Regulation Fair Disclosure

Here's the deal:

- Regulation FD is an issuer disclosure rule that prohibits a US public company and certain persons acting on its behalf from selectively disclosing material nonpublic information about itself or its securities to certain persons outside the company unless it also discloses the information to the public.
- Timing of the required public disclosure depends on whether the selective disclosure was intentional.
- For an intentional selective disclosure, public disclosure must be made simultaneously.
- For an unintentional selective disclosure, public disclosure must be made promptly.
- The required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.
- Acceptable methods of public disclosure can include a press release, a news conference to which the public is granted access and for which notice and the means for access are given, a simultaneous webcast of a news conference or analyst conference call, posting of the information on the company's website or making available to the public a replay of the company's news conference or conference call.
- Consequences of failing to comply with Regulation FD may result in an enforcement action by the Securities and Exchange Commission ("SEC") against the company or individuals responsible for the violation.

What's the Deal?

The SEC adopted Regulation FD (for "Fair Disclosure") in August 2000 to address what the SEC, at the time, observed to be a systemic problem of public companies selectively disclosing material nonpublic information to securities analysts and institutional investors before disclosing the same information to the public. Since its

adoption in 2000, Regulation FD has fundamentally reshaped the manner in which public companies communicate with analysts and investors.

Regulation FD, promulgated by the SEC under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), is a disclosure rule that seeks to level the informational playing field for investors. Rule 100 of Regulation FD sets forth the general rule. Whenever an issuer, or a person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals or holders of the issuer's securities where it is reasonably foreseeable that the holders will trade on the basis of the information), the issuer must disclose that information to the public – simultaneously for an intentional selective disclosure and promptly for an unintentional selective disclosure. The required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public.

Regulation FD is comprised of Rules 100 through 103.

- Rule 100 provides the basic rule regarding selective disclosure of material nonpublic information.
- Rule 101 sets forth the definitions used in Regulation FD.
- Rule 102 provides that a failure to make a disclosure required by Regulation FD cannot, on its own, be grounds for a violation of Rule 10b-5, the Exchange Act's general antifraud rule.
- Rule 103 provides that a failure to comply with Regulation FD will not affect whether the issuer is considered current or timely in its Exchange Act reports for purposes of certain filings and disclosures required under the Securities Act of 1933, as amended ("Securities Act"), or whether there is adequate current public information about the issuer for purposes of Rule 144(c) under the Securities Act.

Regulation FD Fundamentals

Companies Subject to Regulation FD

Regulation FD applies to issuers that have a class of securities registered under Section 12 of the Exchange Act and issuers that are required to file reports under Section 15(d) of the Exchange Act, including closed-end investment companies, but not other types of investment companies. The term "issuer," as defined in Rule 101(b) of Regulation FD, also excludes foreign governments and foreign private issuers, though in practice most foreign private issuers with a class of equity securities listed on a US securities exchange voluntarily comply with Regulation FD. Regulation FD does not apply to a company's initial public offering. A company that has become subject to Section 15(d)'s reporting requirements because it had a registration statement on Form S-4 become effective under the Securities Act for a registered exchange offer of debt securities is subject to Regulation FD even if its equity securities are privately held and its debt securities are not traded on a securities exchange.

Persons Acting on Behalf of an Issuer

Regulation FD also applies to a "person acting on behalf of an issuer." This term is defined in Rule 101(c) as (i) any "senior official" of the issuer, or (ii) any other officer, employee, or agent of the issuer who regularly communicates with securities market professionals or with security holders (this element of the definition is limited to those who "regularly" communicate with securities market professionals and security holders). Rule

101(f) of Regulation FD defines a “senior official” of an issuer as any director, executive officer, investor relations or public relations officer or other person with similar functions.

Issuers cannot circumvent Regulation FD by having a non-covered person make a selective disclosure. In the Regulation FD adopting release, the SEC noted that, based on Section 20(b) of the Exchange Act, if a senior official of an issuer directs an employee who would not otherwise be considered to be acting on behalf of the issuer to make a selective disclosure, then the senior official would be responsible for having made the disclosure.

Rule 101(c) of Regulation FD provides that any 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 will not be considered to be acting on behalf of the issuer. As a result, an issuer is not responsible under Regulation FD when one of its employees improperly trades or tips.

