INSIGHT: Ten Tips for Investor Relations Websites

BY ALLISON C. HANDY AND VICTOR T. NILSSON

Public companies use their investor relations websites to conveniently disseminate important corporate news and information, and many investors and other interested parties in turn rely on those websites as a primary source of such news and information. Whether a company is just preparing to go public or is already well-established as a public company, building and maintaining an investor relations website requires compliance with myriad Securities and Exchange Commission (SEC) regulations and stock exchange listing rules. This article provides ten tips to consider when developing and updating a public company’s investor relations website.

1. Website requirements at the time of the IPO

The New York Stock Exchange (NYSE) requires NYSE-listed companies to maintain a corporate website. Although Nasdaq does not impose the same requirement, Nasdaq-listed companies typically also make information available on or through their corporate websites. The SEC likewise does not require public companies to have a website, but as a practical matter, SEC requirements incentivize public companies whose securities are traded on exchanges other than NYSE to maintain a corporate website on which they post certain corporate information and governance documents. NYSE requires listed companies to post the following documents on their corporate websites by the earlier of the initial public offering (IPO) closing date or five business days from the listing date:

- Audit committee charter
- Compensation committee charter
- Nominating/corporate governance committee charter
- Corporate governance guidelines
- Code of business conduct and ethics

In addition, NYSE expressly permits a listed company to disclose the following additional information on its corporate website instead of in its SEC filings:

- Name of presiding director of executive sessions (or procedure for selecting presiding director)
- Method for communicating with presiding director or independent directors as a group
- Audit committee member’s simultaneous service on three or more public company audit committees (and determination that it does not impair effective service)

If an NYSE-listed company opts to make any of this additional information available on its website rather than in its annual proxy statement (or annual report on Form 10-K, if it does not file an annual proxy statement), it must disclose that fact in its annual proxy statement or annual report on Form 10-K, as applicable, and provide its website address therein.

Of the documents and information listed above, Nasdaq only requires a listed company to make its code of conduct publicly available and posting it on a corporate website satisfies this requirement. If, however, a Nasdaq-listed company does not post the charters of its audit, compensation and nominating/corporate governance committees (or committees performing similar functions) to its website, the SEC requires it to include a copy of those charters as appendices to its proxy statement at least once every three years.

The SEC permits public companies to make certain additional website disclosures related to the above information:

- Code of ethics – A company is required to disclose in its annual report on Form 10-K whether it has adopted a code of ethics for its principal executive officer, principal financial officer and principal accounting officer or controller (or persons performing similar functions). If so, the company must make it publicly available on its corporate website, or file a copy as an exhibit
to its annual report on Form 10-K or indicate therein how to request a copy free of charge.

- **Director independence definitions** – If a company that is listed on a national stock exchange uses its own definitions for determining whether its directors are independent, rather than using the definitions found in the stock exchange listing rules, the company must disclose in its annual proxy statement whether it has provided these definitions on its corporate website.

2. **Website requirements after the IPO** Assuming a public company maintains a corporate website after its IPO, it is required to post the following additional documents and information on its website from time to time and as applicable:

- **Periodic reports and current reports** – Companies that are “accelerated filers” and “large accelerated filers” as defined in Rule 12b-2 of the Securities Exchange Act of 1934 (the Exchange Act) must post their annual, quarterly and current Exchange Act reports on their corporate websites as soon as reasonably practicable after such reports are filed or furnished with the SEC, or otherwise explain in their annual reports why they do not do so. NYSE-listed companies that are required to file annual reports on Form 10-K must simultaneously make such reports available on or through their websites. The SEC recommends that periodic and current reports remain posted on the corporate website for at least 12 months, but many companies maintain access to a substantially longer historical archive to demonstrate transparency.

- **Annual proxy statements and annual reports to shareholders** – Companies that are required to deliver proxy materials to shareholders under the Exchange Act must also post those proxy materials (including the company’s annual report to shareholders) on a publicly accessible website and provide shareholders with a notice in the proxy statement indicating where the materials may be accessed. Companies may also satisfy the obligation to provide the SEC with copies of any annual reports sent to shareholders by posting them to their websites if the report remains accessible for at least one year after posting.

- **Section 16 reports** – Companies must post all beneficial ownership reports filed by company officers, directors and more than 10% beneficial owners by the end of the business day after each form is filed with the SEC. The reports may be posted directly on the corporate website or the company may post a hyperlink to the SEC’s EDGAR database or the website of another third-party service provider. Each report must remain accessible for at least 12 months.

- **Amendments to and waivers of code of ethics** – The SEC requires companies to publicly disclose amendments to or waivers of their SEC-required code of ethics for certain senior officers by either (1) posting the information on the company’s website within four business days after the amendment or waiver, provided that the company has disclosed its website address and its intention to use this method for disclosing such amendments or waivers in its most recent annual report on Form 10-K, or (2) disclosing the information in a current report on Form 8-K filed with the SEC. Any amendment or waiver disclosed on the website must remain posted for at least 12 months.

