

VEDDER PRICE

# Corporate Securities

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A bulletin designed to keep corporate executive and investment banking professionals informed on major developments in the securities industry

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August 2000

## SEC ADDRESSES INTERNET USE BY PUBLIC COMPANIES

The Securities and Exchange Commission has recently published guidance on the use of the Internet by public companies. The SEC guidance is directed toward web site content, electronic document delivery and the conduct of on-line offerings.

### Web Site Content

Public companies are routinely using the Internet to maintain or augment business operations and to provide access to information for customers and clients, suppliers, employees and investors. Many companies also provide market and price information for their publicly traded securities on or through their web sites. Questions often arise about a company's liability for the content of its web site, particularly hyperlinked information and information posted during a registered public offering.

### Hyperlinked Information

Companies are responsible for the accuracy of statements that can reasonably be expected to reach investors or the securities markets regardless of the medium. Content provided via hyperlinks to third party web sites can create the potential for liability under the antifraud provisions under the federal securities laws.

The SEC believes third-party information is attributable to a company if the company has involved itself in the preparation of the information (the "entanglement theory") or explicitly or implicitly endorsed or approved the information (the "adoption theory"). A company's hyperlink to third-party information, whether or not the company participated in its preparation, may result in the company being deemed to have adopted that information. Although there is no "bright line" test, the SEC will

look to several factors when applying the adoption theory to hyperlinked information:

- ⚡ the context of the hyperlink,
- ⚡ the risk of confusion, and
- ⚡ the presentation of the hyperlinked information.

*Context of the Hyperlink* – Whether third-party hyperlinked information creates the potential for liability will be influenced by what a company says about the hyperlink or what is implied by the context in which the hyperlink appears. A company might explicitly endorse the hyperlinked information or use it to suggest that the information supports a particular assertion on the company's web site. Even when a company remains silent about a hyperlink, the context nevertheless may imply that the hyperlinked information is attributable to the company.

*Risk of Confusion* – The presence or absence of precautions against investor confusion about the source of the information is another factor in determining whether a company has adopted the hyperlinked information. Hyperlinked information may be less likely to be attributed to a company if the company makes the information accessible only after a web site visitor has been presented with an intermediate screen clearly indicating that the visitor is leaving the company's web site and that the information provided thereafter is not the company's. The risk of confusion is greater when the information on a third-party site is lined or framed and, therefore, able to be viewed at the same time as the company's web site. And while statements and disclaimers will not necessarily insulate a company from liability, the risk of confusion about whether the company has adopted hyperlinked information is lessened if the company precedes or accompanies the access to the information with a prominent statement disclaiming responsibility for or endorsement of the specific hyperlinked information. A generic disclaimer on the home page may be inadequate for this purpose. The SEC cautioned that specific disclaimers alone may not insulate a company from liability if, for example, the facts and circumstances otherwise indicate that the company has adopted the information or if the hyperlinked information is known to be false or misleading.

*Presentation of Hyperlinked Information* – The manner in which hyperlinked information is presented on a company's web site is often relevant in determining whether the company has adopted the information. The layout of the screen, which includes attempting to differentiate a particular hyperlink from other

hyperlinks on the company's site through size, location, prominence or color, can suggest the company favors certain hyperlinked information over other information available on or through the site. Selectively providing hyperlinks that are not representative of the wealth of information available, or selectively establishing and terminating hyperlinks to third-party web sites depending on the nature of the information about the company, may be viewed as attempting to control the flow of information to investors. These factors can lead to the conclusion that the company has adopted the information during the periods that the hyperlink is operative.

### ***Communications During a Registered Offering***

The SEC has also addressed the permissible content of Internet communications when a company is registering securities for public sale. While in registration, a company must consider the requirements under Section 5 of the Securities Act of 1933 for all of its communications with the public. This includes its own web site information as well as information on a third-party hyperlinked site. Information on a third-party hyperlinked site could constitute an "offer" as broadly defined under the Securities Act, which would raise a strong inference that the hyperlinked information is attributable to the company. Such circumstances could result in the company's web site being deemed an illegal prospectus. A company in registration should carefully review its web site and any information on third-party web sites to which it hyperlinks.

