PRYOR CASHMAN LLP

LEGAL UPDATE

October 28, 2008 *By: Edward C. Normandin and Robert C. Lamonica*

SEC ISSUES IMPORTANT GUIDANCE ON THE USE OF COMPANY WEB SITES

Do Your Company Web Site Practices Comply?

The Securities and Exchange Commission ("SEC") recently provided important new guidance on the use of company web sites regarding compliance with certain provisions under the Securities Exchange Act of 1934 and the applicability of anti-fraud provisions of federal securities laws to web site content. The SEC focused its guidance on four primary areas: (i) whether and when information posted on a company web site is "public" for purposes of Regulation FD; (ii) company liability for information on a company web site and the third-party web sites to which it hyperlinks; (iii) the types of controls and procedures advisable with respect to such information and (iv) the format of information presented on a company web site. Public companies, as well as private companies that are considering going public, would be well-served by reviewing their web site practices with legal counsel for compliance with the new SEC guidance.

WHETHER AND WHEN INFORMATION IS "PUBLIC" FOR PURPOSES OF THE APPLICABILITY OF REGULATION FD

The SEC determined that, in light of the pervasive use of the Internet by companies and investors, further guidance was needed as to when web site information would be considered "public" for the purposes of Regulation FD, the regulation that restricts the selective disclosure of material information. A company should not assume that information posted on its web site is an acceptable dissemination such that subsequent disclosure by the company would not raise Regulation FD issues. Instead, a company must determine whether its web site information is actually "public" by considering whether (i) the company web site is a recognized channel of distribution, (ii) posting of information on the company web site disseminates the information in a manner making it available to the securities marketplace in general and (iii) there has been a reasonable waiting period for investors and the market to react to the posted information. Factors relevant to determining whether a company web site is a recognized distribution channel include, among others, whether the site is (i) a publicized source of company information, (ii) regularly a source for important information, (iii) designed to lead investors to information that is in a readily accessible format and (iv) is updated frequently. Similarly, for determining whether investors and the market have been afforded a reasonable waiting period to react to information, the SEC advised companies to consider (i) their size and market following, (ii) the extent to which investor oriented information on the site is regularly accessed, (iii) the steps it has taken to make investors and the market aware that it uses its web site as a key source of important information, (iv) whether it has taken steps to actively disseminate the information and (v) the nature and complexity of the information.

LIABILITY FOR WEB SITE STATEMENTS

The recent SEC Release reminds companies that the anti-fraud provisions of the federal securities laws apply to company statements made on the Internet, including postings and hyperlinks, in the same way they would apply to any other statement made by, or attributable to, a company. Companies are further reminded that they are responsible for the accuracy of statements that can reasonably be expected to reach investors or the securities markets. In the new guidance, the SEC indicates that companies maintaining previously posted materials or statements on their web sites will not be deemed to be 'reissuing' or 'republishing' such materials or information for purposes of the anti-fraud provisions of the federal securities laws just because the materials or statements remain accessible to the

public. However, it must be reasonably apparent that the posted materials or statements speak as of a certain date or earlier period.

Regarding hyperlinks to third-party web sites and statements, the SEC advises companies to indicate the reason for the hyperlink in order to avoid potential confusion or misunderstanding about what the company's view or opinion is with respect to the hyperlinked information (and whether the company has approved or endorsed the statement). For example, is the hyperlinked information intended to support a company statement or assertion, or is it merely information that the company believes may be of interest to the reader? In addition, "exit notices" or "intermediate screens" may be helpful in avoiding confusion but will not absolve companies from potential anti-fraud liability. Likewise, the use of disclaimers are not sufficient to shield a company from anti-fraud liability.

In presenting summary or overview information, the SEC recommends that companies consider using appropriate explanatory language to identify summary or overview information as well as pairing such explanation with site design techniques that may highlight the nature of the summary or overview including the use of appropriate titles, placement of hyperlinks, and embedding links that enable a reader to drill down to more detail by clicking on them.

