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SEC Issues Temporary Order Suspending Timing, Volume Restrictions of Rule 10b-18

In response to the sudden and excessive fluctuations of securities prices and disruption in the functioning of securities markets, the Securities and Exchange Commission ("SEC") issued an emergency order temporarily suspending the timing and volume restrictions of Rule 10b-18 of the Exchange Act. Rule 10b-18 provides a safe harbor from liability for manipulation under Sections 9(a)(2) and 10b-5 of the Exchange Act for repurchases by an issuer (and the issuer's affiliated purchasers) that are made in accordance with the manner, timing, price, and volume conditions of Rule 10b-18. The order, which was made effective on September 19, 2008 and expires October 2, 2008 (unless further extended by the SEC):

- suspends the timing conditions of Rule 10b-18(b)(2)(i)-(iii) so that issuer repurchases may be made at any time throughout the day; and

- increases the volume condition of Rule 10b-18(b)(4) from 25% of the average daily trading volume of the security to 100% of the average daily trading volume. Average daily trading volume is calculated using the four calendar weeks preceding the week in which the 10b-18 purchase occurs.

The emergency order only pertains to the timing and volume limitations of Rule 10b-18, and does not apply to the manner and price of purchase conditions contained in paragraphs (b)(1) and (b)(3) of Rule 10b-18. As a result, issuers are still obligated to use only one brokerage firm on any given day to effect any solicited repurchases, and the price of such repurchases may not surpass the last bid or transaction price. Additionally, the order does not alleviate potential insider trading concerns.

– *Allen E. Frederic, III*

SEC Issues Interpretative Guidance on the Use of Company Web Sites

On August 1, 2008, the Securities and Exchange Commission issued interpretative guidance (the "Release") on how companies can use their web sites to provide information to investors in compliance with certain relevant provisions of the Securities Exchange Act of 1934 (the "Exchange Act") and the antifraud provisions under the federal securities laws. (Click here to link to the SEC's interpretative release). Through this guidance, the SEC hopes to encourage the continued development of company web sites as a significant vehicle for the distribution to investors of important company information. While it is not expected that the SEC's guidance will lead to significant changes

in practice for most companies, the Release presents a good opportunity for public companies to revisit their web site-related practices.

Web Site Disclosure in Compliance with Regulation FD

Regulation FD provides that when a public company, or person acting on its behalf, selectively discloses material non-public information to securities market professionals or shareholders, the company must make public disclosure of the information simultaneously, or, if the disclosure was accidental, promptly. The "public disclosure" requirement may be satisfied through the filing or furnishing of a Form 8-K with the SEC or through another method of disclosure (or combination of methods) that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In adopting Regulation FD in 2000, the SEC declined to recognize web site disclosure, by itself, as an acceptable method of public disclosure. To satisfy this "public disclosure" requirement of Regulation FD, companies typically publish material information through a press release, which may be simultaneously posted on its web site and filed as an exhibit to a Form 8-K under Item 8.01.

The new SEC guidance makes it clear, however, that under certain circumstances, web site posting, in and of itself, may now satisfy the "public disclosure" requirement of Regulation FD. Specifically, posting information on a company's web site will satisfy the public disclosure requirement if (1) a company is able to establish its web site as a "recognized channel of distribution" and (2) the posting of the information effectively disseminates the information in a manner making it available to the securities market in general. If the public disclosure requirement is met, later private disclosure of the same information will not implicate Regulation FD if there is a reasonable waiting period for investors and the market to react to the posted information before the information is communicated privately. If, however, posting of the information on a company's web site is not considered public disclosure, a company would need to comply with Regulation FD upon privately disclosing that information.

SEC Recommended Web Site Disclosure Practices. In the Release, the SEC suggested certain non-exclusive actions that a company should consider taking to establish its web site as a recognized channel of distribution and ensure that company information on such site is "posted and accessible" and therefore "disseminated," including the following:

- *Inform the market of the company's web site posting practices*. To inform the market of a company's web site posting practices, the company should disclose to the market in all of its periodic reports that it will routinely post important information on its web site and provide its investor center web address, if a more exact location is not available for certain information.

- *Establish a pattern of regular postings.* A company should implement a system to ensure the immediate posting of all important information on its web site, if it does not currently have one. All material information about the company should be posted on the web site as soon as practicable to establish a pattern of

regular postings.

