



Regulation FD: Fair Disclosure

Prepared by the Public Companies
and Securities Litigation Groups at Cooley

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Overview

Rule: Regulation FD prohibits a public company 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.

Covered speakers: Speakers prohibited from making selective disclosures of material nonpublic information include public companies and persons "acting on their behalf," *i.e.*, directors, executive officers, investor or public relations officials, and others who "regularly communicate" with securities market professionals or the company's shareholders.

Covered audiences: Regulation FD prohibits a public company from selectively disclosing material nonpublic information to, among others, buy and sell side analysts, institutional investment managers, broker-dealers, investment advisers, investment companies, hedge funds, Form 13F filers, and shareholders reasonably likely to trade on the information.

Non-covered audiences: Regulation FD does not prohibit a public company from disclosing material nonpublic information to:

- Employees;
- Attorneys, investment bankers, accountants and others who owe a duty of confidence to the company;
- Persons subject to a confidentiality agreement;
- Public media; and
- Persons in connection with certain registered primary public offerings by means of specifically approved forms of written or oral communications.

Timing of public disclosures: If selective disclosure of material nonpublic information occurs, Regulation FD requires that the information be disseminated to the public either simultaneously or promptly, depending upon whether the selective disclosure was "intentional" or "non-intentional."

- **Intentional disclosures:** In the case of an intentional disclosure by a Covered Speaker, the company must disclose the information to the public simultaneously. A disclosure is intentional if the person making the disclosure either knows, or is reckless in not knowing, that the information is both material and nonpublic.
- **Inadvertent disclosures:** In the case of a non-intentional disclosure by a Covered Speaker, the company must disclose that information to the public 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 [company] learns that there has been a non-intentional disclosure ... that the senior official knows, or is reckless in not knowing, is both material and nonpublic."

Materiality: Determining whether information is material is perhaps the most difficult aspect of complying with Regulation FD.

Questions to ask include:

- Is there a substantial likelihood that an investor would consider the information important in deciding whether to buy or sell the company's securities?
- Will the information alter the "total mix" of information available about the company in the market place?

- Is the information likely to have a substantial effect on the market price of the company's securities?

Examples of potentially material information include information relating to the following topics:

- Earnings and revenue;
- Market or industry trends;
- Mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- New products or discoveries, or developments regarding customers or suppliers (*i.e.*, the acquisition or loss of a contract, significant changes in backlog);
- Regulatory developments such as FDA approval;
- Changes in control or management;
- Events regarding the company's securities (*e.g.*, defaults, calls, stock splits, dividends, public or private sales of additional securities);
- Bankruptcies, receiverships, or a significant increase in indebtedness or a default under existing indebtedness;
- Significant litigation or other events requiring the filing of a Form 8-K;
- Additional information that corrects a misinterpretation of a prior public disclosure; and
- In certain circumstances, confirmation of previously issued guidance.

Acceptable methods of making public disclosures

- **Current report on Form 8-K:** Information disclosed in a Form 8-K either furnished to or filed with the SEC is deemed to be publicly disclosed and satisfies Regulation FD. Disclosure may be made on Form 8-K using, for example, Item 2.02 (Results of Operations and Financial Condition), Item 7.01 of Rule 8-K (Regulation FD Disclosure) or Item 8.01 (Other Events). Other Items under Form 8-K may also be used. Information furnished in a Form 8-K pursuant to Item 2.02 or Item 7.01 is not deemed "filed" under Securities Exchange Act of 1934 and is not incorporated by reference into filings under Securities Exchange Act of 1934 or filings under the Securities Act of 1933.
- **Other methods:** A public company may make public disclosure by any method that is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." Examples that appear to satisfy this requirement include any of the following:
 - By press release, distributed through a widely circulated news or wire service.
 - By webcast or conference call provided that the company gives reasonable notice to the public via a press release or website posting of the date, time, subject matter and call-in information or web address, as well as any other necessary access information. Companies are encouraged to also include how, and for how long, a transcript or replay, if any, of the call or webcast will be available after the occurrence.
 - By posting information on a corporate website, provided that the company's website is a "recognized channel of distribution," the posting disseminates the information to the public and there is a reasonable waiting period to allow the market and investors time to react.