As blogs and message boards proliferate among company web sites, the SEC highlighted that companies are responsible for statements made by the companies, or on their behalf, on their web sites or on third-party web sites, and that the anti-fraud provisions of the federal securities laws reach those statements. While noting that blogs or forums can be informal and conversational in nature, the SEC made it clear that statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other company statements when it comes to the anti-fraud provisions of the federal securities laws.

DISCLOSURE CONTROLS AND PROCEDURES

The SEC previously adopted rules permitting companies to satisfy certain Exchange Act disclosure obligations by posting that information on their web sites as an alternative to providing that information in an Exchange Act report. The recent SEC guidance makes clear that, if a company elects to satisfy such disclosure obligations by posting the information on its web site, its disclosure controls and procedures apply to such information because it is information required to be disclosed by the company in Exchange Act reports. Furthermore, any failure to make those disclosures on the company's web site would result in an Exchange Act report being incomplete. Hence, companies must ensure that their disclosure controls and procedures are designed to address the disclosure of such information on their web sites and that the conclusions of the principal executive and financial officers take account of web site disclosures of Exchange Act information.

FORMAT OF INFORMATION AND READABILITY

The SEC, recognizing that the nature of online information is increasingly interactive and not static, clarified that it is not necessary that information appearing on company web sites be printer-friendly unless SEC rules explicitly require it. For example, the notice and access model under the amended proxy rules requires that electronically posted proxy materials be presented in a format "convenient for both reading online and printing on paper."

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The foregoing is not a complete summary of the SEC's Release discussing its guidance on the use of company web sites. The full text of the Release can be found at:
http://www.sec.gov/rules/interp/2008/34-58288.pdf
If you have any questions regarding the SEC's web site guidance, please contact an attorney in Pryor Cashman's Securities and Corporate Finance Group.

About the Authors

Edward C. Normandin
Partner

Direct Tel: 212-326- 0892
Direct Fax: 212 -798-6383
enormandin@pryorcashman.com

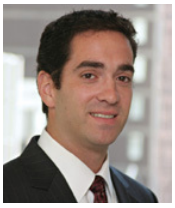
Edward Normandin devotes his practice to counseling clients on general corporate matters, including mergers and acquisitions, public and private debt and equity financing transactions, joint ventures, securities law compliance, venture capital financing, corporate formation and governance. He has handled complex domestic and international transactions for Pryor Cashman's diverse client base.

Ed has represented clients at every stage of development, with such clients ranging from start-up ventures to publicly traded corporations engaged in a wide range of industries, including pharmaceutical, advertising and media, entertainment, energy, manufacturing software and health services, among many others.

Prior to joining Pryor Cashman in 2000, Ed practiced law with a New Jersey firm where, in addition to his current areas of focus, he represented corporate borrowers and financial institutions in bank lending transactions and counseled clients in technology-related transactions.

Before he became an attorney, Ed served as an active-duty officer in the United States Army and held finance-related positions at several large corporations.

Ed is a 1998 graduate of the State University of New York at Buffalo Law School, where he also earned a Certificate of Concentration in Financing Transactions. Ed has a B.S. in Economics from Siena College and an M.B.A. from Bryant University, where he had a concentration in finance.



Robert C.Lamonica
Associate

Direct Tel: 212-326-0810
Direct Fax: 212-515-6387
rlamonica@pryorcashman.com

Robert Lamonica is an associate in the Corporate Group and practices in general corporate matters including mergers, acquisitions, private equity investments, securities, corporate finance, and corporate formation and governance.

Prior to joining Pryor Cashman, Robert worked as an analyst with the Emory University Endowment where he was responsible for reviewing and tracking investments in private equity partnerships, hedge funds, and real estate investment trusts.

Robert is a 2007 graduate of Emory University School of Law, where he was a member of the Moot Court Society, and the Goizueta Business School, where he earned a Master of Business Administration in finance in addition to his law degree.