REGULATION FAIR DISCLOSURE (FD)

The Securities and Exchange Commission in October 2000 adopted Regulation FD to protect the public against a perceived tilting of the investment landscape based upon “selective disclosure” to favored investors and stock analysts. The regulation applies to almost all public companies,[1] including limited partnerships, controlled companies, and closed-end investment companies. Regulation FD restricts both formal and informal communications between public companies and investment professionals, requiring that companies adopt and maintain compliance and monitoring programs to provide appropriate guidance to key personnel. This memorandum updates our firm’s previous guidance, about Regulation FD, and provides additional information based upon current practices and recent developments.

General Rule

Regulation FD prohibits a company from intentionally disclosing material nonpublic information to specified types of securities market professionals and stockholders, as well as to other persons who could reasonably be expected to trade on the basis of this information, unless the company makes a simultaneous public disclosure. In addition, if a company unintentionally discloses material nonpublic information to such recipient, the company must make an immediate public disclosure to mitigate the potential harm associated with the selective disclosure. Both the New York Stock Exchange and the Nasdaq Stock Market rules require prompt public dissemination of information that might reasonably be expected to affect the value of a listed company’s securities, and readers should recognize the inherent tension between the need to preserve confidentiality and the obligation to make prompt disclosures in certain circumstances. This update is not a detailed discussion of the various disclosure requirements that arise under these rules or under Form 8-K and the various other Securities Exchange Act reports and Securities Act registration statements, but public company personnel should bear in mind these obligations and, where the competing obligations create uncertainty, should consult with the company’s general counsel or with outside securities counsel.

Company Representatives Subject to Regulation FD

Regulation FD applies to disclosures made by specified company representatives, including directors and executive officers, investor relations and public relations personnel, and other employees and agents who regularly communicate with securities market professionals and

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[1] Regulation FD does not apply to open-end investment companies or foreign private issuers (although deliberate “tipping” of inside information can result in insider trading sanctions involving securities issued by those entities under other federal and state antifraud laws and regulations).

investors. Statements made by other company employees do not generally trigger disclosure obligations under Regulation FD unless the employee is acting at the direction of senior management. Of course, any attempts to circumvent these restrictions by using third party “consultants” or other sources likely would be viewed as a direct violation by the company and the individual recruiting the third party, as well as by the third party him or herself.

Companies can promote Regulation FD compliance by adopting a policy that limits the individuals who are authorized to speak publicly or to the investment community about material nonpublic information and that delineates the timing, scope and approval requirements for these disclosures. The SEC generally will not consider disclosure by unauthorized personnel, regardless of seniority, to be Regulation FD violations, although these disclosures may give rise to “tipping” and insider trading sanctions under some circumstances.

Recipients Triggering Public Disclosure Obligation

Under Regulation FD, disclosures of material nonpublic information to the following classes of recipients will 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
- stockholders or prospective stockholders if it is reasonably foreseeable the stockholder 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, provided 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 “shelf ” offerings.

Similarly, publicly filed reports by regulated entities, such as bank and bank holding company call reports, reports filed with insurance commissioners, and similar reports, as well as court filings and publicly available responses to agency enforcement actions, are not governed by Regulation FD, although readers should consider whether such disclosures are sufficiently material to justify separate disclosure under the securities laws or whether they trigger a disclosure requirement under, for example, the Legal Proceedings disclosure requirements of Item 103 of Regulation S-K.

Regulation FD also does not apply to ordinary-course business communications with parties such as customers, suppliers, strategic partners and government regulators. However, most public companies maintain contractual nondisclosure or confidentiality restrictions that prohibit unauthorized releases of material nonpublic information and that prohibit unlawful trading in company securities. Readers should note that the SEC's position is that contractual nondisclosure restrictions need not necessarily include trading restrictions; however, we generally advise in favor of these clauses in the absence of compelling contrary circumstances.

An exception to this requirement exists for disclosures to employees, attorneys, accountants and others who have a legally enforceable obligation to protect confidentiality. Disclosures of material nonpublic information to employees, for example, does not constitute a Regulation FD violation, although companies making such disclosures should be aware of other restrictions – such as potential gun-jumping liabilities for public securities offerings in which employees would be permitted to invest. And of course companies should be aware of the risk of unintentional disclosure, which often tends to rise with the expansion of the internal audience.

