

CAPITAL MARKETS BULLETIN

August 13, 2008

SEC PROVIDES GUIDANCE ON PUBLIC REPORTING COMPANIES' USE OF THEIR WEBSITES, AND THE FEDERAL SECURITIES LAWS

On August 1, 2008, the U.S. Securities and Exchange Commission (the "SEC") issued an interpretive release (the "Release") that provides public reporting companies with guidance on the use of their websites under the federal securities laws and related SEC regulations.¹ The Release carries an effective date of August 7, 2008, and marks the first time in eight years that the SEC has issued guidance on corporate electronic communications. With regard to such communications, the SEC has said that it adheres to the fundamental principle that "where access is freely available to all, use of electronic media is at least equal to other methods of delivering information or making it available to investors and the market."²

I. Company Postings and Regulation FD

The SEC noted that if information on a company's website is "public" information for purposes of Regulation FD, then selective disclosure of that information would not violate that regulation. In the Release, the SEC introduced a "principles based test" for a company to determine if information posted on its website would be considered "public" under Regulation FD. The SEC noted that a key element for a company to consider when making a determination as to whether information posted on its website is public is whether the posting of information is disseminated so as to make it available to the securities marketplace in general. The SEC included a number of factors that should be used in making

the determination, such as whether the company discloses in its periodic reports (and in its press releases) its website address and routinely posts and updates important information on its website, and whether the media anticipate information would be posted on the company's website and are in the practice of further distributing this information.

II. General Antifraud Provisions of the Federal Securities Laws

In the Release, the SEC made note that the antifraud provisions of the federal securities laws and related SEC rules (i.e., Rule 10b-5) apply to company statements made on the internet as they would apply to any other statement made by or attributable to a company. The antifraud provisions generally prohibit making material misstatements and omissions of fact in connection with the purchase or sale of securities.

Historical Information

The Release expresses the SEC's view that companies that maintain previously posted information on their websites are not reissuing or republishing such materials or information for purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. For clarity, the SEC now recommends that such materials or statements should be separately labeled as historical or previously posted materials or statements and dated and located in a separate section of the company's website with other previously posted materials.

Hyperlinks to Third-Party Information

The Release also expresses the SEC's view that a company may be held liable for third-party information that is hyperlinked to its website if that information is attributable to the company. As an

¹ SEC Release No. 34-58288 (August 6, 2008).

² SEC Release No. 33-7856 (April 28, 2000).

example, the SEC noted that if a company was involved in the preparation of the information (the “entanglement” theory) or explicitly or implicitly endorsed or approved the information (the “adoption” theory) then the information that is accessible via the hyperlink would be considered attributable to the company and, therefore, the company may be held liable for that content. This is particularly an issue where a company posts a hyperlink to a report issued by a securities analyst that contains a positive recommendation about the company based on information provided to the analyst by the company. The SEC suggested methods for companies to avoid implicitly endorsing or approving hyperlinked information, such as labeling the information as a “recent news article,” offering hyperlinks to materials that present a variety of viewpoints, including those that give negative views of the company and using intermediate screens to notify the user that he or she is leaving the company-endorsed website.

With regard to the so-called “adoption theory,” the SEC suggested that a company ask itself whether the context of the hyperlink and the hyperlinked information, taken together, create a reasonable inference that the company has approved or endorsed the hyperlinked information. If the answer is yes, then the company may be in violation of antifraud provisions of the federal securities laws.

Summary Information

The use of summaries or overviews on a company’s website, particularly of financial information, also may have implications under the antifraud provisions of the federal securities laws. In the Release, the SEC encouraged companies to contemplate methods to alert readers where the more detailed disclosure from which the summary information is derived or the overview is based can be found, and to clearly identify summaries or overviews as such.

Interactive Website Features

In the Release, the SEC offered guidance on interacting with investors through the internet by way of company sponsored blogs and forums. The SEC now recommends that companies take measures to examine content on electronic forums, noting the applicability of the antifraud provisions of the federal securities laws to all communications made by or on behalf of a company. With respect to statements made by company officers or representatives in these forums, the SEC expressed that the officer’s purporting to speak in an individual capacity will not

circumvent a company’s responsibility for his or her statements. Notably, the SEC stated that companies are prohibited from requiring investors to waive protections under the federal securities laws as a condition to using company-sponsored interactive technologies.

III. Disclosure Controls and Procedures

The SEC also stated that its rules concerning a company’s disclosure controls and procedures under the Sarbanes-Oxley Act of 2002, by and large, do not affect information posted on a company’s website except when the information is posted on the website in lieu making a filing with the SEC under the Securities Exchange Act of 1934. Consequently, principal executive officer and principal financial officer certifications typically will not include such officers’ conclusions regarding the effectiveness of any controls that a company may have in place regarding its website disclosures.

IV. Format of Information and Readability

Finally, in the Release, the SEC explained that information posted on a company’s website does not need to satisfy a “printer-friendly” standard unless other rules explicitly require it, such as in the case of electronically posted proxy materials.

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