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New Developments in Compliance with Regulation FD through Website Postings

Overview

Google Inc. may be changing the way in which companies announce material events generally and earnings results in particular. On April 15, Google issued an advisory release referring readers to its website for its first quarter earnings release and announcing that all subsequent disclosures regarding financial performance would be made exclusively through its investor relations website. This announcement created a splash in the investor relations community and, as a result, has triggered discussions among lawyers, commentators and various information service providers.

An SEC release issued in August 2008 introduced the possibility that companies could disclose material information via their corporate websites to comply with Regulation FD, but only if such companies determine that their websites are "recognized channels of distribution of information." The SEC left it up to each company to make such determinations at their own risk based on several factors outlined in the guidance. Consequently, few companies have been willing to make the move away from the conventional method of disclosing earnings through press releases made via newswire services to a corporate website-only disclosure model. Google's

bold announcement has been seen as a move toward reliance on website postings for Regulation FD compliance.

Details of Google's New Disclosure Practice

The summary below outlines the highlights of the Google announcement and related issues.

Google's advisory press release stated it would follow these new disclosure practices:

- Instead of issuing an earnings release through a wire service, Google issued a press release alerting the investors that the earnings release will be posted on Google's website.
- Google also issued a press release announcing that the earnings call would be webcast on Google's website.
- Google's press release further stated that "Google intends to make future announcements regarding its financial performance exclusively through its investor relations website."
- Notably, Google furnished its earnings release under Item 2.02 -

Results of Operations and Financial Condition on Form 8-K.

- As a result, the earnings release satisfied Regulation FD (Form 8-K and website posting with prior announcement). The earnings webcast complied with instructions to Form 8-K Item 2.02 because (i) the earnings information was furnished on Form 8-K, (ii) the webcast was preceded by a public announcement and (iii) the webcast and related Regulation G information were posted on the company website simultaneously with the earnings call.

The SEC's August 2008 release states that, in deciding whether a certain means of communication qualifies as a "recognized channel," a company should consider, among other things (i) whether and how the company informs investors (and the market at large) that the company has a website that they should visit for information, (ii) whether the company has made investors and the markets aware that it will post important information on its website and (iii) whether it has a pattern or practice of posting such information on its website.

Implications of Google's New Practice

The implications of Google's new practice are as follows:

- Contrary to common practice, Google is abandoning the dissemination of earnings information

via a newswire service (such as Business Wire), possibly setting a trend for other companies to follow.

- In accordance with recent NYSE rule changes, press releases are no longer the exclusive means of dissemination of material information; instead, any Regulation FD-compliant method (such as a Form 8-K filing) could satisfy NYSE requirements.
- The loudest objections to Google's new practice come from the newswire community, which is concerned about the loss in revenues such a trend could cause.
- It should be noted that Google has yet to actually use its website as a "recognized channel of distribution" because it followed the traditional Regulation FD guidance (e.g., prior announcement via a press release and concurrent 8-K and webcast) in releasing its financial information. In addition, as long as Form 8-K requirements remain the same, all companies, including Google, are required to submit a Form 8-K in connection with quarterly earnings. However, Google has set the stage for future website-only disclosure of Regulation FD information, which, as discussed previously, would be a significant break from standard practices.

- Interestingly, even before the Google announcement, several other companies (such as Expedia) had issued summary press releases that, instead of including dozens of pages of earnings materials, simply stated that the company had posted its earnings release on the company website and included a link. However, Google's announcement has greater significance because of the company's size and reputation for being a trendsetter.
- In addition, given the fact that its business is so closely tied to its website, it would be easier for Google to establish that its website is a "recognized channel of distribution" for future announcements of material information.

Google's new practice may help some companies overcome their reluctance to use websites for the announcements of material information in reliance on the SEC guidance. On the other hand, few companies can claim to have businesses as closely tied to the Internet as Google's is. Companies that do not have such ties and perhaps have not been as proactive about utilizing the Internet for investor relations may see Google as an exceptional case rather than as a model to emulate. Nonetheless, the SEC guidance is not reserved for information giants, and any company, at least in theory, may establish that its website is a "recognized channel of distribution."