Material Nonpublic Information

As mentioned above, Regulation FD applies to both intentional and unintentional disclosures of "material nonpublic information." Consistent with its longstanding practice, the SEC chose in the Regulation FD adopting release to refrain from defining what constitutes material nonpublic information based upon its contention that the term has a "generally understood" meaning. While one can argue the validity of that position, there exists a considerable body of legal precedent that examines the question, much of which is discussed in the adopting release and in a contemporary release, Staff Accounting Bulletin No. 99 (August 12, 1999). Generally speaking, information is "material" if there exists a substantial likelihood that a reasonable, prudent investor would consider the information important in deciding whether to buy or sell securities and, if so, at what price. Materiality does not necessarily depend on quantitative outcomes. For example, information that suggests a seemingly insignificant deviation in earnings per share can nonetheless be material in a variety of circumstances (such as whether the deviation would cause the issuer to meet or miss its announced guidelines or analysts' expectations). One of the first Regulation FD enforcement actions involved a company that provided public guidance as to annual earnings targets, but shortly thereafter provided additional detail about quarterly earnings patterns to select analysts. Similarly, information that might seem insignificant if viewed in isolation can nonetheless be material if it "alters the total mix of information" available to the investing public. Often the most difficult Regulation FD compliance issues can be the question whether a given piece of information is material and nonpublic. Regulation FD does not define either "material" or "nonpublic." In the SEC release adopting Regulation FD, the SEC stated that these terms have generally understood meanings. 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.

For example, an early enforcement action involving a Regulation FD violation by Raytheon Corporation and its chief financial officer demonstrated that, although the company had provided public (and compliant) guidance about projected fiscal-year performance, the SEC would nonetheless bring charges where the company made additional, selective disclosures about quarterly projections that had not been made to the general public. An early example of this type of information is reflected in a 2002 enforcement action against Motorola, Inc. The company had previously disclosed on an earnings call that it expected "significant weakness" in its quarterly sales, but in a follow-up discussion with a limited group of analysts, it refined this guidance to indicate that it expected to miss its earnings targets and that the "significant weakness" would result in a decline in sales of 25% or more. Similarly, indirectly "signaling" a company's nonpublic expectations to a limited audience, such as directing analysts' attentions to prior guidance and competitors' public disclosures about market expectations can trigger enforcement actions, as evidenced by an enforcement action against Office Depot in 2010.

Regulation FD does provide guidance as to whether information is "nonpublic." Information is nonpublic for this purpose if it has not been disseminated in a manner making it available to investors generally. In assessing whether information is "nonpublic" management should assess whether the disclosure contains information that is sufficiently different from the company's prior public disclosures as to affect the "total mix of information." For example, providing insignificant but nonpublic details about information that has previously been disclosed may well not result in a Regulation FD disclosure. However, executives should recognize that these determinations can be scrutinized in hindsight, and management should take care and should consider consulting with counsel when exercising these judgments. Further, note that "public availability" is not limited to information that has been filed as a part of the company's Securities Exchange Act reports: press releases and other permissible methods of dissemination can be used effectively in appropriate circumstances. Nonetheless, more critical items of information often require disclosure either in a Current Report on Form 8-K or on the company's annual or quarterly reports. (See "*Manner of Required Public Disclosures*" below.) Further, management should not overlook the obligation to notify the company's listing securities exchange prior to disseminating such information outside the ordinary cause.

Intentional v. Unintentional 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 during a private conference with analysts. Intentional disclosure of material nonpublic information is a clear violation of Regulation FD. Unintentional disclosure is any disclosure that does not qualify as an intentional disclosure. An example of unintentional 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 been previously publicly disclosed.

Unintentional disclosure of material nonpublic information triggers an obligation on the part of the company to promptly disclose that information publicly. "Promptly" means as soon as reasonably practicable after a director, executive officer or investor relations or public relations employee learns of the unintentional 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.

