NEW SEC RULES TARGETING SELECTIVE DISCLOSURES BY PUBLIC COMPANIES

On December 20, 1999, the Securities and Exchange Commission issued proposed rules to address the abuses that can result when material nonpublic information is “selectively disclosed”, enabling the recipient of the information to trade before the information is fully disseminated in the public market. The proposed rules were adopted by the SEC, with some modifications, by release dated August 15, 2000. The new rules will become effective on October 23, 2000.

The selective disclosure rules will apply only to reporting companies (i.e., companies that file reports with the SEC under Section 12 or Section 15(d) of the Securities Exchange Act of 1934).

Under the new rules:

• A reporting company will not be able to disclose material information to a securities market professional \(^1\) outside the company except through public disclosure. Selective disclosure of material information will be prohibited unless the recipient of the information expressly agrees to maintain the information in confidence.

• If material information is unintentionally selectively disclosed, the company will be required to make a prompt public disclosure of that information.\(^2\)

• Public disclosure means filing a Form 8-K or disseminating “the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”

• These rules will apply to disclosures made by a senior official of the company i.e., a director, executive officer, investor relations or public relations officer, or other person with similar functions and any other officer, employee, or agent of the company who regularly communicates with any securities market professionals acting on behalf of the company.

• The selective disclosure rules will also apply to disclosures to a security holder of the company under circumstances in which it is

\(^1\) That is, outside broker-dealers, investment advisors and institutional investment managers and persons associated with them, as well as investment companies and their affiliated persons. Disclosures to a person who owes a duty of trust or confidence to the company (for example, the company’s outside consultant or investment banker) will be permitted.\(^2\) Under the rules, “prompt” will mean as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange) after a senior official knows, or is reckless in not knowing, of a non intentional disclosure that is material and nonpublic.
reasonably foreseeable that the security holder will trade on the basis of the information. In effect, this type of security holder is treated as a securities market professional

- The rules will not apply to disclosures made to credit rating agencies solely for the purpose of developing a credit rating when the agencies’ ratings are publicly available.

- The rules also will not apply to disclosures made in connection with a registered securities offering (other than certain delayed or continuous offerings).

In the following you will find a discussion of the selective disclosure rules, in the form of questions and answers, together with a copy of the text of new Regulation FD.

Questions and Answers About Regulation FD

Regulation Fair Disclosure (Regulation FD) seeks to end the practice of what is generally known as selective disclosure. Regulation FD provides that whenever an issuer, or any person acting on behalf of an issuer, discloses material nonpublic information regarding the issuer or its securities to certain categories of persons, it must also make public disclosure of that information. Regulation FD goes into effect on October 23, 2000. We have prepared the following questions and answers for our public company clients to summarize the Regulation and provide guidance on future compliance with the Regulation.

As used below, "you" refers to a non-investment company or a closed-end investment company that is required to file reports under Section 13 or 15(d) of the Securities Exchange Act of 1934.

General

What is “selective disclosure”? Selective disclosure occurs when you, or a person on your behalf, discloses important nonpublic information, such as advance notice of earnings results, to securities analysts or selected institutional investors before making full disclosure of the same information to the general public. The SEC is concerned that when this happens, those who are privy to the information beforehand are able to make a profit or avoid a loss at the expense of those kept in the dark.

Scope of Communications Covered by Regulation FD

Does the Regulation apply to all communications outside the company? No. Generally, Regulation FD will apply only to communications to securities market professionals and to any shareholder under circumstances in which it is reasonably foreseeable that the shareholder will trade in your securities on the basis of the information. It will not apply to a variety of legitimate ordinary course business communications or to disclosures to the media. Securities market professionals include brokers and dealers, investment advisers and investment companies, and persons associated with such entities.

Will Regulation FD prevent open communications with professional advisers and rating agencies? Regulation FD will not apply to a disclosure made to a person who owes you a duty of trust or confidence, such as your attorney, investment banker or accountant - a “temporary insider.” Nor will it apply to a person who expressly agrees to maintain the disclosed information in confidence or to an entity whose primary business is the issuance of credit ratings. Regulation FD will also not apply to your communications in connection with a securities offering registered under the Securities Act, other than a continuous offering under Rule 415.

