



# Business Law / SEC Information Memo

January 2009

## Bond, Schoeneck & King, PLLC

### New York

Albany ■ 518-533-3000  
Buffalo ■ 716-566-2800  
Ithaca ■ 607-330-4000  
Long Island ■ 516-267-6300  
New York City ■ 646-253-2300  
Oswego ■ 315-343-9116  
Rochester ■ 585-362-4700  
Syracuse ■ 315-218-8000  
Utica ■ 315-738-1223

### Florida

Bonita Springs ■ 239-390-5000  
Naples ■ 239-659-3800

### Kansas

Overland Park ■ 913-234-4400

## Securities Law Practice Group

Ronald C. Berger  
Brian J. Butler  
Gregory J. Champion  
Edward R. Conan  
Stephen C. Daley  
David M. Ferrara  
David M. Hayes  
Catherine A. King  
Frank C. Mayer  
Danielle M. McCann  
Henry H. Melchor  
Mikio Miyawaki  
John Patrick Paraschos  
Frank J. Patyi  
Paul W. Reichel  
Courtney Alan Wellar  
Matthew N. Wells  
Philip J. Zaccheo

## 2009 SECURITIES AND EXCHANGE COMMISSION DISCLOSURE CONSIDERATIONS

During 2009 some companies will distribute their first e-proxy, look to their company web sites as a primary disclosure location and report their financial statements using the eXtensible Business Reporting Language (XBRL) for the first time.

### E-PROXY DISCLOSURE

Beginning January 1, 2009, all public companies are required to post their proxy materials on an Internet web site and deliver proxy materials to their shareholders using the “notice only option” or the “full set delivery option” ([see our earlier publication, “SEC: Reminder: SEC’s e-Proxy Rules Compliance for all January 1, 2009 \(11/08\)”](#)).

### WEB SITE DISCLOSURE

In August 2008, the Securities and Exchange Commission issued its interpretative release – Guidance on the Use of Company Web Sites<sup>1</sup> – covering the use of company web sites under the Securities Exchange Act of 1934 and the antifraud provisions of the federal securities. The interpretive release focuses principally on: (1) the use of company web sites to satisfy the public disclosure requirements under Regulation FD; (2) company liability for information on company web sites; (3) disclosure controls and procedures with respect to information posted on company web sites; and (4) the format of information posted on company web sites.

**(1) Use of company web sites to satisfy “public” disclosure under Regulation FD.** The interpretive release provides guidance on the applicability of Regulation FD relating to web site disclosures in two circumstances:

- when is information posted on a company’s web site considered “public” for Regulation FD purposes, so that the company’s subsequent disclosure of the information to analysts, shareholders and other enumerated persons will not violate Regulation FD?
- when does information posted on a company’s web site “cure” a selective disclosure that would otherwise be a Regulation FD violation?

In order to make information “public”, it must be disseminated in a manner calculated to reach investors generally through recognized channels of distribution and investors must be afforded a reasonable waiting period to react to the information. The interpretive release provides the following general criteria that companies must consider in evaluating whether and when information posted on a company’s web site is “public” for purposes of Regulation FD:

- is the company’s web site a recognized channel of distributing information (*i.e., is it known by investors as a location of company information*)?
- is the posted information effectively disseminated to the public (*i.e., is the information “posted and accessible” and, therefore, “disseminated”*)? and
- has there been a “reasonable waiting period” for investors and the securities market to react to the posted information?

Whether a company’s web site is a recognized channel of distribution of information to the public will depend on the steps that a company has taken to alert the market to its web site

BS&K publications are for clients and friends of the firm and are not a substitute for professional counseling or advice. For information about our firm, practice areas and attorneys, visit our interactive web site, [www.bsk.com](http://www.bsk.com).

Attorney Advertising  
© 2009 Bond, Schoeneck & King, PLLC  
All Rights Reserved

Printed on recycled paper

BOND, SCHOENECK & KING, PLLC  
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS



and its practice of disclosing information to the public using its web site, as well as the use of the company's web site by investors and the market. With respect to the question of whether information has been publicly "disseminated", the SEC states, that in the context of a company web site, that is known by investors to be a location at which company information is disclosed, the appropriate approach for determining whether the company information is "public" is to focus on (•) the manner in which information is posted on a company web site and (•) the timely and ready accessibility of such information to investors and the markets.

