

Annual Review of Federal Securities Regulation

*By the Subcommittee on Annual Review, Committee on Federal Regulation of Securities, ABA Section of Business Law**

TABLE OF CONTENTS

INTRODUCTION	835
SIGNIFICANT 2008 ACCOUNTING DEVELOPMENTS	837
DISCLOSURES ABOUT DERIVATIVE INSTRUMENTS AND HEDGING ACTIVITIES, AN AMENDMENT OF FASB STATEMENT NO. 133.....	837
ACCOUNTING FOR FINANCIAL GUARANTEE INSURANCE CONTRACTS, AN INTERPRETATION OF FASB STATEMENT NO. 60	839
DETERMINING THE FAIR VALUE OF A FINANCIAL ASSET WHEN THE MARKET FOR THAT ASSET IS NOT ACTIVE.....	841
DISCLOSURES ABOUT CREDIT DERIVATIVES AND CERTAIN GUARANTEES: AN AMENDMENT OF FASB STATEMENT NO. 133 AND FASB INTERPRETATION NO. 45; AND CLARIFICATION OF THE EFFECTIVE DATE OF FASB STATEMENT NO. 161	842

* Cheryl D. Ganapol, Chair, is a member of the California and District of Columbia bars and is Corporate Counsel at Marvell Semiconductor, Inc., in Santa Clara, California; Anna T. Pinedo, Vice Chair, is a member of the New York bar and a partner in the Capital Markets Group at Morrison & Foerster LLP in New York.

Contributors include Gregory Astrachan, a member of the New York bar and a partner in the Corporate and Financial Services Group at Willkie Farr and Gallagher LLP in New York; David A. Brown, a member of the District of Columbia and Utah bars and an associate at Alston & Bird LLP in Washington, D.C.; Marty Dunn, a member of the Maryland bar and a partner at O'Melveny & Myers LLP in Washington, D.C., who previously served as Deputy Director and Acting Director, Division of Corporation Finance, U.S. Securities and Exchange Commission; William O. Fisher, a member of the California bar, an assistant professor of law at the University of Richmond School of Law, and a former partner at Pillsbury Winthrop LLP in San Francisco, California; Dennis O. Garris, a member of the District of Columbia and Ohio bars, a partner at Alston & Bird LLP in Washington, D.C., and previous Chief of the Office of Mergers & Acquisitions, Division of Corporation Finance, U.S. Securities and Exchange Commission; Ian W. Grant, a member of the Virginia bar with admission pending to the District of Columbia bar and an associate at Alston & Bird LLP in Washington D.C.; Mara C. Goldsmith, a member of the New York bar and an associate at Morrison & Foerster LLP in New York; Bjorn Hall, a member of the District of Columbia bar and an associate at O'Melveny & Myers LLP in Washington, D.C.; Lloyd Harmetz, a member of the New York bar and a partner in the Capital Markets Group in the New York office of Morrison & Foerster LLP; Anna H. Lau, a member of the New York bar and a former associate at Morrison & Foerster LLP in New York; Joseph R. Magnas, a member of the New York bar and an associate at Morrison & Foerster LLP in New York; Carol M. McGee, a member of the District of Columbia and Virginia bars, a partner at Alston & Bird LLP in Washington, D.C., and former Deputy Chief Counsel in the Division of Corporation Finance, U.S. Securities and Exchange Commission; and Leah Shams-Molkara and Douglas Tedeschi, members of the New York bar who practice law in Willkie Farr & Gallagher LLP's New York office.

ACCOUNTING FOR CONVERTIBLE DEBT INSTRUMENTS THAT MAY BE SETTLED IN CASH UPON CONVERSION (INCLUDING PARTIAL CASH SETTLEMENT)	844
ISSUER'S ACCOUNTING FOR LIABILITIES MEASURED AT FAIR VALUE WITH A THIRD-PARTY CREDIT ENHANCEMENT.....	847
SIGNIFICANT 2008 REGULATORY DEVELOPMENTS	849
THE SEC'S DIVISION OF CORPORATION FINANCE STAFF LEGAL BULLETIN No. 14D: GUIDANCE REGARDING SHAREHOLDER PROPOSALS	849
COMMISSION GUIDANCE AND CHANGES TO CROSS-BORDER TENDER OFFER RULES.....	853
SUMMARY OF SEC GUIDANCE ON THE USE OF WEB SITES.....	861
INTERNAL CONTROLS OVER FINANCIAL REPORTING FOR NON-ACCELERATED FILERS	870
SIGNIFICANT 2008 CASELAW DEVELOPMENTS	871
OVERVIEW.....	871
U.S. SUPREME COURT DEFINES SCOPE OF PRIMARY LIABILITY UNDER RULE 10B-5 AND PERMITS PARTICIPANT IN RETIREMENT PLAN TO SUE FOR FAILURE TO FOLLOW HIS INSTRUCTIONS REGARDING INVESTMENTS	876
PLEADING CORPORATE SCIENTER AND THE APPLICATION OF PRIMARY LIABILITY TO INDIVIDUAL DEFENDANTS	879
LAWYER LIABILITY UNDER RULE 10B-5.....	885
PLEADING MISREPRESENTATION AND SCIENTER UNDER THE PSLRA.....	886
FRAUD-ON-THE-MARKET AND CLASS CERTIFICATION	919
LOSS CAUSATION	920
SECURITIES LITIGATION UNIFORM STANDARDS ACT ("SLUSA").....	923
CAFA AND SECURITIES LAWSUITS.....	928
DUTY TO DISCLOSE QUESTIONABLE DOMESTIC PAYMENTS.....	928
MISREPRESENTATION BY PROMISE TO LIST SHARES AFTER MERGER.....	930
ALLEGED FRAUD IN SALE OF BUSINESS	932
RELIANCE IN A FACE-TO-FACE TRANSACTION	935
SECTIONS 11 AND 12(A)(2).....	936
SECTION 13(D).....	939
PROXY DISCLOSURE.....	940
INSIDER TRADING.....	940
SECTION 16(B)	946
SOX SECTION 304 COMPENSATION RECAPTURE AFTER RESTATEMENT	947
SEC ENFORCEMENT ACTIONS.....	948
PARALLEL INVESTIGATIONS	959
CRIMINAL CASES	961
PROPORTIONATE LIABILITY	963
INVESTMENT ADVISOR FEES AT MUTUAL FUNDS.....	964
EXTRATERRITORIAL APPLICATION OF THE SECURITIES LAWS.....	965
CONSTITUTIONALITY OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD	967
DEFINITION OF A SECURITY.....	969
PREEMPTION	970
CONSTITUTIONAL STANDING	970

Introduction

This Annual Review (“Review”) was prepared by the Subcommittee on Annual Review of the Committee on Federal Regulation of Securities of the American Bar Association’s Section of Business Law. The Review covers significant developments in federal securities law and regulation during 2008. The Review is divided into three sections: accounting statements, regulatory actions, and caselaw developments.

The Review is written from the perspective of practitioners in the fields of corporate and securities law. This results in an emphasis on significant developments under the federal securities laws relating to companies, shareholders, and their respective counsel. Our discussion is limited to those developments exceeding a specific threshold of importance that are thought to be of the greatest interest to a wide range of practitioners.

