WINSTON & STRAWN LLP

PUBLIC COMPANIES

Regulation FD (Selective Disclosure) Guide – 2024

Best Practices on How to Talk to Investors, Analysts and Other Securities Market Professionals

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EDITORS
J. Eric Johnson
David Sakowitz

Table of Contents

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I. Regulation FD Best Practices

A. DESIGNATE SPOKESPERSONS AND CONTROL INFORMATION FLOW

Authorize a limited number of spokespersons – typically the CEO, CFO and the head of investor relations. All other employees should be instructed to refer all inquiries to these authorized spokespersons. Controlling information flow and ensure that counsel and your disclosure teams are involved in evaluating materiality of information and whether such information has been previously publicly disclosed

B. ADHERE TO "NO COMMENT" POLICY

With respect to rumors concerning material developments or pending transactions, including M&A, the standard response is that it is the company's policy to not comment on such rumors or respond to such inquiries. Any other response (e.g., that rumor is baseless, or not aware of any such transaction) is inconsistent with the policy and potentially problematic.

C. IMPLEMENT PROTOCOL FOR CONFERENCE CALLS/WEBCASTS WITH INVESTORS AND ANALYSTS

I. MAXIMIZE ADVANCE NOTICE AND PARTICIPATION

Always allow broad participation in the conference call. Provide advance public notice of the call details (date, time, how to access) by issuing a press release and post those details on the company website. Provide as much advance notice as possible (several days minimum for regular quarterly earnings calls and as a far in advance as practicable for any other call). Only hold the call after the press release has been broadly disseminated.

II. ALWAYS USE A SCRIPT

Always prepare a script for each call and that script should be reviewed by counsel for accuracy and completeness to avoid issues outside of Regulation FD, such as potential liability under anti-fraud laws, unintentionally creating a duty to update or correct, or gun jumping issues on offerings or transactions.

III. ALWAYS BEGIN CALL WITH THE SAFE HARBOR

Regulation FD does not change the need to rely on the forward-looking statement safe harbor. Every conference call should start with invoking it.

IV. MAKE AUDIO REPLAYS AVAILABLE

For a limited time, make audio replays of the call or webcast available to the public through the company website. A week or so is appropriate, especially if information is changing rapidly.

D. EXERCISE EXTREME CAUTION IN ONE-ON-ONE CALLS OR MEETINGS WITH ANALYSTS OR INVESTORS

Disclosures of material nonpublic information in one-on-one or other limited access meetings are selective disclosure in violation of Regulation FD, and would trigger the requirement to publicly disclose that information promptly. To avoid unintentionally disclosing material nonpublic information in these settings, the company spokespersons must be fully aware of the company's prior public statements and the selective disclosure rules.

To minimize the risk of violating Regulation FD in a one-on-one or other similar setting, a company should:

- hold such meetings as close in time to the earnings release as possible (i.e., when material nonpublic information is either non-existent or minimal);
- avoid such meetings during blackout periods (whether regular quarterly blackouts or ones imposed due to a pending event or transaction);
- set the ground rules for questions that will not be answered (e.g., internal projections or bases for same); and
- include an investor relations representative in the meeting (or otherwise fully debrief with investors relations and counsel post-meeting) to ensure no material nonpublic information is, or has been, inadvertently disclosed.

E. AVOID COMMENTING ON EARNINGS ESTIMATES AND ANALYST REPORTS

Commenting or otherwise providing investors or analysts with information or "guidance" on results can be extremely problematic and risky. The SEC has noted that a company official takes on a high degree of risk in engaging a private discussion with an analyst who is seeking guidance on earnings estimates. If the company official responds with any information – earnings will be higher than, lower than, or even the same as forecasted – that is almost certainly a violation of Regulation FD. And this is true even if the official's commentary is implied, not express. If a company wants to give guidance on analyst models or forecasts, it should only be done in a public conference call following an earnings release and not in any limited access setting.