Issuer Personnel Covered by the Regulation

Who is a “person acting on behalf of an issuer” for purposes of the Regulation? You will be responsible for communications made by any of your senior officials. You will also be

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3 Disclosures made in connection with secondary offerings, offerings pursuant to dividend and interest reinvestment plans and employee benefit plans, offerings upon exercise or conversion of derivative securities or offerings of securities pledged as collateral or registered on Form F-6 will be subject to the selective disclosure rules.
responsible for communications by any of your other officers, employees or agents who regularly communicates with market professionals or your security holders. However, an officer, director, employee or agent who discloses material nonpublic information in breach of a duty of trust or confidence to you for example, when an employee improperly trades or tips will not be considered to be acting on your behalf.

If you have not done so already, you might consider adopting, and strictly enforcing, a policy outlining who is authorized to communicate with market professionals and security holders on behalf of the company.

Who is a senior official of the issuer?

Any director, executive officer, investor relations or public relations officer, or other person with similar functions is considered a senior official. In addition, to the extent that another employee has been directed to make a selective disclosure by a member of senior management, that member of senior management would be responsible for having made the selective disclosure.

Timing of Required Public Disclosures

When must public disclosure be made of the material information?

When disclosure must be made depends on whether the selective disclosure was intentional or non-intentional. The disclosure must be made simultaneously in the case of an intentional disclosure and promptly in the case of a non-intentional disclosure.

When is public disclosure considered to be made promptly?

A public disclosure is considered prompt if made as soon as reasonably practicable but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange.

When does the duty to make prompt disclosure begin?

It begins when one of your senior officials

- learns that information has been disclosed,
- knows, or is reckless in not knowing, that the information disclosed is material, and
- knows, or is reckless in not knowing, that the information disclosed is nonpublic.

When is a disclosure considered “intentional”?

When the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic. Thus, in the case of a selective disclosure due to a mistaken determination of materiality, liability will arise only if no reasonable person under the circumstances would have made the same determination.

Material Nonpublic Information

When is information considered “material”?

Regulation FD relies on existing definitions of “materiality” established in the case law. Information is material if “there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision”. To fulfill the materiality requirement, there must be a substantial likelihood that a fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available.

Has the SEC identified types of information or events that are more likely to be considered material?

Yes. In its adopting release, the SEC listed the following items as types of information or events that should be reviewed carefully to determine whether they are material:
- earnings information;
- mergers, acquisition, tender offers, joint ventures or changes in assets;
- new products or discoveries or developments regarding customers or suppliers, such as the acquisition or loss of a contract;
- changes in control or in management;
- changes in auditors or auditor notification that the issuer may no longer rely on an auditor’s audit report;
- events regarding the issuer’s securities, for example defaults on senior securities, calls of securities for
redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, and public or private issues of additional securities; and
• bankruptcies or receiverships.

When is information considered nonpublic?

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

May you engage in a private discussion with an analyst who is seeking guidance about earnings estimates?

In the SEC’s view, you will likely be in violation of Regulation FD if you communicate selectively to an analyst nonpublic information that your anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting.

May you engage in any discussions with an analyst?

You are not prohibited from disclosing a non-material piece of information to an analyst, even if that piece helps the analyst complete a mixture of information that, taken together, is material. Since materiality is an objective test, Regulation FD will not be implicated where you disclose immaterial information whose significance is discerned by the analyst.

Public Disclosure Required by the Regulation

Is there a procedure that must be followed to make the required public disclosure of the information selectively disclosed?

The public disclosure required by Regulation FD may be accomplished through a Report on Form 8-K that discloses the information. Alternatively, you may disseminate the information through another method or combination of methods of disclosure that is reasonably designed to provide broad non-exclusionary distribution of the information to the public.

