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Regulation FD Update: SEC's New Selective Disclosure Rule Takes Effect

Regulation FD was adopted by the Securities and Exchange Commission on August 10, 2000 and took effect on October 23, 2000. It applies to almost all public companies, including closed-end investment companies. Regulation FD does not apply to open-end investment companies or foreign private issuers.

Regulation FD and the SEC release adopting the new regulation are available on the SEC's web site at www.sec.gov/rules/final/33-7881.htm. On October 20, 2000, the SEC published interpretive guidance on Regulation FD, which is also available on the SEC's web site at www.sec.gov/offices/corpfin/phonits4.htm.

Regulation FD, which is short for Fair Disclosure, represents the SEC's first attempt at direct regulation of communications between public companies and investment professionals. Public companies need to review, and likely adjust, their investor relations practices in light of the new regulation. See "Practical Guidance for Living with Regulation FD" below. For a litigator's perspective on new Regulation FD, see "Guidance on Guidance" beginning on page 14.

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Regulation FD became effective on October 23, 2000 and represents the SEC's first attempt at direct regulation of communications between public companies and investment professionals.

Practical Guidance for Living with Regulation FD

Following are suggested guidelines for various situations commonly confronted by public companies. While these guidelines are intended to help ensure compliance with Regulation FD, many of the guidelines were sound corporate practices even before the adoption of Regulation FD. Thus, for many companies, adherence to most of these guidelines should not represent a significant departure from their current practices.

Conference Calls with the Investment Community

We recommend that companies observe the following guidelines regarding conference calls with securities analysts and investors, such as the calls that typically follow quarterly earnings releases:

> This *Corporate Advisor* updates our September 2000 publication to incorporate additional guidance released by the SEC and to reflect the rapidly developing learning and practice in this area.

- **Provide advance public notice of the conference call.** The company should provide advance public notice of the conference call by issuing a press release and by posting the information on its web site. The notice should include the date and time of the call, the subject matter of the call (including whether the company intends to provide forward-looking financial information on the call) and the means of accessing it (generally via either a dial-in number or a webcast). The notice should also indicate whether, and for how long, the company will make a replay of the call available over its web site. Some companies are also sending conference call notices via e-mail or telecopy to a public distribution list that the company compiles by permitting people to add their names to the list via the company's web site. While this may be a good investor relations practice, we recommend that companies use

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General Rule

Regulation FD prohibits a company from *intentionally* disclosing material nonpublic information to specified types of securities market professionals and securityholders unless the company publicly discloses the information simultaneously.

In addition, if a company *non-intentionally* discloses material nonpublic information to persons covered by the new regulation, the company must publicly disclose the information promptly. As discussed below, disclosures that many people would think of as accidental could, in some circumstances, be considered intentional under Regulation FD.

Regulation FD only applies to disclosures made by certain company representatives to specified classes of recipients.

Company Representatives Subject to Regulation FD

Regulation FD only applies to disclosures made by the following company representatives:

- directors and executive officers;
- persons performing investor relations or public relations functions; and
- employees and agents who regularly communicate with securities market professionals and securityholders.

Statements made by other company employees do not trigger disclosure obligations under Regulation FD, unless the employee is acting at the direction of senior management.

Recipients Triggering Public Disclosure Obligation

Under Regulation FD, only disclosures of material nonpublic information to the following classes of recipients trigger a company's public disclosure obligation:

- brokers, dealers and persons associated with them, such as securities analysts;
- investment advisers, institutional investment managers, investment companies and persons associated or affiliated with them; and
- securityholders, if it is reasonably foreseeable the securityholder will buy or sell the company's securities on the basis of that information.

Disclosures Not Subject to Regulation FD

The public disclosure obligations of Regulation FD are *not* triggered by disclosure:

- to persons owing a duty of trust or confidence to the company, such as attorneys, accountants and investment bankers;
- to persons who "expressly agree" to keep the disclosed information confidential;
- to rating agencies, if the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available; or
- in connection with registered securities offerings other than certain continuous "shelf" offerings.

The confidentiality agreement referenced above may be either oral or written. The agreement need not include a further commitment by the recipient of the confidential information not to trade based on that information (although trading on that information would likely violate the SEC's new insider trading rules).

The release adopting Regulation FD makes clear that the new regulation is not intended to apply to ordinary-course business communications with parties such as customers, suppliers, strategic partners and government regulators or to disclosures to members of the media.

Since Regulation FD only applies to disclosures made to "any person outside the issuer," the SEC has stated that Regulation FD does not apply to communications of material nonpublic information by a company to its employees, even if the employees are also securityholders. However, there are good business reasons for a company to limit the disclosure of

confidential company information to those employees who need that information in the performance of their jobs. In addition, employees are generally bound by confidentiality obligations, and improper disclosure or use of confidential company information by an employee could subject the employee to legal liability, including liability under the SEC's new insider trading rules.

Material Nonpublic Information

Perhaps the most difficult issue in interpreting and applying Regulation FD is determining what constitutes material nonpublic information.

Regulation FD does not define either "material" or "nonpublic." In the release adopting Regulation FD, the SEC stated that these terms have the meanings established in existing case law. The release, quoting from leading cases on the issue, notes that information is "material" if there is "a substantial likelihood that a reasonable shareholder would consider the information important" in making a decision to buy or sell the company's securities. Stated another way, there must be a substantial likelihood that a reasonable shareholder would view the information "as having significantly altered the 'total mix' of information" available about the company.

