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SEC provides interpretive guidance on use of company websites

The Securities and Exchange Commission (SEC) issued new interpretive guidance for public companies on how to effectively provide website disclosure of important information to investors while complying with relevant securities laws. The SEC's adoption of this interpretive guidance was preliminarily discussed in our July 31, *Securities Law Alert*; however, we wanted to highlight in this *Alert* certain important items contained in the published interpretive guidance. The interpretive release was effective as of August 1, 2008.

Application of Regulation FD to website information

Regulation FD was adopted to prevent the selective disclosure of material information to a select group of individuals with access to corporate insiders. Under Regulation FD, companies are required to make material information available to the public at or near the same time such information is disclosed to individuals outside the company, subject to certain exceptions. Methods by which a company may make information public include disclosure through a broadly disseminated press release or the filing of a Form 8-K. Initially, when the SEC adopted Regulation FD in August 2000, it stated that disclosure on a company website would not, itself, be an acceptable method of public disclosure of material information for purposes of compliance with Regulation FD.

In its interpretive release, the SEC provides updated guidance as to when posting information on a company's website, without further action, would meet the requirements of Regulation FD. The SEC states that companies must consider whether and when:

1. a company website is a recognized channel of distribution;
2. posting of information on a company website disseminates the information in a manner making it available to the securities marketplace in general; and
3. there has been a reasonable waiting period for investors and the market to react to the posted information.

If a company's website and posting of new information satisfy these criteria, the SEC indicated that the website posting alone may be sufficient for public disclosure, so subsequent selective disclosure of this information would not violate Regulation FD.

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Recognized distribution channel and concept of dissemination

The SEC stated that important factors in determining whether a company website is a recognized channel for distribution will depend upon the steps the company has taken to alert the market of its website, and whether the market uses the company's website to obtain this type of information.

In analyzing whether disclosure is publicly disseminated for purposes of compliance with Regulation FD, the SEC stated that companies should focus on (i) the manner in which information is posted on a company's website and (ii) the timely accessibility of this information by investors and the markets.

Factors to review when determining whether a company's website is a recognized distribution channel and whether information on the site is readily accessible to investors include, but are not limited to:

1. how companies let investors and the markets know that they should look to a company's website for information;

2. whether the website is designed to lead investors to the important information in an efficient manner, and whether such information is prominently disclosed;

3. whether a company has a history of posting important information on its website and whether it has made investors aware of this practice;

4. the extent to which the information on a company's website is regularly picked up by the market and reported by the media to reach a broad audience;

5. the steps a company has taken to make its website disclosures accessible, include the use of RSS feeds or other distribution methods;

6. whether a company's website is current and accurate; and

7. whether a company uses other methods predominately to disseminate information to investors.

Reasonable waiting period for website postings

Simply posting news on a company website would not be seen as selective disclosure, but it may not be deemed "public" disclosure, either, if a reasonable period of time has not passed to allow the market to react to the information. Whether a sufficient period of time has elapsed between the posting of the information and the market's reaction depends on the particular facts and circumstances surrounding the disclosure of the information and the nature of the market's awareness of a company's website as a source of important information. Several factors that should be considered, in addition to those set forth in points 2-5 above, include the size and market following of the company and the nature and complexity of the information being disseminated on the website. These factors are important in determining, for Regulation FD purposes, whether the information is deemed publicly disclosed.

Observations

Although this new interpretive guidance permits a company meeting the criteria to post new information on its website to satisfy its disclosure obligations under Regulation FD, we think that the current practice of presenting corporate information in a press release and/or Form 8-K will continue to be followed for some time.

While the guidance sets forth specific criteria for companies to analyze in determining whether a website posting would be sufficient for Regulation FD purposes, some of these criteria are dependent not only upon company actions, but also on market reaction and use of this information once it is posted on a company's website. For instance, it will be difficult for many companies to determine whether website disclosures are regularly picked up by the marketplace. A company would not necessarily know whether an absence of media reporting relating to information on its website is due to the lack of perceived importance of the disclosure by mainstream media or whether the media was simply unaware of the website disclosure.