Generally, the Review does not discuss proposed regulations or rules that are narrowly focused. Additionally, cases are chosen for both their legal concepts as well as factual background. Finally, the Subcommittee tries to avoid making editorial comments regarding regulations, rules, or cases. Following is a summary of the securities laws developments in 2008; no significant federal rulemaking was enacted in 2008.

Significant 2008 Regulatory Developments

THE SEC'S DIVISION OF CORPORATION FINANCE STAFF LEGAL BULLETIN NO. 14D: GUIDANCE REGARDING SHAREHOLDER PROPOSALS

To assist companies and shareholders in complying with the “shareholder proposal” rule of the U.S. Securities & Exchange Commission (“SEC”)—Securities Exchange Act of 1934 (the “Exchange Act”) Rule 14a-8¹—the SEC’s Division of Corporation Finance (the “Division”) has published extensive guidance in the form of staff legal bulletins.² On November 7, 2008, the Division published Staff Legal Bulletin No. 14D (“SLB 14D”) addressing two substantive and three procedural matters as part of its ongoing guidance regarding the shareholder proposal rule.³

Substantively, SLB 14D addressed (i) the treatment of “shareholder proposals that recommend, request, or require a board of directors to unilaterally amend the company’s articles or certificate of incorporation”; and (ii) “whether a company must send a notice of defect if the company’s records indicate that the proponent has not owned the minimum amount of securities for the required period of time as set forth in [Exchange Act] rule 14a-8(b).”⁴

Procedurally, SLB 14D addressed (i) the establishment of “a new e-mail address . . . for the receipt of rule 14a-8 no-action requests and related correspondence”; (ii) “the requirement that a proponent send copies of correspondence to the company”; and (iii) “the manner in which the company and a proponent should provide additional correspondence to [the Division] and to each other.”⁵

1. 17 C.F.R. § 240.14a-8 (2009).

2. See U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin., Staff Legal Bulletin No. 14: Shareholder Proposals (July 13, 2001), <http://sec.gov/interps/legal/cfslb14.htm> [hereinafter “SLB 14”]; U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin., Staff Legal Bulletin No. 14A: Shareholder Proposals (July 12, 2002), <http://sec.gov/interps/legal/cfslb14a.htm>; Staff Legal Bulletin No. 14B (CF): Shareholder Proposals (Sept. 15, 2004), <http://sec.gov/interps/legal/cfslb14b.htm>; Staff Legal Bulletin No. 14C (CF): Shareholder Proposals (June 28, 2005), <http://sec.gov/interps/legal/cfslb14c.htm>.

3. See U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin., Staff Legal Bulletin No. 14D (CF): Shareholder Proposals (Nov. 7, 2008), <http://sec.gov/interps/legal/cfslb14d.htm> [hereinafter “SLB 14D”].

4. *Id.* § A. Rule 14a-8(b) requires that a shareholder must “have continuously held at least \$2,000 in market value, or 1%, of the company’s securities entitled to be voted on the proposal at the meeting for at least one year by the date [it] submit[ted] the proposal” and “continue to hold those securities through the date of the meeting.” 17 C.F.R. § 240.14a-8(b) (2009).

5. SLB 14D, *supra* note 3, § A.

TREATMENT OF SHAREHOLDER PROPOSALS THAT RECOMMEND,
REQUEST, OR REQUIRE A BOARD TO UNILATERALLY AMEND
THE COMPANY'S ARTICLES OR CERTIFICATE OF INCORPORATION

The Division's discussion of shareholder proposals that recommend, request, or require a board to unilaterally amend the company's articles or certificate of incorporation merely restates two longstanding positions of the Division.

First, Exchange Act Rule 14a-8(i)(1),⁶ Rule 14a-8(i)(2),⁷ or Rule 14a-8(i)(6)⁸ may provide a basis for excluding a shareholder proposal from the company's proxy materials if the company shows that applicable state law does not provide the board with the authority to make such an amendment unilaterally, but instead "requires any such amendment to be initiated by the board and then approved by shareholders."⁹

Second, the Division may permit the proponent to revise such shareholder proposal to provide that the board "take the steps necessary" to amend the company's articles or certificate of incorporation and, if the proponent revises the proposal properly within the time frame specified by the Division, none of Rule 14a-8(i)(1), Rule 14a-8(i)(2), or Rule 14a-8(i)(6) will provide the company with a basis for excluding the proposal from its proxy materials.¹⁰

SLB14D does not indicate why the Division took the opportunity to restate these two longstanding positions. It appears, however, that the Division addressed these types of proposals in SLB 14D to clarify a number of no-action letters that it issued during last year's proxy season.

During the 2007–2008 proxy season, the Division concurred with the omission of a proposal requesting that the board "adopt cumulative voting" in its no-action responses to eleven separate no-action requests.¹¹ In each of these no-action

6. Rule 14a-8(i)(1) provides a basis for exclusion of the shareholder proposal if it is "not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." 17 C.F.R. § 240.14a-8(i)(1) (2009).

7. Rule 14a-8(i)(2) provides a basis for exclusion of the shareholder proposal if it "would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2) (2009).

8. Rule 14a-8(i)(6) provides a basis for exclusion of the shareholder proposal "[i]f the company would lack the power or authority to implement the proposal." 17 C.F.R. § 240.14a-8(i)(6) (2009).

9. SLB 14D, *supra* note 3, § B.

10. *Id.*

11. See Am. Int'l Group, Inc., SEC No-Action Letter (Mar. 28, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/americaninternational032808-14a8.pdf>; Schering-Plough Corp., SEC No-Action Letter (Mar. 27, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/scheringplough032708-14a8.pdf>; Exxon Mobil Corp., SEC No-Action Letter (Mar. 24, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/exxonmobil032408.001-14a8.pdf>; Bristol-Myers Squibb Co., SEC No-Action Letter (Mar. 14, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/bristolmyers031408-14a8.pdf>; Pfizer Inc., SEC No-Action Letter (Mar. 7, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/pfizer030708-14a8.pdf>; Northrop Grumman Corp., SEC No-Action Letter (Feb. 29, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/northropgrumman022908-14a8.pdf>; Time Warner Inc., SEC No-Action Letter (Feb. 26, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/timewarner022608-14a8.pdf>; PG&E Corp., SEC No-Action Letter, <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/pgande022508-14a8.pdf> (Feb. 25, 2008);

requests, the company argued that the proposal would require an amendment to its articles or certificate of incorporation and, in each case, the board did not have the authority to unilaterally effect such an amendment. The Division concurred in each company's view and *did not* provide any of the respective proponents an opportunity to revise the proposal to request that the board "take the steps necessary" to effect such an amendment.¹²

The Division's statements in SLB 14D make clear that, notwithstanding its position during the 2007–2008 proxy season with regard to the "adopt cumulative voting" proposals, the Division will continue its longstanding practice of providing proponents with an opportunity to revise proposals that improperly seek unilateral board action.¹³

A COMPANY'S OBLIGATION TO SEND A NOTICE OF DEFECT
IF THE COMPANY'S RECORDS INDICATE THAT THE PROPONENT
HAS NOT OWNED THE REQUIRED AMOUNT OF SECURITIES
FOR THE REQUIRED PERIOD OF TIME