A determination of whether a company's website is a "recognized channel of distribution" requires an inquiry into the steps a company has taken to alert the market to its website and the actual use by the market and investors of the website. Determining whether information posted on a company's website is disseminated for Reg FD purposes hinges on whether such information is "posted and accessible," as further described in the SEC's adopting release.

Unacceptable methods of making public disclosure

- Disclosing the material nonpublic information at a meeting open to shareholders and the public, if the meeting is not otherwise webcast or broadcast by other electronic means.
- Disclosing the material nonpublic information at a non-public meeting attended by Covered Audiences even if the press is in attendance.

Analysts

- **One-on-one meetings:** Avoid one-on-one meetings with analysts.
- **Two-on-one meetings:** A preferred alternative (if meetings are deemed necessary) is to have two company representatives (preferably one of whom is legal counsel) present at analyst meetings so that the second person can confirm the subject matter of the discussion.
- **Scripts:** Use a script during analyst calls (together with draft questions and answers) to keep the message on topic.
- **Preparation of analysts' reports:** Limit review and comment on analysts' reports to correcting historical facts that are a matter of public record or supplying inconsequential data. Remember that implicit communications that convey material nonpublic information by code or signaling are also prohibited.
- **Confidentiality agreements:** Obtain express agreement by analyst to maintain confidentiality of material nonpublic information until such information becomes public.

Consequences of failing to comply with Regulation FD: Failing to comply with Regulation FD exposes a public company to a potential SEC enforcement action. The SEC may seek a cease-and-desist order, or a civil injunction or significant money penalties. Individuals responsible for a violation of Regulation FD also may be subject to an SEC enforcement action as either a "cause" of the violation or as an "aider and abettor."

Securities and Exchange
Commission: Regulation FD

Rule 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 Rule 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 Rule 100, paragraph (a) of this Rule 100 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;
 - (ii) Who is:
 - (A) An investment adviser, as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940;
 - (B) An institutional investment manager, as that term is defined in Section 13(f)(5) of the Securities Exchange Act of 1934, that filed a report on Form 13F with the Commission for the most recent quarter ended prior to the date of the disclosure; or
 - (C) 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, 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, or who would be an investment company but for Section 3(c)(1) or Section 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, assuming for these purposes that a person who would be an investment company but for Section 3(c)(1) or Section 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 Rule 100 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; or
 - (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 (except an offering of the type described in Rule 415(a)(1)(i) under the Securities Act 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;
- (E) A communication permitted by Rule 134 under the Securities Act; 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.

Rule 101 - Definitions

This section defines certain terms as used in Regulation FD.

- (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, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934, including any closed-end investment company (as defined in Section 5(a)(2) of the Investment Company Act of 1940), but not including
 - (i) Any other investment company; or
 - (ii) Any foreign government or foreign private issuer, as those terms are defined in Rule 405 under the Securities Act.
- (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 Rule 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 Rule 100(a) by furnishing to or filing with the Commission a Form 8-K 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 Exchange Act Rule 3b-7), investor relations or public relations officer, or other person with similar functions.
- (g) **Securities offering.** For purposes of Rule 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:
- (a) If covered by Securities Act Rule 415(a)(1)(x), 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);
- (b) If a business combination as defined in Securities Act Rule 165(f)(1), 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);
- (c) If an offering other than those specified in paragraphs (a) and (b), 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).

Rule 102 - No Effect on Antifraud Liability

No failure to make a public disclosure required solely by Rule 100 shall be deemed to be a violation of Rule 10b-5 under the Securities Exchange Act.

Rule 103 - No Effect on Exchange Act Reporting Status

A failure to make a public disclosure required solely by Rule 100 shall not affect whether:

- (a) For purposes of Forms S-2, S-3 and S-8 under the Securities Act, 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 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 Rule 144(c) under the Securities Act.

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