The interpretive release includes a non-exclusive list of factors for companies to consider in evaluating whether a company web site is a "*recognized channel of distribution*" and whether company information is "posted and accessible" and therefore "*disseminated*," including:

- Whether and how the company has let investors and the markets know that the company has a web site and that they should look at the company's web site for important information about the company;
- Whether the company has made investors and the markets aware that it will post important company information on its web site and whether the company has a pattern or practice of posting such information on its web site;
- Whether the company's web site is designed to lead investors and the market efficiently to posted information about the company, whether the posted information is prominently disclosed in a known location routinely used for such company disclosures, and whether the information is presented in a format readily accessible to the general public;
- The extent to which posted information is regularly picked up by the market and reported in readily available media, or the extent to which the company has advised newswires or the media about the availability of the posted information and the size and market following of the company. For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the information posted on their web sites. On the other hand, companies with less of a market following (e.g., companies with smaller market capitalizations), may need to take more affirmative steps to alert investors and others that information is or has been posted on the company's web site and that they should look at the company web site for current information about the company;
- Steps taken by the company to make its web site and the posted information accessible, including the use of "push" technology or releases through other distribution channels, either to widely distribute such 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 those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.

What constitutes a "*reasonable waiting period*" for purposes of giving investors and the markets time to react to information posted on a company's web site will depend on the circumstances of the dissemination, including:

- the size and market following of the company;
- the extent to which investor oriented information on the company web site is regularly accessed;
- steps taken by the company to make investors and the markets aware that the company uses its web site as a key source of disclosing 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; and
- the nature and complexity of the information.

The interpretive release emphasizes that whether the reasonable waiting period criteria is satisfied is a facts and circumstances test; and, what may be a reasonable waiting period after posting information on a company web site for a particular company and a particular type of information may not be a reasonable waiting period for other companies or other types of information. The SEC provides, as example, a large company that frequently uses its web site as a key resource for providing company information, that has taken steps to make investors and the market aware of this, and that reasonably believes its web site is well-followed by investors and other market participants, may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation. The SEC suggests, if the information is important, a company should consider taking additional steps to alert investors and the market to the fact that important information will be posted on the company's web site – for example, prior to such posting, filing or furnishing such information to the SEC or issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will thereby facilitate the broad dissemination of the information.

**(2) Liability for information on company web sites.** The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company. This includes previously posted information,

hyperlinks to third-party information, summary information and content of interactive web sites.

- Previously posted materials or statements. In the interpretative release, the SEC, in response to concerns that companies may have a duty to update previously posted materials or statements on their web sites that are accessible for a period of time after their initial posting, if such materials or statements would be considered “republished” or “reissued” each time the materials or statements are accessed, stated that, as a general matter, it does not believe that simply because investors can access previously posted materials or statements on a company’s web site does not in itself mean that such previously posted materials or statements have been republished or reissued for purposes of the antifraud provisions of the federal securities laws, or that the company has made a new statement or that the company has created a duty to update the materials or statements. However, the SEC suggests that companies should take care to clearly identify materials and statements as historical by dating them and locating them in a separate section of the company’s web site.
- Hyperlinks to third-party information. A company can be held liable for hyperlinked third-party information that is attributable to the company. Whether hyperlinked third-party information is attributable to a company depends upon a company’s level of involvement in the preparation of the information (the “*entanglement*” theory) and, upon whether a company explicitly or implicitly endorses or approves the hyperlinked information (the “*adoption*” theory). The interpretative release focuses on the circumstances or conditions under which a company can fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to that information. The key question in the hyperlinking context is, does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information? In evaluating this question, consideration should be given to:
  - *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 investors* – the presence or absence of precautions against investor confusion about the source of the information; and
  - *the presentation of the hyperlinked information; the use of “exit notices” or “intermediate screens”*.
- Summary information. A company providing summary or overview information about the company on its web site should consider ways to alert readers to the location of the more detailed information from which the summary information is derived or upon which such overview is based. The concern is that readers will fail to realize that the company

information is merely a summary or overview of more detailed information located elsewhere on the company’s web site. The interpretative release offers the following techniques that companies may wish to consider to highlight the nature of the summary or overview information:

- *Use of appropriate titles* – an appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
  - *Use of additional explanatory language* – companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
  - *Use and placement of hyperlinks* – placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based could help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed; and
  - *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.
- Interactive web site features – from “blogs” to “electronic shareholder forums”. Companies using their web sites to communicate over the Internet with their various stakeholders, including customers, vendors and investors, must remain mindful of the fact that all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws. Accordingly, companies should consider taking steps to put into place controls and procedures to monitor statements made by or on behalf of the company on these interactive, Internet forums. The interpretative release provides the following guidance for companies hosting or participating in blogs or electronic shareholder forums:
    - employees acting as representatives of the company should be made aware of their responsibilities in these forums, and they cannot avoid their responsibilities by purporting to speak in their “individual” capacities.
    - any term or condition of a blog or shareholder forum requiring users to agree not to make investment decisions based on the blog’s or forum’s content or 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.