The Division made clear that, while a company's records can prove a shareholder's eligibility to submit a proposal, those records alone cannot prove a shareholder's ineligibility to submit a proposal.¹⁴ Specifically, "if a [shareholder] is listed in a company's records as a registered holder, the company can confirm that the [shareholder's] holdings satisfy the ownership eligibility requirements of rule 14a-8(b)"; however, because the shareholder may hold the company securities by means other than as a record holder, the company's records cannot "prove conclusively that the proponent fails to meet the ownership eligibility requirement."¹⁵

Accordingly, if "a company's records indicate that the proponent does not satisfy the ownership eligibility requirement in rule 14a-8(b)" and "the company intends to exclude the proposal based upon the proponent's failure to satisfy the requirements of rule 14a-8(b)," the company is still obligated to provide the shareholder proponent with a notice of defect indicating that the shareholder "must provide proof of ownership that satisfies the requirements of rule 14a-8(b)."¹⁶

Citigroup Inc., SEC No-Action Letter (Feb. 22, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/citigroup022208-14a8.pdf>; The Boeing Co., SEC No-Action Letter (Feb. 20, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/boeing022008-14a8.pdf>; AT&T, Inc., SEC No-Action Letter (Feb. 19, 2008), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/atandt021908-14a8.pdf>.

12. See SLB 14D, *supra* note 3, § B.

13. See *id.* The Division's no-action letter to Bank of America Corporation appears to confirm this position. In the no-action request from Bank of America, the company noted specifically that the proponent requested that the company's "board take steps necessary to adopt cumulative voting." The Division did not agree with the company's view that it could exclude this proposal in reliance on Rule 14a-8(i)(2) (violation of law) or Rule 14a-8(i)(6) (lack of authority). See Bank of America Corp., SEC No-Action Letter (Jan. 6, 2009), <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/nickrossi010609-14a8.pdf>.

14. See SLB 14D, *supra* note 3, § D.

15. *Id.*

16. *Id.*

THE DIVISION'S NEW E-MAIL ADDRESS FOR THE RECEIPT OF RULE 14A-8 NO-ACTION REQUESTS AND RELATED CORRESPONDENCE

The Division has established a new e-mail address—shareholderproposals@sec.gov—for the submission of Rule 14a-8 no-action requests and related correspondence.¹⁷ Submissions made through this e-mail address should include the name and telephone number of the person submitting the no-action request or related correspondence.¹⁸ The Division indicated that it will process no-action requests and related correspondence submitted through the new e-mail address in the same manner as no-action requests and related correspondence submitted in paper.¹⁹

PROponents ARE REQUIRED TO SEND THE COMPANY COPIES OF CORRESPONDENCE THAT THEY SEND TO THE DIVISION

The Division reminded proponents of Exchange Act Rule 14a-8(k),²⁰ which requires a proponent to provide the company with a copy of any correspondence submitted to the Division in response to the company's no-action request.²¹

THE MANNER IN WHICH THE COMPANY AND A PROponent SHOULD PROVIDE ADDITIONAL CORRESPONDENCE TO THE DIVISION AND TO EACH OTHER

In 2001, the Division stated in section G.9 of Staff Legal Bulletin No. 14²² that both the company and the shareholder proponent “should promptly forward to each other copies of all correspondence” provided to the Division in connection with Rule 14a-8 no-action requests. Although there is no requirement regarding the manner in which this correspondence should be provided, in SLB 14D the Division “encourage[s] companies and proponents to use the same means of transmitting correspondence to each other as they use to transmit materials to [the Division].”²³ As an example, “if a company transmits correspondence to [the Division] via overnight mail, the company should transmit a copy to the [shareholder] proponent via overnight mail as well.”²⁴

CONCLUSION

SLB 14D is the latest step in the Division's efforts to ease compliance and provide practical and substantive guidance to both companies and shareholders regarding compliance with the SEC's rules.

17. *See id.* § C.

18. *Id.*

19. *Id.*

20. 17 C.F.R. § 240.14a-8(k) (2009).

21. *See* SLB 14D, *supra* note 3, § E.

22. SLB 14, *supra* note 2, § G.9.

23. SLB 14D, *supra* note 3, § E.

24. *Id.*

COMMISSION GUIDANCE AND CHANGES TO CROSS-BORDER TENDER OFFER RULES

INTRODUCTION AND SUMMARY OF AMENDED RULES

On September 19, 2008, the SEC adopted amendments to the cross-border tender offer rules (the “Rules”) under the Exchange Act.²⁵ The amendments to the Rules are the first since their initial adoption in 1999.²⁶ The Rules are effective for transactions that commence after the effective date of the rules, which was December 8, 2008.²⁷

The new rules generally provide for an expansion of the exemptions for cross-border transactions and business combinations.²⁸ These changes address the calculation of U.S. ownership of securities and codify certain interpretive positions and exemptions frequently granted by the SEC in cross-border transactions resulting from conflicts of law with foreign regulatory regimes.²⁹

The primary purpose behind the newly adopted rules is to facilitate further the inclusion of U.S. security holders in cross-border business combinations by decreasing the burdens on bidders and issuers in complying with multi-jurisdictional regulatory systems.³⁰ The new rules also seek to update the cross-border rules to account for a global market and to accommodate the frequent conflicts with regulations and practices in foreign jurisdictions noted above.³¹

As adopted, the amendments do the following:

- Modify the U.S. beneficial ownership test for determination of eligibility for Tier I and Tier II exemptions by permitting the issuer to use any date sixty days prior to and thirty days following the date of “public announcement” of the transaction, or, in the case of rights offerings, the applicable record date (with an extension to 120 days if the look-through analysis was not accomplished in the earlier time period);

25. See Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Securities Act Release No. 33-8957, 73 Fed. Reg. 60050 (Oct. 9, 2008) (to be codified at 17 C.F.R. pts. 230, 231, 232, 239, 240, 241 & 249) [hereinafter “Commission Guidance and Revisions”].

26. See Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Securities Act Release No. 33-7759, 64 Fed. Reg. 61382 (Nov. 10, 1999) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249 & 260).

27. See Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Securities Act Release No. 33-8917, 73 Fed. Reg. 26876 (proposed May 9, 2008) (to be codified at 17 C.F.R. pts. 230, 232, 239, 240 & 249) [hereinafter “Revisions to the Cross-Border Tender Rules”].

28. Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60052.

29. *Id.* at 60050–52. For these purposes, “cross-border” means any business combinations where the target company is a “foreign private issuer” under Rule 3b-4(c) of the Exchange Act, and rights offerings where the issuer is a foreign private issuer. See *id.* at 60050 & n.22 (citing 17 C.F.R. § 240.3b-4(c) (2008)).

30. *Id.* at 60052–53.

31. *Id.* at 60052.

