

DAVIS POLK & WARDWELL

Date: August 8, 2008
To: Interested Persons
Re: SEC Issues Corporate Website Guidance

The US Securities and Exchange Commission has issued an interpretive release containing guidance on the use of corporate websites, which became effective yesterday, August 7th.¹ The release indicates that, under certain circumstances, information posted on a corporate website can fulfill the public disclosure aspect of Regulation FD. The release also provides more clarity surrounding the use of corporate websites to provide investors with information, particularly with respect to historical data, third-party hyperlinks, summaries and interactive forums such as blogs. While we do not expect the release will lead to significant changes in practice for most companies, this presents a good opportunity for companies to revisit their website-related practices.

Regulation FD Guidance

Regulation FD indicates that when a US public company discloses any material *nonpublic* information about the company or its securities to analysts or investors, it must also *publicly disclose* the information simultaneously. The Regulation FD release issued in 2000 indicated that information, to be considered public, must be either furnished or filed on a Form 8-K or disseminated through a method that is “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” At that time, the SEC declined to recognize information that is posted only on a company’s website as being “public” for this purpose. The new interpretive release changes this position, so that a company can speak to analysts and simply post the information on its website at the same time, if it can demonstrate all of the following:

- Its website is a “recognized channel of distribution.”
- Posting information on the website actually disseminates it in a manner that makes it available to the securities market.
- There has been a “reasonable” waiting period for investors and the market to react to the posted information. It is not entirely clear from the release whether a waiting period is necessary in each case to ensure dissemination, or how long such a period should be.

¹ The release is available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>. The SEC is accepting comments regarding the release through November 5, 2008.

We expect that most companies are satisfied with their current practice of either distributing press releases or filing Form 8-Ks to comply with Regulation FD, and may decide not to take advantage of the SEC's new guidance. Other companies, particularly those who may provide a continuous stream of updated information about key elements of their business and find it burdensome to constantly issue press releases, may welcome the opportunity to simply post the information. The analysis of whether the above factors and Regulation FD's requirements as a whole have been met will depend on the particular facts and there is no "one size fits all" model, but we suggest companies consider the following:

- *Making market participants aware that the company will post important information on its website, including the location of the information.* A company can disclose in its Exchange Act reports and press releases that it may from time to time post important information on its website. Companies should provide the exact website location instead of their home page, or at least the IR page, when possible. Ideally, companies can also indicate the approximate timing of when information will be posted.
- *Demonstrating that the company has established a practice or pattern of posting important information to its website.* Companies can confirm that they currently post important information on their websites, including Exchange Act reports, Form 8-Ks, Section 16 reports and key press releases (including earnings releases), as well as investor presentations provided in conjunction with such releases or at investor conferences.
- *Ensuring that important information is readily available to investors and the media.* The SEC seems to favor, and we would advise, that companies provide investors with updated alerts that new information has been posted, which can be accomplished either through the ability to subscribe to e-mail alerts or RSS feeds.
- *Using other methods to alert investors to the availability of information.* Whether companies decide to also issue a press release or file a Form 8-K in certain cases depends on both the nature of the information and if they can be sufficiently certain, through examining their e-mail alert subscription list for example, that the key security analysts that cover the company and major media outlets will have immediate access to the posted information.

Guidance on Other Corporate Website Information

The release serves as a reminder that the antifraud provisions of the federal securities laws, such as those in Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, apply to company statements, whether oral, on paper or on a website. The SEC provides updated guidance in terms of several key uses of corporate websites generally to serve as a source of company information, and while much of the guidance is

reminiscent of the Staff's past guidance or existing views of "best practices," the issuance of this release provides a useful opportunity for companies to review their practices.

Historical Information

The release helpfully confirms that materials or statements previously posted on a company's website are not deemed to be reissued or republished for purposes of the antifraud provisions of the federal securities laws each time that they are accessed, nor does posting information cause an automatic duty to update. However, these older-dated materials should be:

- identified separately as "historical"; and
- located in a separate section of the company's website containing previously posted materials or statements.

Some companies comply by separating their materials into "current" vs. "archived" sections on the same web page. To best indicate that the materials speak as of a certain date or to an earlier period, all materials should be clearly dated when posted. Many companies only provide information that is no more than a year old, and move materials into the "archive" section after 30 days or a new quarter.

Hyperlinks

Some company websites provide hyperlinks to information prepared by a third-party or to a third party site. The SEC reiterates its view that hyper-linking to third-party information continues to present a risk that the company will be held liable for third party information if it is viewed as explicitly or implicitly endorsing, approving or adopting such information. In order to minimize this risk, companies should consider:

- providing disclaimers that explain the context and reason for the hyperlink and make it clear that the company does not endorse or recommend the third-party content;
- using exit screens or pop-up notices to indicate that a user is leaving the company's site;
- providing all of the available links to a comprehensive list of similar materials, such as a full list of the names and contact information of the securities analysts that cover the company, rather than selecting hyperlinks favoring "positive" materials; and
- arranging the hyperlinks so that some hyperlinks are not intentionally given more prominence than others, such as chronologically or alphabetically.

While the release reiterates the SEC's view that having only a disclaimer is not sufficient to insulate a company from responsibility, we believe that a well-written disclaimer may be useful when used in conjunction with other efforts by the company to distance itself from third-party content.

Summary Information

The release provides the following guidance on how summary or overview information, particularly financial information, should be presented. By its nature, summary information do not include the more detailed information from which they are derived or on which they are based. The SEC indicates the use of the following will help place the summary in appropriate context:

- using titles and explanatory language that conveys the summary nature of the item;
- placing the summary information next to hyperlinks that provide more detailed information; and
- using a “layered” or tiered format that allows the investor to drill down to more detail.

Interactive Website Features

The release provides that companies are subject to liability under the antifraud provisions of the federal securities laws for statements made by the company, or those acting on the company's behalf, in blogs or forums. Companies cannot require investors to waive their protections under federal securities laws as a condition to entering or participating in the blog or forum.

Companies that allow third parties to post to company blogs or forums will be encouraged that the SEC has stated that they are not responsible for the statements that third parties post on a company-sponsored website. Companies are also not obligated to respond to or correct misstatements made by third parties. A company could be held responsible for statements that it appears to “adopt, endorse or approve.” Accordingly, the company may want to enact a “hands-off policy” with respect to third-party comments, or at a minimum adopt a policy that treats all third-party comments uniformly and does not discriminate between favorable and unfavorable comments. The company should also consider posting a disclaimer to make its role clear.

If you have questions regarding this memorandum, please call your regular Davis Polk contact.