



August 25, 2009



The SEC Provides Updated Guidance for Regulation FD

On August 14, 2009, the Securities and Exchange Commission (the “SEC”) published additional guidance related to Regulation FD, which prohibits issuers from selectively disclosing material nonpublic information. The SEC’s updated guidance is in the form of questions and answers related to issues about the confirmation of forecasts by issuers, comments on analyst models, disclosures to employees, disclosures of road show materials, and the definition of public disclosure.

The following is a summary of the Compliance and Disclosure Interpretations provided by the SEC’s Division of Corporation Finance.

Selective Disclosure

Confirmation of Forecasts

An issuer may selectively confirm a forecast that was previously made to the public without triggering Regulation FD’s public reporting requirements. However, in such a situation, the SEC advises issuers to consider the materiality of the confirmation by determining whether any information above and beyond the original forecast is being conveyed and whether any such additional information is material. Intervening events and the amount of time that has elapsed between the original forecast may affect the materiality of a confirmation.

In the SEC’s view, Regulation FD does not create a duty to update. If an issuer wishes to refer to a prior estimate without confirming it, the issuer should make clear that the prior estimate was as of the date it was given and is not being updated as of the time of the subsequent statement. Conversely, a statement by an issuer that a prior forecast has “not changed,” or that it is “still comfortable with” the forecast, is the same as a confirmation of a prior forecast. In a case in which an issuer is asked about a prior forecast but does

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Our Practice

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not want to confirm it, the issuer may say “no comment.”

Analyst Models

The SEC has also provided guidance on an issuer’s ability to comment on an analyst’s model. As long as material nonpublic information is not communicated, an issuer may privately review and comment on an analyst’s model without requiring public disclosure under Regulation FD. An issuer may correct historical facts that are a matter of public record, and an issuer may also share inconsequential data even if an analyst with knowledge of the industry could use that data, together with public information, to reveal material nonpublic information. However, an issuer may not use the discussion of an analyst’s model as a vehicle for selectively communicating—either expressly or in code—material nonpublic information.

Confidentiality Agreements

The SEC advises that an issuer may provide material nonpublic information to analysts as long as the analysts expressly agree to keep the information confidential until the information is public. However, a mere acknowledgment by the recipient of the information that such information will not be used in violation of the federal securities laws is not sufficient. The recipient must expressly agree to keep the information confidential. If a recipient of material nonpublic information subject to such an agreement trades or advises others to trade, he or she could face insider trading liability.

Disclosures to Employees

An issuer may disclose material nonpublic information to its employees without making public disclosure of the information, even if those employees are shareholders. In the SEC’s view, Regulation FD does not apply to communications of confidential information to employees of the issuer. However, an issuer’s officers, directors, and other employees are subject to duties of trust and confidence and face insider trading liability if they trade or tip.

Unauthorized Disclosures

If an issuer has a policy that limits which senior officials are authorized to speak, selective disclosures of material nonpublic information by unauthorized senior officials are not subject to Regulation FD. However, such disclosures may trigger liability under existing insider trading laws.

Road Show Materials

The SEC has confirmed that road show materials in connection with a registered public offering are excluded from Regulation FD. All other road

financial services, healthcare, technology, manufacturing, telecommunications, media, real estate, consumer products and retail. We also advise our clients with respect to corporate governance matters and the design and implementation of comprehensive compliance programs.

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show materials are subject to Regulation FD unless another exclusion from Regulation FD applies. A disclosure in a road show for an unregistered offering, or while the issuer is not in registration and is not otherwise engaged in a securities offering, is subject to Regulation FD. However, if those who receive road show information expressly agree to keep the material nonpublic information confidential, disclosure to them is not subject to Regulation FD.

Public Disclosure

In the SEC's view, an Exchange Act filing other than Form 8-K, such as a Form 10-Q or proxy statement, constitutes public disclosure. It will be generally sufficient for purposes of making information public within the timeline required by Regulation FD to include information in a document publicly filed on EDGAR with the SEC. The SEC advises companies to bring the disclosure to the attention of readers of the document and not to bury the information or provide it in a piecemeal fashion throughout the filing.

Once the report has been accepted for filing on EDGAR and is publicly available on EDGAR, the information may be disclosed in a nonpublic meeting.

Public and Nonpublic Meetings

A meeting that is open to the public but is not otherwise webcast or broadcast by any electronic means is not considered a method of disclosure "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" as required under Rule 101(e) of Regulation FD.

Additionally, the mere presence of the press at an otherwise nonpublic meeting attended by persons outside the issuer does not render the meeting public for purposes of Regulation FD.

Public Disclosure by Conference Call

If an issuer elects to make public disclosure of material nonpublic information by means of a conference call, the SEC has advised that adequate advance notice under Regulation FD must include the date, time, subject matter and call-in information for the conference call. Issuers should also consider the timing of the notice given prior to the conference call and the availability of the transcript or replay of the conference call after it has occurred.

Public Disclosure by Web Site

The SEC previously provided guidance on the circumstances under which information posted on a company web site would be considered "public" for purposes of evaluating the applicability of Regulation FD to subsequent,

private discussions or disclosure of the posted information, and the satisfaction of Regulation FD's "public disclosure" requirement. The SEC confirmed that issuers should refer to "Commission Guidance on the Use of Company Web Sites," Exchange Act Release No. 58288, dated August 1, 2008, for additional information.

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