- Remove the exclusion of holders of more than 10 percent of the class of subject securities from the calculation of U.S. beneficial ownership;
- Establish an alternative eligibility test for Tier I and Tier II exemptive relief based on average daily trading volume (“ADTV”) if the beneficial ownership analysis is unable to be conducted (subject to certain conditions described below);
- Expand the Tier I exemption for “going private” transactions under Exchange Act Rule 13e-3, regardless of the structure of the transaction;
- Expand Tier II relief to avoid certain recurring conflicts between U.S. and foreign law and practice;
- Clarify that Tier II exemptive relief is available for transactions subject not only to Rule 13e-4 or Regulation 14D, but also for transactions subject only to Regulation 14E;
- Permit subsequent offering periods lasting more than twenty business days in both cross-border offers and offers for U.S. domestic issuers;
- Expand the availability of early commencement to offers not subject to section 13(e) or 14(d) of the Exchange Act, i.e., exchange offers other than for registered equity securities, including exchange offers by domestic companies for their own debt; and
- Permit eligible foreign institutions to utilize Schedule 13G to report their beneficial ownership of U.S. securities.³²

The rules also address technical issues, such as requiring the electronic filing of Form CB and adding boxes to Schedule TO and Forms F-4 and S-4 to indicate what exemption a participant claims.³³ In addition, the SEC provided interpretive guidance regarding the following:

- Situations where U.S. holders can be excluded from an offer in compliance with section 14(d) (the “all-holders rule”);³⁴ and
- Certain issues applicable to “vendor placement” arrangements.³⁵

We highlight a few of the key changes to the cross-border rules after providing a brief history of the changes.

BRIEF HISTORY OF CROSS-BORDER RULES

No special exemption from U.S. securities laws existed for cross-border transactions prior to 1999.³⁶ Consequently, U.S. securities holders were frequently excluded from cross-border transactions.³⁷ To address this issue, the SEC adopted

32. *Id.* at 60052–53.

33. *Id.* at 60072.

34. *Id.* at 60075–78 (citing Exchange Act Rule 14d-10(b)(2), 17 C.F.R. § 240.14d-10(b)(2) (2008)).

35. *Id.* at 60077–78.

36. See Revisions to the Cross-Border Tender Offer Rules, *supra* note 27, 73 Fed. Reg. at 26878.

37. See *id.* at 26877.

rules in 1999 that allowed for the inclusion of more U.S. holders in cross-border deals.³⁸

From inception, the cross-border exemptions have been structured as a two-tier scheme that looks generally to the U.S. ownership of a target that is a foreign private issuer.³⁹

A Tier I exemption is available where 10 percent or less of the subject securities are held in the United States.⁴⁰ If the transaction qualifies for a Tier I exemption, it is exempt from most U.S. tender offer rules and the heightened disclosure obligations in Rule 13e-3 going private transactions.⁴¹ At the same U.S. ownership levels, Rules 801 and 802 of the Securities Act of 1933 (“Securities Act”) provide relief from the registration requirements of section 5 for securities issued in rights offerings and business combinations.⁴² A Tier II exemption applies when U.S. holders owned more than 10 percent, but less than 40 percent, of the subject securities.⁴³ A Tier II exemption was more limited, only providing exemption from some rules, such as the prompt payment and extension requirements in Regulation 14E, and has not provided an exemption from the registration requirements under section 5 of the Securities Act.⁴⁴

Until the October 2008 changes, acquirers were required to calculate U.S. ownership as of the thirtieth day before the commencement of a tender offer or before the solicitation for a business combination other than a tender offer.⁴⁵ The acquirer would “look through” securities held of record by nominees in specified jurisdictions to identify those held for the accounts of persons located in the United States.⁴⁶ If, however, after “reasonable inquiry,” the acquirer could not obtain information about the location of the security holders for whom a nominee held securities, the rules allowed the acquirer to assume that the security holders were residents of the jurisdiction in which the nominee had its principal place of business.⁴⁷

Under the former exemptions, for hostile transactions only, the bidder could rely on the “hostile presumption” that allowed a third-party bidder to assume that U.S. ownership in the target company was no more than 10 percent or 40 percent (depending on the relevant tier) so long as the ADTV did not exceed 10 percent or 40 percent of the ADTV worldwide over a specified period and the bidder had no

38. See Securities Act Rules 800–802, 17 C.F.R. §§ 230.800–802 (2008); Exchange Act Rules 13e-3(g)(6), 13e-4(h)(8), 13e-4(i), 14d-1(d), 14e-2(d), 17 C.F.R. §§ 240.13e-3(g)(6), 240.13e-4(h)(8), 240.13e-4(i), 240.14d-1(d), 240.14e-2(d) (2008).

39. See *supra* note 38.

40. See Exchange Act Rule 13e-4(h)(8), 17 C.F.R. § 240.13e-4(h)(8) (2008).

41. See Exchange Act Rules 13e-3(g)(6), 13e-4(h)(8), 17 C.F.R. §§ 240.13e-3(g)(6), 13e-4(h)(8) (2008).

42. Securities Act Rules 801–802, 17 C.F.R. §§ 230.801–802 (2008).

43. See Exchange Act Rule 13e-4(i), 17 C.F.R. § 240.13e-4(i) (2008).

44. See Exchange Act Rules 13e-4(i), 14d-1(d), 17 C.F.R. §§ 240.13e-4(i), 240.14d-1(d) (2008).

45. See Instruction 2 to Rules 13e-4(h)(8), (i), 17 C.F.R. § 240.13e-4(h)(8), (i) (2008); Instruction 2 to Rules 14d-1(c), (d), 17 C.F.R. § 240.14d-1(c), (d) (2008).

46. See *supra* note 45.

47. See *id.*

reason to know that actual U.S. ownership was inconsistent with that ADTV.⁴⁸ For negotiated transactions, however, there was no similar alternative to the “look-through” analysis.⁴⁹

THE NEW RULES

The new rules maintain the overall structure of the cross-border rules but attempt to expand and enhance their utility.⁵⁰ Although there are more types of transactions qualifying for an exemption under the newly adopted rules, disclosure and other obligations associated with each tier have not substantially changed.⁵¹

CHANGES TO THE TIER I EXEMPTION

The new rules expand the scope of the Tier I exemption from Rule 13e-3 to remove any restriction on a category of transactions that the exemption covers.⁵² The Tier I exemption now covers structures not previously exempt under the old cross-border regimes such as schemes of arrangement, cash mergers, and compulsory acquisitions for cash.⁵³ The new rules focus more on the substance, rather than the form, of the transaction to determine if it qualifies for a Tier I exemption.⁵⁴

CHANGES TO THE TIER II EXEMPTION

The majority of the new rules deal with expanding the Tier II exemption to accommodate foreign law and practice by increasing structural and practical flexibility to include U.S. investors. The SEC extended the specific relief afforded under Tier II to tender offers not subject to section 13(e) or 14(d) of the Exchange Act.⁵⁵

The amended rules expand relief under Tier II “to eliminate recurrent conflicts between U.S. and foreign law and practice” and to accommodate differing practices and transaction structures.⁵⁶ The expansion generally codifies certain exemptions that were frequently granted in cross-border transactions on a case-by-case basis and includes the following:

- Allowing more than one offer to be made abroad in conjunction with a concurrent U.S. offer (previous rules allowed an offer to be made in only one foreign jurisdiction while an offer was outstanding in the United States);⁵⁷

48. See Instruction 3 to Rules 14d-1(c), (d), 17 C.F.R. § 240.14d-1(c), (d) (2008).

49. *Id.*

50. See Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60052–54.

51. See *id.* at 60060–70.

52. See Exchange Act Rule 13e-3, 17 C.F.R. § 240.13e-3 (2009).

53. See Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60060–61.

54. See *id.*

55. See *id.* at 60061. See also 15 U.S.C. §§ 78m(e), 78n(d) (2006).

56. Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60053.

