

Are You Prepared for a SEC Website Compliance Review?

5/25/2018

IR Website Whitepaper

Tom Runzo, Equisolve

Jack Hogoboom, Lowenstein Sandler



A person is shown from the chest up, sitting at a desk and using a laptop. The image is heavily overlaid with a dark blue, semi-transparent filter. The person's hands are visible on the laptop keyboard and trackpad. The overall tone is professional and tech-oriented.

Are You Prepared for a SEC Website Compliance Review?

8 Simple Tips that Could Keep You Out of the SEC's Crosshairs

Any SEC inquiry can be a terrifying experience and website compliance is no exception. While your website may seem insignificant in the grand scheme of things, when it comes to compliance, let's face it: once the SEC puts you in their crosshairs, you may find more than just your website under scrutiny.

Fortunately, keeping your website in compliance is as easy as following eight simple tips, along with a general understanding of SEC requirements and guidance and Exchange rules.

Website Compliance Requirements

The information you put on your company's website will vary. Some companies present the bare minimum information required, while others prefer to use their websites as a powerful tool to attract and inform investors.

Public companies are subject to specific SEC regulations and exchange rules that govern what, when and how content can be posted publicly on their websites. The SEC has also published guidance on specific subjects in areas in which they do not have regulations, but want to prevent investor confusion.

Here are eight specific areas of concern along with guidance and best practices you can use when it comes to website compliance:

1. XBRL Raw Files

Your company's financial statements, including those filed with your 10-K, 10-Qs and any 8-Ks containing updated interim or revised financial statements, must be posted on your company's website using the eXtensible Business Reporting Language (XBRL). The SEC requires this so that investors will be able to more efficiently analyze your financial data, and data of other companies.

Post your raw XML / XBRL files to your website by the end of the same calendar day as filing XBRL data (10-K, 10-Q & 8-K). This data must remain on your website for at least 12 months.

Note: Linking to the XBRL files on the SEC website is not acceptable. You must post the raw XBRL interactive data on your website. Not all investors will have XBRL reading software, so a best practice is to provide both the raw content as XBRL files as well as a more accessible file format such as HTML, Excel, or PDF.

2. Corporate Governance

Public companies are also required to display certain corporate governance information on their websites, including the following data:

Board of Directors

You should list your Board of Directors, and you should indicate whether each director is an independent or non-independent director. You should also provide brief biographies of your board members. You are not required, but it is a good practice to post headshots and group shots.

You are required to include instructions about how website visitors can communicate with the board of directors. Include details on what types of communication should be directed to your board and what should be addressed to management or specific departments within the company. If you are listed on the NYSE, you are also required to post the method to communicate with your presiding director and with your independent or non-management directors as a group.

Governance Library / Committee charters

Post charters for the following committees:

- Code of Ethics
- Audit Committee
- Nominating and Governance Committee
- Compensation Committee
- Any other charters which have been adopted
- Corporate Governance Guidelines (NYSE only)

Committee Membership

A good practice is to show the members and chairperson of each committee. For the audit committee, be sure also to identify who is serving as the financial expert.

Whistleblower Policy

Sarbanes-Oxley Act of 2002 included whistleblower protections designed to identify irregularities while providing protection from retribution and safeguarding investors. Public companies must have and should post whistleblower policies. Your policy, as published, must include how to communicate irregularities to the Audit Committee. Posting your whistleblower policy can help give investors' confidence in your company's commitment to compliance. Additionally, you can implement a more sophisticated whistleblower system, which will be easier for the whistleblowers to use and may provide better oversight.

3. Filings

In addition to adhering to XBRL filing requirements, public companies must also publish certain reports on their websites on a quarterly and annual basis.

Section 16, Forms 3, 4 and 5 filings must be made accessible from your website by the end of the business day after each form is filed with the SEC. This posting requirement can be satisfied by a hyperlink to the SEC's website to a listing of such forms.

These filings must remain on your site for at least 12 months, although many companies choose to leave them posted for a longer period to serve as an archive for investors.

While the rules don't specifically require companies to follow any format when it comes to how these filings are made available, a best practice is to provide website visitors with options to filter and search for specific filings in multiple file formats.

Annual (and Quarterly, if NASDAQ) filings/reports must be made available on your website simultaneously with their filing with the SEC. You must also prominently agree on your website to provide shareholders, upon request, with a hard copy of your complete annual report, including audited financial statement, free of charge.