- **Third-party director compensation** – A Nasdaq-listed company must publicly disclose on its website, or in the proxy or information statement for the next shareholders’ meeting at which directors are to be elected, the material terms of all agreements and arrangements between any director or nominee and any third party relating to compensation or other payment in connection with that person’s candidacy or service as a director. NYSE does not have a similar requirement.

3. **Consider posting additional corporate governance materials and information** In addition to the information and documents specifically required to be posted to a public company’s corporate website under SEC regulations and stock exchange listing rules, many public companies post other materials and information as a matter of good corporate governance and to enhance investor relations. In some cases, companies that have adopted policies in connection with shareholder proposals on topics such as environmental impact reports, independent board leadership or political spending post such policies on their websites. A non-exhaustive list of examples includes:

- Certificate or articles of incorporation and bylaws
- A list of directors and senior management, including biographies and photographs
- A list of board committees, including names of members, chair designations and brief descriptions of committee purposes
- Environmental and social policy information
- Director attendance at annual shareholder meetings
- Lead director charter
- Policy on board oversight of political spending

4. **Use the website for Regulation FD and Regulation G compliance and consider posting earnings releases, webcasts and investor decks** Companies may integrate their corporate websites into their Regulation FD and Regulation G disclosure practices, with the SEC permitting companies to make certain required disclosures on their corporate websites in lieu of in an SEC filing:

- **Regulation FD compliance** – Whenever a company discloses material non-public information to any...
securities market participant, it must simultaneously (or promptly, if the information was disclosed inadvertently) disclose the information through a method reasonably designed to provide broad, non-exclusionary distribution of the information to the public. The most commonly used method to ensure compliance with Regulation FD is furnishing the information on a current report on Form 8-K or issuing a press release. But the SEC has provided interpretive guidance on when a corporate website can also be considered a “recognized channel of distribution” for Regulation FD purposes such that a company can use it to disseminate material non-public information in lieu of filing a current report on Form 8-K.

Any company intending to use its corporate website for disseminating material non-public information should identify its website in periodic and other reports as a place where it routinely posts important information and establish a pattern and practice of actually posting such information on its website. Before relying on its corporate website as a sole or primary channel of distribution of important corporate or financial information, the company must also consider the extent to which the market picks up and reports on information posted on the website. Although public companies should be cautious about using their corporate websites as the sole channel for distributing important corporate and financial information, any public company can integrate its corporate website into its broader Regulation FD communications strategy for materials like earnings releases, webcasts and investor decks, as discussed below.

- **Earnings releases, webcasts and investor decks** – The SEC recommends that webcasts of company presentations, such as quarterly earnings calls and investor presentations, be announced through a Regulation FD-compliant disclosure at least a few days prior to the event, including notice of the date, time, subject matter and call-in information, and that replays be made available for a reasonable time thereafter. The SEC also recommends stating in the announcement how, and for how long, a transcript or replay will be made available. Many companies issue a press release to announce a webcast and post the information on their corporate websites. In some cases, particularly for smaller companies, the information is also reported on a current report on Form 8-K. Many companies also use their corporate websites to post supplemental information for a webcast, such as presentation slides. Companies should consider stating that such supplemental materials will be made available in the press release announcing the webcast in order to establish that the materials have been made public in a Regulation FD-compliant manner.

- **Regulation G compliance** – Regulation G requires public disclosure of material information that includes a non-GAAP financial measure to be accompanied by a presentation of, and reconciliation to, the most directly comparable GAAP financial measure. Regulation G applies to all public disclosures of non-GAAP financial measures and is not limited to the registrant’s public filings, press releases or other written communications. If a company presents a non-GAAP financial measure orally, telephonically or by webcast or other similar means (such as in an earnings call or other publicly accessible investor presentation), it may provide the required Regulation G information and reconciliation by posting it on the company’s website and disclosing the location and availability of that information during the presentation. The SEC recommends that any non-GAAP financial information posted on a company’s website remain posted for at least 12 months.

5. **Be mindful of hyperlinking to or providing third-party content** A public company is responsible—and potentially liable—for all content posted on its corporate website. From a securities law perspective, the company may also be liable for content posted by third parties on the company’s website and content on third-party websites hyperlinked from the company’s website, if a reasonable person would infer that the company approved or endorsed such third-party content. For example, a company hyperlinking to content on a third-party website should avoid placing the hyperlink in the same section of its website as hyperlinks to company-provided content or otherwise displaying the hyperlink in the same style and format as its own hyperlinks.

When hyperlinking to or providing third-party content, such as press stories, analyst reports or historical stock price information, public companies are advised to provide a disclaimer to the effect that the hyperlink or information is provided only for general information and convenience, and that the company does not approve of or endorse the content nor does it maintain, control or monitor such content. Many companies use click-through type disclaimers for this purpose when hyperlinking. Nevertheless, disclaimers do not completely absolve the company from potential liability if a reasonable person would still infer that the company approved or endorsed the third-party content or if the company hyperlinks to third-party content that it knows, or is reckless in not knowing, is materially false or misleading.

