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SEC ISSUES GUIDANCE ON THE USE OF COMPANY WEB SITES TO DISSEMINATE INVESTOR INFORMATION

The SEC's Guidance identifies factors that will help companies determine whether web site posting of information is sufficient public disclosure for Regulation FD. The Guidance also deals with antifraud liability issues, information summaries, shareholder blogs and forums, and disclosure controls and procedures.

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On August 1, 2008, the Securities and Exchange Commission issued interpretive guidance on the use of company web sites under the Securities Exchange Act of 1934 and various antifraud provisions of the federal securities laws.¹ Given the widespread use of company web sites as a means of communications since the SEC last issued guidance in 2000,² the SEC issued this additional guidance to promote company web sites as a significant vehicle for the dissemination to investors of important information. The new guidance addresses, among other things:

- when information on a company web site may be deemed "public" for purposes of Regulation FD;
- company liability under the various antifraud provisions of the federal securities laws for information on company web sites;

- the use of summary information and overviews on web sites;
- the use of "blogs" and electronic shareholder forums;
- the implications of web site information for certifications of disclosure controls and procedures regarding such information; and
- the format of information presented on company web sites.

REGULATION FD

Regulation FD, which was adopted in 2000, generally prohibits the selective disclosure of material non-public information by companies.³ Regulation FD provides that when a company discloses material, non-public information to certain persons, the company must make broad-based public disclosure of such information, either simultaneously or promptly. Public disclosure may be

¹ Rel. Nos. 34-58288, IC-28351 (2008). This release is available at <http://sec.gov/rules/interp/2008/34-58288.pdf>.

² Rel. Nos. 33-7856, 34-42728, IC-24426. This release is available at <http://sec.gov/rules/interp/34-42728.htm>.

³ Rel. Nos. 33-7881, 34-43154, IC-24599. This release is available at <http://sec.gov/rules/final/33-7881.htm>.

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made by means of either "filing" or "furnishing" a Current Report on Form 8-K or "another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."⁴ In a departure from the original adopting release of Regulation FD, the new interpretive guidance provides that, in certain circumstances, information posted solely to a company's web site, rather than through an 8-K or press release through the wire services, could constitute public disclosure of such information.⁵ In evaluating whether posting information on a company web site is public disclosure for purposes of Regulation FD, the SEC has advised that companies must consider whether: (i) the web site is a "recognized channel" of distribution; (ii) posting information on a web site disseminates the information so as to make it available to the markets; and (iii) a reasonable waiting period has occurred so that the market can digest such information.⁶

Whether a company's web site is a recognized channel of distribution depends on "the steps that the company has taken to alert the market to its web site and its disclosure practices, as well as the use by investors and the market of the company's web site." Where on the web site the information appears and whether a company uses "push" technology (as described below) to disseminate information will also factor into the determination.⁷ One way in which a company could

position its web site as a recognized channel of distribution would be to include a statement in its press releases that refers to the company web site as a source of important information. An example could be: "We routinely post information that may be important to investors in the [Investor Relations] section of our web site. We encourage investors to consult that section of our web site regularly for important information about us." References like this should help to establish a web site as a source of disclosures, particularly for large companies with an established pattern or practice of posting information to their web sites. In addition, this language should aid smaller companies that are in the process of developing an established practice or pattern of relying on web site postings. A company could also use "push" technology to make information posted to the web site more accessible to the markets. This technology enables an investor or other interested party to "subscribe" to receive company press releases, Exchange Act reports or other important information posted to the company's web site by e-mail.

The third element in analyzing whether web site posting will make a subsequent selective disclosure compliant with Regulation FD would be whether the markets have been afforded sufficient time to absorb and react to the information set forth in the posting. The SEC has adopted a principles-based approach to this determination, stating that what constitutes a reasonable waiting period depends on the circumstances, which include: (i) the size and market following of the company; (ii) the extent to which investor information

⁴ Rule 101(e) of Regulation FD.

⁵ See *supra* note 1, at Section II.A.2.

⁶ *Id.* at Section II.A.1.

⁷ In the interpretive guidance, the SEC set forth eight non-exclusive factors to help companies make a determination as to whether their web sites are recognized channels of distribution that disseminate important information in a broad manner. These factors include: (1) whether and how the company conveys to the markets it has a web site and that such web site should be viewed as an important source of information; (2) whether the company has made the investing public aware that it will post information on its web site and whether the company has developed a pattern or practice of posting such information; (3)

footnote continued from previous column...

whether the company's web site is designed to lead the public efficiently to information about the company, whether the information is prominently disclosed on the site in a location known and routinely used for such disclosures and whether the information is presented in a readily accessible format; (4) the extent to which information on the web site is regularly picked up and reported by the media; (5) the use of "push" technology; (6) whether the company keeps its web site current and accurate; (7) whether the company uses other methods in addition to web site posting and the extent to which other methods are predominant; and (8) the nature of the information.

on the web site is regularly accessed; (iii) steps the company has taken to ensure the markets know the web site is a key source of important information; (iv) whether the company has taken steps to actively disseminate the information or the availability of information posted on the web site, including using other channels of distribution; and (v) the nature and complexity of the information.⁸

Companies and their legal advisors will want to be highly confident that their web site is widely viewed by the investing public as a recognized source of information before relying solely on web site posting of company information. Absent such determination, companies should continue using wire services and/or Form 8-Ks for public disclosure of material information so as to avoid potential violations of Regulation FD.