57. See *id.* at 60061 & n.150.

- Permitting bidders to include foreign security holders in a U.S. offer and U.S. holders in a foreign offer where required under foreign law and where adequate disclosure is provided;⁵⁸
- Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted and before they are accepted for payment, provided that the offer includes an initial offering period, including withdrawal rights, of at least twenty business days;⁵⁹
- Allowing subsequent offering periods to extend beyond twenty U.S. business days;⁶⁰
- Allowing securities tendered during a subsequent offering period to be purchased within fourteen business days from the date of tender in order to provide flexibility in connection with local jurisdiction requirements and local market conditions;⁶¹
- Allowing bidders to pay interest on securities tendered during a subsequent offering period (payment of interest, where required under foreign law, will not be deemed to violate equal treatment principles under section 14(d) of the Exchange Act⁶²);⁶³ and
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods to facilitate prompt payment and permit the use of a “mix and match” structure.⁶⁴

Additionally, the new rules expand the availability of early commencement to offers not subject to section 13(e) or 14(d) of the Exchange Act.⁶⁵ The SEC will no longer permit bidders to terminate withdrawal rights after reducing or waiving minimum acceptance conditions to non-majority levels.⁶⁶ The rules also codify existing exemptive orders with respect to the application of Rule 14e-5 for purchases outside of the offer for Tier II tender offers.⁶⁷

TIMING

As noted above, under the old rules, to determine U.S. ownership, the acquirer would use a date that was the thirtieth day before the commencement of a tender offer or before the solicitation for a business combination other than a tender offer. The new rules allow an offeror to use the date of public announcement (instead of commencement) of the business combination as the triggering event for calculating U.S. ownership.⁶⁸ The public announcement of a transaction occurs

58. See *id.* at 60062 & nn.159, 164.

59. See *id.* at 60062–63 & n.171.

60. See *id.* at 60063.

61. *Id.* at 60064–65 & n.200.

62. See *id.* at 60065.

63. See *id.* at 60065–66.

64. *Id.* at 60066.

65. *Id.* at 60070.

66. *Id.* at 60066–67.

67. *Id.* at 60069.

68. See Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60055.

when any oral or written communication that is reasonably designed to inform or has the effect of informing security holders or the public in general about the transaction is made by or on behalf of the offeror.⁶⁹ Further, as amended, the cross-border rules now allow an offeror to make its U.S. beneficial ownership calculation no more than sixty days before and no more than thirty days after the public announcement of the transaction.⁷⁰ The SEC noted that it adopted a range that includes dates both before and after the announcement of a transaction to address concerns that requiring acquirers to conduct the look-through analysis prior to announcement could compromise the confidentiality of the transaction.⁷¹ If the offeror is unable to complete the look-through analysis as of this ninety day period, it may use an expanded period calculated based on a date within 120 days before public announcement.⁷²

Obviously, the key element of the exemptions was, and in fact still is, the percentage of U.S. beneficial owners of the relevant class of target securities.⁷³ Under the old rules, beneficial ownership was determined by reference to a target's non-affiliated float.⁷⁴ Non-affiliated float excluded not only securities held by the offeror, but also securities held by greater than 10 percent holders of the target. These shares were to be excluded from both the numerator and the denominator when calculating U.S. ownership.⁷⁵ Commentators on the proposals noted that the exclusion of the greater-than-10-percent holders of the target's securities "disproportionately inflate[d] U.S. holdings because holders of large blocks of foreign stock are more likely to be non-U.S. persons."⁷⁶ Under the new rules, individual holders of more than 10 percent of the subject securities need no longer be excluded from the calculation of U.S. ownership.⁷⁷ Securities held by the offeror are still excluded from the calculation.⁷⁸

THE ALTERNATIVE TEST

Despite the availability of an expanded period to calculate U.S. ownership, there will be circumstances where an offeror is still unable to calculate U.S. ownership, even after having made a good-faith effort to do so. In those circumstances, the offeror may use an alternative to the look-through analysis and instead look to the ADTV.⁷⁹ Unlike the "hostile presumption" which obviously was available only in

69. See Exchange Act Rules 13e-4(c), 14d-2, 17 C.F.R. §§ 240.13e-4(c), 240.14d-2 (2009).

70. See Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60055.

71. *Id.* at 60055.

72. *Id.* at 60056.

73. See *supra* note 38.

74. See *supra* note 45.

75. Securities Act Rule 800(h)(2), 17 C.F.R. § 230.800(h)(2) (2008); Instruction 2(ii) to Exchange Act Rules 13e-4(h)(8), (i), 17 C.F.R. § 240.13e-4(h)(8), (i) (2008); Instruction 2(ii) to Exchange Act Rules 14d-1(c), (d), 17 C.F.R. § 240.14d-1(c), (d) (2008).

76. See Commission Guidance and Revisions, *supra* note 25, 73 Fed. Reg. at 60056.

77. *Id.*

78. *Id.*

79. *Id.* at 60056-57.

connection with hostile transactions, the alternative test is available in both hostile and negotiated transactions, and slightly revises the old “hostile presumption.” An offeror using the ADTV alternative may presume U.S. beneficial ownership falls within the applicable percentages for either the Tier I or Tier II exemption unless:

- “[O]ver a twelve-month period ending no more than sixty days before the announcement of the transaction [the ADTV] is not more than ten percent (forty percent for Tier II) of ADTV on a worldwide basis”;
- The most recent annual report or other annual information filed by the issuer with either the SEC or the issuer’s regulator in its home jurisdiction prior to the public announcement of the transaction indicates that U.S. holders hold more than 10 percent or 40 percent, as applicable, of the subject securities; or
- The offeror “‘knows or has reason to know’ that U.S. beneficial ownership levels exceed the limits for the applicable exemption.”⁸⁰

The alternative test also requires there be a “primary trading market” for the subject securities.⁸¹ “‘Primary trading market’ means that at least [55] percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a twelve-month period,” ending no more than sixty days before the announcement of the transaction.⁸² In addition, if the trading of the subject securities occurs in two foreign markets, the trading in at least one of the two must be larger than the trading market in the United States for that class of security.⁸³

For the “know or reason to know” prong of the ADTV test, an offeror will be deemed to know any information about U.S. beneficial ownership of the subject securities that is contained in any SEC filing or filing made in its home jurisdiction or the jurisdiction of the issuer’s primary trading market, if applicable. The new rules clarify that a company may not ignore nonpublic information that it receives prior to announcement of the transaction.⁸⁴

An offeror or issuer will also be deemed to know or have reason to know any information about U.S. ownership of the subject securities that is “available from the issuer or obtained or readily available from any other source that is reasonably reliable.”⁸⁵ The SEC treats information as “readily available” if it is publicly available from sources reasonably accessible “at no or limited cost.”⁸⁶ In addition, “if the [offeror] and the [issuer] enter into an agreement pursuant to which the [offeror] has the right to obtain information from the [issuer], including information

80. *Id.* at 60058–59.