Relatedly, a company should not review and/or comment draft analyst reports or other publications. If a company feels compelled to do so, it should limit its review to statements of historical fact or company business descriptions and note that the review was so limited and that the company is not commenting on or agreeing with any projections or other forward-looking statements.

II. Overview of Regulation FD

A. THE GOAL – CREATING A LEVEL PLAYING FIELD

The purpose of Regulation FD is to create a level playing field for all investors with respect a company's material, nonpublic information (i.e., the company is not permitted to selectively disclose such information to certain persons).

Specifically, Regulation FD provides that when a company, or person acting on its behalf, discloses material, nonpublic information to certain types of persons (generally, investors, analysts and other securities market professionals), the company must publicly disclose that information:

- *promptly* – for an *unintentional* selective disclosure, or
- *simultaneously* – for an *intentional* selective disclosure.

B. COMPANIES SUBJECT TO REGULATION FD

U.S. public companies, other than foreign private issuers, are subject to Regulation FD. However, stock exchange requirements, such as the NYSE's timely news release policy, would require FPIs to timely release material, nonpublic information to ensure equal access.

C. COMPANY REPRESENTATIVES SUBJECT TO REGULATION FD

Regulation FD only applies to "senior officials" of the company and those other persons that regularly communicate with investors, analysts and other securities market professionals, regardless of title or seniority. Practically, the following persons are subject to the regulation:

- directors,
- executive officers,
- investor relations and public relations personnel, and
- other employees and agents who regularly communicate with investors and market professionals.

No one else is subject to the regulation unless they are directed to disclose by a senior official of the company.

Note that a director appointed or designated by an investor is considered a "senior official" subject to Regulation FD and is subject to the same fiduciary duties as other directors. Therefore, such director must act consistent with those restrictions and duties, regardless of investor expectations regarding company updates and disclosure of other material information.

D. RECIPIENTS COVERED BY REGULATION FD

Only disclosure of material, nonpublic information to (i) a broker/dealer, an investment adviser, an institutional investment manager, an investment company, or persons associated with the foregoing, or (ii) a holder of the company's securities if it is reasonably foreseeable that such holder will purchase or sell the company's securities on the basis of the information, is subject to Regulation FD.

Even if the disclosure is made to one of these specific persons, Regulation FD does not apply to a disclosure (i) to persons who owe the company a duty of trust or confidence (e.g., an investment banker or accountant providing services to the company), (ii) to persons who expressly agree to maintain the information in confidence, and (iii) in connection with most registered securities offerings.

Note that Regulation FD applies to disclosures outside the company. Therefore, a company can disclose material nonpublic information to employees (even if they are shareholders) without violating Regulation FD.

Ordinary-course business-related communications with company customers, suppliers, independent contractors and others (who might also be shareholders) is permissible. However, if there is any concern regarding the nature of the communications, it would be prudent to enter into a confidentiality agreement before sharing material nonpublic information in such circumstances.

E. MATERIAL INFORMATION UNDER REGULATION FD

I. STANDARD MATERIALITY ANALYSIS APPLIES; SAB NO. 99

What is material is determined under the traditional rules of materiality. Information is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. Or there is a substantial likelihood that a reasonable investor would have viewed the information as significantly altering the total mix of information available.

A company should generally consider the following information and events as material:

- earnings information (including guidance and information regarding meeting or missing expectations),
- M&A,
- new product announcements,
- changes in control,
- management changes,
- auditor changes,
- events related to the company's securities (e.g., dividends, stock splits, defaults, etc.),
- cybersecurity incidents, and

- bankruptcy.

Regulation FD references Staff Accounting Bulletin No. 99, which points out that materiality is not tied to any bright line quantitative test. Percentage tests or other "rules of thumb" (e.g., 5% of some financial statement metric) are not dipositive. Materiality judgements are based on the facts and circumstances and the SEC will have the benefit of reviewing the company's determination in hindsight. And if the disclosed information significantly impacted the company's stock price, it may be difficult to argue that the information was not material.