Does it matter how the information is reported on Form 8-K?

Information being publicly disclosed on the Form 8-K may be reported under Item 5 or under Item 9 of Form 8-K. If the information is reported under Item 5, the information will be treated as being “filed” with the SEC; it could give rise to liability under the Exchange Act and will be automatically incorporated by reference into Securities Act registration statements, creating the risk of liability under the Securities Act. If you choose to furnish the information under Item 9, it will not be treated as being “filed” with the SEC. Under this approach, the information will not be subject to liability under the Exchange Act or the Securities Act unless you take steps to include that disclosure in a filed report, proxy statement, or registration statement. All disclosures on Form 8-K, however, remain subject to the antifraud provisions of the federal securities laws.

What alternative methods of disclosure are available?

Acceptable methods of public disclosure include press releases distributed through a widely circulated news or wire service, or announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephonic transmission or by other electronic transmission (including the Internet).

The SEC has suggested the following model for making a planned disclosure of material information, such as a scheduled earnings release:

First, issue a press release, distributed through regular channels, containing the information;

Second, provide adequate notice, by a press release and/or website posting, of a scheduled conference call to discuss the announced results, giving investors both the time and date of the conference call, and instructions on how to access the call.

Third, hold the conference call in an open manner, permitting investors to listen in either by telephonic means or through Internet webcasting.

You might consider following these procedures in connection with any conference calls and meetings you might hold in the future with analysts. Otherwise, you will be forced to closely monitor your communications during such calls or meetings.
so that there is not an “intentional” disclosure of material nonpublic information. If that approach is taken, we recommend you consider recording the communications in order to analyze in an objective setting the materiality of any “new” information that might have been disclosed during the course of the call or the meeting.

**Will the posting of information on the company’s own website be sufficient?**

As technology evolves and as more investors have access to and use the Internet, some companies whose websites are widely followed by the investment community could use such a method. In addition, disclosure made on website could be a part of a combination of methods, reasonably designed to provide broad non-exclusionary distribution of information to the public.

**Issuers Subject to Regulation FD**

**Does Regulation FD apply to all companies?**

Regulation FD applies to any issuer that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or is required to file reports under Section 15(d) of the Exchange Act.

**Liability Issues**

**Will a failure to make a public disclosure required by Regulation FD give rise to antifraud liability?**

No, the failure to make a public disclosure required solely by Regulation FD will not affect whether, for purposes of Forms S-2 and S-8, you are deemed to have filed all the material required to be filed or whether such filings have been made in a timely manner. It also will not affect whether there is adequate current public information about you for purposes of Rule 144.

**Securities Act Issues**

**Is a company that fails to make a public disclosure required by Regulation FD considered delinquent in filing Exchange Act reports?**

No, the failure to make a public disclosure required solely by Regulation FD will not affect whether, for purposes of Forms S-2 and S-8, you are deemed to have filed all the material required to be filed or whether such filings have been made in a timely manner. It also will not affect whether there is adequate current public information about you for purposes of Rule 144.

**Text of New Regulation FD (Part 243):**

**PART 243 -- REGULATION FD**

Sec.
243.100 General rule regarding selective disclosure.
243.101 Definitions.
243.102 No effect on antifraud liability.
243.103 No effect on Exchange Act reporting status.

§ 243.100 General rule regarding selective disclosure.

(a) 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.

(b) (1) Except as provided in paragraph (b)(2) of this section, paragraph (a) of this section shall apply to a disclosure made to any person outside the issuer:

(i) who is a broker or dealer, or a person associated with a broker or dealer, as those terms are defined in Section 3(a) of the Securities Exchange Act of 1934;

(ii) who is: (A) an investment adviser, as that
term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940; (B) an institutional investment manager, as that term is defined in Section 13(f)(5) of the Securities Exchange Act of 1934, that filed a report on Form 13F with the Commission for the most recent quarter ended prior to the date of the disclosure; or (C) a person associated with either of the foregoing. For purposes of this paragraph, a “person associated with an investment adviser or institutional investment manager” has the meaning set forth in Section 202(a)(17) of the Investment Advisers Act of 1940, assuming for these purposes that an institutional investment manager is an investment adviser;