The adopting release states that information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally.

Intentional and Non-Intentional Disclosures

Intentional disclosure of material nonpublic information occurs when the person making the disclosure knew, or was reckless in not knowing, that the information disclosed was both material and nonpublic. An example of intentional disclosure is knowingly including nonpublic projections on a slide shown during a private conference with analysts. Another example is a wink or other gesture in response to an analyst question about whether the company is on track to meet its forecasts which deliberately signals an answer to the question. Intentional disclosure of material nonpublic information in a private setting is a violation of Regulation FD.

Non-intentional disclosure is any disclosure of material nonpublic information that occurs when the person making the disclosure does not know, and is not reckless in not knowing, that such information is material and nonpublic. An example of non-intentional disclosure is an executive's off-the-cuff response to an unanticipated question posed during a private meeting with analysts which provides material information that the executive mistakenly believed had already been publicly disclosed. Non-intentional disclosure of material nonpublic information triggers an obligation on the part of the company to publicly disclose that information promptly.

It is important to bear in mind that the terms "intentional" and "non-intentional", as used in Regulation FD, do not necessarily have their common meanings. A slip of the tongue would constitute intentional disclosure for purposes of Regulation FD if the speaker knew, or should have known, that the information was both material and nonpublic.

"Promptly" means as soon as reasonably practicable after a director, executive officer or investor relations or public relations employee learns of the non-intentional disclosure; provided that the disclosure must be made within 24 hours or, if the next trading day does not begin for more than 24 hours, prior to the beginning of the next trading day.

Intentional disclosure occurs when the person making the disclosure knew, or was reckless in not knowing, that the information disclosed was both material and nonpublic.

Manner of Required Public Disclosure

There are several ways in which a company can make the public disclosure required by Regulation FD. One means is a timely SEC filing, such as a Form 8-K. The SEC has amended Form 8-K by adding a new Item 9 and providing that disclosure required by Regulation FD may be included under either existing Item 5 or new Item 9. Information disclosed under Item 9 is not considered filed for purposes of the provisions of the Securities Exchange Act of 1934 imposing liability for inaccurate or misleading statements in filings under the Exchange Act. Information disclosed

The SEC does not currently consider the posting of information on a company's web site to constitute, by itself, sufficient public dissemination of that information.

under Item 9 also is not automatically incorporated into registration statements filed under the Securities Act of 1933. Including information in another SEC filing (such as a Form 10-Q, Form 10-K, proxy statement or Rule 425 filing under Regulation M-A) also generally constitutes adequate public disclosure of that information, provided the information is not buried within the SEC filing.

Regulation FD's public disclosure requirement can also be satisfied by disseminating the information by a method or combination of methods "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." A press release distributed through widely circulated news or wire services is generally sufficient, although the SEC noted in adopting Regulation FD that if the company knows its press releases are routinely not carried by major business wire services, the company should use other or additional means of public dissemination. In addition, disclosure of information in a conference call open to the general public, through a webcast or dial-in number, is also generally sufficient, provided the public is given adequate notice of the call and the means of accessing it.

The SEC does not currently consider the posting of information on a company's web site to constitute, by itself, sufficient public dissemination of that information.

Liability and Enforcement Issues

In response to concerns that potential liability under Regulation FD would have a "chilling effect" on disclosures by companies and lead to less information in the marketplace, the SEC has taken several steps to mitigate the potential liabilities for breaches of Regulation FD. The failure to make a public disclosure required by Regulation FD:

- is not a breach of the anti-fraud provisions of Rule 10b-5 –– as a result, there is no private right of action for violations of Regulation FD;
- has no effect on a company's eligibility to use short-form registration statements under the Securities Act, such as Form S-3 or Form S-8;
- has no effect on whether a company is in compliance with the current public information requirements of Rule 144; and
- does not result in a loss of the availability of the "safe harbor" protections under the Private Securities Litigation Reform Act of 1995.

The SEC will enforce Regulation FD through administrative actions. Such actions are generally initiated by an informal (that is, "voluntary") request by the SEC staff for information about the circumstances giving rise to the communication at issue. This may be followed by an SEC subpoena requiring the production of additional information. The SEC may also initiate its investigation by subpoena rather than by voluntary request.

After completing its investigation, which may include interviews and depositions, the SEC staff could decide to close the matter. Alternatively, the staff may recommend that the SEC initiate an administrative action or a civil lawsuit. If the staff recommends either action, the subject company or individual would be provided with the opportunity to explain why such an action is unwarranted before an action is initiated.

In the event that the SEC accepts the staff's recommendation to proceed, the administrative or civil action may be defended against like any other lawsuit. An adverse judgment could result in both a monetary penalty and an SEC cease and desist order or a court injunction precluding future Regulation FD violations.

Although not part of the SEC's Regulation FD enforcement mechanism, if a Regulation FD violation results in third-party trading which benefits the disclosing party, the disclosure may also give rise to a civil or criminal proceeding by the SEC under existing insider trading prohibitions and possibly to private litigation. ■

this as a supplement to, and not as a substitute for, providing notice of the call via a press release and web site posting.

