

1 December 2008

Florence E. Harmon  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: Commission Guidance on the Use of Company Web Sites; File No. S7-23-08**

Dear Ms. Harmon:

The CFA Institute Centre for Financial Market Integrity (“CFA Institute Centre”)<sup>1</sup> appreciates the opportunity to comment on this interpretative release that provides additional guidance on the use of company web sites for purposes of meeting requirements primarily under the Securities Exchange Act of 1934 and especially with respect to provisions of Regulation Fair Disclosure (“Regulation FD”). In light of the increased use of company web sites to provide information to the investing public, we applaud this as a needed and timely discussion.

**Executive Summary**

*Posting on Company Web Site for Purposes of Regulation FD.* A company’s web site is an increasingly important tool for disclosing information to the public. However, we do not support an approach that weighs the adequacy of disclosure for purposes of Regulation FD on a range of subjective tests. Given the importance of providing all investors with information at the same time, we urge the development of guidance that provides more certainty.

In particular, we believe that posting information on a company’s web site alone is not sufficient to qualify as “public” information for purposes of Regulation FD. To ensure that investors have access to important information in an even manner, we strongly encourage requiring companies to use an additional method, such as a press release, to simultaneously direct the public to the company web site.

*Remedy to Selective Disclosure under Regulation FD.* We do not support the approach in this proposed guidance that would allow posting information on a company web site alone to serve as an alternative means of disclosure for purposes of remedying selective disclosure. This in

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<sup>1</sup> The CFA Institute Centre for Financial Market Integrity is a part of CFA Institute. With headquarters in Charlottesville, Virginia, USA, and regional offices in London, Hong Kong, and New York, CFA Institute is a global, not-for-profit professional association of more than 99,700 financial analysts, portfolio managers, and other investment professionals in 133 countries and territories, of whom 86,300 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 136 member societies in 57 countries and territories.

essence would allow a company to avoid making an 8-K filing by using this alternative disclosure approach, thereby undermining the basic purposes of required 8-K filings.

*Responsibility for Statements under Anti-fraud Provisions.* Companies should be held to the same standards for statements made electronically as those for filings made with regulators or positions issued in paper form.

*Use of Web Sites to Disclose Financial Information.* Additional guidance is needed in this area to ensure uniformity in providing the investing public with information. In particular, financial information on a company's web site should indicate whether it has been audited. We also recommend that companies be encouraged to announce ahead of time when earnings will be released, and to provide supplementary materials that are referenced in the earnings release on the company's web site.

We strongly recommend that companies be required to post earnings releases on their web sites simultaneously with dissemination of the release through any other means.

Finally, we encourage consideration of requiring reconciliation of non-GAAP measures to be retained in EDGAR, as well as published on the company's web site, and global coordination of a shift to the use of XBRL in financial reporting.

## **Discussion**

As a general principle, CFA Institute Centre strongly supports the use of electronic means to provide the investing public with timely and relevant information. Given the increasingly global nature of the financial marketplace, the use of the Internet to supply information is an efficient way to issue information to a broad audience at the same time and at the earliest point in time when it is available.

The CFA Institute Centre has also been a strong proponent of the SEC's XBRL initiative as an important step to make financial report information more readily available to and accessible by investors in an electronic format. Through its XBRL Working Group, it has developed guiding principles aimed at benefitting investors as regulators move to adopt XBRL reporting frameworks.<sup>2</sup>

We recognize the utility in electronic transmission of information and the empowering of investors by providing them with ready access to such information. And we agree that providing data in an interactive format has the potential to increase the speed and efficiency of a range of disclosures. However, we remain mindful of the need to maintain adequate investor protections.

To this end, we encourage SEC staff to augment this guidance to address the timing of disclosures in general for purposes of increasing investor access to important information. Information that is released just prior to the market's opening and even during the trading day disadvantages investors whose access to electronic information may be limited. Once the market has reacted to the information released hours earlier, the investor has lost his equal footing with others in terms of making investment decisions. We therefore urge the SEC to strongly

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<sup>2</sup> See August 1, 2008 comment letter from Kurt N. Schacht, and Thomas H. Larsen, CFA to David Blaszkowsky of the SEC on Interactive Data to Improve Financial Reporting (File No. S7-11-08).

encourage companies to release information that is important after closing of the market, in order to allow for fuller and fairer dissemination to all investors.

