Nasdaq Investor Relations Conference

IR and FD: What You Need to Know About SEC Regulation FD and Other Current Disclosure Issues

Stephen D. Poss, P.C.
Goodwin Procter LLP

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Regulation FD Overview

1. **Regulation FD**
   - Bans selective disclosure of material nonpublic information to certain types of market participants

2. **Rule 10b5-1**
   - Creates liability for trading “on the basis of” material nonpublic information whenever a trader is aware of the information

3. **Rule 10b5-2**
   - Sets forth types of relationships which create a duty of trust or confidence sufficient to serve as a basis for liability under the misappropriation theory of insider trading
Reg. FD: Background

• SEC concerns about market impact of selective disclosure

• SEC view of selective disclosure and its causes

Issuers retain some degree of control over the timing of certain important public disclosures

Issuers sometimes choose to disclose important information to certain individuals or groups before making broad disclosure to the public at large

Risk that managers will use selective disclosure to “curry favor or bolster credibility with particular analysts or institutional investors.” (SEC Proposing Release)
Reg. FD: Background

Other causes of selective disclosure

Managers’ desire to “guide” the market toward more accurate estimates, in order to reduce volatility

Inadvertence, lack of training and knowledge, human factors
Reg. FD: Background

SEC’s view on harm caused by selective disclosure:

**Unfair advantage** – some can trade based on information not yet possessed by others

Impact “greater in today’s more volatile, earnings-sensitive markets”

Opportunity for analyst conflicts of interest – analysts might pull punches to avoid being cut off from access to non-public information
Securities and Exchange Commission's view on harm caused by selective disclosure (cont):

**Analyst laziness** – risk that analysts will conduct “less independent research and analysis” because of dependence on access to guidance from corporate insiders.

Corporate management might “treat material information as a commodity to be used to gain or maintain favor with particular analysts or investors”.

Result is threat to market integrity, including “loss of investor confidence in the integrity of our capital markets”.
Controversial Rule

• Reg. FD was proposed in December, 1999
• Nearly 6000 comment letters received by the SEC – “the vast majority . . . consisted of individual investors”
• Extensive debate in the legal and brokerage communities
• Some modifications made from proposed rule
• Impact of final rule still hotly debated
Summary of Reg. FD
(17 CFR 243.100 – 243.103)

§243.100 General rule regarding selective disclosure:

“whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in §241.101(e):
Summary of Reg. FD
(17 CFR 243.100 – 243.103)

1. Simultaneously, in the case of an intentional disclosure; and

2. Promptly, in the case of a non-intentional disclosure
Summary of Reg. FD
(17 CFR 243.100 – 243.103)

Simple, isn’t it?  Not

• “Harry Potter” effect: you have to know the magic words to understand the spell

• Need to understand each of the terms used in the rule
To whom does the rule apply?

• “issuer”:
  • Has a class of securities registered under Section 12 of the Securities Exchange Act of 1934
  • Or is required to file reports under Section 15(d)
  • Including any closed-end investment company (as defined in the Investment Company Act, 15 U.S.C. 80a-5(a)(2))
  • But not including any other investment company or any foreign government or foreign private issuer (as defined in Rule 405 of the Securities Act)
To whom does the rule apply?

• any person “acting on behalf” of an issuer:
  • Any senior official of the issuer
  • For closed-end investment companies, any senior official of the issuer’s investment adviser
  • Or “any other officer, employee, or agent of an issuer who regularly communicates with any person described” in (b)(1)(i), (ii), or (iii) of Reg. FD, or “with holders of the issuer’s securities.”
To whom does the rule apply?

- any person “acting on behalf” of an issuer (cont):
  - But, “an officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer”
To whom does the rule apply?

- practical tip: if an issuer has a formal policy limiting which senior officials are authorized to speak to persons listed in §100(b)(1)(i) – (iv) of Reg. FD:
  - then disclosures made by senior officials not so authorized under the issuer’s policy will not be subject to Reg. FD
  - because such disclosures, if made by someone who is not “authorized,” would be made “in breach of a duty of trust or confidence to the issuer” (Fourth Supplement to Corp. Fin.’s Manual of Publicly Available Telephone Interpretations, October 2000)
To whom does the rule apply?

- **Catch-22:** by taking the position that such a disclosure is not subject to Reg. FD, the issuer may be conceding that the individual who made the disclosure acted “in breach of a duty” to the issuer, and hence may create liability.
To what type of communication does Reg. FD apply?