Consider the Office Depot action as an example of how the SEC has often viewed Regulation FD enforcement cases. The Office Depot case resulted from what the SEC alleged was a deliberate attempt to circumvent Regulation FD by giving tacit guidance by referring to competitors' forecasts of declining earnings. According to the SEC's enforcement release, Office Depot's CEO and CFO directed investor relations personnel to provide guidance to selected analysts, "talking down" the analysts' expectations. The executives directed the investor relations personnel to reach out to the analysts by telephone to indicate that Office Depot had – unbeknownst to the public – reduced its earnings expectations. According to the SEC, Office Depot's employees "did not directly tell the analysts that it would not meet their expectations; rather, this message was signaled through its references to recent public statements of comparable companies about the impact of the slowing economy on their earnings, and reminders of Office Depot's prior cautionary public statements. The analysts promptly lowered their estimates for the period." Several days after the investor relations calls began, and only after a significant decline in Office Depot's stock price (accompanied by higher than normal trading volumes), the company filed a Form 8-K reporting that it "now anticipates that its domestic sales and corporate earnings will be negatively impacted due to continued soft economic conditions." The stock price had closed at $32.15 per share on the day before the Form 8-K was filed, down from $33.49 per share on the day the company began calling the preferred analysts. One could argue that the fact that Office Depot's two largest competitors had already lowered their earnings estimates had, at least to some degree, been "priced into" the trading price of Office Depot's stock, as well, and but for the allegedly disingenuous actions of the company's management, the stock price would have fallen in a substantially similar pattern over time. Indeed, the price had already declined significantly before the calls began: the closing price on May 31, 2007, stood at $36.40 per share. However, the SEC's view was that, by designing a scheme tacitly to treat favored analysts differently from the investing public, and by doing so in a manner that appears to have been a deliberate attempt to circumvent the application of the rules, Office Depot had engaged in an intentional violation of Regulation FD. As a result, the company was fined $1 million and each of the executives was fined $50,000.

Manner of Required Public Disclosure

There are several ways in which a company can make the public disclosure required by Regulation FD. The first and most obvious is by filing a Form 8-K furnishing the information to with the SEC. Information disclosed in this manner 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, or incorporated into registration statements filed under the Securities Act.

The second means of satisfying Regulation FD's public disclosure requirement is 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. Additionally, the SEC views disclosure on the company's Internet website as sufficiently disseminated if the company has taken reasonable steps to alert the investing public that it intends to use its website as a channel for disclosing information, and if investors generally use the website as a means to access investor relations information. The SEC recommends making it clear that the company uses its website as a primary disclosure resource and that, if it intends to rely on this method, it does so consistently. The information should be prominently available and readily accessible, and the use of RSS feeds or similar types of "push" technology are viewed positively in this regard. Perplexingly, however, the SEC notes that "in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their web sites." On the other hand, the adopting release goes on to suggest, less well-known companies, ordinarily small-cap companies, those that have a more limited trading volume, and those that are traded in the over-the-counter system, as well as new public companies, may find it helpful to direct the investing public to their website or to provide simultaneous press releases or Form 8-K filings. In other words, companies that may find it most cost-effective and convenient to use their websites as a primary source of investor relations materials are, at least in the Commission's view, the ones that are least likely to be viewed favorably in doing so unless, of course, they also use an alternative or additional method. As with all methods of making securities disclosures, a company using its website for investor relations materials must keep the website current and complete.

In addition, to these written methods disclosure of information in a conference call open to the general public, through a webcast and dial-in number, is also generally sufficient, provided the public is given adequate notice of the call and the means of accessing it. Information about the call should be included in a press release and posted on the company's website.

Liability and Enforcement Issues

We have discussed several prominent Regulation FD enforcement cases above, and although these cases can be highly fact-specific, cases that involve intentional violations, as well as those that involve significant delays in making corrective disclosure after discovering inadvertent disclosures, are the ones most likely to give rise to enforcement actions. However, readers should recognize that the failure to make required a public disclosure under 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. However, Rule 10b-5 applies nonetheless to intentional acts involving the "tipping" of information and, of course, to fraudulent or intentional misuse of material nonpublic information.

- does not affect a company's obligation to file timely periodic reports under Section 13 or Section 15(d) of the Securities Exchange Act (such as Form S-3 or Form S-8) or for a stockholder's ability to meet the "current public information" requirement embodied in Securities Act Rule 144(c).

- does not affect a company's ability to use the "safe harbor" protections for forward looking statements, whether those statements are embodied in the disclosure under the Private Securities Litigation Reform Act of 1995.