In the case of regularly scheduled quarterly conference calls, we recommend that notice of the call be disseminated at least one week prior to the call. However, for some press releases — such as a press release announcing a merger or a shortfall in quarterly revenue or earnings — it may not be possible for the company to provide notice of the accompanying conference call more than several hours in advance. In such a situation, there is uncertainty as to how much advance notice will be deemed sufficient, and consequently there is some risk that statements made on the conference call may not be considered publicly disclosed within the meaning of Regulation FD. Until this uncertainty is resolved, we recommend that companies holding conference calls on short notice include all material nonpublic information that they wish to disclose about the matter in the press release or in a Form 8-K filed prior to the conference call, and not provide any additional material nonpublic information on the call.

- **Allow broad participation in the conference call.** The company should permit any interested person to listen to the entire conference call, including the question and answer session after the company's prepared remarks. It is permissible for the company to permit only certain participants, such as securities analysts, to ask questions, with others participating in a listen-only mode. Companies may wish to permit members of the public who are in listen-only mode to submit questions by e-mail, although companies that do so should indicate that not all questions can be answered.

- **Hold the call after public dissemination of the press release, and not before.** The company should not hold the conference call until the press release which is the subject of the call has been broadly disseminated.

- **Script the call.** The company should prepare a script of the presentation to be made during the conference call. The script should be reviewed internally and by counsel for accuracy and to reduce the risk of inappropriate statements during the call. Even though inappropriate statements would not raise selective disclosure concerns if the call qualifies as a broad public dissemination of information, those statements could still subject the company to liability under anti-fraud laws, create a going-forward duty to update or correct, or raise "gun-jumping" issues in connection with public offerings or M&A transactions.

- **Anticipate and prepare for likely questions.** As part of the process of preparing for and scripting the call, the company should try to anticipate the questions that investors and analysts are likely to ask in order to reduce the likelihood of being unable to address questions on the call. The old practice of telling an analyst you will follow-up with him or her in response to a question you do not have a ready answer to is problematic under Regulation FD.

- **Say it all on the call.** So long as adequate notice is given and the conference call provides broad, non-exclusionary distribution of information to the public, there is no need to worry about selective disclosure with respect to anything said during the call. This represents a significant departure from prior practice, when much care was required to make certain nothing material was said during the conference call which was not included in the press release. Accordingly, companies which desire to provide earnings guidance or other material information, such as a discussion of the company's operating model, should do so either during the call (and/or as part of the press release preceding the call), rather than in individual conversations with analysts or investors following the conference call.

So long as adequate notice is given and the conference call provides broad, non-exclusionary distribution of information to the public, there is no need to worry about selective disclosure with respect to anything said during the call.

- **Include a "safe harbor" statement.** Regulation FD does not alter the need to properly invoke the safe harbor under the Private Securities Litigation Reform Act for forward-looking statements. In fact, to the extent Regulation FD leads a company to increase the amount of forward-looking information disclosed during the conference call, the need for the safe harbor is increased. To take advantage of this safe harbor, a company representative should begin the conference call by making the following statement:

  "Various remarks that we may make about future expectations, plans and prospects for the company constitute forward-looking statements for purposes of the safe harbor provisions under The Private Securities Litigation Reform Act of 1995. Actual results may differ materially from those indicated by these forward-looking statements as a result of various important factors, including those discussed in the [reference the company's most recent SEC filing which contains a "risk factors" section] which is on file with the SEC."

- **Make replays available for a limited time.** The company should tape investor conference calls and permit people to listen to a rebroadcast of the call, either through a dial-in number or over the web. However, in a rapidly changing business environment, the statements made by the company in a call that were true on one day may not be true several weeks later. Accordingly, the company should limit the time period during which a rebroadcast of the conference call is made available, generally to a period of not more than one week. If for investor relations reasons a company has a strong desire to make replays available for a longer period of time — for example, until the next quarterly conference call is held — the replays should be archived in a separate area with appropriate disclaimers. However, companies should realize that there is no assurance these disclaimers will be effective in all circumstances.

- **Limit availability of transcript of call.** For the reasons noted above, it is generally not advisable for the company to distribute transcripts of the conference call. In addition, a company that wishes to post a transcript of the call on its web site should be aware that the safe harbor warning described above, while sufficient to protect oral forward-looking statements, is not sufficient to protect written forward-looking statements. A written forward-looking statement must be *accompanied* by cautionary statements, and the production of a transcript of the call would transform oral forward-looking statements into written ones. Accordingly, a company that does post a transcript of the call on its web site should do so for only a limited period (generally no more than one week) and should add to the beginning of the transcript safe harbor language adequate to protect written forward-looking statements.

- **Consider expanded safe harbor language for replays of the call.** It is possible that the SEC may take the position that making a replay of a call available results in the call being a written statement, rather than an oral statement for purposes of the safe harbor for forward-looking statements discussed above. Accordingly, consideration should be given to requiring anyone who wants to listen to a replay of the call first to view, by click-through agreement or otherwise, detailed risk factors and appropriate disclaimers.

Regulation FD does not alter the need to properly invoke the "safe harbor" for forward-looking statements.