We share a concern that certain mechanisms must be in place to ensure that all investors have equal access to pertinent information so as not to unduly compromise the integrity of the securities and financial disclosure system. Not only must information be transparent, but investors must know how and where to access it. To that end, we particularly welcome this guidance as it applies to Regulation FD.

## **A. Regulation FD**

### ***When Posted Information is “Public”***

Under the proposed guidance, the analysis of whether information is “public” turns on three primary factors:

- The degree to which a company’s website is a recognized channel of distribution of information;
- Whether a company’s posting of information on its website “disseminates” the information in a way that makes it available to the securities marketplace in general; and
- Whether there has been a “reasonable waiting period” for investors and the market to react to that information.

In addition, the release notes that the manner in which the information is posted on a company’s website, as well as the timely and ready accessibility of that information to the market and investors will weigh heavily in determining whether that information has been widely disseminated with respect to meeting the “public” test. Most of this determination is based on a facts and circumstances test, in accordance with a number of factors provided in the release to guide companies.

We do not support this “facts and circumstances” approach to determining when information posted on a company’s web site is deemed public for purposes of Regulation FD. How these factors will be weighed in light of Regulation FD requirements not only creates uncertainty on part of the company, but risks investors not receiving certain information that they are entitled to under the Regulation. An *ex post* analysis of whether the company gave appropriate weight to the factors does little to restore lost opportunities or ill-informed decision making by the investor.

For example, while certain information may technically be housed on a company’s web site, the degree to which it is apparent and easily accessible by the public will bear on the degree of its “public” nature. The extent to which the media highlights the company and relies upon the company’s website also will inform the degree to which a company may need to increase its promotion of its website to investors and the market.

This weighting of a number of factors by companies in order to determine their Regulation FD compliance relies only on *ex post* subjective parameters to determine the adequacy of investor information.

### ***When Public Disclosure Must be Made***

Under Regulation FD, if a non-public disclosure has been made, the company must simultaneously (in the case of intentional disclosure) or promptly (in the case of non-intentional disclosure) undertake steps to publish to the public the information that was selectively disclosed. This can be accomplished through the filing of Form 8-K or through alternative means designed to provide broad, public distribution of the information.

Through this guidance, staff advises that posting of such information on the company's website may satisfy the "alternative disclosure" requirement, provided that certain conditions are met. Once again, companies would need to assess their particular circumstances in determining whether this means of disclosure would satisfy the letter and spirit of Regulation FD requirements. In particular, the company must consider the extent to which postings on their web sites alone will actually provide "broad, non-exclusionary distribution of the information to the public."

We do not support this approach. Web site posting alone cannot substitute for an 8-K filing. Otherwise, under this approach, companies could readily selectively disclose information, only to cure the problem by posting the information on its web site, thereby altogether evading the "public filing" of the information. This result clearly circumvents the underlying objectives of Regulation FD. Instead, we support a combination of methods, including issuing a press release to alert the public, should the company forego use of a Form 8-K and instead rely on use of its web site.

### **B. Antifraud Provisions under the Exchange Act**

We strongly support the direction of this guidance that a company must carefully weigh, and is responsible for, the statements it makes in terms of the antifraud provisions of the Securities Exchange Act. We also believe that given the widespread acceptance of electronic communications, statements published by companies over the Internet must be held to the same standards as those applicable to those filed with regulators or printed in paper form. This guidance emphasizes the facts and circumstances test that is applied to determine whether there has been a violation of Rule 10b-5's materiality standard.

#### ***(a) Previously posted information***

We support the approach taken with respect to whether historical information maintained on a company's website will be considered republished for purposes of the antifraud provisions. As long as the statements were accurate when posted, they should not be considered republished simply because they remain accessible to the public; further action by the company to restate or issue the statements could produce a different result.

#### ***(b) Hyperlinks to third-party information***

We also agree with the guidance provided with respect to when hyperlinks to third-party information can raise questions of liability under Rule 10b-5 under the "adoption theory". The context within which the hyperlink is being supplied is important for evaluating the degree of "endorsement" by the company of the source and content of the linked information. Without a

reasonable context, the investor lacks the ability to accurately assign the appropriate weight to the information.

Given that the company has provided the hyperlink on its website, we agree that the onus is on the company to distance itself from adopting the substance of the information that is being provided. We also support the position that a company's disclaimer alone should not insulate it from liability if it provides hyperlinks to information that it knows or was reckless in not knowing was materially false or misleading.

