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 e-mail 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 e-mail 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 a.m. and 3 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.

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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”).

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 material company information, it is an appropriate time to provide additional Commission guidance specifically addressing company Web sites. While we addressed certain discrete Internet issues relating to the Securities Act of


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.
1933 (the “Securities Act”) in 2005, we last provided guidance in 2000 on the electronic delivery of disclosure documents, company liability for Web site content, as well as other matters. 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.

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 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. Our guidance focuses principally on:

- 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.

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. Central to the effective operation of 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 commerce 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. Investors are turning increasingly to electronic 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.

Through the years, we have taken a number of steps to encourage the dissemination of information electronically. In May 2003, we believed 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, and we provide free access to EDGAR on a real-time basis through our Internet Web site, www.sec.gov. In addition to our own efforts to improve and modernize EDGAR, we have encouraged, and recently proposed requiring, companies to provide

5 See id. at Section II.D.
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 both recommending 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.
9 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.
10 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.
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 1990s pursuant to a Congressional direction, 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.
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
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. Interactive data has the potential to increase the speed, accuracy and usability of financial and other disclosure, and eventually to reduce costs.\textsuperscript{15} 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 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.\textsuperscript{16}

A company’s Web site is an obvious place for investors to find information 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”).\textsuperscript{17} 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 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 6536]; 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].

\textsuperscript{15} See Section I.B, infra. See also Exchange Act Section 16(a)(4)(C) [15 U.S.C. 78p(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 sites 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 30A.14.

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 prior years, see generally Robert Prentice et al., Corporate Web Site 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”).

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 a hyperlink to a hyperlink to their financial statements, and 46% have an interest.

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 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.\textsuperscript{17}

A company’s Web site is an obvious place for investors to find information about the company,\textsuperscript{18} and a substantial majority of large public companies already provide access to their Commission filings through their Web sites.\textsuperscript{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.\textsuperscript{20} We recognize that allowing companies to present data in formats different from those dictated by our forms or more technologically advanced than EDGAR may be beneficial to investors.\textsuperscript{21} Indeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 investors under the Securities Act and the Exchange Act.\textsuperscript{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 information.\textsuperscript{26}

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 capabilities. 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 other areas in which investors and others may have an interest.” See CIPIF Progress Report, supra note 1.


26 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 read, more easily searched through hypertext links and other search tools, more readily updated and easier to compare relevant data about several companies more easily.”
disclosures. 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. Indeed with respect to proxy materials, certain companies are 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.

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:

- 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;
- Mutual funds disclose in their prospectuses whether shareholder reports are available on their Web sites, and if not, why not;
- 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;
- 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; and
- Companies post on their Web sites, if they have one, notice of their intent to delist or deregister their securities.

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. 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;
- An asset-backed issuer may post disclosure of static pool data on its Web site rather than filing it on EDGAR;
- 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;

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 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 on-line 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 believe it is appropriate to retain the information on their Web sites for 12 months. We believe such a retention 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.h. (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 EDGAR). In that release, we recommended that companies include ongoing on-line 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 believe it is appropriate to retain the information on their Web sites for 12 months. We believe such a retention 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.

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. 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. 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. We note that such questions have numerous implications under the federal securities laws.

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 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 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 disclosure and the posted information and (2) satisfaction of Regulation FD’s “public disclosure” requirement.

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. In particular, Regulation FD was adopted to address the problem of selective disclosure of material information by companies, in 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.” 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.

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) 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 10b-5 [17 CFR 240.10b-5](definition of issuer for purposes of Regulation FD).

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

See Regulation FD Adopting Release, supra note 41 at 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.
“In order to make information public, it must be disseminated in a manner calculated to reach the securities marketplace in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.”

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. 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 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 in which the accessibility to the information is not limited to reading a newspaper or the “broadcast 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.

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, 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;
- 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 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.

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.

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.
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

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. A separate 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 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 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 alternative public disclosure provisions of Regulation FD. 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 can reasonably be 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 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

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.”).
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.
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 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
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 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 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

65 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. 1970); Hollinger v. Titan Capital, Inc., 94 F.3d 1546, 1559 (9th Cir. 1996); Aaron v. SEC, 446 U.S. 680 (1980).