81. *Id.* at 60058.

82. *See id.* *See also* 17 C.F.R. § 240.12h-6(f)(5)(i), (f)(6) (2009).

83. 17 C.F.R. § 240.12h-6(f)(5)(ii) (2009).

84. Commission Guidance and Revisions, *supra* note 25, at 60058.

85. *Id.* (internal quotation marks omitted).

86. *Id.*

about U.S. ownership, [the offeror] will be deemed to know any such information known to the [issuer].”⁸⁷

The alternative test is available only in “limited situations” where the bidder is “unable to conduct” the look-through analysis and will be based on the facts and circumstances of that particular transaction.⁸⁸ Although the SEC did not give an exhaustive list of situations that would make an offeror eligible for the alternative test, it did provide some useful examples, including:

- Transactions in non-U.S. jurisdictions where security holder lists are generated only at fixed intervals and are not otherwise available, so that published information is available only as of a date falling outside the extended look-through period;
- Transactions where the subject securities are held in bearer form;
- Transactions in non-U.S. jurisdictions where nominees are prohibited by law from disclosing information, including country of residence, about the beneficial owners; and
- Non-negotiated business combination transactions.⁸⁹

The assessment must ultimately be based on the “facts and circumstances” of the particular transaction.⁹⁰

CHANGES APPLICABLE TO ALL TENDER OFFERS

The SEC also decided to apply two changes to the cross-border tender offer rules to all tender offers, including those involving U.S. target companies. In a tender offer or exchange offer, bidders may now extend subsequent offering periods beyond the current U.S. cap of twenty business days.⁹¹ Additionally, for offers not subject to section 13(e) or section 14(d) of the Exchange Act, bidders may also use “early commencement” where the tender offer may be launched prior to a registration statement being declared effective by the SEC.⁹²

CHANGES TO BENEFICIAL OWNERSHIP REPORTING BY FOREIGN INSTITUTIONS

While amending the cross-border tender offer rules, the SEC also took the opportunity to amend the rules related to beneficial ownership reporting. Here, the SEC again codified frequently granted exemptive relief.⁹³

For some time, the list of institutional investors permitted to file on Schedule 13G did not include non-domestic institutions.⁹⁴ As such, foreign institutions that

87. *Id.*

88. *Id.* at 60057.

89. *Id.*

90. *Id.*

91. *Id.* at 60064.

92. *Id.* at 60070.

93. *See id.* at 60073 & n.313.

94. *See id.* at 60073.

sought to use Schedule 13G as qualified institutions needed to obtain exemptive relief from the SEC, or a no-action position from the Division.⁹⁵ Such “[r]elief was based upon the [institutional investor] undertaking to grant [the SEC] access to information that would otherwise be disclosed in a Schedule 13D and the comparability of the foreign regulatory scheme applicable to the . . . institutional investor.”⁹⁶

With the new rules, the SEC amended its existing rules to allow streamlined access for foreign institutional investors to file on Schedule 13G. Effective December 8, 2008, to be eligible to file on Schedule 13G, a foreign institution is now only required to determine, and certify on Schedule 13G, that it is subject to a regulatory scheme substantially similar to its U.S. counterparts, and must furnish, upon request, the information that it otherwise would be required to provide on Schedule 13D.⁹⁷ This extension of Schedule 13G filing eligibility extends only to such foreign institutions “that acquire and hold the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect.”⁹⁸ An investor should make a determination regarding its eligibility to file on Schedule 13G when the investor exceeds the 5 percent beneficial ownership threshold.⁹⁹ However, if at any time a previously qualified investor can no longer continue to certify its eligibility to file on Schedule 13G, it is required to file a Schedule 13D within ten days of that determination.¹⁰⁰

CONCLUSION

These revisions should facilitate the use of the cross-border exemptions by reducing the burden of determining eligibility for the exemption and should facilitate additional participation in offers by U.S. security holders. The change of the reference date to announcement instead of commencement should reduce the uncertainty surrounding the calculation of U.S. ownership because offers are often announced publicly months prior to commencement, allowing parties to know whether they are eligible for U.S. relief and to comply with any home country requirements. Additionally, the changes should also reduce the circumstances under which participants will need to spend time and money to seek no-action or exemptive relief from the SEC.

SUMMARY OF SEC GUIDANCE ON THE USE OF WEB SITES

On August 1, 2008, the SEC published an interpretive release titled Commission Guidance on the Use of Company Web Sites (the “Release”) providing new

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 60074.

99. *See id.*

100. *See* 17 C.F.R. § 240.13d-1(e)(1) (2009).

guidance from the SEC on the use of company web sites.¹⁰¹ The SEC focused its guidance on the following subjects:

- “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.”¹⁰²

EVALUATION OF THE “PUBLIC” NATURE OF INFORMATION ON COMPANY WEB SITES

Whether and When Information Is “Public” for Purposes of the Applicability of Regulation FD

In the first part of the Release, the SEC provides guidance regarding the circumstances under which information posted on a company web site would be considered “public” for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of public information and (2) satisfaction of Regulation FD’s “public disclosure” requirement.¹⁰³ According to the Release, a public company, in determining whether the posting of material, nonpublic information on its web site would make the information “public” for Regulation FD purposes, must consider whether:

- The company’s web site “is a recognized channel of distribution”;
- The posting of information on its web site “disseminates the information in a manner making it available to the securities marketplace in general”; and
- Whether “there has been a reasonable waiting period for investors and the market to react to the posted information.”¹⁰⁴

Companies should also consider the following non-exclusive factors in evaluating whether their web site is a recognized channel of distribution and whether the information on its site is “posted and accessible” and therefore “disseminated”:

- Whether and how the company informs investors and the markets that it “has a Web site and that [investors] should look at the company’s Web site for information”;

101. See Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, 73 Fed. Reg. 45862 (Aug. 7, 2008) [hereinafter “Commission Guidance on the Use of Company Web Sites”].

102. *Id.* at 45863.

103. *Id.* at 45866.

104. *Id.* at 45867.

- “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” doing so;
- “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”;
- “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 [the] information or advise the market of its availability”;
- “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.”¹⁰⁵

As mentioned above, the last factor in determining whether and when information posted on a company’s web site would be public for purposes of Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information.¹⁰⁶ The SEC has provided a non-exclusive list of circumstances for companies to consider in deciding whether the dissemination of information through their web sites satisfies this factor. The circumstances are as follows:

- “The size and market following of the company”;
- “The extent to which investor oriented information on the company Web site is regularly accessed”;
- “The steps the company has taken to make investors and the market aware that it uses its company Web site as a key source of important information about the company, including the location of the posted information”;
- “Whether the company has taken steps to actively disseminate the information or the availability of the information posted on the Web site, including using other channels of distribution of information”; and
- “The nature and complexity of the information.”¹⁰⁷

105. *Id.*

106. *See supra* note 104 and accompanying text.

107. *Id.* at 45867–68.

