



## **Public Company Website Disclosure Requirements**

*as of October 13, 2014*

The SEC mandates that certain disclosures be posted to public companies' websites. Recently the SEC has taken enforcement action for violations, ranging from warnings all the way up to possible jail time. In addition, the NYSE and NASDAQ enforce their own specific rules for what must be disclosed and easily available for public consumption. Below is a detailed breakdown of all such rules and how we can help you decipher the relevant regulations.

### **SEC Required Postings**

#### *Annual Report and Proxy Information*<sup>1</sup>

A company must post its annual report, proxy statement, and proxy card on a publicly available website other than EDGAR, if it delivers its proxy materials electronically. The website used for disclosing this information will typically be the company's own website. The information must be presented in a format that is convenient for reading online and for printing.

#### *10-K, 10-Q, and 8-K*<sup>2</sup>

Accelerated filers and large accelerated filers are required to post Forms 10-K, 10-Q, and 8-K, including all amendments, on their websites. These forms must be posted as soon as reasonably practicable after they are filed with the SEC. Access to the reports can be granted through a hyperlink to the SEC's website or through a third party, so long as there is no charge associated with obtaining the information. Fortis also recommends that information referenced within these reports be posted for at least 12 months.

#### *Forms 3, 4, and 5*<sup>3</sup>

Forms 3, 4, and 5, including all exhibits and attachments, must be posted on the company's website for at least 12 months. These reports must be posted by the end of the business day after they are filed with the SEC. They can be posted directly to the company's website or through a hyperlink on the site. If a hyperlink is used, it must be separate from any other links and connect directly to these reports.

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<sup>1</sup> Rule 14a-16, Exchange Act.

<sup>2</sup> Item 101(e), Regulation S-K.

<sup>3</sup> Rule 16a-3(k), Exchange Act.

### *XBRL Data*<sup>4</sup>

XBRL interactive data files must be posted on the company's website by the end of the day that the company filed or was required to file the periodic report. This information cannot be provided with a hyperlink to the SEC website. It must remain posted on the company's website for 12 months.

### *Delisting Securities*<sup>5</sup>

A company must disclose its intention to delist or deregister its securities on its website. Additionally, the company must issue a press release stating its intention to delist these securities.

### *Use of Conflict Minerals*<sup>6</sup>

Information about the use of conflict minerals, if any are required for the production or functionality of a product manufactured by the company, must be disclosed on the company's website. The company must also provide a link to this information on Form SD.

## **SEC Optional Postings**

### *Regulation G*<sup>7</sup>

If non-GAAP financial measures are disclosed orally, the Regulation G requirements can be completed by posting the information to the company website and providing the website address during the presentation. Fortis recommends that this information be posted for at least 12 months.

### *Earnings Calls*<sup>8</sup>

A company must make its earnings calls known to the public prior to the earnings call through a press release. Additionally, it must post an audio file to its website with all previously undisclosed information that was released during the call, in order to avoid filing an additional 8-K. Furthermore, the company must post a presentation of the new information on its website before the call occurs. If new information is unexpectedly released during an earnings call, the information must be promptly posted to the company's website. All earnings call information should be posted for 12 months.

### *Regulation FD*<sup>9</sup>

A company can use its website to make disclosures required under Regulation FD, if the website provides broad, non-exclusionary distribution of the information to the public. However, it will likely have to use other methods also, such as a press release or conference call, because disclosure on a website alone is generally considered insufficient.

### *Audit/Compensation/Nominating and Corporate Governance Committee Charter*<sup>10</sup>

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<sup>4</sup> Rule 405, Regulation S-T.

<sup>5</sup> Rule 12d2-2(c)(2)(iii), Exchange Act.

<sup>6</sup> Item 1.01(b) and (c), Form SD

<sup>7</sup> Rule 100, Regulation G and Item 2.02, Form 8-K.

<sup>8</sup> *Id.*

<sup>9</sup> Rules 100 and 101(e), Regulation FD.

<sup>10</sup> Item 407(c-e), Regulation S-K and Instruction 2 to Item 407.

