SEC PROVIDES GUIDANCE ON THE USE OF COMPANY WEBSITES TO PROVIDE INFORMATION TO INVESTORS

On August 1, 2008, the Securities and Exchange Commission ("SEC") issued an interpretive release (the "Release") that provides guidance regarding the use of company websites to provide information to investors.[1] Recognizing the widespread use of the Internet and that company websites "can serve as effective information and analytical tools for investors," the Release is designed to encourage companies to further develop their websites to disseminate information to investors in compliance with the Securities Exchange Act of 1934 (the "Exchange Act") and the antifraud provisions of the federal securities laws. The Release became effective on August 7, 2008.

The Release discusses four aspects with respect to information posted on a company website: (1) whether and when information posted on a company website is considered "public" for purposes of Regulation FD; (2) company liability for such information; (3) disclosure controls and procedures; and (4) the format of information presented.

I. The "Public" Nature of Information Contained in Company Websites.

Regulation FD restricts the selective disclosure of material non-public information, requiring companies to publicly disclose such information by filing or furnishing a Form 8-K or by disseminating the information "through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public." In the adopting release issued in 2000, the SEC stated that an issuer's posting of new information on its own website would not by itself be considered a sufficient method of public disclosure, but recognized that, as technology evolves and as more investors have access to and use the Internet, certain issuers, whose websites are widely followed by the investment community, could use such a method. With the Release, the SEC is acknowledging that, in certain cases, company websites may now be an appropriate method of distribution.

In the Release, the SEC provides guidance as to whether and when information contained in a company website may be considered "public" for purposes of (a) permitting selective disclosure of such information and (b) satisfying Regulation FD's public dissemination requirement.[2]

---

[1] See SEC Release No. 34-58288, File No. S7-23-08 (August 7, 2008). Comments must be received on or before November 5, 2008.

[2] The Release expressly does not address issues related to insider trading that may be implicated by disclosures on company websites. Nor is it intended to modify previous guidance regarding implications under the Securities Act with respect to private offerings or address issues under Securities Act Rule 144 relating to "public information."

(A) Whether and When Website Information is Considered "Public" for Purposes of Application of Regulation FD.

In determining whether website information is considered "public" for purposes of the application of Regulation FD, a company must consider whether and when

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

Whether a company website is a recognized channel of distribution depends on the steps that the company has taken to alert the market to its website and disclosure practices and the extent to which investors use the company's website. Whether the posting of information on a company website disseminates the information such that it is available to the marketplace in general depends upon the manner in which information is posted on a company website and the timely and ready accessibility of such information to investors and the markets. Whether there has been a reasonable waiting period for investors and the markets to react to information posted on a company website depends on facts and circumstances that are unique to both the particular company and type of information involved. If a company concludes that information contained on its website is public under the foregoing analysis, it may subsequently selectively disclose such information without triggering Regulation FD because such information would not be considered "non-public."

(B) Satisfaction of Public Disclosure Requirement of Regulation FD.

Similar to the above analysis, the Release provides that companies, in determining whether and when postings on their websites are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" for purposes of Regulation FD, consider whether a company website is a recognized channel of distribution and whether posting of information on the website disseminates the information in a manner that makes it available to the securities marketplace in general. A company must also consider its website's capability to meet the simultaneous or prompt timing requirements under Regulation FD once a selective disclosure has been made.

Commentary:

- With the current practice, particularly for larger public companies, to use their websites as an important and frequent source of information, we would expect that most companies would be able to avail themselves of this proposal. Companies should inform their investors and the market as to their website disclosure policies and information posted on their websites should be clearly presented, up-to-date and readily accessible so that investors and other interested parties continue to look to the website for recent developments.

- Companies should consider the extent to which information posted on their websites is regularly picked up by the media and newswires. Companies with limited market followings may need to take affirmative steps to alert investors to the fact that information has been posted on their websites.

- Companies should consider the use of "push" technology, permitting investors and other interested parties to sign up for email alerts as to new information, as well as other methods of informing their investors and the market as to the availability of new website postings. Companies should also consider expanding this "alert" mechanism for new material information posted, in addition to press releases and SEC filings.

- Companies should consider the materiality of the information provided. Important new information should continue to be issued in a press release and/or a Form 8-K, even if posting it on the website may still be considered Regulation FD-compliant.

II. Anti-Fraud and Other Exchange Act Provisions.

The Release reiterates the SEC's view expressed in previous interpretive releases that the antifraud provisions of the federal securities laws[3] apply to company statements made on websites in the same way that they apply to any other statements made by or on behalf of a company. The Release provides guidance with respect to the application of the antifraud rules as they relate to specific types of information posted on company websites.

(A) Previously Posted or "Historical" Information on a Company Website.

