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SEC ISSUES GUIDANCE ON COMPANY WEBSITE DISCLOSURE

On August 1, 2008, the Securities and Exchange Commission (the "SEC") issued an interpretive release ("Website Release")¹ about disclosing on your company website information that is subject to the federal securities laws.² This is the first guidance the SEC has given regarding this subject since it issued Regulation FD (Fair Disclosure) in 2000³. This guidance was effective on August 7, 2008. The Website Release provides guidance in the following areas.

- Whether information posted solely on your company website might be "publicly available" for purposes of Regulation FD;
- Whether you have an ongoing duty to update information posted on your company website;
- Whether you are responsible for information on third-party websites linked from your company website;
- Posting summary financial information on your company website;
- Offering interactive features like blogs or investor message boards on your company website;
- Appropriate use of disclosure controls and procedures with your company website; and
- Guidance on formatting information for easy reading or printing from your company website.

Whether information posted solely on your company website might be "publicly available" for purposes of Regulation FD.

The Website Release provides guidance about when information posted on a company's website could be considered sufficiently public for purposes of Regulation FD. Regulation FD was adopted to prohibit companies from selectively disclosing material non-public information. Under Regulation FD, information is considered to be publicly available if it is communicated by a method (or combination of methods) that is reasonably designed to effect broad, non-exclusionary disclosure of the information to the public.

The SEC previously had said that some types of information may not be sufficiently publicly disclosed if disseminated solely by posting that information on the company's own web site⁴ – notwithstanding that, the SEC

¹ Release Nos. 34-58288, IC-28351; File No. S7-23-08; www.sec.gov/rules/interp/2008/34-58288.pdf ("Website Release").

² The Website Release considers issues that are raised under the Securities Exchange Act. Your company may also need to consider issues that may be raised under the Securities Act by your website postings.

³ Release No. 33-7881; www.sec.gov/rules/final/33-7881.htm.

⁴ In its final rulemaking release for Regulation FD, the SEC implied that a website posting might not be, by itself, a sufficient means of public disclosure, depending on the facts and circumstances. See Release No. 33-7881; www.sec.gov/rules/final/33-7881.htm at note 73.

considered similar postings to its own EDGAR website to be sufficiently publicly disclosed. The Website Release now recognizes that information may, in certain circumstances, be adequately publicly disclosed solely by a posting on a company's website.⁵

Whether information posted on your company's website is sufficiently publicly available for purposes of Regulation FD will depend on: (1) whether your website is adequately recognized as a channel that you use to distribute important information about your company, (2) whether posting the information on your company website makes it available to the securities marketplace in general, and (3) whether enough time has elapsed for the securities marketplace to react to the information.⁶ Each of these will depend on the facts and circumstances. The Website Release indicates that the SEC would consider factors such as the following in making those assessments:

- Do you adequately market your website as a source of important information about your company?
 - What steps have you taken to inform investors and the securities marketplaces about your website and that it is a key source of important information about your company?
 - For example, do your periodic reports and press releases include your company website address and state that you routinely post important information there?
 - Have you made investors and the securities marketplaces aware that you post on your company website important information about your company and the location of that information?
- How do you regularly disclose material information about your company?
 - What is the nature and complexity of the information being disclosed?
 - Do you have a pattern or practice of posting similar important information about your company on your website? Do you keep your company website current and accurate?
 - How do you disseminate information about your company, other than by posting information on your company website? What is the predominant method?
 - What is the size and market following of your company?⁷
 - To what extent is information posted on your company website regularly picked up by the securities marketplace and regularly picked up and reported by readily-available news media?
 - How have you advised the newswires or media about the information posted on your company website?
- Do you make investor information on your company website easy to find and use?

⁵ The Website Release acknowledges that disclosure may be enhanced by using web technologies more advanced than those available on EDGAR. Website Release at note 23.

⁶ It is important to allow sufficient time after disclosure for the material information to "percolate" in the securities marketplace, in order to avoid "selective disclosure" of the same information to a recipient who is subject to Regulation FD.

⁷ Companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their websites. Companies with less of a market following may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's website.