• §100(b)(1) – disclosures made to any person outside the issuer:
  
  i. Who is a broker or dealer, or a person associated with a broker or dealer . . .

  ii. Who is an investment adviser . . . An institutional investment manager . . . Or a person associated with either of the foregoing . . .
To what type of communication does Reg. FD apply?

• §100(b)(1) – (Cont):

  iii. Who is an investment company . . . Or who would be an investment company but for Section 3(c)(1)(15 U.S.C. 80a-3(c)(1)) or Section 3(c)(7)(15 U.S.C. 80a-3(c)(7)) thereof, or an affiliated person of either of the foregoing . . . ; or

  iv. Who is a holder of the issuer’s securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer’s securities on the basis of the information.
To what type of communication does Reg. FD apply?

§100(b)(2) – FD does **not** apply to disclosures made:

- “To a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant);

- To a person who expressly agrees to maintain the disclosed information in confidence;
To what type of communication does Reg. FD apply?

• §100(b)(2) – FD does not apply to disclosures made:

  • To an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity’s ratings are publicly available; or

  • In connection with a securities offering requested under the Securities Act . . .”
To what type of communication does Reg. FD apply?

Of any “material nonpublic information”

- “nonpublic” – not previously disclosed to the general public
- “material” – consider SAB99 factors
SEC Materiality “Hot Buttons”

1. “earnings information

2. mergers, acquisitions, tender offers, joint ventures, or changes in assets;

3. new products or discoveries, or developments regarding customers or suppliers (e.g., the acquisition or loss of a contract);

4. changes in control or in management;
5. change in auditors or auditor notification that the issuer may no longer rely on an auditor’s audit report;

6. events regarding the issuer’s securities – e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes in the rights of security holders, public or private sales of additional securities; and

7. bankruptcies or receiverships.”
How do you determine whether a disclosure is “intentional” or “non-intentional?”
• “a selective disclosure of material nonpublic information is ‘intentional’ when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.” (§243.101(0))

• thus a disclosure can be “intentional” even if you did not plan to make the disclosure. (SEC Manual of Publicly Available Telephone Interpretations)
If the selective disclosure was “non-intentional,” what does it mean to make public disclosure “promptly?”
• “as soon as reasonably practicable”

• “but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange”

• after a senior official “learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer”

• “of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic” (§243.101(d))
What constitutes “Public Disclosure?”

Whether “simultaneously” (in the case of intentional disclosure), or “promptly” (in the case of non-intentional disclosure), Reg. FD states that the issuer “shall make public disclosure” of the material nonpublic information.
What constitutes “Public Disclosure?”

What must you do to meet the “public disclosure” requirement?
What constitutes “Public Disclosure?”

243.101(e) of Reg. FD provides that the issuer:

- Shall furnish to or file with the Commission a Form 8-K disclosing the information, or
- Satisfy the exemption from the 8-K requirement if it “instead disseminates the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”
Form 8-K Disclosure

Two options:

1. “file” under Item 5

   - subject to liability under Section 18 of the Exchange Act
   - automatically incorporated by reference into securities act registration statements, and hence subject to liability under Sections 11 and 12 (9)(2)
Form 8-K Disclosure

Two options (Cont.):

2. “furnish” under Item 9

- not subject to §18 or §11 liability unless otherwise included in filings.

- may not be adequate if issuer is selling securities, has open shelf registration.
Form 8-K Disclosure (Cont.)

- Information either “furnished” or “filed” solely to satisfy FD will not be deemed an admission that the information is material.

- All disclosures on 8-K remain subject to 10b-5 antifraud provisions.
Alternative Methods of “Public Disclosure”

Must be reasonably designed to effect

- broad
- non-exclusionary
- distribution
- of information
- to the public
Alternative Methods of “Public Disclosure”

One size doesn’t fit all
Alternative Methods of “Public Disclosure”

Method or combination of methods must be selected “given the particular circumstances of that issuer”

A single method of disclosure may not be adequate for some issuers

- If you know that your press releases are not routinely carried by major business wire services, a press release alone may not be enough
Alternative Methods of “Public Disclosure”

How will the SEC evaluate whether your method of disclosure was “reasonably designed?”

