauging shareholder interest with respect to a variety of topics," and the forums "could be used to provide a means for management to communicate with shareholders by posting press releases, notifying shareholders of record dates, and expressing the views of the company's management and board of directors."[96] Accordingly, we are providing the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

- The antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums. As stated above, companies are responsible for statements made by the companies, or on their behalf, on their web sites or on third party web sites, and the antifraud provisions of the federal securities laws reach those statements. While blogs or forums can be informal and conversational in nature, statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other

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fraud in connection with the solicitation of proxies. The general disclosure obligations under the federal securities laws continue to apply to these forums as well. See id. at n. 88 (referring participants in shareholder forums to the requirements of Regulation FD); and id. at n. 24 (reminding participants that the antifraud provisions of Rule 14a-9 may require a participant in a forum that otherwise allows anonymity to identify itself if failure to do so in the circumstance would result in omission of a "material fact necessary in order to make the statements therein not false or misleading.").

96 See id. at Section I.

company statements when it comes to the antifraud provisions of the federal securities laws. 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.

- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum. Any term or condition of a blog or shareholder forum requiring users to agree not to make investment decisions based on the blog's or forum's content or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum is inconsistent with the federal securities laws and, we believe, violates the anti-waiver provisions of the federal securities laws.[97] A company is not responsible for the statements that third parties post on a web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties. The company remains responsible for its own statements made (including statements made on its behalf) in a blog or a forum.[98]

C. Disclosure Controls and Procedures

Postings on a company's web site also may implicate Exchange Act rules governing certification requirements relating to disclosure controls and procedures.[99]

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97 See Securities Act Section 14 [15 U.S.C. 77n]; Exchange Act Section 29(a) [15 U.S.C. 78cc]; Section 47(a) of the Investment Company Act of 1940 ("Investment Company Act") [15 U.S.C. 80a-46(a)] and Section 215(a) of the Advisers Act [15 U.S.C. 806-15].

98 See, e.g., Rule 14a-17(b) [17 CFR 240.14a-17(b)]. Of course, the company may be held responsible under the "adoption theory" or "entanglement theory" if the company adopts, endorses, or approves the statement. See generally Section II.B.2., supra.

99 Exchange Act Rules 13a-15(e) [17 CFR 240.13a-15(e)] and 15d-15(e) [17 CFR 240.15d-15(e)] and Investment Company Act Rule 30a-3(c) [17 CFR 270.30a-3(c)] define "disclosure controls and procedures" as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is:

Under these rules, a company's principal executive officer and principal financial officer must certify that they are responsible for establishing and maintaining disclosure controls and procedures, that such controls and procedures have been designed to ensure that material information relating to the company is made known to them, that they have evaluated the effectiveness of the disclosure controls and procedures as of the end of a reporting period, and that they have disclosed in the company's periodic report for that reporting period their conclusions about the effectiveness of those controls and procedures.[100]

As discussed above in Section I.B, we have adopted rules permitting companies to satisfy certain Exchange Act disclosure obligations by posting that information on their web sites as an alternative to providing that information in an Exchange Act report.[101] If a company elects to satisfy such disclosure obligations by posting the information on its web site, disclosure controls and procedures would apply to such information because it is information required to be disclosed by the company in Exchange Act reports. Failure to make those disclosures on the company's web site would result in an Exchange Act report being incomplete. For example, if the company failed to disclose waivers of its code of ethics on its web site, it would need to file an Item 5.05 Form 8-K; if the company failed to disclose its board policy on director attendance at the annual meeting

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(1) "recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms," and

(2) "accumulated and communicated to the company's management . . . as appropriate to allow timely decisions regarding required disclosure."

100 See Exchange Act Rule 13a-14(a) [17 CFR 240.13a-14(a)]; Exchange Act Rule 15d-14(a)[17 CFR 240.15d-14(a)]; Item 601(b)(31)(i) of Regulation S-K [17 CFR 229.601(b)(31)(i)]; Investment Company Act Rule 30a-2(a) [17 CFR 270.30a-2(a)].