One-on-One Calls or Meetings with Analysts and Investors

The legal risks inherent in one-on-one calls or meetings with analysts and investors have been exacerbated by Regulation FD. A properly arranged conference call, to which the investing public is given access and sufficient advance notice, constitutes public disclosure of the statements made by the company during the call. However, the intentional disclosure of any material nonpublic information in one-on-one or other limited-access settings is a violation of Regulation FD. If any material nonpublic information is non-intentionally disclosed in such a setting, the company must publicly disclose that information promptly.

Some public companies have stated that they will no longer meet or speak with securities analysts in one-on-one situations. While that is certainly a safe course of action from a legal perspective, for most companies this is not a realistic option. Moreover, in the adopting release, the SEC explicitly acknowledged that Regulation FD is not intended to eliminate all analyst communications:

> "[A]n issuer is not prohibited from disclosing a non-material piece of information to an analyst, even if, unbeknownst to the issuer, that piece helps the analyst complete a 'mosaic' of information that, taken together, is material. Similarly, since materiality is an objective test keyed to the reasonable investor, Regulation FD will not be implicated where an issuer discloses immaterial information whose significance is discerned by the analyst. Analysts can provide a valuable service in sifting through and extracting information that would not be significant to the ordinary investor to reach material conclusions. We do not intend, by Regulation FD, to discourage this sort of activity."

If a company wishes to engage in conversations with analysts or investors in one-on-one or other limited-access settings, it is critical that the company not disclose any material nonpublic information. Materiality judgments are inherently fact-specific, and there is no bright-line standard or list of items that can define materiality in all cases. In order to make materiality judgments on a real-time basis, company officials must be fully versed about the company, its prior public statements and the applicable legal rules.

We recommend that companies engaging in one-on-one or other limited-access conversations with analysts or investors adhere to the following guidelines to help minimize the risk of disclosing material nonpublic information. Additional recommendations specifically relating to earnings guidance in these settings is contained in the next section.

- Hold any conversations in which financial matters will be discussed shortly after the earnings release and related conference call, when the potential universe of material nonpublic information is smallest.

- Avoid any conversations relating to financial matters during the company's quarter-end blackout periods.

- Establish and articulate ground rules for topics, such as those discussed in the next section, that will not be addressed in private meetings.

- The company representatives participating in these conversations should be fully-informed about the business and finances of the company to ensure the information provided is accurate.

- The company representatives participating in these conversations should also be fully informed about what company information is already publicly available, to ensure that no material nonpublic information is inadvertently disclosed in the mistaken belief that it is already publicly known.

- The company should explore ways of publicly disclosing information that it wants to be free to discuss in one-on-one meetings. For example, the company may want to add more detailed supplemental financial information to its quarterly earnings release.

- A company holding a meeting with, or making a presentation to, a group of analysts or investors, should generally have at least two company representatives present to reduce the risk that inappropriate or inaccurate statements are made, and to help monitor any non-intentional disclosure of material nonpublic information. In addition, company representatives may find it useful to debrief their investor relations personnel or legal counsel immediately after any one-on-one conversations as a means of confirming that no material nonpublic information has been disclosed.

The company should explore ways of publicly disclosing information that it wants to be free to discuss in one-on-one meetings.

"When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD."

It is permissible for a company to disclose a transaction — such as the signing of a merger agreement — to one or more analysts shortly before the public announcement of that transaction, provided the analysts agree to maintain the confidentiality of that information until it is publicly disclosed by the company. In some situations, a company may find this advantageous because it enables the analysts who regularly follow the company to evaluate the transaction for a brief period of time before it is publicly disclosed, and thus be better prepared to publish reports and advise investors immediately following the public announcement of the transaction. However, companies that wish to do so should consider the investor relations problems that might result, and should consult with counsel on an appropriate manner of evidencing the confidentiality agreement with the analysts.

Earnings Guidance

One particularly problematic situation is providing analysts or investors with information or "guidance" on the company's projected operating results. In the release adopting Regulation FD, the SEC bluntly stated:

> "When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the issuer official communicates selectively to the analyst nonpublic information that the company's anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the issuer likely will have violated Regulation FD. This is true whether the information about earnings is communicated expressly or through indirect 'guidance', the meaning of which is apparent though implied. Similarly, an issuer cannot render material information immaterial simply by breaking it into ostensibly non-material pieces."

This quote has caused much consternation in the financial and legal community. However, it is arguable whether the SEC's position here is fully supported by applicable law, since it does not appear to take into account the materiality of the information communicated in a particular situation. In fact, the SEC has subsequently stated that whether the private confirmation of a prior public financial forecast is material depends upon a number of factors, including the amount of time that has elapsed since the prior forecast was made and the occurrence of significant intervening developments.

Despite the fact that the SEC's original statements on this matter may have been too alarmist, providing financial guidance in a limited-access setting necessarily involves difficult materiality judgments and remains inherently risky. We have the following recommendations concerning earnings guidance:

- Companies should provide forward-looking financial information and give guidance on analysts' models or projections only in a press release or another qualifying public forum, such as a public conference call following an earnings release, and not in limited-access settings.

- Companies that provide forward-looking financial information in a public setting should not reaffirm or otherwise comment on that guidance, other than in a press release or another qualifying public forum. A statement, on the day following a conference call in which the company provided earnings guidance, that the company remains comfortable with that guidance would generally not be deemed to be material information. However, such a statement may well be material two weeks later, or during the last week of the company's quarter. To avoid these difficult judgment calls, it is best to adopt a policy that the company will not privately comment on or reconfirm such forecasts.