“In light of all the relevant facts and circumstances”

- deviations from the issuer’s “usual practices” may be suspect
Alternative Methods of “Public Disclosure”

Is posting the information on your website sufficient?
Alternative Methods of “Public Disclosure”

No, not alone
Alternative Methods of “Public Disclosure”

What are generally acceptable methods?
Alternative Methods of “Public Disclosure”

- “press releases distributed through a widely circulated news or wire service”
- “announcements made through press conferences or conference calls that interested members of the public may attend or listen to”
  - in person
  - by telephone
  - On the Internet
- Only if the public has “adequate notice of the conference or call and the means for accessing it”
Alternative Methods of “Public Disclosure”

What appears to be the SEC’s preferred model of disclosure?

1. Press release the information itself

2. Press release at least several days in advance that there will be a conference call or speech taking place at which the information will be discussed, including details of date, time, and how to access
Alternative Methods of “Public Disclosure”

What appears to be the SEC’s preferred model of disclosure?

3. Provide a simultaneous listen-in phone service or webcast of the conference call or presentation

4. Provide a “replay” for a specified period of time

5. Stick to the subject matter described in the press release
Alternative Methods of “Public Disclosure”

Situations where such multiple methods may be desirable:

- earnings releases
- conference calls
- speeches at industry or analyst conferences
- product announcements
Alternative Methods of “Public Disclosure”

Will Reg. FD lead to more securities class action suits?
Alternative Methods of “Public Disclosure”

No
Alternative Methods of “Public Disclosure”

§243.102 “No failure to make a public disclosure required solely by [Reg FD] shall be deemed to be a violation of Rule 106-5”
Alternative Methods of “Public Disclosure”

And Yes . . .
**Alternative Methods of “Public Disclosure”**

- Chilling of guidance may lead to more missed numbers, more volatility, and more suits
- Increased formal disclosures required by FD may lead to more suits
- The plaintiffs’ lawyers will find a way to use FD
Nods, winks and Errors:

May I still have “one-on-ones” with the analysts covering my company?
Nods, winks and Errors:

• “When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD.”

• “If the issuer official communicates selectively to the analyst nonpublic information that the company’s anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the issuer likely will have violated Regulation FD.”
Nods, winks and Errors:

• “This is true whether the information about earnings is communicated expressly or through indirect ‘guidance,’ the meaning of which is apparent though implied.”

• “Similarly, an issuer cannot render material information immaterial simply by breaking it into ostensibly non-material pieces.”

SEC Release 34-43154
Nods, winks and Errors:

Is there anything I can say selectively to an analyst?
Nods, Winks and Errors:

- SEC says OK to disclose a “non-material piece of information” to an analyst if the significance of that piece of information “is not apparent to the reasonable investor” and could only help the analyst complete a mosaic of material information “unbeknownst to the issuer”

SEC Release 34-43154

- don’t count on it

- can use an express embargo
SUMMARY: What Should You Do?

1. Educate your company and board of directors about the new world of Reg. FD

2. Adopt a policy designating those senior officials authorized to speak to brokers, dealers, investment advisers, investment company and shareholders, and prohibiting others from doing so, so that your FD circle is limited

3. Develop policies and/or good habits for pre-announcing and providing public access to events such as earnings releases, conference calls, and speeches or presentations by senior officials.
What Should You Do?

4. Prepare a “two minute drill” for non-intentional disclosures:

- Rapid evaluation and response needed
- Make sure senior officials know who to call if they are afraid they have made an accidental selective disclosure of nonpublic material information
- Designate FD response team of management, financial, and legal advisors
What Should You Do?

- Create an emergency contact list for the team
- Have pertinent materials readily accessible
  - Prior press releases and SEC filings
  - Reg. FD and commentary
  - SAB 99
- Document your materiality decisions
Sample Press Release Pre-announcing Scheduled Earnings Release and Conference Call

Tuesday, October 24, 6:10 pm Eastern Time

Press Release

[XYZ Company] to Announce Third Quarter Results
October 31, 2000
[LOCATION] Oct. 24, 2000/ [PRNewswire/Bizwire]/ -- [XYZ Company] ([NYSE/Nasdaq/AMEX]: [SYMBOL]), will report third quarter results after the close of market on October 31, 2000. The company will hold a conference call at 6:00 p.m.* Eastern Time to discuss its quarterly financial results, business highlights and [if appropriate — outlook]. In addition, the company may answer one or more questions concerning business and financial developments and trends, [if appropriate — the company’s view on earnings forecasts] and other business and financial matters affecting the company, some of the responses to which may contain information that has not been previously disclosed.

*[Reflects preference for holding conference calls after the close of trading (including after hours trading), which is 4:00 p.m. for NYSE and AMEX companies and 6:00 p.m. for Nasdaq companies.]