Current reports on Form 8-K (and Quarterly reports if not NASDAQ) should also be posted because SEC rules require the disclosure on your 10-K of whether such reports (as well as 10-Ks and 10-Qs) are made available on your website and, in the case they are not, the reasons why not.

4. Proxy Materials, Notice and Access

Physically mail proxy materials to shareholders

This mailing should include notices of shareholder meetings, proxy statements, annual reports, letters to shareholders and information on how shareholders can vote their proxies.

Post your proxy materials on a website that does not track cookies

If you opt to mail notice of online availability of proxy materials to your company's shareholders rather than the full proxy materials, you are required also to make the

materials available on a website in a manner that does not infringe on the anonymity of a person accessing the website, including by not tracking cookies. This website is typically a third-party website separate from your website, or at least a page or pages segregated from your regular website. Be sure that this separate website does not use tracking cookies for the proxy materials. In the spirit of the regulation, you also shouldn't use information contained in IP addresses and browser strings to get additional insight about the persons accessing the website.

Your online posted proxy materials must be in a format readers can search, print and read. HTML and PDF files meet these requirements.

The published information must also include instructions on how shareholders can vote their proxies. If you choose to use an online voting system, you can also include a link to that system. Access to this link must be included in your proxy materials and must be maintained online until after the meeting in which voting takes place.

Post your proxy materials on your company website (which may track cookies)

After posting proxy materials on a site that does not track cookies, you may also post the proxy materials on your own company website if you choose to do so.

5. Entanglement & Adoption of Content

You are responsible and liable for all the content you post on your website. While this seems simple enough on its face, what you may not realize is that you can also be deemed responsible and liable for third parties' content, including content on other websites or content developed by a third party but posted on or linked from your website.

Let's break this down into a few areas which can help determine what you can and can't do:

Hyperlinking

Take care when describing the content you're linking to, and what the actual hyperlink itself says. The key question is: does the context of the hyperlink and the hyperlinked information together create a reasonable inference that you have approved or endorsed the information. For example, rather than saying "XYZ's website contains the best description of our business that is currently available," which would likely make you liable for the website's contents, you could instead say "The XYZ Company produced an independent report which is available on their website." In the latter example, you're clearly stating that your company did not produce, and does not own, or endorse the content you're linking to.

You should not cherry-pick the information you hyperlink. Where a range of information is publicly available, you should seek to link to sources that are representative of the mix of available information. If you focus on only one source, your inclusion of the hyperlink could be deemed to be an endorsement of the linked information.

The location of hyperlinks on your website matters too. Don't place hyperlinks to third parties' sites in the same location and using the same style you use when linking to other material on your own site. If you give the impression that the link is like any other on your site, you could inadvertently become responsible for its content. Never place links to third parties' websites or content in either your main/top website navigation menus or in your footer/bottom navigation menus.

Disclaimers

When you do link to other websites, for example on a resource page that you created for convenience, or a page including news highlights about your company from outside sources, it's important to provide a clear description/disclaimer of what the content and links on the page are about. Your description/disclaimer should inform site visitors that the links are provided for convenience only and that your company does not approve of or endorse the content. It should also clearly state that your company does not maintain, control or monitor the content in any way. Finally, you should make clear that the information on linked sites is only valid for a certain period of time, after which it can be deemed to be stale.

Another popular method of using a disclaimer for your site's third-party content is to use a pop-up box so that when someone clicks on the link to the third-party site, they receive a message clearly telling them they are leaving your company's website and you are not responsible for the linked content.

Note: Ask your attorney to provide specific disclosure language for your disclaimer, no matter what method you choose. That disclaimer may need to be modified depending on the content you're linking to. Also, keep in mind that no disclaimer will help you avoid liability if the context or location of the hyperlink leads the investor to believe that it is your content. Further, even with the use of disclaimers and/or pop-up boxes, you would not be shielded from antifraud liability for hyperlinking to information you may know, or are reckless in not knowing, is materially false or misleading.

Research/Analyst reports

Some companies make the mistake of thinking they are helping investors by posting research or analyst reports on the website. However, doing so can lead directly to potential entanglement issues.

Don't host these reports on your website and do not link directly to research/analyst reports hosted on a third party's website, for the same reason. You can state that an independent research/analyst report is available on a third-party's website. If you take this approach, only provide a link to that site's home page - not directly to the actual report itself.

Sample language for a disclaimer that should accompany any links or listing of analysts covering your stock would read as follows:

[Company] is followed by the analysts listed above. Please note that any opinions, estimates or forecasts regarding [Company]'s performance made by these analysts are theirs alone and do not represent opinions, forecasts or predictions of [Company] or its management. [Company] does not by its reference above or distribution imply its endorsement of or concurrence with such information, conclusions or recommendations.