II. CREATING A "MOSAIC" OF MATERIAL INFORMATION MAY NOT VIOLATE REGULATION FD

Note that the focus of a materiality determination is the "reasonable investor" and not the actual recipient of any disclosed information. An item of information that is immaterial to a reasonable investor could be disclosed to an analyst or other professional who combines such information with other information to form a "mosaic" of information that is in fact material. The SEC has stated that such immaterial disclosure, regardless of the resulting material mosaic, is not a violation of Regulation FD.

III. STANDARD OF REVIEW – KNOWING OR RECKLESS

To be a violation of Regulation FD, the person making the disclosure must know or be reckless in not knowing that information disclosed is both material and nonpublic. This is a relatively high standard requiring a significant departure from ordinary care and acts as a meaningful safeguard against liability. Therefore, a company acting in good faith to comply with Regulation FD is unlikely to be considered reckless. However, repeated errors or mistakes in judgment could put a company at risk.

F. NONPUBLIC INFORMATION UNDER REGULATION FD

I. GENERAL RULE – WIDELY AVAILABLE

Information is "public" information if it has been disseminated in a manner that makes it widely available to investors. Typically, for information to be public, it must also have been available for a reasonable period of time so that the market can digest it (and what is a reasonable period of time can vary significantly between companies depending on how widely they are followed). Under Regulation FD, this time requirement does not apply if the information is disseminated by Form 8-K. See more below on other channels of distribution.

Information provided by someone other than the company is not public. And unnamed sources of information in the media are unlikely to satisfy the requirement that the information originate from the company.

II. WEBSITE DISCLOSURE

In August 2008, the SEC issued its interpretive release on the use of company websites and how to analyze whether information posted on a company website is deemed public for purposes of Regulation FD. In the release, the SEC set out three considerations for a company in making this determination:

- Is the company's website a "recognized channel of distribution"?
- Is the manner in which the information is posted make it "readily accessible" to investors and the markets?
- Has there been a reasonable waiting period for the market to digest and react to the information?

1. Recognized Channel of Distribution

The following are factors a company should consider in determining whether the company's website is a recognized channel of distribution:

- Does the company let the market and investors know that the company has a website, and they can find information there (e.g., in press release and periodic reports)?
- Is it the company's practice to post important information on its website?
- Is the company's website designed to lead the market and investors to important information and is such information prominently disclosed in the location where it would typically be disclosed and is otherwise readily accessible?
- To what extent does the market and media access the website information and further distribute it?
- What other technology (such as push technology like RSS feeds) or other distribution channels are used to disseminate the information or let the market know it is available?
- Is the company's website kept current and accurate?

2. Readily Accessible and Disseminated

The key is the manner in which information is posted and whether it is timely and readily accessible. The factors described above are instructive to this analysis.

3. Reasonableness of Waiting Period

The determination of what is a reasonable waiting period depends on the facts and circumstances and the size of the company and its following. Large companies with a larger market following and more robust channels of communication that are frequently accessed will have a shorter waiting period. The nature of the disclosed information can also impact the waiting period. More complex information can take longer to digest.

III. SOCIAL MEDIA

In 2013, the SEC provided guidance on how Regulation FD should apply to social media disclosures noting that the website guidance discussed above applies equally to social media. A company must evaluate whether the social media used is a recognized channel of distribution using the same factors.

G. MANNER OF DISSEMINATION

Public disclosure can be made in multiple ways. Regulation FD prescribes that the information be disclosed via a Form 8-K or through another method or combination of methods reasonably designed to provide broad, non-exclusionary distribution of the information to the public. Compliance can be achieved through several methods:

- Furnish a Form 8-K under Item 7.01 or file a Form 8-K under Item 8.01;
- Issue a press release through widely circulated news or wire services; or
- Disseminate through any other method or combination of methods reasonably designed to provide broad non-exclusionary distribution to the public, such as press conferences, conference calls, webcasts and the like provided that the public is given adequate notice of, and means for accessing, these methods.