If you are interested in listening to the conference call, please dial [PHONE NUMBER] (domestic calls) or [PHONE NUMBER] (international calls) at 5:45 p.m. and reference the XYZ Company conference call. A simultaneous live webcast of the call will be available over the Internet at [WEB SITE URL]. Replays of both the call and the webcast will be available for [three to seven]** days following the call beginning at [9:00 p.m. on October 17, 2000]. To access the re-play by telephone, please call [PHONE NUMBER] (domestic) or [PHONE NUMBER] (international). To access the re-play by webcast, please visit [WEB SITE URL].

**[Please note that, to the extent that a client desires to maintain the replay for more than 3-7 days, we recommend that the replay be moved to a separate archive section of the website with a disclaimer that it is for historical purposes only.]

[Paragraph with Standard Description of the Company]
The Risks of Harm From Corporate Web Sites are Real
Someone is watching you.
1. The SEC
2. The Plaintiffs’ Securities Class Action Bar
3. The Regulators
4. Your Competitors
5. Your Customers
6. Short Sellers
7. Analysts
8. Public Shareholders
Someone is watching you.

• Companies about to go public need to pay special attention:
  – Once you are in registration the SEC will check every link on your site
Failure to Accept Reality Increases the Hazards of Corporate Internet Use
Top 10 Dangerous Comforting Myths

8. “Everyone understands the Internet is different and informal”

9. “I don’t understand the Internet. - Let the young people who know what they’re doing take care of it and I won’t have to worry.”

10. “Whistling in the Dark” (if I just pretend I don’t hear those twigs snapping behind me everything will be OK)
Top 10 Dangerous Comforting Myths

5. “As long as we only post copies of information we reviewed carefully at the time it was written we don’t have to worry”

6. “As long as I am careful about my formal SEC disclosures what we say on our website can’t hurt us”

7. “Our website changes so often that it is futile to attempt to review it”
Top 10 Dangerous Comforting Myths

1. “My company is too big to worry about this”

2. “My company is too small to be noticed”

3. “This isn’t directed to shareholders -- it’s only marketing stuff”

4. “The public can get this information elsewhere anyway, so hyperlinking to it on our website can’t be any worse”
Is the Internet Different?

O Brave New World... NOT.
The Securities Laws Apply to the Internet

“The liability provisions of the federal securities laws apply equally to electronic and paper-based media.”

“Electronically delivered documents must be prepared, updated, and delivered consistent with the federal securities laws in the same manner as paper documents.”

“Regardless of whether information is delivered through paper or electronic means, it should, of course, convey all material and required information.”

The Securities Laws Apply to the Internet

“It is important for issuers… to keep in mind that the federal securities laws apply in the same manner to the content of their websites as to any other statements made by or attributable to them.”

SEC Interpretive Release on Use of Electronic Media
April 28, 2000 (No. 33-7856, No. 34-42728)
The Securities Laws Apply to the Internet

“Issuers are responsible for the accuracy of their statements that can reasonably be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet.”

SEC Interpretive Release on Use of Electronic Media
April 28, 2000
Chat Rooms and Message Boards
Chat Rooms and Message Boards

The Problem

• a battlefield for the reputation of your company

• playground of the shorts, touts, and louts

• generally, you have no duty to correct or update false statements or rumors posted on a bulletin board or chat room

• unless the source is someone at your company
Chat Rooms and Message Boards

The Problem

• yet employees often are motivated to participate
  – loyal employee shareholders want to rebut negative rumors and set the record straight
  – disgruntled employees want to vent
  – ex-employees want to keep up-to-date or trash their former employer

• most people believe incorrectly that their communications are anonymous
Chat Rooms and Message Boards

What to Do

• Avoid participation by management
• Don’t respond to rumors
• Don’t link to them
Chat Rooms and Message Boards

What to Do

• Adopt written policies forbidding employees, absent prior approval, from:
  – participating in chat rooms concerning the company
  – posting anything concerning the company on the Internet
  – communicating any non-public information concerning the company
Chat Rooms and Message Boards

What to Do

– using pseudonyms, code names or otherwise making anonymous communications concerning the company

– including non-public company information in e-mails

– responding to unsolicited inquiries about the company via e-mail or otherwise
Avoiding Selective Disclosure on the Internet
Avoiding Selective Disclosure on the Internet

• the Internet catch-22

  – “public enough” to create 10b-5 securities fraud liability
  – but not public enough to avoid claims of selective disclosure
  – under Regulation FD, website posting is not sufficient to constitute non-selective public disclosure
Avoiding Selective Disclosure on the Internet