- Companies should not provide intra-period historical financial information in conversations with analysts or other limited-access settings. For example, a company should not disclose to an analyst, during the third month of a quarter, the company's revenue or net income for the first two months of the quarter.

In addition, it is important to note that even in qualifying public settings, revenue and earnings guidance involves risks under anti-fraud and other securities laws, and must be carefully crafted. Providing guidance on expected operating results is inherently risky, and we encourage companies to consult with counsel before doing so.

Reviewing Analyst Reports

Reviewing and commenting on a report of a securities analyst prior to its publication creates a serious risk that the company's comments on the draft report will impart material nonpublic information to the analyst. Accordingly, we recommend that the company not review and comment on draft analyst reports. Company officers sometimes remark that when they see a factual error in a draft analyst report, they feel compelled to correct it, and worry that they may have liability for failing to correct obvious errors. To avoid this conundrum, it is best to inform the securities analysts covering the company that it is the company's policy not to review draft reports in advance of their publication, and to request that no such draft reports be sent to the company. In addition, to reduce the risk of analysts making factual errors, the company could prepare and publish its own document containing the background and factual information about the company, and its business and products, that is likely to be of interest to analysts.

A company that nevertheless insists on reviewing analyst reports in advance of publication should take the following two steps, which should reduce, but not eliminate, the attendant risks:

- Limit its review and comments to those portions of the draft report that constitute statements of historical fact or a factual description of the company's business, and not comment on any forward-looking statements in the report, including financial projections.
- In providing comments to the analysts, state in writing that the review of the report covers only factual statements and that the company is not commenting on or endorsing any forward-looking statements or financial projections in the report.

Disclosure in Other Limited-Access Forums

There are a variety of situations in which companies present information about themselves to a relatively large audience that includes securities analysts, institutional investors and/or other stockholders. Companies often tend to think of these settings as public forums and may therefore be less vigilant about selective disclosure issues. However, unless those settings provide for broad, non-exclusionary distribution to the public of the information disclosed by the company, the disclosures by the company are not considered to have been publicly made, and instead constitute selective disclosures. Accordingly, the risks and guidelines described above for one-on-one conversations are equally applicable to disclosures in these settings.

Examples of forums in which the presentation of information by companies generally are subject to the prohibitions against disclosure of material nonpublic information include:

- investor conferences, such as those hosted by investment banks;
- company-sponsored open houses and analyst days;
- online interactive chat sessions involving company officials;
- interviews broadcast over the web with quasi-media organizations which are affiliated with market participants; and
- stockholder meetings.

If a company expects to disclose material nonpublic information in such a forum, it must either

- make the setting a forum for true public disclosure by providing the public with sufficient notice of and access to the event, in a manner similar to our recommended approach for investor conference calls; or
- issue a press release or file a Form 8-K prior to the company's presentation that contains the material nonpublic information to be included in the presentation.

Reviewing and commenting on a securities analyst's report prior to its publication creates a serious risk that the company's comments will impart material nonpublic information to the analyst.

Companies should not assume that the presence of media members in a limited-access setting in which analysts or investors are also present exempts the disclosures made in such a setting from the coverage of Regulation FD. While disclosures to the media are not covered by Regulation FD, the mere presence of the media in a limited-access setting would not immunize disclosures made to other covered persons, such as analysts or investors, present in that setting. Unless the company is able to ensure that the media present will somehow effect a simultaneous public disclosure of the information presented by the company — such as by a live public broadcast for which adequate advance notice has been given — statements made in such a setting would be deemed selective disclosure notwithstanding the presence of media.

Companies should not assume that the presence of media members in a limited-access setting in which analysts or investors are also present exempts the disclosures made in such setting from the coverage of Regulation FD.

Interviews with News Media

Regulation FD does not apply to disclosures to members of the press or other news media — that is, disclosure of material nonpublic information to members of the media does not trigger a company's public disclosure obligation. However, care must still be taken in dealing with the media for the following reasons:

- The distinction between news media and market professionals can be blurry, with some "media" organizations functioning like market participants subject to Regulation FD.
- Even if a selective disclosure to the media is not subject to Regulation FD, the issuer must consider the impact of other applicable federal securities laws, such as anti-fraud rules and the publicity restrictions in connection with public offerings.
- As a business matter, providing information to the media before issuing a press release or other public disclosure could harm the company's relationship with the investment community and institutional investors.

We recommend that public companies treat the media as if they are subject to Regulation FD. This means, for example, that if a company wishes to provide advance information of an impending transaction to a reporter so that a more in-depth article may be published concurrently with the public announcement of the transaction, the company should obtain an express agreement from the newspaper to hold the information in confidence until the authorized release date. Moreover, this practice may not be advisable even if an embargo agreement is obtained.

Securities Offerings

The public disclosure requirements of Regulation FD are not triggered by communications made in connection with most registered securities offerings, including the registered issuance of securities in connection with M&A transactions. As a result, road show and sales force presentations after a registration statement has been filed are not subject to Regulation FD.

The exception for registered public offerings applies only to statements made "in connection with" the offering. For example, Regulation FD does not exempt statements made in a nonpublic conference call that happens to occur during the course of a registered offering. Moreover, statements made during a public conference call accessible via a webcast may violate SEC rules applicable to the public offering. Accordingly, companies engaged in a public offering should work closely with counsel to ensure their communications during the offering process are made in compliance with all applicable legal requirements.