101 See Section I.B, supra.

of security holders on its web site, it would need to do so in its proxy statement.[102] Hence, companies must make sure that their disclosure controls and procedures are designed to address the disclosure of such information on their web sites.

On the other hand, disclosure controls and procedures do not apply to other disclosures of information on a company's web site. This means that the principal executive officer and principal financial officer will not be disclosing their conclusions regarding the effectiveness of any controls that a company may have in place regarding its web site 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. That said, other disclosures on a company's web site are subject to antifraud liability, and companies also need to consider whether such disclosures are in compliance with Regulation FD, the Securities Act, and the federal proxy rules, among others.

D. Format of Information and Readability

The nature of online information is increasingly interactive, not static. The inability to print a particular browser screen or presentation, particularly one designed for interactive viewing and not for reading outside the electronic context, is not inherently detrimental to its readability. We do not think it is necessary that information appearing on company web sites satisfy a printer-friendly standard[103] unless our rules explicitly require it.[104] For example, our notice and access model requires that electronically posted

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102 See Instruction to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)].

103 See 1996 Electronics Release, supra note 25 at Section II.A.2. We use the term "printer-friendly" to describe a version of a web page that is formatted for printing. For example, if a web page includes advertising and navigation, those items may be removed to format the relevant content for printing on standard size paper.

104 For example, Exchange Act Rule 14a-16(c) [17 CFR 240.14a-16(c)] requires proxy materials to be presented in a format convenient for both reading online and printing in paper when delivered electronically. See the text accompanying note [97] supra. See Shareholder Choice Release,

proxy materials be presented in a format "convenient for both reading online and printing on paper."[105] Hence, all other information on a company's web site need not be made available in a format comparable to paper-based information.[106]

III. Request for Comment

We invite interested parties to submit written comment on any other approaches or issues involved in facilitating the use of electronic media, including as a result of technological developments, to further the disclosure purposes of the federal securities laws.

List of Subjects in 17 CFR Parts 241 and 271

Securities

Amendment of the Code of Federal Regulations

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supra note 21, at n. 35: "We believe that requiring readable and printable formats is important so that shareholders have meaningful access to the proxy materials." Similarly, proposed Rule 498 under the Securities Act would permit the obligation to deliver a statutory prospectus relating to a mutual fund to be satisfied by sending or giving a summary prospectus and providing the statutory prospectus online. If provided online, proposed Securities Act Rule 498(f)(2)(i) would require that the statutory prospectus be presented in a format that is "convenient for both reading online and printing on paper." See Mutual Fund Summary Prospectus Proposing Release, supra note 27, at Section II.B.3. and n. 113.

105 See Exchange Act Rule 14a-16(c); Internet Proxy Release, supra note 10, at n. 82.

106 See 1996 Electronics Release, supra note 25, at Section II.A.2. As we noted in the 2000 Electronics Release, if special software is required in order to view information aimed at investors that a company puts on its web site, we believe the company should make a free, downloadable version of the software available on the web site or the site should contain information on the location where the required software may be downloaded free of charge so that all investors can effectively access the information provided. In the case of interactive data, we have taken a different approach. We have proposed that companies that maintain web sites post on their web sites the same interactive data they file or furnish with certain Exchange Act reports and Securities Act registration statements. We have not proposed, however, that registrants also provide interactive data viewers (or information on how to obtain viewers) on their web sites. Instead, we have determined to allow third parties to develop viewers, anticipating that these viewers will, over time, become more readily accessible at a little or no cost to investors. The Commission makes several interactive data viewers available through its web site at http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml. See Interactive Data Proposing Releases, supra note 14, at Section II.A, and supra note 15.

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as set forth below:

PART 241— INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

Part 241 is amended by adding Release No. 34-58288 and the release date of August 1, 2008, to the list of interpretive releases.

PART 271—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

Part 271 is amended by adding Release No. IC-28351 and the release date of August 1, 2008, to the list of interpretive releases.

By the Commission.

Florence E. Harmon
Acting Secretary

Dated: August 1, 2008