The best guidance is always to be clear which information on your site is your content, and which belongs to a third party. Doing so can help you avoid the risk of an investor or regulator being confused about your website's content.

6. Financial Disclosures

Non-GAAP and Summary Financial Information

In addition to posting your required financial reports and XBRL files, you may also want to post your non-GAAP financials, if applicable.

While it is acceptable to post non-GAAP financials, be sure that you don't make the non-GAAP financials more prominent than the required GAAP financial disclosures and always include a reconciliation of the non-GAAP measures to the most directly comparable GAAP measures.

Whenever you provide access to non-GAAP financial information, always include access to the GAAP financials via a link posted either next to, or near, the link to the non-GAAP financials, as well as the reconciliation between the non-GAAP and GAAP financials.

When presenting non-GAAP financial information, always precede it with an equally prominent presentation of the comparable GAAP measures or include the GAAP measures in the same table, if applicable. Also, do not discuss or analyze non-GAAP measures without a similar discussion and analysis of the comparable GAAP measure in a location of equal or greater prominence.

If you post summary financial information for investors, be sure to use appropriate titles that will clearly identify the information as “Summary Information.” As with non-GAAP financial postings, include a link to the actual financials near the summary information.

Investor Presentations Before and During Offerings

An investor presentation (in some cases referred to as a “road show”), is a presentation made by one or more members of management to investors that includes information about a company. In compliance with Regulation FD, these investor presentations are usually posted on a company website. A company always has potential liability for material misstatements or omissions contained in such an investor presentation.

When no offering of securities is contemplated, an investor presentation is not considered part of a registration statement or prospectus. However, if a presentation is posted to a company website shortly before or following the launch of an offering process, there is a risk that the presentation could be deemed to be an “offer” of securities under the securities laws. As a result, a company should not post a new presentation if it is in an offering process or expects to commence an offering in the near future.

If a new presentation is prepared for a registered offering, Regulation FD exempts the presentation from having to be publicly disclosed unless it contains material non-public information. If the presentation includes such information, the information must be simultaneously provided to the public or the recipient of the information must agree to keep the information confidential and not to trade in the company’s stock. Normally, the new presentation would not be posted to the Company’s website until after the offering is concluded or abandoned and a sufficient period of time has elapsed.

Finally, if you are beginning an offering process, you aren’t obligated to remove an old investor presentation from your website, but may want to consider doing so if the information in the presentation varies significantly from your offering materials.

7. General Content Guidelines

In addition to specific content requirements, there are some general requirements for public companies’ websites.

First, the link to your investor relations information needs to be easy to locate – it should not be buried deep in your website’s hierarchy.

Your site also needs to be accessible 24/7, so ensure it is designed to handle a potentially high volume of website traffic and that the web host is reliable and secure.

For all previously-posted materials maintained and archived on your site, such as press releases, be sure that information is dated so that it's clear the information is only current as of a specific date, and you're not keeping it up to date. This prevents the content from being considered re-published by virtue of being on your website.

Whether it's press releases, SEC Filings, or something else, be sure your archive includes all the documents – don't remove any records or it could be perceived as an intentional omission or a manipulation of information.

8. General Disclaimer Guidelines

Finally, it is important to publish a disclaimer that is available and accessible from any page on your website. Many companies meet this requirement by including a link in their website footer that takes users to a separate disclaimer page.

However, if information posted on your site opens a PDF file outside of your site, you'll also need to include a disclaimer on the file or document itself. Ask your lawyer to provide the specific language to be used for this disclaimer.

Conclusion

Maintaining website compliance probably isn't at the top of your to-do list. However, it's worth it to take a few extra steps to review the information you provide, and the way you provide that information, to investors and analysts.

Being proactive and diligent about maintaining website compliance can help you avoid landing on the SEC's or exchanges' radar screens for a technical error you could have easily avoided.



Tom Runzo, CEO
2455 E. Sunrise Blvd., Suite 1201
Fort Lauderdale, FL 33304
954-858-8550
tom@equisolve.com
equisolve.com

Lowenstein Sandler

Jack Hogoboom
1251 Avenue of the Americas
New York, New York 10020
646-414-6846
jhogoboom@lowenstein.com
lowenstein.com

This White Paper has been prepared by Equisolve and Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Neither Equisolve nor Lowenstein Sandler assumes any responsibility to update the White Paper based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation



**Lowenstein
Sandler**