- Is your company's web site designed to lead investors and the marketplace efficiently to information about the company, including information specifically addressed to investors⁸?
- Is the information prominently disclosed on your company website in the location you routinely use to post important information about the company?
- Is the information presented in a format that is readily accessible to the general public?
- What steps you have taken to make information on your company website more accessible; for example by using "push" technology such as RSS feeds?⁹

The Website Release emphasizes that the length of time a company should wait after posting information on its website before it treats that information as "publicly available" may vary from company to company.¹⁰ It also notes that a reasonable waiting period for any particular type of information may not be reasonable for other types of information. Thus your company should consider using other ways to alert investors and the securities marketplace that important information is being posted on your company website.

The Website Release also describes how your company might use its website to disclose material information that is inadvertently disclosed to a person covered by Regulation FD before that information had become publicly available. If your company's designated spokesperson inadvertently makes a selective disclosure of material non-public information about your company, your company must promptly file or furnish a Form 8-K or use an alternative method or methods of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of that information to the public.¹¹ The Website Release acknowledges that, for some companies in certain circumstances, posting the information on the company's website may be a sufficient method of public disclosure under Regulation FD. Whether a posting on your company's website will, by itself, satisfy Regulation FD will depend on an analysis using the factors described above.

Whether you have an ongoing duty to update information posted on your company website.

Your company is responsible under the securities laws for the accuracy of statements that it makes on its website. Some companies have been concerned that, once they post information on their websites, the information will be considered to be "republished" each time it is accessed on the website and that their companies may have a duty to continually update the previously posted information.

In the Website Release, the SEC clarifies that companies are not necessarily required to continually update materials posted on their websites in order to avoid violating the antifraud provisions of the Securities Exchange Act. If the information originally published simply remains available on your website as historic information, but you do not later affirmatively restate, reissue or republish the information, then you may not have a duty to correct or update

⁸ For example, are investor and news links easy to locate on the home page of your company website? Does your home page provide news headlines with direct links to the posted information?

⁹ The Website Release does not require that Really Simple Syndication (RSS) or other push technology be used. It is a factor to be considered in evaluating accessibility of the information.

¹⁰ A large company that frequently uses its website as a key resource for providing information, that has taken steps to make investors and the market aware of that use, and that reasonably believes that its website is well-followed in the securities marketplace, might get comfortable with a shorter waiting period than would a company that is not in the same situation.

¹¹ Rules 100(a) and 101(e) of Regulation FD.

the information.¹² The following are some factors to consider in analyzing whether you have a duty to correct or update previously published information:

Is it apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period?

- Is the information clearly identified as historical or as previously-posted? For example, do you date your posted materials or statements?
- Is the information located in a separate section of your company's website which contains previously posted materials or statements? For example in a section titled "Archived News Releases."
- Does the website contain a notice that your company disclaims a duty to correct or update the previously posted information?

Whether you are responsible for information on third-party websites linked from your company website.

The Website Release provides guidance about when a company may have liability under the antifraud provisions of the Securities Exchange Act for information that is contained in a third-party website hyperlinked from your company website. In general, a company may be responsible for statements made by a third party if the company has explicitly or implicitly endorsed or approved the information ("adoption"). The SEC may consider the following, non-exhaustive list of factors in determining whether a company has adopted hyperlinked third-party statements:

- What steps does your company take to reduce the risk of confusing investors about the source of the information? For example:
 - Does your company website provide notice that a third-party is the source of the information?
 - Is it clear to users when they leave your company website to follow a hyperlink to third-party information? For example, does your company website provide an exit screen or intermediate pop-up window when users follow a hyperlink to third-party information?
 - How does your company graphically present the hyperlinked third-party information? For example, is the third party information captured and presented in a "frame" that appears to be part of your company website?
- What does your company website expressly say in providing the hyperlink?
 - Does your company website explain why you are providing the hyperlink and how readers should consider the information?
 - Does your company website explain whether the company is commenting on or endorsing the accuracy of the third-party information?
 - Does the company website explain the extent to which your company was involved in preparing the third-party information?
 - Does the company website disclaim responsibility for the third-party information?¹³

¹² Website Release at note 71. The SEC discussed this issue in the context of securities offering in Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] ("2000 Electronics Release").

- What is implied by the context in which the company provides the hyperlink?
 - Does the context of the hyperlink and the hyperlinked information create a reasonable inference that your company has approved or endorsed the hyperlinked information?
 - Does your company website hyperlink only to favorable third-party information and ignore unfavorable third-party information? For example, do you link only to those news reports or analyst reports that include a positive view of your company or its management?

Posting summary financial information on your company website.