• if it is material information, do not release it on your website until you have put a press release on the wire

• a simple way to keep out of trouble (with apologies to Dr. Seuss):
  – A shareholder is a shareholder no matter how small.
  – You can’t say anything material to one unless you first tell them all.
“Safe Harborizing”
Your Web Site
“Safe Harborizing” Your Web Site

• Private Securities Litigation Reform Act of 1995

• Provides a limited safe harbor for forward-looking statements, provided:
  
  – the forward-looking statement is identified as such, and
  
  – is accompanied by meaningful cautionary statements
  
  – which identify important factors that could cause actual results to differ materially
“Safe Harborizing” Your Web Site

– only an oral forward-looking statement may cross-reference the cautionary statements

– written forward-looking statements must be accompanied by the cautionary statements
“Safe Harborizing” Your Web Site

• What is probably not a meaningful cautionary statement?
  – boilerplate
  – “the sky is falling, or it might fall, or it fell but we didn’t notice”
  – generic risk factors that could apply to any company

• Strive for detailed, company-specific risk factors.
Risk Factor Hyperlinks

• When you hyperlink to risk factors, are those cautionary statements:
  – “accompanying” the forward-looking statement?
  – or are they cross references?

• Open issue - safest course is direct, obvious link from same page as forward-looking statement
Risk Factor Hyperlinks

• It makes sense for the courts to accept hyperlinks as “accompanying,” but not much guidance so far
Posting Excerpts from Annual Reports

- risky
- you may lose the protection of risk factors stated elsewhere in the document
- use an explicit disclaimer for all excerpts
- best to include the entire document
Posting Transcripts of Speeches and Conference Calls
“Is it live, or is it…”

just another written disclosure?
Posting Transcripts of Speeches and Conference Calls

• The original, oral version may have merely cross-referenced meaningful cautionary statements.

• Once it is transcribed and available on your website, it may become a written forward-looking statement.

• If so, cross-referencing does not technically satisfy the safe harbor requirements.
Don’t Jump the Gun

• increasing SEC focus on website content prior to, during, and following Initial Public Offerings

• new or changed websites prior to an IPO are highly risky

• review all website content and new postings with IPO legal counsel

• serious consequences for violations
Posting Historical Information On Your Site

• Many companies post old
  – press releases
  – news articles
  – SEC filings

• Be careful to avoid "republishing" such information

• "In effect, a statement may be considered to be ‘republished’… each day that it appears on the website."

SEC Interpretive Release on Use of Electronic Media
April 28, 2000

Boston ◆ New York ◆ New Jersey ◆ Washington
Posting Historical Information On Your Site

What to Do

- Make clear the information is not being republished
- Use disclaimers for historical information
- Segregate old data and information on your site
Risks of Being Held Responsible For Third-Party Information

• Many websites either contain or provide hyperlinks to material written by others, such as
  – reports by securities analysts
  – newspaper or magazine articles
  – customer endorsements

• What if that material is inaccurate or incomplete, or creates a duty to update?
Risks of Being Held Responsible For Third-Party Information
Can you be at risk for securities fraud liability for material hyperlinked to your website even if you did not write it?

Yes.
“Entanglement” and “Adoption”

• In general, corporations may not be held liable simply because a third party, such as a securities analyst or a journalist, publishes false or misleading projections or other information about the corporation.

• But a company can be held legally responsible for what an analyst writes if the company
  – becomes “entangled” in the preparation of the third party’s report, or
  – “adopts” the third party’s report.
Risks of Being Held Responsible for Third-Party Information

• “In the case of hyperlinked information, liability under the ‘entanglement’ theory would depend upon an issuer’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, an issuer, explicitly or implicitly, endorses or approves the hyperlinked information.”

SEC Interpretive Release on Use of Electronic Media
April 28, 2000

Boston ◆ New York ◆ New Jersey ◆ Washington
Entanglement

• If the company is sufficiently involved in the preparation of the analyst’s report, there is a risk that the report’s inaccuracies will be attributed to the corporation just as if the company wrote and published the report itself.
Entanglement

“"A company may so involve itself in the preparation of reports and projections by outsiders as to assume a duty to correct material errors in those projections. This may occur when officials of the company have, by their activity, made an implied representation that the information they have reviewed is true or at least in accordance with the company’s views."

