

SECURITIES ALERT

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A GLOBAL LAW FIRM FOR THE 21ST CENTURY

JULY 2000

SEC GUIDANCE REGARDING THE USE OF ELECTRONIC MEDIA BY COMPANIES

The staff of the Securities and Exchange Commission recently released "SEC Interpretation: Use of Electronic Media." The interpretation addresses three areas: (i) a company's liability for Web site content, (ii) the use of electronic media to deliver documents under the federal securities laws and (iii) basic legal principles that companies and intermediaries should consider in conducting online offerings.

Web Site Content

As a general rule, federal securities laws apply in the same manner to the content of a Web site as to any other statements made by or attributable to a company. The following clarifies the SEC's position with respect to certain issues pertaining to Web site content:

- **Company Responsibility for Hyperlinked Information.** Companies can be liable for statements made directly on their Web site or for third-party information hyperlinked from a company's Web site. Liability for third-party information depends on whether the company has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. Two factors that the SEC considers in determining whether third-party information is attributable to a company are:

- Context of the Hyperlink. If the company either indicates that it endorses the information or that such information supports a particular assertion of the company then the information will be attributable to the company. Any embedded hyperlinks within a document on the company's Web site will be deemed to be adopting the hyperlinked information.
- Risk of Confusion. Hyperlinked information on a third-party Web site may be less likely to be attributed to a company if the company makes the information accessible only after a visitor to its Web site has been presented with an intermediate screen that clearly and prominently indicates that the visitor is leaving the company's Web site and that information subsequently viewed is not the company's information. Statements and disclaimers, however, will not necessarily insulate a company from liability for hyperlinked information if the relevant facts and circumstances otherwise indicate that the company has adopted the information.

Both presentation and layout are also relevant in determining whether the company has adopted the information. A company's efforts to direct an investor's attention to particular third-party information by selectively providing hyperlinks would support the position that the company has adopted such information.

- **Company Communications During a Registered Offering.** A company that is in registration should maintain communications with the public as long as the

subject matter of the communications is limited to the ordinary-course business and financial information, which may include:

- advertisements concerning the company’s products or services
- proxy statements, annual reports to security holders and dividend notices
- press announcements concerning business and financial developments
- answers to unsolicited telephone inquiries concerning business matters from analysts
- questions from financial analysts, security holders and participants in the communications field who have a legitimate interest in the company’s affairs
- security holders’ meetings and responses to security holder inquiries relating to these matters.

This position is consistent with past SEC interpretations.

Electronic Document Delivery

The interpretation provides:

- **Telephonic Consent** An investor may give telephonic consent, in lieu of written consent, to electronic delivery as long as the company or market intermediary obtains a record of such consent.
- **Global Consent** An investor may give global consent to electronic delivery relating to all documents of any company as long as the consent is informed. Any global consent must specify the type of electronic media to be used. However, if the consent permits various electronic delivery methods, it need not specify the medium to be used by any particular company.
- **Use of Portable Document Format (PDF).** Companies and market intermediaries delivering documents electronically may use PDF if it is not so burdensome that it effectively prevents access.
- **Clarification of the “Envelope Theory.”** There are some cases when companies or intermediaries need to

deliver documents simultaneously. The “envelope theory” evolved to provide assurances to companies and intermediaries that multiple documents delivered electronically via hyperlink to one another or posted in close proximity to one another on a Web site were sufficient means of satisfying delivery requirements. The interpretation provides that information on a Web site will not become part of a prospectus unless a company acts to make it part of the prospectus. The entirety of the Web site content, not the location, will determine whether information will be deemed impermissible free writing. If information is from a hyperlink embedded in the prospectus, that information must be filed as part of the prospectus and is subject to Securities Act liability. If an external document is hyperlinked to a prospectus, both documents are considered to be delivered together but the external document is not deemed to be part of the prospectus.

Online Offerings

- **Online Public Offerings.** Two fundamental legal principles should guide companies, underwriters and other offering participants in online public offerings:
 - Offering participants can neither sell, nor make contracts to sell, a security before effectiveness of the related registration statement.
 - Until delivery of the final prospectus has been completed, written offers and offers transmitted by radio and television cannot be made outside of a Section 10 prospectus except in connection with business combinations. After filing, offering participants may disseminate sales literature and other writings as long as accompanied or preceded by a final prospectus. Oral offers, using any combination of electronic and traditional media, are permissible as soon as a registration statement is filed.
- **Online Private Offerings Under Regulation D.** Offerings of securities online that are intended to be

exempt from SEC registration are problematic because such offerings prohibit general solicitation. Access to these offerings needs to be limited by using password protected sites that permit access only to accredited investors with pre-existing substantive relationships with the issuer or the intermediary. The SEC will continue to

examine offerings made online on a case-by-case basis. Web sites that permit self-accreditation are not acceptable.

Web site operators should also consider whether the activities they are undertaking require them to register as broker-dealers.

IF YOU HAVE ANY QUESTIONS OR COMMENTS ABOUT SEC GUIDANCE REGARDING THE USE OF ELECTRONIC MEDIA BY COMPANIES OR ABOUT SECURITIES LAW IN GENERAL, PLEASE CONTACT:

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