In Question 101.10 of the Regulation FD Compliance and Disclosure Interpretations (the “Reg FD C&DIs”), the staff of the SEC’s Division of Corporation Finance (the “Staff”) noted that if an issuer has a policy that limits which senior officials of the issuer are authorized to speak to persons enumerated in Regulation FD, disclosures by senior officials not authorized to speak under the policy will not be subject to Regulation FD. However, the unauthorized disclosure may trigger liability under insider trading laws.

Companies subject to Regulation FD should specify in writing which employees are authorized to speak on behalf of the company and adopt policies and procedures for responding to inquiries from analysts, investors and other securities market participants. In addition, Regulation FD policies and procedures should require any unauthorized employee who receives an inquiry from an analyst, investor, or other securities market participant to refer the inquiry to the company’s authorized spokespersons.

Disclosures of Material Nonpublic Information

Regulation FD does not define materiality. In the Regulation FD adopting release, the SEC cited and discussed the leading Supreme Court cases regarding materiality, *TSC Industries v. Northway*, 426 U.S. 438 (1976) and *Basic v. Levison*, 485 U.S. 224 (1988). Under those cases, information is considered material if there is a “substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision, or if the facts “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”

The Regulation FD adopting release also includes a non-exhaustive list of information or events that the SEC noted should be reviewed carefully to determine whether any such information or event, if disclosed, would likely be considered material. This list includes information and events relating to:

- earnings information (including historical earnings information, earnings estimates and changes in previously released earnings estimates);
- mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- new products or discoveries;
- regulatory developments or developments regarding customers or suppliers, such as the acquisition or loss of a contract;
- changes in control or management;

- liquidity problems;
- major litigation or other events that require the filing of a Form 8-K;
- change in auditors or auditor notification that an issuer may no longer rely on an auditor's report;
- events involving the company's securities, such as defaults on senior securities, redemptions of securities, repurchase plans, public or private sales of securities, stock splits, changes in dividends, or changes to the rights of security holders;
- bankruptcies or receiverships; and
- in some circumstances, confirmation of previously issued guidance.

In 2018, the SEC published interpretative guidance to assist public companies in preparing disclosures about cybersecurity risks and incidents (*see* Release No. 33-10459). The SEC noted that information about cybersecurity risks and incidents may be material and companies should have policies and procedures to ensure that any disclosures of material nonpublic information related to cybersecurity risks and incidents are not made selectively, and that any Regulation FD required public disclosure is made simultaneously or promptly and is otherwise in compliance with the requirements of Regulation FD. This is now superseded by the SEC's final rules on cybersecurity risk management, strategy, governance, and incident disclosure (*see* Release No. 33-11216).

Regulation FD also does not define the term "nonpublic." In general, information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally. For information to be made public, "it must be disseminated in a manner calculated to reach the securities marketplace in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information." The exact length of a "reasonable waiting period" depends on the circumstances of the dissemination.

Disclosures to Securities Market Professionals or Security Holders

Regulation FD is not a blanket prohibition on all material nonpublic disclosures. Instead, the regulation prohibits selective disclosure of material nonpublic information only to certain categories of persons outside the issuer enumerated in Rule 100(b)(1) of the regulation. Regulation FD proscribes disclosure to the following categories of persons:

- broker-dealers and their associated persons, including sell-side analysts (Rule 100(b)(1)(i));
- investment advisers and institutional investment managers and their associated persons, including buy-side analysts (Rule 100(b)(1)(ii));
- registered investment companies and unregistered private investment companies, including hedge funds and some venture capital funds, and their affiliated persons (Rule 100(b)(1)(iii)); and
- any holder of the issuer's securities (debt or equity) if it is reasonably foreseeable that such holder will purchase or sell the issuer's securities on the basis of the selectively disclosed information (Rule 100(b)(1)(iv)).

By limiting the types of communications covered by Regulation FD to the above enumerated persons, the SEC intended to exclude business communications made in the ordinary course to strategic partners, customers and suppliers, as well as communications made to governmental agencies and the media.

Directors are not prohibited from speaking privately with shareholders. In Question 101.11 of the Regulation FD C&DIs, the Staff confirmed that Regulation FD does not prohibit an issuer's directors from speaking privately with a shareholder or group of shareholders, so long as the director does not disclose material nonpublic information to such shareholder or shareholders under circumstances in which it is reasonably foreseeable that the shareholder will purchase or sell the company's securities based on such information. Additionally, Regulation FD does not apply to disclosures made to a person who expressly agrees to maintain the disclosed information in confidence. Under these circumstances, a private communication between a director and a shareholder would not present Regulation FD issues.