A company may also make the necessary disclosure, presuming it is timely and conspicuous, in other publicly filed Exchange Act documents, such as a Form 10-Q or a proxy statement.

No particular disclosure method is required, and a press release as described above will typically satisfy the requirements of Regulation FD.

H. TIMING OF DISCLOSURE

The timing of the required disclosure depends on whether or not the material nonpublic information was disseminated intentionally or not. If intentional, the company must disclose the same information to the public simultaneously. If non-intentional, the company must disclose the same information "promptly" after a company's senior official learns (or is reckless in not knowing) that the disclosed information is both material *and* nonpublic.

I. INTENTIONAL AND SIMULTANEOUS

Intent is a facts and circumstances determination. Did the person making the disclosure either (i) have actual conscious awareness that the information was both material and nonpublic, or (ii) was reckless in not knowing that the information was both material and nonpublic.

Simultaneous is not defined in Regulation FD, but is generally interpreted to mean that the company should disseminate the information to the public before or at the same time as the intentional disclosure.

II. NON-INTENTIONAL AND PROMPTLY

Non-Intentional is not defined in Regulation FD, but is generally interpreted to mean that the person making the disclosure does not know and is not reckless in knowing that such information is both material and nonpublic. Quick materiality determinations are often required when a spokesperson answers unanticipated questions. A disclosure team including counsel should be on call to rapidly evaluate the disclosure and determine a course of action.

Promptly means the later of 24 hours or the commencement of the next trading day on the NYSE after the senior official learns of the non-intentional disclosure and knows (or is reckless in not knowing) that the disclosed information is both material and nonpublic.

I. SECURITIES OFFERINGS

Regulation FD generally doesn't apply to registered securities offerings other than certain ongoing and continuous shelf offerings. The SEC has confirmed that Regulation FD does not apply to traditional road show disclosures. Regulation FD does apply to communications made before and after a registered offering.

Regulation FD does apply to unregistered offerings, including any information in offering memorandums or road shows. A company must disclose any material nonpublic information that they disclose privately to investors, or obtain confidentiality agreements from such investors.

Appendix A: Regulation FD

§ 243.100 GENERAL RULE REGARDING SELECTIVE DISCLOSURE.

(a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e):

(1) Simultaneously, in the case of an intentional disclosure; and

(2) Promptly, in the case of a non-intentional disclosure.

(b)

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

(i) Who is a broker or dealer, or a person associated with a broker or dealer, as those terms are defined in Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

(ii) Who is an investment adviser, as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)); an institutional investment manager, as that term is defined in Section 13(f)(6) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(6)), that filed a report on Form 13F (17 CFR 249.325) with the Commission for the most recent quarter ended prior to the date of the disclosure; or a person associated with either of the foregoing. For purposes of this paragraph, a "person associated with an investment adviser or institutional investment manager" has the meaning set forth in Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)), assuming for these purposes that an institutional investment manager is an investment adviser;

(iii) Who is an investment company, as defined in Section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), or who would be an investment company but for Section 3(c)(1) (15 U.S.C. 80a-3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a-3(c)(7)) thereof, or an affiliated person of either of the foregoing. For purposes of this paragraph, "affiliated person" means only those persons described in Section 2(a)(3)(C), (D), (E), and (F) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)(C), (D), (E), and (F)), assuming for these purposes that a person who would be an investment company but for Section 3(c)(1) (15 U.S.C. 80a-3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a-3(c)(7)) of the Investment Company Act of 1940 is an investment company; or

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

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

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

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

(iii) In connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act (§ 230.415(a)(1)(i) through (vi) of this chapter) (except an offering of the type described in Rule 415(a)(1)(i) under the Securities Act (§ 230.415(a)(1)(i) of this chapter) also involving a registered offering, whether or not underwritten, for capital formation purposes for the account of the issuer (unless the issuer's offering is being registered for the purpose of evading the requirements of this section)), if the disclosure is by any of the following means:

(A) A registration statement filed under the Securities Act, including a prospectus contained therein;

(B) A free writing prospectus used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act;

(C) Any other Section 10(b) prospectus;

(D) A notice permitted by Rule 135 under the Securities Act (§ 230.135 of this chapter);

(E) A communication permitted by Rule 134 under the Securities Act (§ 230.134 of this chapter); or

(F) An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

[65 FR 51738, Aug. 24, 2000, as amended at 70 FR 44829, Aug. 3, 2005; 74 FR 63865, Dec. 4, 2009; 75 FR 61051, Oct. 4, 2010; 76 FR 71877, Nov. 21, 2011]

§ 243.101 Definitions.

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

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

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

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

(d) *Promptly.* "Promptly" means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer's investment adviser) learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.

(e) *Public disclosure.*

(1) Except as provided in paragraph (e)(2) of this section, an issuer shall make the "public disclosure" of information required by § 243.100(a) by furnishing to or filing with the Commission a Form 8-K (17 CFR 249.308) disclosing that information.

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

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

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

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

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

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

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

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

§ 243.102 NO EFFECT ON ANTIFRAUD LIABILITY.

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

§ 243.103 NO EFFECT ON EXCHANGE ACT REPORTING STATUS.

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

(a) For purposes of Forms S-3 (17 CFR 239.13), S-8 (17 CFR 239.16b) and SF-3 (17 CFR 239.45) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), or Form N-2 (17 CFR 239.14 and 274.11a-1) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), an issuer is deemed to have filed all the material required to be filed pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or where applicable, has made those filings in a timely manner; or

(b) There is adequate current public information about the issuer for purposes of § 230.144(c) of this chapter (Rule 144(c)).

Appendix B: Compliance & Disclosure Interpretations

SECTION 101. RULE 100: GENERAL RULE REGARDING SELECTIVE DISCLOSURE

QUESTION 101.01

Question: Can an issuer ever confirm selectively a forecast it has previously made to the public without triggering the rule's public reporting requirements?

Answer: Yes. In 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). For example, a confirmation of expected quarterly earnings made near the end of a quarter might convey information about how the issuer actually performed. In that respect, the inference a reasonable investor may draw from such a confirmation may differ significantly from the inference he or she may have drawn from the original forecast early in the quarter. 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.

We note 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. Moreover, under certain circumstances, an issuer's reference to a prior forecast may imply that the issuer is confirming the forecast. If, when asked about a prior forecast, the issuer does not want to confirm it, the issuer may simply wish to say "no comment." If an issuer wishes to refer back to the prior estimate without implicitly 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. [Aug. 14, 2009]

QUESTION 101.02

Question: Does Regulation FD create a duty to update?

Answer: No. Regulation FD does not change existing law with respect to any duty to update. [Aug. 14, 2009]

QUESTION 101.03

Question: Can an issuer ever review and comment on an analyst's model privately without triggering Regulation FD's disclosure requirements?

Answer: Yes. It depends on whether, in so doing, the issuer communicates material nonpublic information. For example, an issuer ordinarily would not be conveying material nonpublic information if it corrected historical facts that were a matter of public record. An issuer also would not be conveying such information if it shared seemingly inconsequential data which, pieced together with public information by a skilled analyst with knowledge of the issuer and the industry, helps form a mosaic that reveals material nonpublic information. It would not violate Regulation FD to reveal this type of data even if, when added to the analyst's own fund of knowledge, it is used to construct his or her ultimate judgments about the issuer. An issuer may not, however, use the discussion of an analyst's model as a vehicle for selectively communicating — either expressly or in code — material nonpublic information. [Aug. 14, 2009]

QUESTION 101.04

Question: May an issuer provide material nonpublic information to analysts as long as the analysts expressly agree to maintain confidentiality until the information is public?