*(c ) Presentation of summary information*

While the use of electronic venues, in general, and company web sites, in particular, provides investors and the market with valuable and timely access to information, it is important that any limitations of this information be made clear. Thus, we support the guidance provided with respect to the treatment of summary information on a company's website.

While providing access to certain summary information may be helpful, a company must ensure that the investing public does not confuse its summary nature with a full rendering of information or otherwise mistakenly rely on the context in which the information is provided. The techniques suggested in the guidance—including the use of appropriate titles, additional explanatory language, hyperlinks to more detailed information, and a layered or tiered format—all seek to avoid investor confusion.

*(d) Interactive web sites*

We appreciate the staff's efforts to promote the use of company web sites to communicate with stakeholders on an interactive basis. We believe that this not only reflects the current state of technology but also opens up important channels of communication between the company and investing public.<sup>3</sup> In particular, we support the use of electronic shareholder forums as a means of extending the net of communications among stakeholders and to provide the company with valuable feedback.

We strongly agree that the antifraud provisions should apply to statements made by the company on blogs and through electronic forums. We also strongly support staff's position that companies cannot require investors to waive their federal securities law protections in order to participate in a blog or forum. Use of such a precondition would only discourage investors from engaging in these forms of communication and undermine the effort to foster an open exchange of ideas.

## **C. Use of Web Sites to Disclose Financial Information**

In addition to responding to specific areas addressed in this guidance statement, we want to raise several issues relevant to a company's use of its web site to disclose certain financial information. We believe that additional guidance to companies in this area would help create a more uniform approach to issuing information and thus provide the investing public with information on a more consistent basis.

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<sup>3</sup> See, generally, October 2, 2007 letter from Kurt N. Schacht, CFA and Linda Rittenhouse to the SEC on Shareholder Proposals (File No. S7-16-07).

As a general premise, we believe that any financial information appearing on a company's web site should indicate whether or not it has been audited. Without this clarity, some investors will not know the weight that should be afforded that information.

As noted above, some companies allow investors to receive alerts directly prior to the posting of information. We urge the SEC to encourage companies to implement this practice with respect to the posting of earnings releases. Similarly, we would welcome additional statements by the SEC that encourage companies to announce reasonably ahead of time when earnings will be released. While some companies already engage in this practice, others continue to release earnings statements without any prior notice, which may disadvantage those without the dedicated means to consistently track this information. We also urge the SEC to require that supplementary materials that are referenced in the earnings release be provided on the company's web site.

Most importantly, posting of earnings releases should be simultaneous with any dissemination of the release through other means. Ideally, the posting of earnings releases should be coincident with the posting of other critical information, as well as the filing of financial statements and notes. In keeping with the tenor of the SEC's proposed guidance, a company's web site will only become a "public" information vehicle when it provides information at the same time that it is accessible elsewhere. However, many companies currently post their earnings on their web site only after the information has been disseminated through Business Wire or similar services. Such an approach only undermines the use of web sites as a primary source, and should be discouraged.

We also urge the SEC to consider requiring the reconciliation of non-GAAP measures to be retained in EDGAR as well as to be published on the company's web site. We believe it is important for investors and the marketplace to be able to understand the true nature of adjustments to GAAP in order to avoid confusion.

Finally, we raise for consideration the future impact of XBRL on the nature of financial reporting. While it has been determined that approximately 16,000 tags will be required for U.S. use of XBRL in order to be useful for investors, only 4,000 tags would be required under IFRS. We urge better global coordination of this effort as part of the major shift of using the Internet for financial reporting.

## **Conclusion**

The CFA Institute Centre appreciates the opportunity to comment on this release providing guidance on the use of company Web sites. While we appreciate the intent to promote use of company web sites to disclose information and to provide companies with flexibility under Regulation FD, we do not support the general thrust of this guidance that allows a predominately subjective analysis by companies in determining their Regulation FD obligations.

Instead, we recommend that if use of a "bright-line" test is not feasible at this time, the SEC require a company to use additional means—such as a press release—to publish information that has been posted on its web site. While an additional step for companies, this will serve to safeguard the important objective of ensuring dissemination of material information to all investors at the same time. Should you have any questions about our positions, please do not

hesitate to contact Kurt N. Schacht, CFA at [kurt.schacht@cfainstitute.org](mailto:kurt.schacht@cfainstitute.org) or 212.756.7728; or Linda Rittenhouse at [linda.rittenhouse@cfainstitute.org](mailto:linda.rittenhouse@cfainstitute.org) or 434.951.5333.

Sincerely,

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