If the company's audit, compensation, or nominating and corporate governance committees have charters, the charters must be either included as an appendix to the company's proxy statement at least once every three years or be posted on the company's website and notated in the proxy statement that the charters are available on the website, with the website address included.

#### *Shareholder/Board Communication Procedures*<sup>11</sup>

The shareholder/board communication policy and procedures must be either included as an appendix to the company's proxy statement or be posted on the company's website and notated in the proxy statement that they are available on the website, with the website address included. The company must include information regarding how shareholders can contact board members; how it is determined which communications are forwarded to board members; and the policies regarding director attendance at annual meetings and the number of directors that attended the annual meeting the previous year.

#### *Code of Ethics*<sup>12</sup>

A company may disclose its code of ethics by: (1) including the code of ethics as an exhibit to Form 10-K; (2) indicating in the annual report that the company will provide a copy of the code of ethics free of charge upon request, and instructions on how to make such a request; or (3) posting its code of ethics on the company website and indicating in its annual report that it is posted there, including providing the website address.

Compliance with the requirement to disclose amendments or waivers to the code of ethics can be completed by posting the information on the website within four days of the amendment or waiver. To use this process for amendments or waivers, the annual report must state that this method will be used for disclosing amendments or waivers, and include the website address. Amendments and waivers must be disclosed on the website for at least 12 months. Waivers to the code of ethics can also be disclosed on Form 8-K.

#### *Director Independence Standards*<sup>13</sup>

If a company has its own director independence standards, in addition to stock exchange standards, the standards must be posted on the company's website or included in the proxy statement, as an appendix, at least every three years.

#### **NYSE Rules**<sup>14</sup>

- Companies listed on the NYSE are required to maintain a publicly accessible website.<sup>15</sup>
- Annual reports must be posted on the company's website, unless the company posts its Form 10-K instead.<sup>16</sup> The company can either follow the disclosure requirements under SEC Rule 14a-16<sup>17</sup> or simultaneously issue a press release stating that the annual report is

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<sup>11</sup> Item 407(b) and (f), Regulation S-K.

<sup>12</sup> Item 406(c) and (d), Regulation S-K and Item 5.05, Form 8-K.

<sup>13</sup> Item 407(a)(2), Regulation S-K.

<sup>14</sup> From NYSE Listed Company Manual ("NYSE LCM").

<sup>15</sup> Section 307.00 NYSE LCM.

<sup>16</sup> Section 203.01 NYSE LCM.

<sup>17</sup> 14a-16 requires that a company send a Notice of Internet Availability of Proxy Materials to Shareholders at least 40 days prior to the security holder meeting date or 40 days prior to the date votes, consents, or authorization will be used to effect corporate action, if no meeting is to be held.

available on its website, providing the website address, and stating that shareholders can get a free hard copy upon request.

- Contributions to tax exempt organizations where an independent director serves as an executive officer must be reported in either the company's proxy statement or on its website, if the contributions for the past three years exceed the greater of \$1 million or 2% of the tax exempt organization's consolidated gross revenues.<sup>18</sup> If any information is disclosed on the company website, the annual proxy statement or annual report must state that the information is on the website, and include the website address.
- The name of the director who presides over executive sessions must be disclosed on the company's website or in its proxy statement.<sup>19</sup> If it is not always the same person, the procedure for determining who presides over each meeting must be disclosed. The method for contacting the director or directors must also be listed on the company's website or proxy statement.
- The charter of the nominating and corporate governance committee must be listed on the company's website.<sup>20</sup> If any functions of that committee are delegated to another committee, the charter of that committee must also be posted.
- The charter of the compensation committee must be listed on the company's website.<sup>21</sup> If any functions of that committee are delegated to another committee, the charter of that committee must also be posted.
- The charter of the audit committee must be posted on the company website.<sup>22</sup> Additionally, if an audit committee member simultaneously serves on the audit committee of more than three public companies, the board must disclose its determination that such service will not impair the member's ability to serve on the company's audit committee on either its website or in its proxy statement.<sup>23</sup>
- The company's corporate governance guidelines must be posted on its website.<sup>24</sup>
- The company's code of business conduct and ethics must be posted on its website.<sup>25</sup> If a waiver of the code of business conduct and ethics is granted, it must be disclosed within four business days by posting on the company's website, distributing a press release, or filing a current report on Form 8-K with the SEC.
- Foreign private issuers that are not required to file Form 20-F with the SEC must either post their statement of significant differences on their websites or in their annual reports.<sup>26</sup> If the statement of significant differences is posted on the company's website, the company must disclose that fact in its annual report and provide the website address.