The SEC generally enforces violations of Regulation FD using enforcement actions and civil suits against issuers and their responsible officials. For example, the SEC has, in recent years, brought enforcement actions that resulted in fines ranging from $50,000 for individuals (SEC v. Polizzotto, 2013) to $250,000 or more for companies (SEC v. Siebel Systems, Inc., 2002) and, in cases involving willful misconduct, has collected civil money penalties of as much as $1,000,000 (SEC v. Office Depot, 2010; SEC v. Schering-Plough Corporation, 2004).

More recently, the SEC has also provided guidance in the form of an enforcement action that did not involve a fine against the company. That case, the Polizzotto case cited above, involved a decision not to sanction the company based upon the SEC's perception that the company "cultivated a culture of compliance" regarding securities matters, that it made corrective disclosure on a press release immediately after it discovered Mr. Polizzotto's actions, that it voluntarily self-reported the circumstances to the SEC, and that it took additional remedial actions intended to protect against future failures.

PRACTICAL GUIDELINES

The SEC offers specific guidance in the adopting release for Regulation FD to help ensure compliance with Regulation FD in specified and commonly encountered circumstances.

Investor Calls

For conference calls with securities analysts and investors, such as earnings calls that typically follow quarterly earnings releases:

- **Public access.** Investor calls generally should be broadly available to the public, providing access through telephonic or Internet access such as a webcast. Calls should be publicly announced well in advance, including notice of the date and time and the appropriate access details. Pertinent information should be disseminated in a press release and should be posted on the company's website. In the case of quarterly conference calls, this information should be disseminated at least 24 hours, and ideally several days, prior to the call. For extraordinary calls such as those to discuss mergers or other material business developments, this information should be disseminated as far in advance of the call as practicable. (Registrants are reminded about the obligation to notify the listing exchange in advance of unscheduled announcements.) Companies may restrict questions to a limited segment of the audience and may provide other participants with muted, or listen-only, access. Access restrictions should generally be based upon a participant's category, however: while it would seem reasonable to permit only analysts to ask questions during a call, companies generally should not discriminate among analysts by (for example) permitting only those perceived to be "friendly" or "supportive" to ask questions, while relegating others to the listen-only segment.

- **Timing of Calls.** The company should not hold the conference call until the press release announcing the basic information that forms the subject of the call, has been broadly disseminated. While we generally believe that it is ideal to conclude the call only after the market has digested the published data, we recognize that a broad variety of issuers often commence the call after only a very brief delay, and the SEC has not commented adversely on this practice.

- **Preparing the Script.** Management, together with the company's finance or accounting department, the general counsel's office, and outside counsel, should prepare a script in advance of the call. Practitioners should recognize that, even statements made during an earnings call do not constitute selective disclosure, they can still subject the company to liability under anti-fraud laws, or by assuming a duty to update or correct information in the future. Further, certain types of statements can give rise to "gun-jumping" or "conditioning the market" issues in connection with public offerings or M&A transactions.

- **Complete Information.** So long as 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. For example, both the Raytheon case mentioned above and an early enforcement case involving Motorola involved private follow-up discussions with analysts that took place after a quarterly earnings call and that provided additional information to the more limited audiences that the SEC contended altered the "total mix of information" available to the investing public.

- **"Safe Harbor" Statement.** Regulation FD does not limit the obligation to describe cautionary statements relating to any forward-looking statements that will be disclosed during the call. In fact, to the extent Regulation FD leads a company to increase the amount of forward-looking information it publicly discloses, the need for the safe harbor statement increases correspondingly. To take advantage of this safe harbor, the 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 federal and state securities law. Our actual results may differ from our expectations expressed here, and we may take actions that deviate from our current plans. Some of the factors that can cause our forward-looking statements to prove inaccurate are discussed in the "Risk Factors" section of our most recent [Annual Report on Form 10-K] [or other filing], which is on file with the SEC and available on our website."

- **Make replays available for a limited time.** The company should record investor calls and permit people to listen to a rebroadcast, 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. Further, we recommend that the introduction to the call include an admonition that the information provided is accurate as of the current date and time, but that the company does not intend to update the contents of the call other than as may be required under applicable laws.