ANTIFRAUD LIABILITY

The SEC also reiterated its position that the antifraud provisions of the securities laws apply to company statements made on the Internet the same way as any other statement made by, or attributable to, a company.⁹ In an attempt to ease concerns that a company may incur liability from previously posted information accessed on the web site at a later date, the SEC affirmed that merely maintaining the accessibility of previously posted information on a web site does not "republish" that information. It recommends, however, that the information bear a publication date and be located in a separate section of the web site.¹⁰

The SEC has attempted in the release to clarify company liability for hyperlinks on a company web site to third-party information. Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, a company may be liable for information prepared by unrelated third parties to which it hyperlinks from its web site. A company may be liable for third-party information to which it hyperlinks if the information could be deemed as attributable to the company. This can happen in circumstances where the company has: (i) been involved in the preparation of the third-party information ("entanglement"); or (ii) explicitly or implicitly endorsed or otherwise approved

⁸ *Id.* at Section II.A.1.

⁹ Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 promulgated thereunder impose liability for material misstatements and omissions in connection with the purchase or sale of securities.

¹⁰ *See supra* note 1, at Section II.B.1.

the third-party information ("adoption"). The SEC recommends that companies state the source of the hyperlink and provide an explanation as to why the hyperlink is being used. In addition, companies may want to consider posting both positive and negative hyperlinks under a general heading, such as "Recent News Articles," to minimize the possibility of a finding that the company has implicitly adopted the third-party information found in any single hyperlink. Finally, the SEC has recommended that companies consider using "exit notices" or "intermediate screens" to indicate to the investing public that the hyperlink is to third-party information, though the use of such devices will not absolve companies from liability in all instances.¹¹ Disclaimers alone will be insufficient to shield a company from liability under the antifraud provisions of the securities laws if the company knew or was reckless in not knowing that the hyperlinked information was false or misleading.

SUMMARY INFORMATION

The SEC included in its release guidance with respect to companies' use of summaries and overviews. The use of summaries and overviews is encouraged so long as the information is identified as such and the investing public is made aware of the location of the more detailed information from which the summary or overview was derived. When using summaries or overviews on a web site, the SEC encourages companies to: (i) use appropriate headings or titles to convey the summary nature of the information; (ii) use additional explanatory language identifying the text as a summary and where more detailed information may be found; (iii) use hyperlinks embedded in the summary or overview to take the reader directly to the more detailed information; and (iv) use a "layered" or "tiered" format, which allows the reader to proceed from the summary or overview to more detailed information.¹²

BLOGS AND ELECTRONIC SHAREHOLDER FORUMS

In the interpretive release, the SEC also stated its desire to promote increased use of company web sites by

¹¹ For example, if there is an analyst report that provides a positive outlook on the company's prospects, and the company provides a hyperlink to that report only (while ignoring other analyst reports that may be less favorable to the company and its future prospects), then the use of "exit notices" or explanatory disclosure may be insufficient to rebut an inference the company has implicitly approved or endorsed the favorable report. *Id.* at Section II.B.2.

¹² *Id.* at Section II.B.3.

making them more interactive by using devices such as "blogs" and "electronic shareholder forums." The SEC reminded companies that the antifraud provisions of the federal securities laws apply to company statements made on blogs and shareholder forums, notwithstanding the typically informal and conversational nature of such forums.¹³ In addition, companies cannot require a waiver of protections under the federal securities laws for those that wish to enter and/or participate in a blog or shareholder forum.

DISCLOSURE CONTROLS AND PROCEDURES

The SEC has allowed companies to satisfy certain of their Exchange Act disclosure requirements by posting such information directly to their web sites in lieu of filing the required information.¹⁴ The interpretive

guidance clarifies that a company's disclosure controls and procedures, and the related officer certifications, generally do not apply to information posted on a company's web site unless the company is electing to satisfy an Exchange Act disclosure obligation (when permitted) through such a posting.

FORMAT OF WEB SITE INFORMATION

Finally, the interpretive guidance provides that information appearing on company web sites need not be "printer friendly," or formatted for ease of printing, unless explicitly required by the rules, such as the "E-Proxy" rules.¹⁵ This affords companies a great degree of flexibility as to how they present information on their web sites.■

¹³ *Id.* at Section II.B.4.

¹⁴ For example, Item 5.05(c) of Form 8-K permits a company to disclose waivers of its code of ethics on its web site, instead of filing such information on Form 8-K. *Id.* at II.C.

¹⁵ Rule 14a-16(c) of the 1934 Act.