Regulation FD does not prohibit an issuer from making material nonpublic disclosures to its employees, without making public disclosure of the same. This is because employees are not persons "outside the issuer."

Exempt Communications Made to Securities Market Professionals or Security Holders

Certain communications to persons outside of the issuer enumerated in Rules 101(b)(i) through (iv) are exempt under Regulation FD and not subject to the public disclosure requirement of Regulation FD. The three categories of exempt communications are:

- communications to a person who owes the issuer a duty of trust or confidence, such as an attorney, investment banker or accountant, otherwise known as "temporary insiders;"
- communications to any person who expressly agrees to maintain the information in confidence (there is no additional requirement that the individual agree not to trade on the information, and a promise to maintain confidentiality is sufficient); and
- communications in connection with an offering of securities registered under the Securities Act (see "Regulation FD and Securities Offerings" below for more information).

When Regulation FD was adopted in 2000, communications to credit ratings agencies under certain conditions were exempt from Regulation FD. In 2010, the SEC repealed the express exemption for disclosures of material nonpublic information to credit rating agencies. Disclosures of material nonpublic information by an issuer, or a person acting on its behalf, to a credit rating agency may still be exempt under other Regulation FD exemptions. For example, if a credit rating agency has expressly agreed to maintain the disclosed information in confidence, or owes a duty of trust or confidence to the issuer, disclosures to the credit rating agency will be exempt from Regulation FD.

Timing of Required Public Disclosure

If an issuer, or a person acting on its behalf, selectively discloses material nonpublic information to a person enumerated in Rule 101(b)(i) through (iv) of Regulation FD and the disclosure is not exempt, the timing of the required public disclosure depends on whether the selective disclosure was intentional or unintentional. With respect to an intentional selective disclosure, the issuer must make public disclosure of the information

simultaneously. In the event of an unintentional selective disclosure, the issuer must make public disclosure of the information promptly.

Rule 101(a) of Regulation FD defines "intentional" for purposes of Regulation FD. 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 being communicated is both material and nonpublic. For example, a CEO or another executive officer that makes an off-the-cuff remark when they know the information is material and nonpublic will have made an intentional disclosure even if they did not intend to make it.

Rule 101(d) of Regulation FD defines "promptly" for purposes of Regulation FD. The term 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."

Public Disclosure

Under Regulation FD, the required public disclosure may be made with an Exchange Act filing such as furnishing or filing a Form 8-K, or by a combination of disclosure methods that are reasonably designed to provide broad, non-exclusionary distribution of the information to the public. These methods can include: a press release, a news conference to which the public is granted access and for which advance notice and the means for access are given, a simultaneous webcast of a news conference or analyst conference call, posting of the information on the company's website, or making available to the public a replay of the company's news conference or conference call.

In determining whether a company's method of making a particular disclosure is reasonable, the SEC will consider all the relevant facts and circumstances—recognizing that effective methods of disclosure will differ depending on the company.

A company may use its website to effect "public disclosure" for the purposes of Regulation FD. The "Commission Guidance on the Use of Company Websites," published by the SEC in August 2008 provides guidance on the use of company websites (the "2008 Guidance"). The 2008 Guidance addresses the circumstances under which information posted on an issuer's website would be considered "public" for purposes of evaluating: (i) whether website posting of information satisfies Regulation FD's "public disclosure" requirement; and (ii) whether a subsequent selective disclosure violates Regulation FD.

Whether a company's website is a "recognized channel of distribution" that can serve as an effective means for disseminating information requires an inquiry into the steps a company has taken to notify investors that information is available on its website and the actual use by investors and the market of its website. In determining whether information disclosed solely on the company's website qualifies as "public" for Regulation FD purposes, the 2008 Guidance provides that a company should consider whether:

- the website is a recognized channel of distribution;
- the posting of information on the website disseminates the information in a manner that makes it generally available to the securities marketplace; and

- there has been a reasonable waiting period for investors and the market to react to the posted information.

Each company must evaluate whether the posting of information on its website meets the simultaneous or prompt timing requirements of Regulation FD for public disclosure once a selective disclosure has been made.