Answer: Yes. [Aug. 14, 2009]

QUESTION 101.05

Question: If an issuer gets an agreement to maintain material nonpublic information in confidence, must it also get the additional statement that the recipient agrees not to trade on the information in order to rely on the exclusion in Rule 100(b)(2)(ii) of Regulation FD?

Answer: No. An express agreement to maintain the information in confidence is sufficient. If a recipient of material nonpublic information subject to such a confidentiality agreement trades or advises others to trade, he or she could face insider trading liability. [Aug. 14, 2009]

QUESTION 101.06

Question: If an issuer wishes to rely on the confidentiality agreement exclusion of Regulation FD, is it sufficient to get an acknowledgment that the recipient of the material nonpublic information will not use the information in violation of the federal securities laws?

Answer: No. The recipient must expressly agree to keep the information confidential. [Aug. 14, 2009]

QUESTION 101.07

Question: Must road show materials in connection with a registered public offering be disclosed under Regulation FD?

Answer: Any disclosure made "in connection with" a registered public offering of the type excluded from Regulation FD is not subject to Regulation FD. That includes road shows in those offerings. All other road shows are subject to Regulation FD in the absence of another applicable exclusion from Regulation FD. For example, a disclosure in a road show in an unregistered offering is subject to Regulation FD. Also, a disclosure in a road show made while the issuer is not in registration and is not otherwise engaged in a securities offering is subject to Regulation FD. If, however, those who receive road show information expressly agree to keep the material nonpublic information confidential, disclosure to them is not subject to Regulation FD. [Aug. 14, 2009]

QUESTION 101.08

Question: A publicly traded company has decided to conduct a private placement of shares and then subsequently register the resale by those shareholders on a Form S-3 registration statement. The company and its investment bankers conduct mini-road shows over a three-day period during the private placement. Does the resale registration statement filed after completion of the private placement affect whether disclosure at the road shows is covered by Regulation FD?

Answer: No. The road shows are made in connection with an offering by the issuer that is not registered (i.e., the private placement), regardless of whether a registration statement is later filed for an offering by those who purchased in the private placement. [Aug. 14, 2009]

QUESTION 101.09

Question: Can an issuer disclose material nonpublic information to its employees (who may also be shareholders) without making public disclosure of the information?

Answer: Yes. Rule 100(b)(1) states that Regulation FD applies to disclosures made to "any person outside the issuer." Regulation FD does not apply to communications of confidential information to employees of the issuer. 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. [Aug. 14, 2009]

QUESTION 101.10

Question: If an issuer has a policy that limits which senior officials are authorized to speak to persons enumerated in Rule 100(b)(1)(i) – (b)(1)(iv), will disclosures by senior officials not authorized to speak under the policy be subject to Regulation FD?

Answer: No. Selective disclosures of material nonpublic information by senior officials not authorized to speak to enumerated persons are made in breach of a duty of trust or confidence to the issuer and are not covered by Regulation FD. Such disclosures may, however, trigger liability under existing insider trading law. [Aug. 14, 2009]

QUESTION 101.11

Question: Does Regulation FD prohibit directors from speaking privately with a shareholder or groups of shareholders?

Answer: No. Regulation FD prohibits a company or a person acting on its behalf — such as directors, executive officers and investor relations personnel — from selectively disclosing material, non-public information to a shareholder under circumstances in which it is reasonably foreseeable that the shareholder will purchase or sell the company's securities on the basis of that information. If a company's directors are authorized to speak on behalf of the company and plan on speaking privately with a shareholder or group of shareholders, then the company should consider implementing policies and procedures intended to help avoid Regulation FD violations, such as pre-clearing discussion topics with the shareholder or having company counsel participate in the meeting. In addition, because Regulation FD does not apply to disclosures made to a person who expressly agrees to maintain the disclosed information in confidence, a private communication between an independent director and a shareholder would not present Regulation FD issues if the shareholder provided such an express agreement. [June 4, 2010]

SECTION 102. RULE 101: DEFINITIONS

QUESTION 102.01

Question: If an issuer wants to make public disclosure of material nonpublic information under Regulation FD by means of a conference call, what information must the issuer provide in the notice and how far in advance should notice be given?