Elkind v. Liggett & Myers, Inc.,
635 F.2d 156, 163 (2d Cir. 1980)
Adoption

- You distribute it, you own it

- **Presstek case - December, 1997**
  - the SEC took the position that even if a company is not entangled in the preparation of an analyst’s report, it can “adopt” and become liable for the statements made in the report by disseminating the report after it is published

  *In re Presstek, Inc.*, SEC Release No. 34-39472 (December, 1997)
Adoption

• Potential liability even if you had no involvement in preparing the report

• Presstek case
  – “If an issuer knows, or is reckless in not knowing, that the information it distributes is false or misleading, it cannot be insulated from liability because management was not actively involved in the preparation of the information.”

In re Presstek, Inc., SEC Release No. 34-39472 (December, 1997)
Adoption

• The theory is that registrants should not be able to pass on information to the market they know is incorrect,

• Simply because someone else wrote it.

• Adoption is a major issue for websites, where some companies link to analysts’ reports on the company.
“Adoption”:
Don’t Push the (Electronic) Envelope

If information can be accessed from the same website, it may be considered a company publication, even if written by a third party.

Example:

“Company XYZ places a preliminary prospectus on its Internet Web site and provides direct access via a hyperlink to a research report on the Company written by ABC Corporation, a registered brokerage firm. The investor reviewing the preliminary prospectus can click on a box marked ‘ABC’s research report’ and the investor will be linked to the brokerage firm’s Web site where the research report is available.”
“Adoption”:
Don’t Push the (Electronic) Envelope

“The hyperlink function provides the ability to access information located on another Web site almost instantaneously. This direct and quick access to ABC’s research report would be similar to the Company including the paper version of the research report in the same envelope that it is using to mail the paper version of the preliminary prospectus to potential investors. During the waiting period, the Company may make offers only through the use of a preliminary prospectus, [Section 5(b) of the Securities Act] whether in paper or electronic print format; therefore, its use of the research report under these circumstances would not be permissible.”

SEC Release No. 33-7233, 34-36345 (October 6, 1995)
Boston ◆ New York ◆ New Jersey ◆ Washington
“Adoption”: Don’t Push the (Electronic) Envelope

SEC Position:

• In documents required to be filed or delivered under the federal securities laws,

“when an issuer embeds a hyperlink to a website within that document, the issuer should always be deemed to be adopting the hyperlinked information.”

SEC Interpretive Release on Use of Electronic Media
April 28, 2000
“Adoption”:
Don’t Push the (Electronic) Envelope

DOs and DON’Ts:

• Avoid explicit or implicit endorsements of the hyperlinked information

• don’t be selective
  – link to all reports or articles, not only the favorable ones
  – don’t terminate the link when negative information is published
“Adoption”:
Don’t Push the (Electronic) Envelope

• Avoid any confusion about the source of hyperlinked information
• make clear that the user is no longer on your site
• linking to a home page for another site may be safer than a “deep link” to a page within the linked site
• avoid “framing” and “inlining”
“Adoption”:
Don’t Push the (Electronic) Envelope

When hyperlinking to or referencing material on another site:

• use exit screens

• use disclaimers
To Sum Up
Summary of Website Liability Basics

1. “Dead documents tell no tales”
   – clean-up your site periodically and purge or expressly archive old documents
Website Liability Basics

2. “The web of the living dead”

– older documents which would normally have been viewed as no longer “alive” for securities fraud purposes may be deemed continuously re-published, and hence a source of misrepresentations, on your website
Website Liability Basics

3. “What a tangled web we weave”

– avoid “entanglement” with the statements of analysts and other third parties by steering clear of comments and editing
Website Liability Basics

4. “You post it, you own it”

– avoid “adoption” of, and responsibility for, the statements of third parties such as analysts and journalists by never posting or linking to such materials, without explicit disclaimers of responsibility for their content and exit screens warning that the viewer is leaving your site.
Website Liability Basics

5. “Good fences make good neighbors”
   – make clear when a visitor is leaving your site via hyperlink and disclaim responsibility for what they may see or learn on their journey
   – do not “frame” material from other sites so that it looks like yours
Website Liability Basics

6. “A disclosure is a disclosure is a disclosure”

– Give website postings the same pre-publication review as paper disclosures
– make sure personnel with SEC disclosure sensitivity review all material
– marketing or promotional statements can create 10b-5 liability
– if you wouldn’t put it in a written filing, don’t post it on your site
IR and FD:
What You Need to Know About
SEC Regulation FD and Other
Current Disclosure Issues

By
Stephen D. Poss, P.C.
Goodwin Procter LLP