- **Do not post transcript of call.** It is generally not advisable for the company to post a transcript of the conference call on its web site or make a transcript available upon request. The safe harbor warning described above, while sufficient to protect oral forward-looking statements, is <u>not</u> sufficient to protect written forward-looking statements. A written forward-looking statement must be accompanied by cautionary statements, and a transcript of the call may transform oral forward-looking statements into written ones.

One-on-One Discussions

Regulation FD considerably increased the risks associated with one-on-one meetings with analysts and investors. A publicly accessible conference call, compliant with the recommendations described above, constitutes public disclosure of the contents, thus satisfying the timely dissemination requirements of Regulation FD while simultaneously avoiding other selective disclosure risks. However, statements made in one-on-one or other limited-access situations are much more likely to constitute selective disclosure if material nonpublic information may be discussed during the session.

A small minority of public companies maintain a policy against meeting privately with securities analysts and investors. Of course, this policy may be a safe course of action from a legal perspective, but for most companies this is not a realistic alternative. Moreover, the SEC explicitly decided against such a blanket prohibition when adoption Regulation FD, even if diligent analysts might obtain a benefit from these meetings, "even if, unbeknownst to the issuer, [the information discussed] 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."

When preparing for meetings or other one-on-one discussions, or for presentations at investor conferences or in other nonpublic settings, the disclosure team should take care to assure that no material nonpublic information is disclosed. Because materiality judgments are inherently fact-specific, and because these disclosures are often evaluated with the benefit of hindsight, authorized speakers should carefully examine their presentations and disclosures in light of existing disclosures, previous forward-looking statements, and market expectations. We hope this update provides helpful guidance in preparing for these discussions, but there can be no adequate substitute for discussing the matter with the legal team and investor relations staff beforehand. A few additional guidelines may be helpful:

- Avoid nonpublic discussions during "blackout periods," meaning the period that begins when a company has developed substantial insight into quarterly performance and that ends shortly after it releases its earnings.

- Conversations should be completed as soon as practicable after the quarterly earnings release and conference call. We strongly recommend avoiding discussions of any such matters between the posting of the earnings release and the completion of the conference call.

- Establish – and adhere consistently to – formal guidance for questions that will not be answered. For example, the company should not disclose its internal financial projections, and companies that do not publicly disclose other aspects of strategy or finances should not do so in these settings.

- Representatives participating in these conversations should be fully informed about the business and finances of the company, including prior disclosures and risk factors, to ensure the information provided is accurate and that it does not inadvertently conflict with prior public statements.

- Company representatives or legal counsel may find it useful to debrief their investor relations personnel immediately after any one-on-one conversations as a means of confirming that no inappropriate disclosure has occurred.

Earnings Guidance

Discussions that involve "guidance" about expected future results can be particularly risky, whether they involve initial disclosures about projections or updates of existing information. The most critical aspects of this risk are not directly related to Regulation FD, but instead give rise to questions of a duty to update previous guidance and to implications under the antifraud and misrepresentation/nondisclosure statutes, both of which are beyond the scope of this update but should be considered and discussed with counsel and with financial and accounting staff in detail. The Regulation FD implications, however, are also heightened when nonpublic meetings involve a discussion about earnings targets. Regarding the Regulation FD requirements for such disclosures, the SEC noted in the release promulgating the regulation that private discussions with analysts and investors who are seeking guidance about earnings estimates involves "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."

Further, “an issuer cannot render material information immaterial simply by breaking it into ostensibly non-material pieces,” as was alleged to have been the case in the Office Depot enforcement action discussed above. Indeed, several of the enforcement actions noted above have borne out the SEC’s emphasis on this position, and it should be clear from a review of these cases that any significant discussions about earnings or the components thereof can give rise to significant risks. Indeed, many companies have adopted a practice of furnishing their investor presentation “slide decks” or PowerPoint presentations under Item 9 of Form 8-K, and making them readily accessible via websites, in advance of such meetings to assure that where individual discussions do take place, the general information provided to the analysts has previously been publicly disclosed. Even in public settings, however, 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 difficult, 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 caution our clients against such reviews. Company executives have told us from time to time that they feel compelled, however, to correct factual errors in a report, have sometimes expressed concern that the company might incur liability for failing to correct obvious errors. A policy of informing the company’s analysts that it will not review draft reports in advance of their publication, and to request that such draft reports not be sent to the company, will mitigate this problem – but only if the policy is consistently followed. If a company intends to adopt a different stance, or to deviate from an existing policy, we strongly recommend that management discuss their intentions with counsel before communicating with the analysts about such matters.