Answer: An adequate advance notice under Regulation FD must include the date, time, subject matter and call-in information for the conference call. Issuers also should consider the following non-exclusive factors in determining what constitutes adequate advance notice of a conference call:

- **Timing:** Public notice should be provided a reasonable period of time ahead of the conference call. For example, for a quarterly earnings announcement that the issuer makes on a regular basis, notice of several days would be reasonable. We recognize, however, that the period of notice may be shorter when unexpected events occur and the information is critical or time sensitive.
- **Availability:** If a transcript or re-play of the conference call will be available after it has occurred, for instance via the issuer's website, we encourage issuers to indicate in the notice how, and for how long, such a record will be available to the public. [Aug. 14, 2009]

QUESTION 102.02

Question: Could an Exchange Act filing other than a Form 8-K, such as a Form 10-Q or proxy statement, constitute public disclosure?

Answer: Yes. In general, including information in a document publicly filed on EDGAR with the SEC within the time frames that Regulation FD requires would satisfy the rule. In considering whether that disclosure is sufficient, however, companies must take care to bring the disclosure to the attention of readers of the document, must not bury the information, and must not make the disclosure in a piecemeal fashion throughout the filing. [Aug. 14, 2009]

QUESTION 102.03

Question: For purposes of Regulation FD, must an issuer wait some period of time after making a filing or furnishing a report on EDGAR that complies with the Exchange Act before making disclosure of the same information in a non-public meeting?

Answer: Prior to making disclosure of this information in a non-public meeting, the issuer need only confirm that the filing or furnished report has been accepted for filing on EDGAR and is publicly available on EDGAR. [Aug. 14, 2009]

QUESTION 102.04

Question: During a nonpublic meeting with analysts, an issuer's CEO provides material nonpublic information on a subject she had not planned to cover. Although the CEO had not planned to disclose this information when she entered the meeting, after hearing the direction of the discussion, she decided to provide it, knowing that the information was material and nonpublic. Would this be considered an intentional disclosure that violated Regulation FD because no simultaneous public disclosure was made?

Answer: Yes. A disclosure is "intentional" under Rule 101(a) when the person making it either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic. In this example, the CEO knew that the information was material and nonpublic, so the disclosure was intentional, even though she did not originally plan to make it. [Aug. 14, 2009]

QUESTION 102.05

Question: Can an issuer satisfy Regulation FD's public disclosure requirement by disclosing material nonpublic information in a speech at a shareholder meeting open to the public? The meeting will not be covered by the press, or webcast or broadcast by any electronic means.

Answer: No. Under Rule 101(e), public disclosure of information required to be disclosed by Rule 100(a) can be made either by furnishing or filing with the Commission a Form 8-K disclosing that information, 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." 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." [Aug. 14, 2009]

QUESTION 102.06

Question: Does the mere presence of the press at an otherwise non-public meeting attended by persons outside the issuer described in paragraph (b)(1) of Rule 100 under Regulation FD render the meeting public for purposes of Regulation FD?

Answer: No. [Aug. 14, 2009]

QUESTION 102.07

Question: What are the circumstances under which information posted on a company web site (whether by or on behalf of such company) would be considered "public" for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD's "public disclosure" requirement?

Answer: The Commission has provided guidance on both of these questions in its interpretive release, "Commission Guidance on the Use of Company Web Sites," Exchange Act Release No. 58288 (Aug. 1, 2008). [Aug. 14, 2009]

SECTION 103. RULE 102: NO EFFECT ON ANTIFRAUD LIABILITY.

[Reserved]

SECTION 104. RULE 103: NO EFFECT ON EXCHANGE ACT REPORTING STATUS

[Reserved]