The Release makes clear that a company “must look at the particular facts and circumstances” regarding any posting of previously material, non-public information on its web site to determine whether the reasonable waiting period has been satisfied.¹⁰⁸ The SEC advises that if the information is important, the company “should consider taking additional steps to alert investors and the market to the fact that important information will be posted” on the web site.¹⁰⁹ The SEC also notes that existing case law regarding the reasonable waiting period for insider trading purposes may provide guidance for a company’s determination.¹¹⁰

The SEC clarifies that the posting of information on a company’s web site in a location and format readily accessible to the general public would not be “selective” disclosure for purposes of Regulation FD.¹¹¹ That being said, the disclosure of previously undisclosed material information solely on a web site and not in any other manner will have other implications.¹¹²

Satisfaction of Public Disclosure Requirement of Regulation FD

As discussed above, Rule 101(e) of Regulation FD¹¹³ provides that a company may make selective disclosure of material, nonpublic information as long as the information is filed or furnished on a Form 8-K or is disseminated “through another method (or combination of methods) . . . reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”¹¹⁴ To determine whether a web site provides broad, non-exclusionary distribution of the information to the public, a company must look to the factors discussed above regarding the first two elements of the analysis—“whether the[] company Web site is a recognized channel of distribution and whether the company information . . . is ‘posted and accessible’ and, therefore, ‘disseminated.’”¹¹⁵ In performing such an evaluation, the company must also evaluate whether the posting of information on its web site “meet[s] the simultaneous or prompt timing requirements [of Rule 101(e)] for public disclosure once a selective disclosure has been made.”¹¹⁶

108. *See id.* at 45868.

109. *Id.*

110. *See id.*

111. *See id.* *See also* 17 C.F.R. § 243.101(e) (2009).

112. If the disclosure on a company’s web site is not considered “public,” subsequent selective disclosure of material information may trigger the application of Regulation FD. *See* Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45868.

113. 17 C.F.R. § 243.101(e) (2009).

114. *See id.* § 243.101(e)(2). *See also* Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45868.

115. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45867.

116. *See id.* at 45868.

ANTIFRAUD AND OTHER EXCHANGE ACT PROVISIONS

The SEC makes clear that the antifraud provisions of the federal securities laws, including section 10(b) of the Exchange Act¹¹⁷ and Rule 10b-5¹¹⁸ promulgated thereunder, apply to information on a public company's web site, just as they apply to any other statement made by, or attributable to, a public company.¹¹⁹ "This includes postings on and hyperlinks from company Web sites that satisfy relevant jurisdictional tests."¹²⁰ In addition, to the extent a company is allowed to satisfy certain Exchange Act reporting obligations as an alternative to filing the information on EDGAR, an action may be brought under section 13(a) of the Exchange Act¹²¹ or Rule 13a-1¹²² or 12b-20¹²³ promulgated thereunder if the company fails to file the report in question.¹²⁴

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

According to the Release, the SEC does not believe that the maintenance of previously posted materials or statements on a company's web site should be deemed to be the reissuance or reposting of such materials or information for purposes of the antifraud provisions of the federal securities laws solely because the materials or information remain accessible to the public, nor should there be a duty to update such materials or information.¹²⁵ In circumstances where it is not apparent to the reasonable person that posted materials or statements speak as of a certain date or earlier period, the postings 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 [a] company's Web site containing previously posted materials or statements."¹²⁶

This analysis does not apply if a company affirmatively restates or reissues a statement that is posted on its web site.¹²⁷ However, if a company does affirmatively restate or reissue a statement, the restated or reissued statement must be accurate when made.¹²⁸

117. 15 U.S.C. § 78j(b) (2006).

118. 17 C.F.R. § 240.10b-5 (2009).

119. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45869.

120. *Id.*

121. 15 U.S.C. § 78(m) (2006).

122. 17 C.F.R. § 240.13a-1 (2009).

123. *Id.* § 240.12b-20.

124. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45869.

125. *Id.* at 45870.

126. *See id.*

127. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45870.

128. *Id.*

Hyperlinks to Third-Party Information

The Release provides guidance regarding the steps a public company should take in order to avoid liability for third-party information that is available on the company's web site through a hyperlink. As stated in the Release, a company may be liable under section 10(b) of the Exchange Act and Rule 10b-5 "for third-party information to which it hyperlinks from its Web site and which could be attributable to the company."¹²⁹ Third-party information hyperlinked to a company's web site may be attributable to a company if the company has "involved itself in the preparation of the information, or [] explicitly or implicitly endorsed or approved the information."¹³⁰ The SEC provides a non-exhaustive list of factors that influence the analysis of whether a company has adopted hyperlinked materials, which were first provided by the SEC in its 2000 release titled *Use of Electronic Media*.¹³¹ The list is as follows:

- "Context of the hyperlink—what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink";
- "Risk of confusing the investors—the presence or absence of precautions against investor confusion about the source of the information"; and
- "Presentation of the hyperlinked information—how the hyperlink is presented graphically on the Web site, including the layout of the screen containing the hyperlink."¹³²

The SEC stated that it would be helpful to provide additional guidance regarding these factors to help a company avoid creating a reasonable inference that it has approved or endorsed hyperlinked information.¹³³ "The key question... is: [d]oes the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?"¹³⁴ In answering this question, the SEC places emphasis on what a company says about a hyperlink and if there is an implication by the context in which the company places the hyperlink.¹³⁵ The SEC stated that consideration of the context of a hyperlink begins from "the assumption that providing [the] 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 [the] Web site."¹³⁶ The SEC advises that to avoid potential confusion or misunderstanding

129. *Id.*

130. *See id.*

131. *See Use of Electronic Media*, Securities Act Release No. 33-7856, 65 Fed. Reg. 25843 (May 4, 2000).

132. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45870.

133. *See id.*

134. *Id.* at 45871.

135. *See id.*

136. Commission Guidance on the Use of Company Web Sites, *supra* note 101, at 45871.

ings, a company should explain the context of the hyperlink, thereby making explicit the company's reasons for providing the hyperlink.¹³⁷ In the alternative, "a company might simply note that the third-party Web site contains information that may be of interest or of use to the reader" of the web site.¹³⁸

According to the SEC, "[t]he degree to which a company [makes] 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."¹³⁹ The SEC offers an example of a company that posts a hyperlink to "a news article that is highly laudatory of [the company's] management."¹⁴⁰ The company should explain why it is providing the hyperlink to avoid an inference that the company is commenting on or approving the accuracy of the article.¹⁴¹ However, more general or broad-based information would require a more general explanation.¹⁴²

The SEC also advises that companies use exit notices or intermediate screens "to denote that the hyperlink is to third-party information."¹⁴³ The SEC warned that although such methods will help avoid confusion, no one type of exit notice or intermediate screen "will absolve companies from antifraud liability for third-party hyperlinked information."¹⁴⁴

Finally, the SEC restated its long-held position with respect to disclaimers. According to the SEC, a disclaimer alone is not "sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise."¹⁴⁵ In addition, the SEC reminded companies "that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws."¹⁴⁶

Summary Information

The Release provides guidance regarding a company's use of summaries or overviews to present information, particularly financial information, on its web sites. However, the SEC warns that summaries or overviews should contain explanatory language notifying the user of the web site that the information is only a summary or an overview.¹⁴⁷ The SEC advises that summary information and overviews should be accompanied by features designed to alert the users of the web site "to the location of the detailed disclosure from which [the] summary

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 45871 & n.86.

