



The Company Website has not Replaced the Press Release Yet

On April 15, 2010, Google Inc. issued a press release announcing that it had released its first quarter 2010 financial results and directing the reader to visit Google's investor relations website to view the earnings release. The press release stated that "Google intends to make future announcements regarding its financial performance exclusively through its investor relations website." Google's announcement resulted in immediate discussion on various blogs, websites, and other forums regarding the potential implications of this approach regarding the manner in which public companies disclose material information to the public. Since the SEC's interpretive release "Commission Guidance on the Use of Company Websites" (the "Release") was published, many public companies and legal practitioners have been assessing the disclosure practices public companies adopt based on this guidance, and the extent to which public companies rely on their websites instead of traditional press releases. The Google release is a step toward stronger reliance on company websites; but as a precedent it may be limited in that it included only earnings information.

In 2000, the SEC enacted Regulation FD to address the selective disclosure by certain public companies of material, nonpublic information. According to Regulation FD, whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must simultaneously, in the case of intentional disclosures, or promptly, in the case of unintentional disclosures, make public disclosure of that information. Regulation FD provides public companies with the flexibility to either file a Current Report on Form 8-K or to choose any method or combination of methods to disclose publicly material information as long as those methods are reasonably calculated to make effective, broad, and non-exclusionary public disclosure, given the company's particular circumstances.

In the Release, the SEC recognized that a company website is an important resource for the dissemination of information and stated that it believes that it should provide guidance regarding "the circumstances under which information posted on a website would be considered 'public' for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of public information and (2) satisfaction of Regulation FD's 'public disclosure' requirement." The Release includes a list of factors that a company may consider in determining, on its own, whether the posting of material, nonpublic information on its website would make the information "public" for purposes of Regulation FD. According to the Release, a public company, in making such a determination, must consider whether:

- A company website is a recognized channel of distribution;
- The posting of information on a company website disseminates the information in a manner that makes it generally available to the securities marketplace; and
- There has been a reasonable waiting period for investors and the market to react to the posted information.

The Release also includes a list of non-exclusive factors to consider in evaluating whether a public company's website is a recognized channel of distribution of information and whether the information on such site is "posted and accessible" and, therefore, "disseminated." All of these factors are subjective and their application, absent additional guidance from the SEC, could be interpreted differently by reasonable parties. Accordingly, in our experience, practitioners have generally not been prepared to advise clients that they have met the criteria discussed by the SEC in the Release and, therefore, that the posting of information on the client's website makes the information public for purposes of Regulation FD.

The discussion surrounding Google's announcement relates to these factors and how others have inferred that Google is interpreting SEC guidance. Many practitioners have been waiting for public companies to test the waters; public practices, unless challenged by the SEC, will provide the market with at least a benchmark. On its face, it appears that Google is declaring its website to be a recognized channel of distribution of information. And, why not? Google is one of the most important names in the Internet. Google's search engine is so much a part of everyday life that "googling" has been recognized as a verb by the Merriam-Webster dictionary since 2006. We used Google to research back-up information for this client alert. Earnings releases, however, exist within their own category of public information and there are specific guidelines regarding their dissemination. This diminishes the utility of this as a precedent in determining whether a company website is a recognized channel of distribution of material information.

The instructions to Item 2.02 of the Current Report on Form 8-K dictate the manner of disclosing earnings information. Item 2.02(a) provides that if a public company, or any person acting on its behalf, makes any public announcement or release disclosing material nonpublic information regarding the public company's results of operations or financial condition for a completed quarterly or annual fiscal period, the public company must disclose the date of the announcement or release, briefly identify the announcement or release, and include the text of that announcement or release as an exhibit to the Form 8-K. Item 2.02(b) provides that a Form 8-K is not required to be furnished under Item 2.02 in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if: (1) the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to Item 2.02 prior to the presentation; (2) the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast, or by similar means; (3) the financial and other statistical information contained in the presentation is provided on the registrant's website, together with any information that would be required under Rule 100 of Regulation G; and (4) the presentation was announced by a widely disseminated press release, that included instructions as to when and how to access the presentation and the location on the registrant's website where the information would be available.

In summary, a public company must file a Form 8-K to announce its earning release and must include the release as an exhibit to the form unless, among other things, the financial and other statistical information is made available on the company's website. In addition, Item 2.02 specifically allows that earnings information need not be included in a Form 8-K as long as, among other things, the details regarding the manner of disclosure were disseminated in a press release. Common practice is to issue a press release in advance of an earnings call to inform the market of the call and, on the day of the call, to issue a press release that contains the financial and other statistical information discussed on the call and to file a Form 8-K, which, among other things, includes the press release as an exhibit.

Google's announcement followed the procedure outlined in Item 2.02. First, it issued a press release on April 5, 2010, announcing that there would be an earnings call on April 15, at 4:30 p.m., Eastern time. On April 15, at 4:01 p.m., it issued a second press release directing readers to the earnings information on its website. At 4:07 p.m., a Form 8-K was posted on EDGAR which, among other things, included the earnings release as an exhibit. This process, which complies with Item 2.02, results in the earnings release being both furnished on a Form 8-K and posted on the company website. Although the common practice is to include earnings information in a press release, Google is not the first to elect not to do so.

The new practice differs from that followed by many other companies only in the exclusion of a press release containing the earnings information. However, this may be a difference in form, not in substance. Substantively, the earnings information was disseminated in a manner that complies with Regulation FD, the Form 8-K. Item 2.02 does not give a public company the flexibility to determine its own recognized channel for the distribution of the earnings release. It more or less mandates the inclusion of the information on a Form 8-K or dictates that the information be made available on the company's website and that the location of the website be disclosed on a Form 8-K. There is no need to determine whether or not Google's posting of the earnings release on the website makes the information public for purposes of Regulation FD; furnishing the information on a Form 8-K made it "public" for Regulation FD purposes. If Google did not include the earnings release on a Form 8-K or if it did not reference the release on a Form 8-K, Google would not have complied with Item 2.02.

For the first quarter of 2010, Google issued two earnings press releases. The size of the press releases may have contracted but they have not disappeared altogether. Although this is not an example of a website being a recognized channel of distribution, Google's decision does represent a strong statement regarding the growing importance and public awareness of company websites as resources. In the August 2008 release, the SEC stated that if a company is evaluating whether its website is a recognized channel of distribution and whether the information on such site is "posted and accessible" and therefore "disseminated," the company should consider, among other things, (i) whether and how the company lets investors and the markets know that the company has a website and that investors should look at the company's website for information and (ii) whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting such information on its website. A company that takes steps such as those announced by Google will be informing the market that its website is a resource for material information and will be establishing a practice of utilizing the website for disclosure purposes. Accordingly, the company will be closer to establishing its website as a recognized channel for the distribution of any material information under Regulation FD, not just earnings information.

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