Regulation FD *does* apply to disclosures made in connection with certain continuous "shelf" public offerings and all unregistered offerings made by public companies, including Rule 144A and Regulation S offerings, "PIPE" transactions and traditional private placements. Regulation FD covers the information included in offering circulars or other disclosure documents used in those offerings, as well as statements made on road shows for the offerings. Public companies conducting unregistered offerings or non-exempt "shelf" public offerings must either:

- avoid disclosing any material nonpublic information in connection with those offerings;

- publicly disclose any material information disclosed nonpublicly to potential investors in those offerings; or

- obtain express confidentiality agreements from potential investors, which may be resisted by investors.

It remains to be seen what practices will develop in this area.

Companies that have shelf registration statements on file must carefully consider the means by which they make any public disclosures required by Regulation FD. If the information is sufficiently important that it should be incorporated by reference into the shelf registration statement, the company should file a Form 8-K and include the information under Item 5. If, on the other hand, the company does not want that information to be incorporated into the shelf registration statement, and made subject to the liability provisions applicable to public offering registration statements, the company should disclose the information through another means, such as a press release or under Item 9 of Form 8-K.

Other Recommended Disclosure Practices

Now more than ever, the combination of Regulation FD with other existing legal requirements places a premium on consistent adherence to the following good disclosure practices:

- **Decide on the nature and scope of information to be publicly disclosed.** It is imperative that companies carefully develop a policy concerning the nature and scope of the financial and business information — particularly forward-looking information — that the company will disclose to the investing public. This policy should be based on factors such as what financial and business metrics the company believes are most important to an understanding of the company; what data securities analysts have historically sought from the company; and what information is publicly disclosed by competitors of the company. Having a well-formulated policy on the types of information that the company will disclose to the public should help ensure consistent disclosure practices by the company, should reduce the risk of selectively disclosing information in the mistaken belief that it has been previously publicly disclosed, and should make it easier for the company to respond to analysts and others seeking information that the company does not wish to publicly disclose.

- **Authorize a limited number of spokespersons.** Formally designate a limited number of persons — usually not more than two or three, and generally consisting of the CEO, the CFO and/or an executive in charge of investor relations — as the only representatives of the company authorized to communicate with investors, securities analysts, media and other members of the general public. All other employees of the company should be instructed to refer inquiries to these designated persons. This practice limits the class of persons whose statements trigger the company's public disclosure obligations; helps ensure that all communications to members of the public are made by persons who are fully informed about both the company and the guidelines and risks applicable to external communications; and reduces the risk of different company representatives making inconsistent statements.

- **Educate all employees on how to handle outside inquiries.** One consequence of Regulation FD may be that analysts increasingly seek to obtain information from employees at all levels of an organization. It is important to educate employees that they should not respond to such inquiries, other than to refer them to the appropriate company spokesperson. In addition, companies should educate all employees not to make unauthorized disclosures about the company's customers, suppliers and other business partners.

- **FD means "fair disclosure" not "forward-looking disclosure."** Regulation FD prohibits the selective disclosure of material nonpublic information, such as financial projections or earnings guidance, in non-public settings. Although Regulation FD may result in more forward-looking information

It is imperative that companies carefully develop a policy concerning the nature and scope of the forward-looking financial and business information that the company will disclose to the investing public.

becoming publicly available, it does not *require* companies to make forward-looking statements. As before, companies can decline to make predictions about the future.

- **Observe "no comment" policy.** Follow a "no comment" policy which prohibits the company from responding to inquiries or commenting upon rumors concerning prospective developments or transactions, such as acquisitions. Adherence to this policy requires that the company respond with a statement to the effect that it is the company's policy not to comment upon or respond to such inquiry or rumor. A statement that the company does not know of any basis for such a rumor, or is not aware of any pending transaction, is not consistent with this policy and, if inaccurate, could subject the company to liability.

- **Restrict external disclosures.** Even though Regulation FD does not apply to ordinary-course business disclosures, companies should not disclose material nonpublic information to outside parties absent a valid business reason and a written confidentiality agreement. Although the SEC has stated that for purposes of Regulation FD an "express oral agreement" is sufficient and a written agreement is not required, a written agreement can better define the scope of permitted uses and eliminate subsequent disputes.

- **Maintain internal information flow.** Maintain prompt and complete information flow to authorized spokespersons and counsel who need to make materiality judgments on an ongoing basis.

- **Use "safe harbor" disclaimers.** Continue to take advantage of the Private Securities Litigation Reform Act by including appropriate safe harbor language in all oral and written forward-looking statements.

- **Don't voluntarily undertake an obligation to update information.** In certain circumstances, a company may have a legal duty to update information that it has publicly disclosed. In addition, there may at times be good business and investor relations reasons to update previously provided information. However, the decision of whether a company is required or should update previous statements must be made on a case-by-case basis, and a company should not complicate the analysis by committing in advance to provide updates.

- **Remember that anti-fraud rules still apply.** Remember that the general anti-fraud provisions of federal securities law continue to apply to all disclosures, even disclosures that are not subject to Regulation FD. Companies can comply with Regulation FD and still be liable for false, misleading or incomplete statements under other securities laws.