147. *Id.* at 45872.

information is derived or upon which such overview[s] [are] based, as well as to other information about [the] company on [its] Web site.”¹⁴⁸

The SEC has provided the following techniques that a company should consider to highlight the nature of summary or overview information relating to more complete information located elsewhere on the company’s web site:

- 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
- Use of “layered” or “tiered” format. In addition to providing hyperlinks to more complete information, companies can organize their Web site presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a logical path into, and thereby obtain increasingly greater details about, the financial statements, a company’s strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.¹⁴⁹

Interactive Web Site Features

The SEC acknowledged the utility of interactive web site features, such as blogs and shareholder forums, and provided guidance with respect to the use of such features to help promote their use by public companies. First, the SEC advised that the antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums.¹⁵⁰ According to the SEC, companies are responsible for statements made by them, or on their behalf, on their web sites or on third-party web sites, and the statements are subject to the antifraud provisions of the federal securities laws as are statements made by the company in other forms of media.¹⁵¹ The SEC also advises that “[e]mployees acting as representatives of

148. *Id.*

149. *Id.* (footnote omitted).

150. *Id.*

151. *Id.*

the company should be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their ‘individual’ capacities.”¹⁵²

The SEC takes the position that “[c]ompanies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.”¹⁵³ The SEC explained that “[a]ny term or condition of a blog or shareholder forum requiring users to agree not to make investment decisions based on the [content therein] or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum is inconsistent with the federal securities laws and . . . violates the anti-waiver provisions of the federal securities laws.”¹⁵⁴ The SEC further explained that a company is not responsible for third-party statements posted on a company-sponsored web site and that a company is not “obligated to respond to or correct misstatements made by third parties.”¹⁵⁵

DISCLOSURE CONTROLS AND PROCEDURES

In recent years, the SEC has adopted a number of rules that permit a public company to satisfy certain Exchange Act disclosure obligations by posting information on its web site as an alternative to providing the information on an Exchange Act report.¹⁵⁶ When a company elects to do so, the company’s disclosure controls and procedures must apply to the posted information because it is information that is required to be disclosed in Exchange Act reports.¹⁵⁷ The failure to make those disclosures on the company’s web site results in an incomplete Exchange Act report.¹⁵⁸ The SEC also made clear that disclosure controls and procedures do not apply to other information posted on the company’s web site.¹⁵⁹

FORMAT OF INFORMATION AND READABILITY

Finally, the SEC noted that, unless SEC rules explicitly require, it is not “necessary that information appearing on company Web sites satisfy a printer-friendly standard.”¹⁶⁰ For example, the notice and access rules relating to proxy statements require web site postings to be presented in a format “convenient for both reading online and printing on paper.”¹⁶¹

152. *Id.* at 45873.

153. *Id.*

154. *See id.* *See also id.* at 45873 n.97 (citing various securities laws).

155. *Id.* at 45873.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 45874.

160. *Id.*

161. *Id.* (citing Exchange Act Rule 14a-16(c), 17 C.F.R. § 240.14a-16(c) (2008)); *see also* Internet Availability of Proxy Materials, Exchange Act Release No. 34-55146, 72 Fed. Reg. 4148, 4168 (Jan. 29, 2007) (to be codified at 17 C.F.R. pts. 240, 249 & 274).

INTERNAL CONTROLS OVER FINANCIAL REPORTING FOR NON-ACCELERATED FILERS

On June 26, 2008, the SEC adopted amendments to the December 21, 2006, temporary rules¹⁶² requiring non-accelerated filers¹⁶³ to include an attestation report by their independent auditors on internal controls over financial reporting (“ICFR”) pursuant to section 404(b) of the Sarbanes-Oxley Act of 2002¹⁶⁴ for fiscal years ending on or after December 15, 2008.¹⁶⁵

In the adopting release, the SEC indicated that it was providing the additional one-year extension so that the SEC and the Public Company Accounting Oversight Board (the “PCAOB”) could take additional actions regarding the implementation of the section 404 requirements.¹⁶⁶ Included in these actions “[are] the PCAOB’S final staff guidance on auditing ICFR of smaller public companies”¹⁶⁷ and an additional SEC study regarding the effects of its ICFR management guidance and Auditing Standard No. 5¹⁶⁸ in “facilitating more cost-effective ICFR evaluations and audits for smaller reporting companies.”¹⁶⁹ Under the amendments,¹⁷⁰ non-accelerated filers will not be required to provide the auditors’ attestation in their annual reports until fiscal years ending on or after December 15, 2009. Additionally, the SEC will continue the temporary liability distinction allowing management’s report on ICFR to be “furnished” and not “filed.”¹⁷¹

162. See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, Securities Act Release No. 33-8760, 71 Fed. Reg. 76580, 76584 (Dec. 21, 2006) (to be codified at 17 C.F.R. pts. 210, 228, 229, 240 & 249). The SEC further extended the auditor attestation compliance date for non-accelerated filers to December 15, 2008, in February 2008. See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Securities Act Release No. 33-8889, 73 Fed. Reg. 7450, 7452 (proposed Feb. 7, 2008) (to be codified at 17 C.F.R. pts. 210, 228, 229 & 249).

163. The SEC refers to non-accelerated as “an Exchange Act reporting company that does not meet the Rule 12b-2 definition of either an ‘accelerated filer’ or a ‘large accelerated filer.’” Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Securities Act Release No. 8934, 73 Fed. Reg. 38094, 38094 n.11 (July 2, 2008) (to be codified at 17 C.F.R. pts. 210, 228, 229 & 249).

164. 15 U.S.C. § 7262 (2006).

165. See Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, *supra* note 163, 73 Fed. Reg. at 38094.

166. See *id.* at 38094–95.

167. See *id.* at 38095.

168. See Auditing Standard No. 5, An Audit of Internal Control over Financial Reporting that Is Integrated with an Audit of Financial Statements and Related Independence Rule and Conforming Amendments, PCBA Release No. 2007-005A (June 12, 2007), available at http://www.pcaobus.org/rules/docket_021/2007-06-12_release_no_2007-005a.pdf.

169. See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, *supra* note 163, 73 Fed. Reg. at 38095.

170. The amendments apply to Rule 2-02T of Reg. S-X (17 C.F.R. § 210.2-02T (2009)), Item 308T of Regs. S-K and S-B (17 C.F.R. § 229.308T (2009)), Item 4T of Form 10-Q (17 C.F.R. § 249.308a (2009)), Item 3A(T) of Form 10-QSB (17 C.F.R. § 249.308b (2009)), Item 9A(T) of Form 10K (17 C.F.R. § 249.310 (2009)), Item 8A(T) of Form 10-KSB (17 C.F.R. § 249.310b (2009)), Item 15T of Form 20-F (17 C.F.R. § 249.220f (2009)), and Instruction 3T of General Instruction B(6) of Form 40-F (17 C.F.R. § 249.240f (2009)).

171. See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, *supra* note 163, 73 Fed. Reg. at 38096.