The Website Release provides guidance about a company's use of summaries or overviews to present information on its website – especially financial summaries. The SEC generally endorses the use of summaries or overviews that can be helpful to investors – so long as (1) it would be apparent to a reasonable person that the information presented is a summary, and (2) the company alerts the reader about where more detailed information is located.

The Website Release suggests that a company should consider ways to alert readers to the location of the detailed disclosure from which summary information is derived or upon which such overview is based, as well as to other information about the company on its company website. You should consider the following when presenting summary information on your company website:

- *Using appropriate titles.* An appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid user confusion about the summary nature of the information. For example, clearly labeling as a “Summary” the page on your company website which presents overview tables or graphs of key performance metrics in a manner similar to an introductory page in your glossy annual report.
- *Using explanatory language.* Consider using explanatory language to identify the text as a summary or overview and providing users with the location of the more detailed information from which the summary was derived.
- *Use and proximity of hyperlinks.* Consider placing hyperlinks to the more detailed information in close proximity to the summary or overview information.
- *Using “layered” or “tiered” formats.* Consider presenting the most important summary or overview information about your company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links.

Offering interactive features like blogs or investor message boards on your company website.

Companies are using their websites to communicate with various constituencies, including customers, vendors and investors. All communications made by your company or its behalf – including those made over the internet using blogs or message boards – are subject to the antifraud provisions of the federal securities laws. The Website Release suggests that a company implement controls and procedures to monitor those types of communications made by or on behalf of the company. Consider the following when you facilitate communications over the internet.

- Your employees or agents communicating as authorized representatives of your company should be informed that their responsibilities under the federal securities laws apply to internet communications.

¹³ Website Release at note 71. The SEC discussed this issue in the context of securities offering in Use of Electronic Media, Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843] (“2000 Electronics Release”)

- Consider formally designating authorized company spokespersons.
- Company representatives cannot avoid company liability by purporting to speak only in their “individual” capacities.
- Your company should not require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.¹⁴
 - You should not require users to agree not to make investment decisions based on the blog’s or forum’s content.
 - You should not require users to agree to waive claims for damages of any kind arising under the federal securities laws.
- Your company is not responsible for statements posted by third parties, on a company sponsored website or otherwise.
 - Your company is not obligated to respond to or correct misstatements made by third parties.

Appropriate use of disclosure controls and procedures with your company website.

The Website Release notes that disclosure on a company website may be subject to the certification of disclosure controls and procedures by the company’s principal executive officer and principal financial officer. A company may elect to satisfy certain Securities Exchange Act disclosure obligations by posting information on its website. If the company fails to make those disclosures on its website, its related Securities Exchange Act reports would be incomplete. Your company should, therefore, design its disclosure controls and procedures to ensure it discloses the required information on your company website. The certification of disclosure controls and procedures is not required, however, for any other disclosures of information on a company website.

Nevertheless, disclosure on your company website is subject to other aspects of the federal securities laws. Your company’s disclosure controls committee (or equivalent body) should, therefore, consider whether your company website disclosure complies with all applicable provisions of the securities laws.

Guidance on formatting information for printing from your company website.

The Website Release notes that online information is increasingly interactive, so that users may not be able to print a particular browser screen or presentation that is designed for interactive viewing. This is consistent with the SEC’s advocacy of eXtensible Business Reporting Language (XBRL) and its use of interactive data viewers on its own website.¹⁵ The Website Release indicates that the federal securities laws do not generally require that information on your company website be presented in a printer-friendly format – unless the SEC’s rules explicitly require it in a particular circumstance.¹⁶ Your company should, however, consider whether there are other laws that require you to provide information in ways that are accessible to particular users.

¹⁴ The SEC believes such waivers are inconsistent with the federal securities laws and violate the anti-waiver provisions of the federal securities laws. See Securities Act Section 14 [15 U.S.C. 77n]; Exchange Act Section 29(a) [15 U.S.C. 78cc]; Section 47(a) of the Investment Company Act of 1940 (“Investment Company Act”) [15 U.S.C. 80a-46(a)] and Section 215(a) of the Advisers Act [15 U.S.C. 806-15].

¹⁵ The SEC’s interactive data viewers are linked at <http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml>.

¹⁶ For example, Securities Exchange Act Rule 14a-16(c) requires electronically delivered proxy materials to be presented in a format convenient for both reading online and printing in paper.

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