67 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 fine print.” See Hollinger v. Titan Capital, Inc., 94 F.3d 1546, 1559 (9th Cir. 1996). 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 plain English. In addition, in the context of the use of summary information in the electronic 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 also Securities and Exchange 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].
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 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, there to assume 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

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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 “hyperlink,” 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 107–116, n. 5).

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

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 the application of the Exchange Act and Rule 10b–5.” But see Exemption from Section 10b-5 of the Electronic Signatures in Global and National Commerce Act for Registered Investment Companies, Release No. 33–81777 (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 to liability under the adoption theory which 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.

80 Some commentators 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/temp/estp71100.shtml or at our Public Reference Room at 100 F Street, NE., Washington DC 20549 in File No. 57–11–00.

81 See 2000 Electronics Release, supra note 4, at Section II.B.1.
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 evidentiary, it is in the context of the hyperlink and the hyperlinked information together that a reasonable inference be made for 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. 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.

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 the 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.

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 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.

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

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. We understand that

84 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.
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. 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. We believe that summary information can be particularly 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 “glossary” 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 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; and

We believe this approach is analogous to the “envelope” theory, which describes rules 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 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.

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.

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.

A “blog” has been defined as “[a] Web site (or section of a Web site) where users can post a
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. 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 investors feedback on various issues in a real-time basis, and we have adopted rules to encourage their use. 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 chronological, up-to-date e-journal entry of their thoughts. It is an open forum communication tool that, depending on the Web site, 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.

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 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.

See Electronic Shareholder Forums, Release No. 34-49180 (Aug. 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 do not provide an exemption from Rule 14a–9 [17 CFR 240.14a–9], which prohibits 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 blog or forum to establish 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.”).

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.” 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.
- Companies can 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 disclosing 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. 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.

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. 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. These controls and procedures have been designed to ensure that material information relating to the company is made known to them, that they have evaluated theeffectiveness 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.

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. 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 made known to them, that they have evaluated theeffectiveness 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.

See generally Section I.B., supra.

The antifraud provisions of the federal securities laws apply to blogs and, we believe, violate the anti-waiver 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.

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 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.

See Electronic Shareholder Forums, Release No. 34-49180 (Aug. 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 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 blog or forum to establish 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.”).

See id. at Section I.


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 I.B., supra.

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: (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.” 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)(11) of Regulation S–K [17 CFR 229.601(b)(11)]; Investment Company Act Rule 30a–2(a) [17 CFR 270.30a–2(a)]. See Section I.B., supra.
failed to disclose its board policy on director attendance at the annual meeting of security holders on its Web site, it would need to do so in its proxy statement.\(^\text{102}\) 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\(^\text{103}\) unless our rules explicitly require it.\(^\text{104}\) For example, our notice and access model requires that electronically posted proxy materials be presented in a format “convenient for both reading online and printing on paper.”\(^\text{105}\) Hence, all other information on a company’s Web site need not be made available in a format comparable to paper-based information.\(^\text{106}\)

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

- 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—INTERPRETIVE 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.

Proposing Release, supra note 27, at Section II.B.3. and n. 113.

\(^{103}\) See Exchange Act Rule 14a–16(c); Internet Proxy Release, supra note 10, at n. 82.

\(^{104}\) 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.

\(^{105}\) 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, 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)(C) 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

PART 271—INTERPRETIVE 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.

Dated: August 1, 2008.

Florence E. Harmon,
Acting Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

[Docket No. FDA–2008–N–0039]

New Animal Drugs For Use in Animal Feeds; Oxytetracycline

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Phibro Animal Health. The supplemental NADA provides for use of oxytetracycline dihydrate in Type C medicated feeds for the control of mortality in freshwater-reared salmonids due to coldwater disease and for the control of mortality in freshwater-reared Oncorhynchus mykiss due to columnaris disease.

DATES: This rule is effective August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Donald A. Prater, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8343, e-mail: donald.prater@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660, filed a supplement to NADA 38–439 for TERRAMYCIN 200 for Fish (oxytetracycline dihydrate) Type A medicated article used for control of certain bacterial diseases in several species of fish and for skeletal marking of Pacific salmon. The supplement provides for use of oxytetracycline dihydrate in Type C medicated feeds for