### **NASDAQ Requirements**<sup>27</sup>

- A company must make its annual report available to shareholders within a reasonable time after filing it with the SEC.<sup>28</sup> There are three options for complying with this

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<sup>18</sup> Section 303A.02(b)(v), NYSE LCM.

<sup>19</sup> Section 303A.03, NYSE LCM.

<sup>20</sup> Section 303A.04, NYSE LCM.

<sup>21</sup> Section 303A.05, NYSE LCM.

<sup>22</sup> Closed-end funds do not have to comply with this requirement.

<sup>23</sup> Section 303A.07, NYSE LCM.

<sup>24</sup> Section 303A.09, NYSE LCM.

<sup>25</sup> Section 303A.10, NYSE LCM.

<sup>26</sup> Section 303A.11, NYSE LCM.

<sup>27</sup> From Nasdaq Equity Rules.

<sup>28</sup> Nasdaq Equity Rules 5250(d)(1).

requirement: (1) mailing the report to shareholders; (2) following the disclosure requirements under SEC Rule 14a-16; or (3) posting the annual report on its website and simultaneously issuing a press release stating that the annual report is available on its website, providing the website address, and stating that shareholders can get a free hard copy upon request. Companies are also encouraged to make interim reports available using technological methods that are more cost effective.

- NASDAQ has disclosure requirements for companies who issue units.<sup>29</sup> A unit is more than one class of securities traded together. A company must provide the terms and conditions of components of the unit and the ratio of components of the unit on its website, if it has one. It must also disclose when a component of the unit is listed separately on NASDAQ.
- A company who appoints a non-independent director to its nomination or compensation committee based on exceptional and limited circumstances must disclose the board's determination that the decision is in the best interests of the company on its website or in its proxy statement.<sup>30</sup>
- Waivers to the company's code of ethics must be disclosed within four business days either on the company's website, by issuing a press release, or by filing a current report on Form 8-K.<sup>31</sup>
- A foreign private issuer may disclose any of the NASDAQ listing rules it does not follow because it is following rules from its home country only on its website, if it is not required to file Form 20-F.<sup>32</sup> If the foreign private issuer is required to file Form 20-F, NASDAQ recommends that the disclosure be made on the company's website in addition to the requirement to disclose in the company's annual reports to the Commission.<sup>33</sup>
- Listing of a series of Index Fund Shares requires daily public website disclosure of portfolio holdings that will form the basis for the calculation of the net asset value.<sup>34</sup>

## **Best Practices**

Most major public companies list all of the required and optional information stated above on their websites. While most of the information is only required to be posted for 12 months, best practice is to post all filings for the past ten years.

## **Fortis Law Partners**

Fortis Law has broad expertise in handling SEC disclosure requirements for public corporations. With the SEC stepping up enforcement of all aspects of securities law, it has never been more important than now to ensure that both you and your company are in 100% compliance with all of the statutes relevant to your company. The proactive investment of time and resources to set up the appropriate systems and procedures will pay dividends for years to come.

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<sup>29</sup> Nasdaq Equity Rules 5225(a)(3).

<sup>30</sup> Nasdaq Equity Rules 5605(d)(2)(B) and 5605A(d)(3).

<sup>31</sup> Nasdaq Equity Rules 5610.

<sup>32</sup> Nasdaq Equity Rules 5615(a)(3)(B).

<sup>33</sup> Nasdaq Equity Rule 5615-3

<sup>34</sup> Nasdaq Equity Rule 5705(b)(1)(B)(iv).

**For more information or to discuss specific scenarios, please contact:**

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