- while a company is not responsible for the statements that third parties post on a company sponsored web site and is not obligated to respond to or correct misstatements made by third parties, the company remains responsible for its own statements made (including statements made on its behalf) in a blog or a forum.

**(3) Disclosure controls and procedures.** Companies are permitted to satisfy certain Exchange Act disclosure obligations by posting the information on their web sites as an alternative to providing the information in their Exchange Act reports, such as disclosure of a waiver of a company’s code of ethics or disclosure regarding director attendance at annual shareholder meetings. If a company elects to satisfy such Exchange Act disclosure obligations by posting the information on its web site, disclosure controls and procedures will apply to such information (including the principal executive officer’s and principal financial officer’s certifications to such controls and procedures) because it is information required to be disclosed in Exchange Act reports. Accordingly, companies must make sure that their disclosure controls and procedures are designed to address the disclosure of such information on their web sites as an alternative to being disclosed in their Exchange Act reports.

**(4) Format of information presented on company web sites.** The interpretive release clarifies that information on a company’s web site does not need to be made available in printer-friendly format unless the SEC’s rules explicitly require it, e.g., proxy materials.

### FINANCIAL STATEMENT REPORTING USING XBRL, INTERACTIVE DATA FORMATTING

On December 17, 2008, the SEC adopted a rule requiring companies to file a new exhibit to their Exchange Act periodic reports, transition reports and Securities Act registration statements. The new exhibit, Exhibit 101 under Item 601 of Regulation S-K, will contain a company’s financial information in an interactive data format known as – eXtensible Business Reporting Language (XBRL). Using XBRL, all of the facts in a financial statement are labeled with unique computer-readable “tags,” which function like bar codes to make financial information more searchable on the Internet and more readable by spreadsheets and other software. Investors will be able to instantly find specific facts disclosed by companies, and compare that information with details about other companies to help them make investment decisions.

To comply, companies using U.S. GAAP will be required to “tag” their financial information (that is, their financial statements and notes and schedules thereto) using the most recent list of tags for U.S. financial statement reporting, as released by XBRL U.S. and required by the SEC’s EDGAR Filer Manual. Currently,

there are over 15,000 terms for use in tagging financial data. A company may choose to tag its own financial statements using commercially available software, or it may choose instead to outsource the tagging process.

The XBRL reporting requirements will be phased-in over a period of three years, beginning with fiscal periods ending on or after June 15, 2009:

- *Year 1* – domestic and foreign large accelerated filers that use U.S. GAAP and have a worldwide public float above \$5 billion will be required to file with interactive data reports beginning with their first periodic report filed for a period ending on or after June 15, 2009;
- *Year 2* – all other domestic and foreign large accelerated filers using U.S. GAAP will be required to file with interactive data reports beginning with their first periodic report filed for a period ending on or after June 15, 2010; and
- *Year 3* – all remaining filers using U.S. GAAP, including smaller reporting companies, and all foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board will be required to file with interactive data reports beginning with their first periodic report filed for a period ending on or after June 15, 2011.

The interactive data format reporting requirements will not change the current financial information filing requirements – financial statements and financial statement schedules will continue to be filed through EDGAR in the HTML or ASCII formats – the interactive data reporting is merely a supplement to the traditional filing requirements.

Interactive data files will be excluded from the officer certification requirements under the Exchange Act and will not require auditor assurances. Companies will be required to post the new financial statement interactive exhibit on their web sites on the same day that the exhibit is filed with the SEC.

\*\*\*\*\*

In Buffalo / Niagara Falls, call 716-566-2800 or e-mail:

Robert A. Doren                      rdoren@bsk.com

In the Capital District, call 518-533-3000 or e-mail:

Gregory J. Champion                gchampion@bsk.com

In Central New York, call 315-218-8000 or e-mail:

Ronald C. Berger                    rberger@bsk.com

Catherine A. King                  caking@bsk.com

In the New York Metro area, call 646-253-2300 or e-mail:

Louis P. DiLorenzo                  ldilorenzo@bsk.com

In the Rochester Region, call 585-362-4700 or e-mail:

Robert H. Kirchner                  rkirchner@bsk.com

<sup>1</sup> SEC Release No. 34-58288.