(iii) who is an investment company, as defined in Section 3 of the Investment Company Act of 1940, or who would be an investment company but for Section 3(c)(1) or Section 3(c)(7) thereof, or an affiliated person of either of the foregoing. For purposes of this paragraph, “affiliated person” means only those persons described in Section 2(a)(3)(C), (D), (E), and (F) of the Investment Company Act of 1940, assuming for these purposes that a person who would be an investment company but for Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 is an investment company; or

(iv) who is a holder of the issuer’s securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer’s securities on the basis of the information.

(2) Paragraph (a) of this section shall not apply to a disclosure made:

(i) to a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant);

(ii) to a person who expressly agrees to maintain the disclosed information in confidence;

(iii) to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity’s ratings are publicly available; or

(iv) in connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i)-(vi) (230.415(a)(1)(i) - (vi) of this chapter).

§ 243.101 Definitions.

This section defines certain terms as used in Regulation FD (§§ 243.100 - 243.103).

(a) Intentional. A selective disclosure of material nonpublic information is “intentional” when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.

(b) Issuer. An “issuer” subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any closed-end investment company (as defined in Section 5(a)(2) of the Investment Company Act of 1940) (15 U.S.C. 80a-5(a)(2)), but not including (i) any other investment company or (ii) any foreign government or foreign private issuer, as those terms are defined in Rule 405 under the Securities Act (§ 230.405).

(c) Person acting on behalf of an issuer. “Person acting on behalf of an issuer” means any senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer’s investment adviser), or any other officer, employee, or agent of an issuer who regularly communicates with any person described in § 243.100(b)(1)(i), (ii), or (iii), or with holders of the issuer’s securities. An officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer.

(d) Promptly. “Promptly” means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange) after a senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer’s investment adviser) learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.
(e) Public disclosure.
(1) Except as provided in paragraph (e)(2) of this section, an issuer shall make the “public disclosure” of information required by § 243.100(a) by furnishing to or filing with the Commission a Form 8-K (17 CFR 249.308) disclosing that information.

(2) An issuer shall be exempt from the requirement to furnish or file a Form 8-K if it instead disseminates the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

(f) Senior official. “Senior official” means any director, executive officer (as defined in § 240.3b-7 of this chapter), investor relations or public relations officer, or other person with similar functions.

(g) Securities offering. For purposes of § 243.100(b)(2)(iv):

(1) Underwritten offerings. A securities offering that is underwritten commences when the issuer reaches an understanding with the broker-dealer that is to act as managing underwriter and continues until the later of the end of the period during which a dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated);

(2) Non-underwritten offerings. A securities offering that is not underwritten:

(a) if covered by Rule 415(a)(1)(x) (§ 230.415(a)(1)(x) of this chapter), commences when the issuer makes its first bona fide offer in a takedown of securities and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities in that takedown (unless the takedown is sooner terminated);

(b) if a business combination as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter), commences when the first public announcement of the transaction is made and continues until the completion of the vote or the expiration of the tender offer, as applicable (unless the transaction is sooner terminated);

(c) if an offering other than those specified in paragraphs (a) and (b), commences when the issuer files a registration statement and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated).

§ 243.102 No effect on antifraud liability

No failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of Rule 10b-5 (17 C.F.R. 240.10b-5) under the Securities Exchange Act.

§ 243.103 No effect on Exchange Act reporting status

A failure to make a public disclosure required solely by § 243.100 shall not affect whether:

(a) for purposes of Forms S-2, S-3 and S-8 under the Securities Act, an issuer is deemed to have filed all the material required to be filed pursuant to Section 13 or 15(d) of the Securities Exchange Act or, where applicable, has made those filings in a timely manner; or

(b) there is adequate current public information about the issuer for purposes of Rule 144(c) under the Securities Act.