A company in registration is allowed and should maintain communications with the public as long as the subject matter is limited to ordinary course business and financial information, which may include advertisements concerning the issuer's products and services, periodic corporate reports required to be filed with the SEC, proxy statements, annual reports to shareholders, press announcements regarding business and financial developments, and answers to unsolicited telephone inquiries concerning business matters from securities analysts, financial analysts, shareholders and the press. Statements containing this type of information or falling within a safe harbor available to a company under the Securities Act may be posted on the company's web site while in registration. Of course, such information should not include forecasts of financial results or opinions concerning values. A non-reporting issuer preparing to offer its securities to the public for the first time that has a history of ordinary course business communication through its web site should be able to continue to provide the type of information noted above on its site. Non-reporting issuers without a history of

#### **About Vedder Price**

Vedder, Price, Kaufman & Kammholz  
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approximately 190 attorneys in Chicago, New York City and Livingston, New Jersey. The firm's corporate finance and securities attorneys regularly represent underwriters and issuers, both foreign and domestic, in a wide variety of matters, including:

- ✧ debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- ✧ capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- ✧ corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;
- ✧ private placement of securities, including Rule 144A and Regulation S transactions;
- ✧ tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- ✧ international offerings of securities and compliance by foreign issuers with the U.S. securities laws; and
- ✧ litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters.

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ordinary course communications over a web site must exercise greater caution while in registration.

### Electronic Delivery of Documents

The SEC emphasized that companies and broker-dealers must continue to assess their compliance with the document delivery requirements under the federal securities laws in terms of notice to investors, access to information, and evidence of delivery. The SEC has attempted to clarify regulatory issues relating to electronic delivery of disclosure documents. Key points include the following:

- ✧ investors may consent to electronic delivery telephonically, as long as such consent is informed, whereby the investor specifies the electronic means by which he is willing and able to receive documents, and a detailed record of the consent is maintained by the company or broker-dealer;
- ✧ broker-dealers may request an investor's consent to deliver on a "global," multiple-issuer basis, which means that an investor may give his informed consent to have all documents of any issuer whose securities he owns through that broker-dealer sent electronically, although the SEC noted that such a consent would not be valid if it were a condition to opening a brokerage account;
- ✧ electronic delivery in portable document format, or PDF, is acceptable so long as investors have been informed of the requirements necessary to download a PDF file and have been provided with the necessary software, for example, by a hyperlink to free Adobe Acrobat software over the Internet;
- ✧ an embedded hyperlink within a prospectus or any other document required to be filed or delivered under the federal securities laws causes the hyperlinked information to become a part of that document;
- ✧ the close proximity of information on a web site to a prospectus available on the site does not, by itself, make that information an "offer to sell," "offer for sale" or "offer" within the meaning of the Securities Act, and information on a web site would be deemed part of a prospectus only if an issuer acts to make it part of the prospectus; and
- ✧ municipal securities underwriters may rely on a municipal securities issuer to identify the documents on or

hyperlinked from the issuer's web site that comprise the preliminary, deemed final and final official statements, even if the issuer's web site contains other documents or hyperlinks to other web sites.

The SEC continues to believe that direct notice of the availability of electronic disclosure documents (i.e. via e-mail or facsimile notice) is necessary unless an issuer or broker-dealer can otherwise establish that delivery has been made.

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## Online Offerings

The SEC deferred taking action on requests by online brokerages to make additional regulatory accommodations to facilitate online offerings. Instead, the SEC left intact its earlier guidance in this area and suggested that it may take regulatory action to further facilitate online offerings in the future. The SEC did admonish that intermediaries providing access to online private placements may need to register as broker-dealers under the Securities Exchange Act of 1934. Finally, the SEC reminded online brokerages of their obligations to have adequate facilities and personnel to promptly execute and consummate all of their security transactions. The SEC suggested that such brokerages should consider taking steps to maintain their operational integrity during high volume and high volatility periods, such as immediately after market trading following an initial public offering.

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