

Regulation FD and Web Site Dos & Don'ts

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Why is this Important?

- Posting info on the Company's Web site does not fulfill the Company's disclosure obligations.
- In some cases, posting info on the Company's Web site **violates** Reg FD's selective disclosure rules.

Regulation FD

- “Whenever an **issuer**, or any person acting on its behalf, discloses any **material nonpublic information** regarding that issuer or its securities **to any person** described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e): (1) simultaneously, in the case of an **intentional disclosure**; and (2) promptly, in the case of a **non-intentional disclosure**.” C.F.R. § 243.100

“Issuer”

- Directors and Executive Officers
- Investor Relations Personnel
- Employees and Agents who regularly communicate with the securities market

“To Any Person”

- Brokers, Dealers, or Analysts
- Investment Advisors / Institutional Investors
- Securityholders (if trading on the info is reasonably foreseeable)

“To Any Person”

- **Does not** mean:
- Attorneys, Accountants, Bankers
- Persons subject to confidentiality
- Rating Agencies (in normal course)
- Media or Government

“Material” Information

- Substantial likelihood that a reasonable shareholder would consider the information important in making a decision to buy or sell the company’s securities

“Nonpublic” Information

- Information is “nonpublic” if it has not been disseminated in a manner making it available to investors generally.

“Intentional Disclosure”

- Knew, or was reckless in not knowing, that the information was both material and nonpublic
- Example: knowingly including nonpublic projections on a slide shown during a private conference with analysts.

“Non-Intentional Disclosure”

- Person disclosing does not know, and is not reckless in not knowing, that such information is material and nonpublic.
- Example: CEO’s off-the-cuff response during a private meeting with analysts where CEO mistakenly believes the info had already been publicly disclosed.

PRACTICE TIP:

- “Intentional” and “Non-intentional” not necessarily given their common meanings
- A “slip of the tongue” will be an “Intentional Disclosure” if the speaker knew or should have known the info was material and nonpublic

Manner of Public Disclosure

- Form 8-K (or other SEC filing)
- Wire service press release
- Public conference call (with adequate prior notice)

Reg FD Implications

- Does not change existing antifraud provisions, including rules governing insider trading, tipping and “gun-jumping”
- Violations enforced through SEC administrative / civil actions
- No private right of action under 10b-5

Web Site Dos and Don'ts

No Selective Disclosure

- Don't post material information to the Company's Web site unless it has first been publicly disclosed through more traditional means.
- Examples: SEC filing or Press Release

Web Site Czar

- One person should be responsible for reviewing and approving all materials before they are posted.
- Person should be:
 - familiar with legal risks and rules
 - knowledgeable about the company's business

Keep it Current

- Date all content
- Periodically review the site to update or delete outdated or inaccurate content
- Move historical content to a clearly labeled “Archive” section if not deleted

Be Wary of Linking

- Don't link to third-party content (like Analyst reports) without an adequate disclaimer
- “You are now leaving XYZ's Web site. XYZ assumes no responsibility for information or statements you may encounter on the Internet outside XYZ's site.”

Be Wary of Predictions

- Avoid or minimize forward looking statements
 - dates of future product releases
 - market share expectations, etc.
- Include appropriate “Safe Harbor” language under the PSLRA.

Don't Post Transcripts

- Oral statements and written statements are treated differently under the PSLRA.
- “Safe Harbor” warnings made orally during a conference are probably insufficient for a written transcript of the same call.

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