The SEC has recognized social media as a legitimate means for "public disclosure" for purposes of Regulation FD. On April 2, 2013, the SEC issued a "report of investigation" that provides meaningful guidance for companies that wish to use social media platforms such as Twitter and Facebook to publicly disseminate material information. The SEC emphasized that the appropriateness of a public disclosure through social media depends on the facts and circumstances and that companies should apply the 2008 Guidance when considering whether a social media channel is in fact a "recognized channel of distribution." Relevant factors might include that investors receive notice from the company that they intend to use social media to disseminate material information on this platform. It is clear from SEC guidance that every situation will be evaluated based on its own facts. Disclosure of material nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the social media site may be used for this purpose, would not likely qualify as an acceptable method of public disclosure for purposes of Regulation FD compliance.

In Question 102.05 of the Reg FD C&DIs, the Staff confirmed that an issuer cannot satisfy Regulation FD's public disclosure requirement by disclosing material nonpublic information in a speech at a shareholder meeting that is open to the public if the meeting is not webcast or broadcast by any electronic means. According to the Staff, a meeting that is open to the public but not otherwise webcast or broadcast by any electronic means is not a method of disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

Regulation FD and Securities Offerings

Regulation FD generally does not apply to company communications and disclosures made in connection with an offering of securities registered under the Securities Act. This exemption is not available for certain registered shelf offerings, including secondary offerings, employee benefit plan offerings, and offerings of warrants and other convertible securities. Disclosures made in connection with a registered offering within defined starting and ending points of the offering are exempt. Rule 101(g)(1) of Regulation FD explains when, for these limited purposes, registered underwritten offerings begin and end. Rule 101(g)(2) of Regulation FD defines when registered non-underwritten offerings begin and end.

In Question 101.07 of the Reg FD C&DIs, the Staff confirmed that road show disclosures made in connection with registered public offerings are not subject to Regulation FD. Disclosures in a non-deal road show (a road show made while the company is not in registration or not otherwise engaged in a securities offering) are subject to Regulation FD. If, however, those who receive non-deal roadshow information expressly agree to keep the material nonpublic information confidential, disclosure to these persons is not subject to Regulation FD.

There is no exemption from Regulation FD for disclosures made in connection with an exempt (private) offering. A reporting company subject to Regulation FD that is making a private offering must consider carefully the Regulation FD issues that may arise in connection with its discussions regarding the private

offering. Any material information that is privately disclosed to investors or potential investors must be disclosed in a Regulation FD compliant manner, or the company must require that those who receive such information agree to maintain it in confidence. Investors in a private offering may be unwilling to expressly agree to keep material nonpublic information confidential because if they do so, they have a duty to "disclose or abstain from trading" under Rule 10b-5. As a result, they would be prohibited from trading in the securities of the company undertaking the offering until the company publicly discloses the information.

Disclosures that companies make in connection with proxy solicitations or tender offers are also not exempt from Regulation FD. A reporting company subject to Regulation FD must consider whether statements or commitments it makes in the context of soliciting proxies or opposing a third-party tender offer involve material nonpublic information within the scope of Regulation FD. This applies even though a person soliciting in opposition to a company or conducting a hostile tender offer is not subject to a corresponding requirement under Regulation FD.

Regulation FD does not give rise to an affirmative duty for the company to make a public disclosure. Instead, Regulation FD is meant to provide fair access once a company has made selective disclosures of material nonpublic information. Reporting companies subject to Regulation FD should heed their pattern of disclosures and should, in the context of a securities offering, give special consideration to the timing of their disclosures. However, the "bad news" doctrine still provides important guidance in this regard.

The "bad news" doctrine is the basic concept that a company does not have an affirmative obligation to make real time disclosures. For example, a company has no affirmative duty to disclose bad news. A public company only has an affirmative duty to disclose as required by Form 8-K for certain triggering events, only to the extent it is making its Exchange Act filings, and must provide disclosures that are not misleading, and when it is conducting a securities offering (again to ensure that it has not made disclosures that are misleading).

Enforcement of Regulation FD

Since enactment in 2000, Regulation FD has been the basis for the SEC periodically bringing enforcement actions against public companies and individuals who have violated the rule. Regulation FD is a disclosure rule and not an antifraud rule. Issuers and their individual personnel responsible for the violation of Regulation FD can be subject to an SEC enforcement action. The SEC could seek an injunction or impose fines, along with the attendant obligations to disclose the violation.