In response to concerns that previously posted information on websites could be considered "republished" each time such information is accessed and thus may potentially expose companies to antifraud liability, the Release makes it clear that the simple act of maintaining previously released information or statements on a company website does not amount to a "reissuance" or "republication" of such information or statements for purposes of the antifraud rules. To make this clear to investors, the Release recommends that previously posted materials or statements maintained on a company's website should be (i) separately identified as historical or previously posted materials or statements (i.e., by dating such materials or statements), and (ii) located in a separate section of a company's website which contains previously posted materials or statements. However, companies should be aware that the antifraud rules do apply to statements at the time they were initially made and also apply in situations where a company affirmatively restates or reissues a statement.

[3] For example, Exchange Act Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

(B) Hyperlinks to Third-Party Information.

The Release provides guidance with respect to a company's antifraud liability for hyperlinks to third-party information included on its website. A company may be held liable for third-party information which has been provided in a hyperlink on the company's website and which could be attributable to the company. Whether third-party information can be attributable to the company depends on whether the company has involved itself in the preparation of the information (the so-called "entanglement theory") or explicitly or implicitly endorsed or approved the information (the so-called "adoption theory"). The question turns on whether "the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information." Therefore, an important factor to consider is what a company says about a hyperlink and the implications of the context in which a hyperlink is presented.

The Release suggests that a company explain the context for the inclusion of a hyperlink (i.e., state why the hyperlink is being provided). The extent to which the context of a hyperlink should be explained depends upon the nature and content of the hyperlinked information. For example, selective hyperlinks (as opposed to more general ones) require more explanation from the company in order to avoid an inference that the company approves or was involved in the preparation of the hyperlinked information. Finally, the Release discusses companies' use of "exit notices" or "intermediate screens" to indicate to viewers that they are being hyperlinked to third-party information. Although these methods, including related disclaimers, may help to avoid confusion as to the source, or a company's endorsement of, the third-party information, the Release makes it clear that their use will not automatically insulate companies from antifraud liability for third-party hyperlinked information.

(C) Summary Information.

The Release provides guidance with respect to a company's use of summaries or overviews to present information (including financial information) on its website. Although the SEC believes that summary information contained on a company's website can be helpful to investors, the Release cautions that it should be clear that such information is in fact only a summary and should be read in the context of the full information being summarized. The Release urges companies to consider ways to alert viewers to the location of the more detailed disclosure to which a summary or overview relates, such as through appropriate headings, hyperlinks to more detailed information and a layered or tiered presentation, and to consider using explanatory language to identify summary or overview information.

(D) Interactive Website Features.

Recognizing that companies are increasingly making their websites interactive through the use of "blogs" and "electronic shareholder forums" and the benefits of such tools in helping companies communicate with their various constituencies, the Release provides the following guidance for companies that host or participate in blogs or electronic shareholder forums:

- A company is responsible for statements made by the company (or by others on its behalf) on its website or on third-party websites, including in blogs or electronic shareholder forums. The antifraud provisions of the federal securities laws apply to such statements.
- A company cannot require investors to waive protections under the federal securities laws as a condition for entering or participating in a blog or forum. For example, a company may not condition an investor's use of a blog or forum by requiring such investor to agree to refrain from making investment decisions based on the blog's or forum's content or by disclaiming liability for damages arising from the use or inability to use the blog or forum.
- Although a company is not responsible for statements made by third parties on a blog or forum and is not obligated to respond to or correct misstatements made by third parties on a blog or forum, a company may be liable if it adopts, endorses or approves the statement, as discussed above.

III. Disclosure Controls and Procedures.

The Release provides guidance as to how information contained in a company's website may implicate the requirement under the Exchange Act that a company's principal executive officer and principal financial officer certify as to the effectiveness of the company's disclosure controls and procedures. As discussed in the Release, a company may satisfy certain disclosure obligations under the Exchange Act by providing such information on its website as an alternative to providing such information in an Exchange Act report.[4] Accordingly, a company that elects to provide such alternative disclosure on its website in lieu of in an Exchange Act report must make sure that its disclosure controls and procedures encompass the disclosure of such information on its website.

IV. Website Presentation.

Recognizing that "online information is increasingly interactive, not static," the Release states that information that appears on a company website need *not* satisfy a printer-friendly standard unless other rules specifically require it.[5] The Release provides that "[t]he inability to print a particular browser screen or presentation, particularly one designed for interactive viewing and not for reading outside the electronic context, is not inherently detrimental to its readability."

---

[4] Examples of disclosure that a company is permitted to make on its website as an alternative to filing such disclosure on EDGAR include (1) non-GAAP financial measures and Regulation G-required information; (2) asset-backed issuers' disclosure of static pool data; (3) the posting of its audit, nominating and compensation committee charters; (4) material amendments to a company's code of ethics or a material waiver of a provision of its code of ethics; and (5) information regarding board member attendance at an annual shareholders meeting.

[5] For example, the proxy rules require that proxy materials made available on a company website be presented in a format that is convenient for both reading online and printing on paper.

* * * * * * * * * * * * * * *

If you have any questions concerning the foregoing or would like additional information, please contact Cristopher Greer (212-728-8214, cgreer@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com), Theodore Neos (212-728-8984, tneos@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com and is frequently updated to provide important information to our readers.

August 8, 2008