- *Ensure clear and prominent presentation of information.* A company should ensure that the web site is designed to lead investors clearly and efficiently to the important information and that important information is presented in a format readily accessible to the general public.

- *Take steps to increase market/media following of the web site.* A company should take steps to make certain that disclosures on its web site are routinely picked up by and reported in the market and readily available media by actively informing the market and the media that important information has been posted or will regularly be posted on its web site. The SEC noted that while companies with a large market capitalization and market following may need to make little or no effort to attract a market/media following, companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's web site and that they should look at the company web site for current information about the company.

- *Make web site information accessible.* To ensure that important information is readily available to investors and the media, the SEC recommends that companies provide investors with updated alerts that new information has been posted, which can be accomplished through the ability to subscribe to e-mail alerts or RSS feeds.

Reasonable Waiting Period. What constitutes a reasonable waiting period for purposes of later private disclosure of posted information depends on the circumstances of the dissemination, which may include (1) the size and market following of the company; (2) the extent to which investor-oriented information on the company web site is regularly accessed; (3) the steps the company has taken to make investors and the market aware that it uses its company web site as a key source of important information about the company, including the location of the posted information; (4) whether the company has taken steps to actively disseminate the information or the availability of the information posted on the web site, including using other channels of distribution of information; (5) and the nature and complexity of the information.

Use of Web Site Disclosure to Satisfy Regulation FD Going Forward. Companies may, of course, continue to rely on the filing or furnishing of a Form 8-K, the issuance of a press release or a publicly accessible analyst conference call or webcast as a means to satisfy their disclosure requirements under Regulation FD. Because the new facts and circumstances analysis set forth in the Release is a relatively subjective test that may create uncertainty for companies seeking to use web site disclosure as a means to satisfy the disclosure requirements of Regulation FD, companies may want to initially implement the SEC's suggested web site disclosure practices side-by-side with their current methods of disclosure (e.g., issuing a press release and filing a Form 8-K).

This approach is also recommended considering that current NYSE rules contemplate a press release as the ordinary method of public disclosure. Additionally, information that a company wants to include in its Exchange Act "record" or incorporate by reference automatically into a Securities Act of 1933 filing will still need to be filed in an Exchange Act report by filing the information in a Form 8-K under Item 8.01.

Compliance with the Antifraud Provisions of the Federal Securities Laws

In the Release, the SEC reiterated that companies are responsible for the accuracy of their public statements, including postings on and hyperlinks from their web sites. The Release reminds companies 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 on a web site. In that light, the SEC provided updated guidance with respect to a number of fundamental issues involving the use of corporate web sites.

Information Previously Posted on a Company's Web Site. The SEC clarified that materials or statements maintained on a company's web site will not be deemed to be "republished" or "reissued" (for purposes of the antifraud provisions of the federal securities laws) simply because an investor can continue to access those materials or view those statements on the web site. At the same time, posting information on a company web site will not cause an automatic duty to update. To make certain that investors understand that the posted materials or statements speak as of a date or period earlier than when the investor may be viewing the posted materials or statements, the SEC suggested that a company take steps to identify information as "historical" when appropriate and to state clearly that the information speaks only as of the initial date of posting. The SEC also recommended storing historical materials and statements in a separate section of the web site.

To indicate that materials maintained on a company's web site speak as of a certain date or to an earlier period, companies should clearly date all materials, including its news and earnings releases, when posted. In addition, companies should consider moving dated materials into an archived section of the company's web site after 30 days or at least after the end of each fiscal quarter, rather than, for example, posting all news releases from the current year under the "latest news" heading.

Hyperlinks to Third-Party Information. A company may be liable under the antifraud provisions for third-party information to which it hyperlinks if the information could be attributable to the company, based upon 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. In the Release, the SEC identified certain factors that would help determine whether a company implicitly adopted the hyperlinked information, including the context of the hyperlink, the presence or absence of precautions to prevent investor confusion about the source of the information, and the presentation of the hyperlinked information on the web site. If a company should decide to hyperlink to third party information, time and attention should be given to reviewing the information being referenced.

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Summary Information. In connection with a summary presentation of lengthy and complex information, the SEC cautioned that a company should avoid creating the misleading impression that the summary is presenting complete information about the company. To avoid confusion, if a company posts summary information on its web site, the company should clearly label the discussion as a "summary" or "overview," include explanatory language that the summary omits more detailed information located elsewhere on the web site, and present the summary information in a hyperlinked or layered format to allow readers to "drill down" into more detailed disclosure by clicking on the hyperlink.