Companies should take steps to review how information is presented and disseminated on their websites. Is new information easy to find and prominently disclosed, or is the latest information buried under several web pages? Does the website support RSS feeds or another method by which new corporate disclosure can be "pushed" to investors? Such changes would support the SEC's criteria that the website be well-designed and new information be accessible to investors. In addition, the SEC notes that companies should consider the extent to which their Internet infrastructures can accommodate spikes in traffic volume that may accompany a major company development.

Companies can also take steps to give their websites more prominence by referencing the sites in press releases and calls with analysts; alerting investors that new information will be posted on the website before such postings; and including disclosure in their Form 10-Ks and Form 10-Qs identifying their website addresses and disclosing that the company routinely posts important information on its website.

Liability issues

Companies should be aware that the antifraud provisions of Section 10(b) and Rule 10b-5 apply to statements made on corporate websites. The same traditional analysis for determining liability under these provisions also is used for website disclosures that contain material misstatements or omissions.

Liability for previously posted website material

In its release, the SEC clarifies that companies whose websites maintain previously posted material will not be considered to be republishing or reissuing this information for purposes of the antifraud rules simply because the information remains accessible to investors. To delineate between statements made in the past and material that has been restated or updated, however, the SEC indicated that historical statements on a company's website should be (i) separately identified as historical by dating such material and (ii) placed in a separate section of the company's website containing historical statements.

Hyperlinks to third-party information

When companies link to third-party information from other websites, they run the risk that this information could be attributable to them, rather than the third-party who prepared the information. In its "Use of Electronic Media" release from 2000, the SEC indicated that whether third-party information would be attributable to a company depended upon whether the company (i) was involved in the preparation of the information, often referred to as the "entanglement" theory, and (ii) explicitly or implicitly endorsed the linked information, often referred to as the "adoption" theory.

In providing additional analysis regarding the adoption theory and whether a company has approved third-party information, the SEC indicated that companies should take steps to explain why a link to third-party information is being provided. This can be done by indicating whether the company endorses certain information in the hyperlink or by providing some context about the source and provider of the hyperlinked information. The SEC cautioned, however, that disclaimers used to separate the company from the source of the information will not shield a company from liability for providing hyperlinks to information that they know is materially false or misleading.

Use of interactive websites

The SEC, in recognizing the vast developments in the use of corporate websites over the past several years, also provided interpretive guidance to companies on the use of corporate weblogs, or blogs, and other means of interactive shareholder communication.

For companies that host or wish to establish blogs or electronic shareholder forums, the SEC provided the following guidance.

- The antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums, and companies should take steps to place controls and procedures to monitor statements in these forums made by or behalf of a company. Whether a person is acting on behalf of a company is dependent upon the facts and circumstances. Therefore, it is important that the people authorized by companies to moderate these forums or blogs understand that confidentiality must be maintained for compliance with the securities laws, including Regulation FD and insider trading purposes.

- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.

- A company is not responsible for the statements that third parties post on a blog or other company-sponsored forum, and companies are not obligated to respond to or correct misstatements made by third parties. This is important guidance for companies sponsoring blogs where misstatements about company business, plans, or products could be posted by a third-party participant. Companies would still be responsible for statements by third parties that they endorse, adopt, or approve.

The antifraud rules also apply to blogging on third-party websites by representatives of the company. The CEO of Whole Foods Market, Inc. allegedly penned some 1,400 anonymous messages on Yahoo! Finance message boards about himself or the company, resulting in a highly publicized board of directors and SEC investigation. The SEC recently advised the company that it has concluded its

inquiry into the CEO's online financial message board postings and that no enforcement action has been recommended against any individual involved or the company.[1]

[1] See Whole Foods Market, Inc. Form 8-K dated April 25, 2008.

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