

## Legal Updates & News

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#### The SEC Staff Updates Regulation FD Guidance

August 2009

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The staff of the Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) recently published Compliance and Disclosure Interpretations (“C&DIs”) regarding Regulation FD. For the most part, these interpretations repeat prior-issued interpretations from the Fourth Supplement to the Manual of Publicly Available Telephone Interpretations. The updated guidance provides an excellent opportunity for companies to revisit their Regulation FD practices and policies, particularly in light of the current economic environment.

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#### Background on Regulation FD

Regulation FD prohibits selective disclosure of material nonpublic information to specified persons. Two key principles underlying Regulation FD are:

- Selective disclosure of material information that has previously been adequately publicly disseminated will not violate Regulation FD; and
- Unless an exclusion to Regulation FD applies, a company is required to publicly disclose any material nonpublic information that it discloses selectively to the persons enumerated in Regulation FD.

Regulation FD provides that material nonpublic information can be publicly disclosed by either filing or furnishing a Form 8-K or by 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.”

#### Confirming Prior Guidance

Regulation FD C&DI Question 101.01 addresses the extent to which a company may permissibly confirm prior public guidance to analysts or investors on a selective basis. The staff notes in the interpretation, as it had in the past in a telephone interpretation, that whether Regulation FD’s reporting requirement is triggered depends on the materiality of the company’s confirmation of the guidance. In assessing the materiality, the company must consider the extent to which the confirmation (including the related

circumstances and context around the confirmation) conveys additional material information. In examining these circumstances, the staff notes in the interpretation that the amount of time that has elapsed since the original guidance was given and the extent to which there have been intervening events since that time may be relevant factors. For example, the confirmation of quarterly guidance at the end of a quarter may be material, while confirmation in the middle of the quarter may not be deemed as material, given differing inferences that could be drawn based on the relative timing of the confirmations. Further, intervening events may also render the confirmation of guidance material. The interpretation provides an example where an intervening loss of a customer since the publication of the original guidance may make a subsequent confirmation of the original guidance material.

The interpretation has now been expanded to address the types of language that might be deemed to be confirming prior guidance. In this regard, it is noted that a statement by the company that it has “not changed” or that it is “still comfortable with” prior guidance is the same as providing a direct confirmation of the prior guidance. Further, the interpretation notes that merely a reference to the prior guidance may imply confirmation of that guidance. In the event that a company does not wish to confirm the prior guidance, the interpretation notes that the company could say “no comment.” Further, a company could make clear when referring to prior guidance that the guidance was provided as an estimate as of the date it was given, and that it is not being updated at the time of the subsequent statement.

With the variability of financial results driven by the recession and the financial crisis, executives may increasingly find themselves in situations where they risk violating Regulation FD by providing selective disclosure with respect to prior guidance. Analysts or investors may press for information as to management’s level of comfort with prior guidance, and, as noted in Regulation FD C&DI 101.01, there is potential for violations of Regulation FD depending on the circumstances in which these discussions arise. Companies should consider whether it is prudent to implement a “no comment” policy regarding confirmation of prior guidance, particularly in those situations where there is a heightened risk for selective disclosure regarding prior guidance.

In the current economic environment, many companies have also considered whether to suspend their prior guidance or to otherwise change their guidance practices, given the many uncertainties that they face. In general, any change to guidance practices, including the suspension of current guidance, should be announced in a manner that complies with Regulation FD, preferably in the same manner in which the company typically provides the guidance itself.

### **Press Involvement in a Non-Public Meeting**

Regulation FD C&DI 102.06 notes that the mere presence of members of the press at an otherwise non-public meeting attended by persons covered by Regulation FD (e.g., analysts and investors) would not make the meeting public for the purposes of Regulation FD. In restating this interpretation, the SEC staff removed a discussion of the facts and circumstances that might have been relevant to a determination, including when, what and how widely the press reported on the meeting. Under C&DI 102.06, the presence of the press will not now be considered to be sufficient for establishing public disclosure under Regulation FD, even if the members of the press ultimately report on the meeting in a public manner.

### **Reminder Regarding the Use of Websites for Regulation FD Purposes**

Regulation FD C&DI 102.07 reminds companies that the SEC has provided guidance on the use of corporate websites, including the extent to which information posted on websites would be considered “public” for the purposes of the applicability of Regulation FD and whether the information would be deemed to satisfy Regulation FD’s “public disclosure” requirement.

In Release No. 34-58288 (August 1, 2008), the SEC provided three considerations for determining whether information posted on a corporate website is considered “public”:

- Is a company’s website a “recognized channel of distribution”?
- Is information posted in a manner calculated to reach investors?
- Is information posted for a reasonable period of time so that it has been absorbed by investors?

In the context of whether a website posting satisfies the public disclosure requirement of Regulation FD following the selective disclosure of material, non-public information, the guidance from the Release indicates that companies must consider whether website postings are “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” In conducting this analysis, a company must examine the first two factors referenced above, and also must consider whether its website is capable of meeting the simultaneous and prompt timing requirements under Regulation FD once a selective disclosure has been made.

Companies have continued to struggle with applying the SEC’s guidance in practice, given the difficulty in making judgments about the nature of a company’s website. As a result, practices have not significantly changed in terms of how information is disseminated in order to make the information public or to comply with Regulation FD’s public disclosure requirement. More guidance from the SEC or the staff on this topic would be welcome.