Interactive Web Site Feature. With respect to the use of interactive technologies such as "blogs" and "electronic shareholder forums," the SEC clarified that companies are responsible for statements that are made by or on behalf of the company, including statements by an employee acting as a representative of the company (even if the employee claims to be speaking only in an "individual" capacity). Very few of the largest U.S. companies operate public blogs, likely due to of the risk of exposure to liability stemming from statements made using these technologies and from the ability of investors to use these technologies to spread criticisms or make false statements about the company.

– *Kelly C. Simoneaux* and *Jessica F. Natali*

NYSE Amends Tests for Independent Directors

Effective September 11, 2008, the New York Stock Exchange ("NYSE") amended Section 303A.02(b) of its Listed Company Manual. The amendments change the test for determining who qualifies as an independent director under the NYSE's rules.

Direct Compensation Test

Previously, Section 303A.02(b)(ii) provided that a director may not be deemed independent for purposes of Section 303A if such director had received, or has an immediate family member who had received, during any 12-month period within the last three years, more than $100,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service). The new rule increases the dollar threshold of this test to $120,000 to coincide with the Security and Exchange Commission's threshold for disclosure of related party transactions under Item 404 of Regulation S-K.

Auditor Test

The NYSE also amended the test in Section 303A.02(b)(iii) relating to the company's internal and external auditors. The previous rule stated that a director could not be considered independent if any of the following applied to the director:

- the director or an immediate family member was a current partner of a firm that was the company's internal or external auditor;
- the director was a current employee of such a firm;
- the director had an immediate family member who was a current employee of such a firm and who participated in the firm's audit, assurance, or tax compliance (but not tax planning) practice; or
- the director or an immediate family member had been within the last three years (but was no longer) a partner or employee of such a firm and personally worked on the listed company's audit within that time.

The NYSE expressed its concern that these rules, as they related to directors' family members, were perhaps too stringent in that they applied to family members who may not have had any relationship with the company's audit. The amendments narrow the scope of disqualifying family members and bring the NYSE rules more in line with those of the Nasdaq and American Stock Exchange.

The amended test with respect to directors' immediate family member covers only those immediate family members who:

- are a current partner of the company's internal or external auditor;
- are a current employee of such a firm and who personally work on the listed company's audit; or
- were, within the last three years, a partner or employee of such a firm and personally worked on the listed company's audit within that time.

– Scott D. Chenevert and Justin D. DesHotel

SEC Announces Interactive Successor to EDGAR Database

On August 19, 2008, the Securities and Exchange Commission announced a new electronic data system called IDEA, or "Interactive Data Electronic Applications," which will replace the current 1980s-era EDGAR filing database. Currently, most SEC filings are available only in static, regulatorily prescribed forms through the EDGAR system. Investors seeking information are constrained by the forms provided and must often wade through multiple forms to pull relevant data then to be re-entered in a more utilizable fashion. IDEA will permit investors to apply front-end applications that instantly arrange and analyze massive amounts of data information from thousands of companies and forms to create reports and analysis in any way they choose.

Interactive data relies on computer "tags," like bar codes, which identify specific financial line items. Every number on an income statement or balance sheet is in-

dividually labeled, allowing information about thousands of companies contained on thousands of forms to be searched via the Internet, downloaded into spreadsheets, reorganized in databases, and put to any number of other comparative and analytical uses by investors, analysts, journalists, and financial intermediaries.

The SEC announced that the IDEA logo will begin to appear immediately on the SEC's Web site as the agency transitions to making IDEA the primary source for all SEC filings. Companies' interactive data filings are expected to be available through IDEA beginning in the latter part of the fourth quarter of 2008.

Current EDGAR users will continue to be able to use the system for the indefinite future. However, during the transition to IDEA, investors will be able to take advantage of interactive, IDEA-like features that will be grafted onto the EDGAR system in the short term. This transition will make it possible for investors to employ IDEA's advanced search capabilities, and to use the information from EDGAR within spreadsheets and analytical software, something that has never been possible with EDGAR. The EDGAR database also will continue to be available as an archive of company filings for past years.

Click here to view the SEC press release.

– *Sanford B. Kaynor, Jr.* and *Peter J. Rivas*

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Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities Practice Group:

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