- **Use your corporate web site to facilitate compliance with Regulation FD.** See "Using Corporate Web Sites to Facilitate Compliance with Regulation FD and Enhance Investor Relations" beginning on page 13 for a discussion of recommended disclosure practices relative to corporate web sites. ■

This Corporate Advisor *was written by Patrick J. Rondeau, David A. Westenberg and Jonathan Wolfman.*

Although Regulation FD may result in more forward-looking information becoming publicly available, it does not require companies to make forward-looking statements.

Using Corporate Web Sites to Facilitate Compliance with Regulation FD and Enhance Investor Relations

The arrival of Regulation FD presents a compelling reason for companies to take a fresh look at their corporate web sites and web site practices with an eye toward making changes that will facilitate compliance with Regulation FD, both now and in the future, and enhance investor relations.

Use your web site to help turn previously private events into public forums. So long as adequate advance notice has been provided, a simultaneous web cast of events such as quarterly conference calls or speeches given at industry conferences will satisfy Regulation FD's requirement for simultaneous public dissemination of material nonpublic information that is intentionally being disclosed. This represents a significant departure from prior practice, when conference calls were invitation-only events and much care was required to make certain nothing material was said during a conference call that was not included in a press release.

Use your web site to help provide adequate notice of upcoming events. Every company should take steps to turn its corporate web site into an effective tool for announcing when public conference calls, meetings and presentations will take place. This can be done by setting up an email subscriber list or using other "push" technology. Eventually, these efforts may enable the company to stop issuing separate press releases announcing upcoming public events. The availability of a subscriber list may also significantly enhance a company's ability to provide adequate notice of future events that must be quickly scheduled, such as conference calls to discuss mergers.

Don't rely on your web site as the exclusive means for public dissemination of material information. The SEC's position on this issue is clear — the mere posting of information on a corporate web site does not constitute adequate public dissemination of the information. While this view is likely to change over time, for now, companies should assume that posting information on their web site does not satisfy their public disclosure obligations under Regulation FD or other securities laws unless they do so in combination with other methods of dissemination providing broad, non-exclusionary distribution of the information. For example, Regulation FD provides that broad, non-exclusionary dissemination of information may be accomplished through a press release, the filing of a Form 8-K or a public conference call after adequate advance notice. Depending on the circumstances, it may be adequate to issue a press release which only identifies the topic of information available on the web site and indicates how the information can be accessed. However, this approach should be used cautiously, particularly if market-moving information is involved.

Establish an investor relations section on your web site. Companies should group applicable IR materials into a single designated area of their web site. For example, the IR area could contain:

- the company's SEC filings and reports to stockholders;
- press releases issued by the company;
- historical company stock price information and current stock quotes;
- frequently asked questions (including information about past stock splits, transfer agent information and other basic information of interest to stockholders);
- a list of upcoming public events involving the company and the means by which interested investors may access these events;
- if the company has a strong desire to list the securities analysts who publish reports on the company, a list of *all* such securities analysts, in alphabetical order, without giving disproportionate prominence to any (however, do not include quotes from or reports of financial analysts, or hyperlinks to such reports);
- an *appropriate* "safe harbor" statement under the Private Securities Litigation Reform Act of 1995 and risk factors affecting the company's future oper ating performance (if forward-looking information is also included on the company's web site, consideration should be given to requiring anyone who wants to access that information first to view, by click-through agreement, the "safe harbor" statement and risk factors);

(cont. on page 16)

Every company should take steps to turn its corporate web site into an effective tool for announcing when public conference calls, meetings and presentations will take place.

Guidance on Guidance: A Litigator's Perspective

In August, after much comment and some controversy, a divided Securities and Exchange Commission promulgated Regulation FD (meaning Fair Disclosure).

While gathering our thoughts on the topic, we could not avoid bemusement at the instant reaction of some of our colleagues who variously proclaimed the end of one-on-one conversations with analysts, the end of commenting on analysts models, the end of participation in broker-dealer sponsored events and indeed the end of guidance from issuers to the analyst community.

The reality is that companies will continue to offer access to the analyst community in exchange for coverage by that community, although any earnings guidance will almost certainly be provided in public forums rather than private conversations. Our view is that most corporate officers have long been law-abiding citizens, and what Regulation FD threatens them with is not a sudden burst of investigative energy from the SEC but rather an enhanced duty of caution in their daily lives — a duty which good counsel, outside directors knowledgeable about and respectful of Regulation FD, and an adroit use of technology can help them discharge.

Regulation FD prohibits selective disclosure of material information to investment professionals while not bothering to define materiality. The Commission's commentary to the regulation does, however, provide a list of topics which are presumptively material and at the top of the list is earnings. The Commission's stark language bears quoting:

> "One common situation that raises special concerns about selective disclosure has been the practice of securities analysts seeking 'guidance' from issuers regarding earnings forecasts. *When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the issuer official communicates selectively to the analyst nonpublic information that the company's anticipated earnings will be higher than, lower than, or even the same as analysts have been forecasting, the issuer likely will have violated Regulation FD. This is true whether the information about earnings is comm-unicated expressly or through indirect 'guidance,' the meaning of which is apparent though implied.* Similarly, an issuer cannot render material information immaterial simply by breaking it into ostensibly non-material pieces.
>
> "At the same time, an issuer is not prohibited from disclosing a non-material piece of information to an analyst, even if, unbeknownst to the issuer, that piece helps the analyst complete a mosaic of information that, taken together, is material. Similarly, since materiality is an objective test keyed to the reasonable investor, Regulation FD will not be implicated where an issuer discloses immaterial information whose significance is discerned by the analyst." (emphasis supplied.)