There are several important limitations to potential enforcement:

- Only conduct that is knowing or reckless can constitute a violation, as Regulation FD is a disclosure rule and not an antifraud rule.
- A finding that a company has violated Regulation FD does not automatically give rise to liability under other SEC rules. Rule 102 of Regulation FD expressly states that the failure to make a public disclosure under Regulation FD does not in and of itself constitute a Rule 10b-5 violation.
- There is no private right of action under Regulation FD. Individual plaintiffs, including shareholders, cannot make a claim based on a company's violation of Regulation FD.

WHAT'S THE DEAL?

Rule 103 of Regulation FD expressly states that a violation of Regulation FD will not cause a company to forfeit its Form S-3 eligibility, nor will the violation prevent a shareholder from making sales of securities under Rule 144.

Regulation FD enforcement actions are somewhat rare. The SEC has brought fewer than two dozen actions to enforce Regulation FD since its adoption. Prior to the action discussed below, only one case (*SEC v. Siebel Sys., Inc.,* 384 F. Supp. 2d 694 (S.D.N.Y. 2005)) resulted in adversarial litigation.

In March 2021, the SEC filed a lawsuit in the United States District Court for the Southern District of New York against a telecommunications company alleging that the company, aided and abetted by three executives in its Investor Relations ("IR") department, repeatedly violated Regulation FD by disclosing the company's projected and actual financial results during one-on-one phone calls the three IR defendants had with analysts at approximately Wall Street firms. The company contested the allegations and argued that, among other things, the SEC could not establish any of the elements of a Regulation FD violation.

In September 2022, US District Judge Paul Engelmayer put the SEC and the telecommunications company on notice that, unless the parties reached a pretrial settlement, they were headed to trial, and in a 129-page opinion the court denied the parties' cross-motions for summary judgment. Neither party had established the absence of a genuine issue of material fact for trial, since a jury could find (based on the facts and evidence that would be presented at trial and detailed in the court's opinion) that the information allegedly disclosed to analysts was (or was not) material, nonpublic, and/or disclosed knowingly or recklessly.

In December 2022, the SEC announced that the company agreed to a $6.25 million penalty, resolving the Regulation FD charges against the company and the defendants. As part of the settlement, the company and the IR defendants neither admitted nor denied the allegations. The case is notable for producing one of only two judicial decisions to apply Regulation FD in adversarial litigation since Regulation FD's adoption.

The case represented only the second SEC Regulation FD enforcement action since 2013 and could reveal a new enforcement trend. In August 2019, the SEC brought an enforcement action against TherapeuticsMD ("TMD"), a life sciences company, alleging violations of Regulation FD for selectively communicating to sell-side analysts information about interactions between TMD and the US Food and Drug Administration regarding the potential approval of one of TMD's drugs. The case demonstrates the legal standard for determining whether information is material is fact dependent and ultimately rests on judgment calls that have to be made by companies. However, when assessing the materiality of information that has been selectively disclosed, the SEC, courts, and juries will have the benefit of hindsight.

Companies should design and implement policies and procedures addressing Regulation FD and regularly assess written Regulation FD training materials in order to mitigate the risk of violations. The SEC used the company's Regulation FD training materials against the company and the individuals named in the SEC's complaint, alleging that the three IR defendants had received regular Regulation FD training and the company's Regulation FD training materials specifically noted that the company's revenues and sales of smartphones were the types of information generally considered "material" to company investors. Public companies should be aware that the SEC may seek to review company Regulation FD training materials in the course of an investigation relating to an alleged violation.

WHAT'S THE DEAL?

Potential Preventive Measures

How can public companies mitigate potential risks associated with Regulation FD?