Other Common 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 will 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 will be subject to the prohibitions against disclosure of material nonpublic information include:

- investor conferences, such as those hosted by investment banks;
- online interactive chat sessions involving company officials and members of the public;
- interviews broadcast over the web with organizations such as Radio Wall Street; and
- stockholder meetings.

A company may be able to comply with Regulation FD by turning some of these situations into forums 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 by issuing a press release containing the text of the company's presentation. However, this is not likely to be feasible for all such settings.

Media Interviews

Regulation FD does not apply to disclosures to the press because such statements are, by their nature, intended to be broadly disseminated (and because of the First Amendment implications were the regulation to have provided otherwise). However, given the state of the modern news media and the proliferation of popular financial reporting on news shows like "Mad Money®" and news services such as Bloomberg News®, the distinction between a financial disclosure and a media disclosure can be indistinct, and issuers should be cautious when addressing these audiences in a nonpublic discussion.

Additionally, regardless of whether a statement to the media is governed by Regulation FD, issuers should consider whether it creates problems under other aspects of the securities laws, including gun-jumping restrictions and antifraud regulations as well as potential violations of marketplace rules.

Accordingly, we recommend that public companies avoid distinguishing media interviews and discussions from disclosures that are governed by Regulation FD and other securities laws. Readers should therefore consider limiting media interviews to authorized and adequately prepared personnel and will be well served by assuring that the contents of such discussions have been contemporaneously or previously disclosed in a Regulation FD-compliant manner.

Securities Offerings

Regulation FD does not apply to communications made in connection with most registered securities offerings, including those conducted in connection with business combinations. As a result, road show and sales force presentations after a registration statement has been filed are not subject to Regulation FD (although they may require filing as free-writing prospectuses or supplemental disclosures under the Securities Act). Regulation FD *does* apply to disclosures made in connection with "shelf takedowns" and to offerings by public companies that are exempt from registration, including Rule 144A and Regulation S offerings, "PIPE" transactions and private placements. There are two ways to balance a company's Regulation FD obligation against its obligation to provide accurate and complete disclosure of information related to an exempt offering: companies can either make public disclosure of material information used in a private offering but not previously disclosed, or they can obtain nondisclosure agreements from prospective investors who will receive the nonpublic information. (Of course, they can also use a combination of these methods.) Information disclosed during road shows for "shelf takedowns" and private placements is governed by Regulation FD, and companies should take care to anticipate the implications of any such discussions. Companies that maintain an effective shelf registration statement should also consider whether they intend that the contents of press releases and similar disclosures should be "filed" rather than "furnished" under the Exchange Act as a basis for assuring the completeness of the relevant prospectus, and when making these decisions should also consider the additional liability risks that arise in the context of a public offering under Section 11(a) and Section 12(a)(2) of the Securities Act. Companies that intend to "furnish" information, and thereby to avoid incorporation by reference, should make disclosures under Item 9 of Form 8-K; those that intend to "file" the information should use Item 5 or another Form 8-K item that is directly applicable to the information disclosed.

Practicalities: Balancing All These Requirements against Business Reality

The various interwoven obligations attendant to being a public company today – providing thorough, accurate guidance fairly to the investment community and to other constituents, such as customers, vendors, lenders and employees – while complying with an ever-evolving series of regulations, guidelines and compliance obligations, can be daunting. We recommend that companies adopt and maintain a series of measures that should help balance these obligations, and we are happy to assist clients in developing, maintaining and refining these measures to meet their corporate needs and their business and operational constraints.