These words inspire contradictory reactions in us. We can't quarrel with the Commission's seeking to put an end to the selective guiding of analysts up or down. We are a little surprised, however, that the Commission may now be prohibiting private expressions of comfort with analysts' estimates. It may be that private discussions with investment professionals concerning earnings prospects are now simply taboo. Indeed, a majority of the public companies responding to a recent National Investor Relations Institute survey said they will probably limit their communications with analysts and investors as a result of Regulation FD. Our suspicion, however, is that one-on-one meetings and attendance at investor conferences will still continue, but subject to the new rules of engagement outlined elsewhere in this *Corporate Advisor*.

Our experience with the SEC has been that the Commission does not bring frivolous proceedings and that appeals to the Commission's common sense —

whether in an informal dialogue or in formal written submissions — prove constructive a high percentage of the time. So our disquietude is somewhat muted.

That said, we have two concerns, quite apart from the difficulty inherent in changing the folkways of Corporate America. First, selective disclosure cases will be tempting ones for Commission lawyers seeking quick victories. Unlike revenue recognition cases which require painstaking discovery and a mastery of accounting rules, a selective disclosure case only needs an otherwise unexplainable trading blip which the market surveillance cops are already very effective in identifying. Thereafter, the case is merely what corporate official said what to what analyst when. A potentially easy score.

Second, we want to return to the Commission's quotation we italicized earlier.

"This is true whether the information about earnings is communicated expressly or through indirect 'guidance,' the meaning of which is apparent though implied."

That sentence seems mildly ominous. True, we are already accustomed to seeing people trade and suffer the consequences for shrewd deconstruction of oblique words. The reassurance that "your bunny has a very good nose" prompted a senior banker a decade and a half ago to quickly and profitably close out a position — and to spend 109 days in a Club Fed for the pleasure of having done so.

We also can understand the Commission pursuing an issuer for some officer's intentional winks, blinks, nods or body language which spoke words about that corporate officer's state of the mind. Imagine, however, a CFO who in response to an analyst's query "How's the quarter going?" promptly assumes — quite involuntarily — the bereaved air of the nephew who just discovers his well-off maiden aunt has died, leaving everything to her Siamese cats. Suppose further that the analyst observes this change in demeanor and gets his clients out of the shares. Will the Commission bring an enforcement action based simply on the emotional transparency of the CFO?

Polonius instructed his manservant "by indirections find directions out." No community has ever taken Polonius' instructions more to heart than the analyst community. If the SEC takes too seriously its prohibition on "apparent though implied" guidance, private meetings with analysts really will have to cease. We hope the Commission will not push a good point too far.

— Jeffrey B. Rudman

To keep abreast of important developments in corporate and securities litigation, log on to Hale and Dorr's Corporate & Securities Litigation web site at www.haledorr.com/securities_litigation/index.html *and click on* ***The Defense Never Rests: Hale and Dorr's Guide to Avoiding and Defending Corporate Litigation.***

Using Corporate Web Sites to Facilitate Compliance with Regulation FD and Enhance Investor Relations *(cont. from page 13)*

- an audio replay of the most recent analysts' conference call (rebroadcasts generally should be made available for only a limited period of time);
- the electronic means to request additional information or submit questions to management in advance of quarterly conference calls (explicitly stating that not all requests or questions can be entertained);
- the ability for investors to subscribe to email distribution lists to receive press releases and other information from the company; and
- appropriate portions of the company's disclosure policies.

Maintain in-house capabilities to post materials to your web site. While many companies find it cost-effective to work with outside vendors to maintain and update their corporate web site, it is important that companies not become 100% dependent on outside vendors. For example, if a company is planning to present slides at an analyst conference and wishes to post the slides on its web site, but the slides will not be available until shortly before the meeting starts, an outside vendor may not be able to process and post the slides in time to make them available prior to the start of the meeting. In these circumstances, it may be important that the company be able to post the slides itself. Please remember, however, that merely posting information to a web site does not currently satisfy the public disclosure requirements of Regulation FD.

Perform a technical review of your web site. The increased use of web casts and dissemination of information through corporate web sites is going to result in increased traffic. Consideration needs to be given to whether a web site's current technical infrastructure has the capacity to keep up with expected increases in demand, particularly during events like quarterly conference calls. In addition, companies should review the ease of use and functionality of their web sites to be sure visitors enjoy a positive experience, rather than becoming frustrated by a confusing user interface.

Review your web site and linking practices in light of recent SEC guidance. In April, the SEC published an interpretive release providing guidance on the use of the Internet and other electronic media. The most important parts of the release address a company's liability for information on third-party web sites to which it has established hyperlinks from its web site or SEC filings, and a company's responsibility for the contents of its own web site. For additional information about these issues, and other practical tips for web site management, please see our Summer 2000 *Corporate Advisor* entitled "Legal Updates for Internet Times" located at www.haledorr.com/publications/corp/2000_08_CorpAdvisor.html. ■

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