- Work with a legal team to determine the right approach to disclosing information to analysts, institutional investors, shareholders and the public, and evaluate those processes regularly in light of Regulation FD.
- Establish a comprehensive disclosure policy that emphasizes the seriousness and potential consequences of Regulation FD violations. Engage in periodic Regulation FD compliance training. In 2013, the SEC choose not to bring a Regulation FD enforcement action against First Solar Inc. (but instead only against the company officer that violated Regulation FD) in part due to the company's "environment of compliance" prior to the violation.
- A company may wish to designate the general counsel or another key employee as the point person for determining whether information is material, determining whether it already has been disclosed to the public, and answering any other questions about compliance with Regulation FD. This person should also be the contact for receiving notifications of non-intentional disclosures.
- Establish a record that collects the company's public statements (SEC filings, press releases, transcripts of conference calls, etc.) to track whether information has been disclosed to the public.
- Have a plan in place that is ready to be implemented in the event prompt corrective measures are necessary for disclosure. Establish a framework for Regulation FD disclosures so that the company is prepared to make simultaneous or prompt disclosures when required. Remember that issuers must publicly disclose material nonpublic information following an unintentional selective disclosure before the later of 24 hours or the beginning of the next day's trading on the New York Stock Exchange (regardless of whether the issuer's stock is traded on another exchange).
- Identify in advance a team that will be responsible for public disclosures. This team should be comprised of members from legal, investor relations, and finance. This team should include a person who is up to date on the company's safe harbor warnings, because Regulation FD disclosures should include that language.
- Review the company's directors' and officers' insurance policy to ensure that the definition of "claim" includes an SEC investigation into alleged violations of Regulation FD. Many (and sometimes, most) of the expenses are incurred during the investigation. Review the company's indemnification agreements with directors and officers to determine if they cover costs associated with an SEC investigation.

Calls to, or Meetings with, Analysts

Private meetings with or calls to analysts are risky. The risk increases as the quarter progresses and is heightened when company personnel speaking with analysts, or instructing personnel to speak with analysts, have nonpublic information about the company's quarterly operating results. When speaking with analysts:

- Give the safe harbor warning for forward-looking statements.

- Tell the analyst that, in the speaker's view, he or she is not disclosing any material nonpublic information. Ensure that the analyst understands that the speaker does not intend to disclose material nonpublic information selectively.
- Consider putting together detailed scripts for the speaker to reference in meetings and other communications with analysts, including answers to anticipated questions.
- If the analyst disagrees with the speaker's assessment of the information the speaker has disclosed (and particularly if the analyst plans to write a report changing his or her rating based on the information), ask that the analyst notify the speaker before publishing the information.
- Explain that the notification is needed so that the company can determine whether it needs to make a Regulation FD disclosure so that the company does not violate Regulation FD.
- Ensure that there is more than one representative present from the company so that one person can take notes.

Other Regulation FD Considerations

One common situation that raises special concerns has been the practice of securities analysts seeking "guidance" from issuers regarding earnings forecasts. An issuer takes on a "high degree of risk under Regulation FD" when it engages in private discussion with an analyst seeking earnings guidance. "Harmless" comments that earnings match analysts' forecasts could trigger a violation of Regulation FD. Accordingly, companies should avoid providing guidance to analysts outside of methods that meet the definition of "public disclosure." Companies should consider whether it is prudent to implement a "no comment" policy regarding confirmation of prior guidance.

In Question 101.01 of the Reg FD C&DIs, the Staff addressed the extent to which a company may permissibly confirm prior public guidance on a selective basis without triggering Regulation FD's public disclosure requirement. The Staff noted that, when assessing the materiality of an issuer's confirmation of its own forecast, the issuer should consider whether the confirmation conveys any information above and beyond the original forecast and whether that additional information is itself material. That may depend on, among other things, the amount of time that has elapsed between the original forecast and the confirmation (or the amount of time elapsed since the last public confirmation, if applicable). The materiality of a confirmation also may depend on, among other things, intervening events. For example, if it is clear that the issuer's forecast is highly dependent on a particular customer and the customer subsequently announces that it is ceasing operations, a confirmation by the issuer of a prior forecast may be material, thus triggering a disclosure obligation. The Staff noted in Question 101.01 of the Reg FD C&DIs that a statement by an issuer that it has "not changed," or that it is "still comfortable with," a prior forecast is no different than a confirmation of a prior forecast. Additionally, under certain circumstances, a company's reference to a prior forecast may imply that the company is confirming the forecast.

In the event that a company does not wish to confirm the prior guidance, the C&DIs note 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.

Checklist of Key Questions

- ✓ What does Regulation FD require?
- ✓ What is the timing for disclosure under Regulation FD?
- ✓ What constitutes "material information" for purposes of Regulation FD?
- ✓ What is "nonpublic information" for purposes of Regulation FD?
- ✓ What is recognized as "public" disclosure?
- ✓ What are preventative measures a company can take under the guidance of Regulation FD?
- ✓ What potential liabilities could result from violations of Regulation FD?
- ✓ What are specific preventative measures that a public company and its authorized spokespersons should consider when speaking with analysts?