6. **Date posts and archive old information** Information posted to a company’s website should be clearly dated and identified as historical or archived once it is no longer current. The SEC has clarified that the fact that an investor can access prior materials does not mean that such materials have been reissued or republished by the company or that the company has created a duty to update the materials. Maintaining older information on the corporate website can improve investors’ perception of a company’s transparency and lead more investors to use its corporate website as a primary source of company information. To avoid the potential for investor confusion or company liability, however, companies should date all material posted to the corporate website, including webcasts and related information. Maintaining separate sections on the corporate website for “upcoming,” “recent” and “historical” investor presentations can also help clarify the historical context of dated materials.

7. **Periodically review the website to ensure that it remains current and compliant** Public companies should schedule regularly recurring reviews of their investor relations websites to ensure that all information and materials remain current and compliant. The in-house legal and investor relations teams should be sure to make appropriate updates to the website whenever corporate governance materials are revised or there are changes to management or the board or its committees.
8. Consider creating a dedicated webpage for the annual shareholder meeting. Shareholder engagement is becoming ever more important in the current activist shareholder environment. To proactively campaign for their own director slates and management proposals, and make sure that institutional investors and proxy advisors have a complete view of their corporate governance profile, companies should consider creating a dedicated webpage for their annual shareholder meetings that provides all related content in one user-friendly place. These webpages give public companies another opportunity to present their annual reports and proxy statement disclosures in more interactive formats and can also be used to provide visitors with various supplemental information and multimedia.

Companies are, for example, posting annual review videos that highlight financial and other accomplishments over the prior year, as well as separate videos in which their director candidates explain why they are running and their qualifications. Note that supplemental material posted on the website may need to be filed with the SEC as “additional soliciting material” under Rule 14a-6(b) of the Exchange Act. To maximize the potential benefit of these dedicated annual meeting webpages, companies should optimize the content for viewing on multiple platforms, encourage access in their proxy materials and promote them on their homepages and social media.

9. Controlled companies and foreign private issuers are exempt from certain website requirements. Under NYSE and Nasdaq listing requirements, controlled companies (companies in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company) are not required to have a compensation committee or a nominating/corporate governance committee and thus need not post charters of those committees on their corporate websites as long as they remain controlled companies.

With limited exceptions, both NYSE and Nasdaq permit a listed company that is also a “foreign private issuer” as defined in Rule 3b-4 of the Exchange Act to follow its home country practices in lieu of the exchange listing rules applicable to U.S. companies. Foreign private issuers that follow home country practices are required by NYSE to disclose any significant ways in which their corporate governance practices differ from NYSE listing standards or by Nasdaq to disclose each Nasdaq requirement that they have elected not to follow and briefly explain the home country practices they follow instead.

The SEC also exempts foreign private issuers from filing Section 16 reports, current reports on Form 8-K and SEC-compliant proxy statements, unless they voluntarily elect to use the registration and reporting forms for U.S. companies (in which case they must comply with all the requirements of the domestic company forms). In addition, foreign private issuers are not required to post on their websites their annual reports on Form 20-F or, for certain Canadian companies, Form 40-F. Forms 20-F and 40-F do, however, include provisions like those for domestic U.S. filers that require the adoption and public disclosure of a code of ethics for certain senior officers and the public disclosure on a Form 6-K or on the company’s website of any amendment to or waiver of such code of ethics. There are also limited exceptions available to foreign private issuers for Regulation G public disclosure and reconciliation requirements.

10. Social media posts and Regulation FD. As social media channels proliferate and companies use more and more tools to communicate with investors, including corporate and executive Twitter accounts, blogs, and web-based applications for taking questions during earnings calls, companies must remain thoughtful about ensuring compliance with Regulation FD, discussed in tip number 4 above. The SEC’s framework for when a corporate website can be considered a recognized channel of distribution likewise applies to social media, and companies would be advised to consider the following practices:

- Disclose in Exchange Act periodic reports those social media channels the company intends to use to disclose information
- Consider SEC factors for whether disclosure made through those social media channels can be considered public, including analyzing the number of followers and traffic
- If social media channels are not considered recognized channels of distribution, disclose material non-public information through these channels only after, or in connection with, Regulation FD-compliant disclosures
- Train users of corporate social media channels, including executives, on Regulation FD disclosure practices and have knowledgeable corporate counsel or investor relations staff monitor social media posts for inadvertent disclosures of material non-public information

Allison Handy is a partner in Perkins Coie’s Corporate practice who focuses on corporate governance, capital markets and strategic transactions. Her experience includes advising public and private companies in connection with securities offerings, such as equity offerings, debt offerings and tender offers, and corporate transactions.

Victor Nilsson is an associate in Perkins Coie’s Corporate practice, where he represents issuers and financial institutions in a wide variety of public and private financing transactions. He also counsels public and private companies in M&A transactions, and regularly advises clients on SEC reporting obligations, disclosure issues and corporate governance matters.