- **Designated, Trained Spokespersons.** Few protective measures are more important than designating a few specific individuals who are authorized to speak to the investment community on a company's behalf. These employees will normally include the chief executive officer, chief financial officer, and a small staff of investor relations personnel. These individuals should be thoroughly trained regarding the various regulatory obligations confronting the company, including Regulation FD and, where appropriate, gun-jumping, enforcement and investigatory responses, and similar matters, and each should be thoroughly familiar with the company's current and historical reports and with the company's position regarding the issues that are to be discussed publicly. From time to time it may be appropriate to designate a director to speak to extraordinary matters such as executive succession, strategic combinations, responses to activists and audit matters, and these spokespersons should be well-versed in the same subjects as employee spokespersons but with a particular focus on the unusual events to be discussed. All other company employees and directors should be instructed in writing to refer outside inquiries to the designated personnel. Generally we recommend that this instruction also be set forth in the company's employee handbook. This practice helps identify the persons whose statements trigger Regulation FD obligations, promotes consistent messaging regarding matters of importance to the company, and assures that spokespersons are fully informed both about the matters to be discussed and the matters that will not be discussed.

- **Knowing What Not to Discuss.** Public companies often face scrutiny and receive inquiries from the news media, the investment community, employees and community organizations regarding a wide range of operational and strategic information. Not surprisingly, these inquiries tend to multiply during periods in which the company is facing challenges, making significant changes, or growing quickly. While it is important to be able to respond to appropriate questions, it is also critical to avoid discussing matters whose confidentiality is critical. There are a variety of problems that can result from premature disclosure, and those are not limited to Regulation FD violations: untimely disclosure can also damage sensitive business negotiations, interfere with potential strategic transactions such as business combinations and securities offerings, violate "gun-jumping" restrictions, and create uncertainty among employees and other constituents, among other difficulties. Adopting and then scrupulously following a "no comment" policy about such matters can help companies avoid these and other challenges. Further, from time to time the company may receive inquiries about unfounded rumors. Consistent adherence to the "no comment" policy requires that the company not respond by stating or suggesting that the rumors are baseless, that the company knows of no basis for the rumor, or similar statements, and responses should be limited to the equivalent of "As a matter of corporate policy, we do not respond to rumors or otherwise discuss issues of this nature." Limited exception to this policy exist when the rumor is attributable to the company or when the company discovers that an authorized prior statement was inaccurate when made. These situations can be quite challenging and can involve a variety of legal and business risks, and should be discussed promptly with counsel and with the various corporate divisions relevant to the circumstances.

- **Policies Regarding Non-Regulation FD Disclosures.** As noted above, Regulation FD does not apply to information disclosed in the ordinary course of business, such as disclosures to employees, suppliers, lenders, regulatory authorities, and customers. However, at the risk of stating the obvious, public companies should avoid disclosing sensitive business information other than under an enforceable confidentiality obligation to persons who have a bona fide need to know. While oral agreements are legally sufficient for Regulation FD purposes, they can be difficult to enforce and also can make it unnecessarily difficult to demonstrate that a binding agreement was in place. We therefore strongly encourage our clients to reduce such agreements to writing and, at a minimum, to confirm any oral or informal agreements in writing.

- **Internal Communications.** Personnel who are required to make public disclosures should communicate frequently and thoroughly with the appropriate constituencies within the company as well as with legal counsel. These individuals should strive to anticipate and address materiality judgments and other questions that may arise in the course of disclosure, and generally decisions about the timing, form and content of disclosures, as well as the authorization to make them, should be well documented.

- **Cautionary Statements.** As mentioned above, a company's forward-looking statements can present various challenges because they represent current intentions and expectations and, in effect, are an attempt to anticipate or predict the future. Any disclosures, oral or written, that include forward-looking information – by which we mean any statements that are not limited to a description of historical fact – should be accompanied by a "safe harbor" statement or a reference to the risk factors section of the company's most recent securities filings. These statements should not be "boilerplate" statements but should include brief, meaningful and specific language identifying the nature of the projection or expectation and the known risks that could cause actual results to vary.

- **Investor Relations Websites.** Nearly all public companies maintain investor relations websites, and those companies should continually review those sites to assure that the contents are current and accurate, that dated or superseded information is removed when appropriate, and that the contents comply with the requirements of the Exchange Act and the listing stock exchange(s) that require the inclusion of certain types of data. The website itself should disclose that its contents are current as of the date printed on the document and that disclosures are not updated other than as expressly stated therein or as otherwise required by law. We also recommend that clients' references in their Securities Act registration statements and Exchange Act reports to their investor relations website include a disclaimer that that the contents of the website are not incorporated by reference into, and do not form a part of, the filing that contains the reference.

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