

FREQUENTLY ASKED QUESTIONS ABOUT REGULATION FD

Background

What is Regulation FD?

Regulation FD (for “Fair Disclosure”), promulgated by the SEC under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), prohibits companies from selectively disclosing material nonpublic information to analysts, institutional investors, and others without concurrently making widespread public disclosure. The rule reflects the view that all investors should have equal access to a company’s material disclosures at the same time. Since its enactment in 2000, Regulation FD has fundamentally reshaped the ways in which public companies conduct their conference calls, group investor meetings, and so-called “one-on-one” meetings with analysts and investors.

Why was Regulation FD adopted?

Regulation FD is intended to promote full and fair disclosure of information by issuers. The SEC adopted Regulation FD to address the selective disclosure by issuers of material nonpublic information. In its adopting release, the SEC referred to publicized reports, describing that many issuers were disclosing important nonpublic information, such as advance warnings of earnings results, to securities analysts or selected

institutional investors or both, before making full disclosure of the same information to the general public. Where this had happened, the SEC observed, those who were privy to the information beforehand were able to profit or avoid a loss at the expense of those kept in the dark.¹

The Regulation

What does Regulation FD require?

Under Regulation FD, whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must disclose that information to the public. The timing of the required public disclosure depends on whether the selective disclosure was intentional or unintentional. Accordingly, the company must make this public disclosure (i) simultaneously, in the case of intentional disclosures, or (ii) promptly afterwards, in the case of unintentional disclosures. The public disclosure may be made through an Exchange Act filing (such as a Current Report on Form 8-K) or through any method reasonably designed to effect broad, non-exclusionary distribution of the information.

¹ See the Regulation FD adopting release available at <http://www.sec.gov/rules/final/33-7881.htm>.

See Frequently Asked Questions About Liability of Public Companies and Companies in Registration for Website and Social Media Content — “Regulation FD and Company Web Content.”

Scope of Regulation FD

Which companies are subject to Regulation FD?

Regulation FD applies to all companies that have a class of securities registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act, 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.

Which employees are covered by Regulation FD?

Regulation FD applies to the public issuer and any “person acting on behalf of the issuer.” This definition includes the following individuals:

- senior company officials (a director, executive officer, investor relations or public relations officer, or other person with similar functions), including individuals acting under their direction; and
- other officers, employees, or agents of the company who regularly communicate with securities market professionals or with security holders. Note that this element of the definition is limited to those who “regularly” communicate with securities market professionals and security holders.

As part of its Regulation FD policy, a company should specify which employees are authorized to speak on behalf of the company and the procedures related to responding to media and other inquiries.

What constitutes “material information” for purposes of Regulation FD?

Regulation FD regulates the disclosure of nonpublic material information. Though Regulation FD does not define materiality, the adopting release² provides guidance in its references to existing case law regarding determinations of “materiality.”

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 adopting release also includes a list of information that, if disclosed, would likely be considered material:

- earnings information (including historical or earnings estimates);
- mergers, acquisitions, tender offers; joint ventures or changes in assets;
- new products or discoveries;
- developments regarding customers or suppliers, such as the acquisition or loss of a contract;
- changes in control or management;
- change in auditors or auditor notification that an issuer may no longer rely on an auditor’s report;

² See footnote 1.

- defaults on senior securities;
- stock splits or dividends;
- redemptions or repurchases of securities;
- public or private sales of securities; and
- bankruptcy.

What is “nonpublic information” for purposes of Regulation FD?

As with the materiality standard discussed above, the SEC does not provide a specific definition. Essentially, 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.

Which disclosures are proscribed?

Regulation FD is not a blanket prohibition on material nonpublic disclosures; rather, the rule only proscribes disclosures to the following individuals:

- securities market professionals, such as brokers, dealers, investment advisers, institutional investment managers, and sell-side and buy-side analysts; and
- shareholders who it is reasonably foreseeable would trade on the basis of the information.

By limiting the types of communications covered by the rule to the above enumerated persons, the SEC attempted to exclude ordinary-course business

communications with customers, suppliers, and strategic partners, as well as communications made to the public media and to governmental agencies. In addition, as described below, there are a few types of communications that are specifically excluded from the rule. See “What communications are exempt from Regulation FD.”

Are directors prohibited from speaking privately with shareholders?

No. Question 101.11 in the Compliance and Disclosure Interpretations (“C&DIs”) published by the staff of the SEC³ confirms that Regulation FD does not prohibit an issuer’s directors from speaking privately with a shareholder or groups of shareholders, provided 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 trade the issuer’s securities on the basis of such information. Alternatively, a private communication between a director and a shareholder would not present Regulation FD issues, if the shareholder expressly agrees to maintain the disclosed information in confidence.

When drafting or updating Regulation FD policies in light of the recent C&DIs, 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, consideration should be given to implementing procedures intended to help avoid Regulation FD violations. Pre-clearing discussion topics with the shareholder or having counsel participate in the meeting are examples noted in the C&DIs.

³ See the Compliance and Disclosure Interpretations regarding Regulation FD, updated June 4, 2010, available at <http://sec.gov/divisions/corpfin/guidance/regfd-interp.htm>.

What communications are exempt from Regulation FD?

Regulation FD specifically excludes certain communications from the scope of the regulation. These exempted disclosures generally fit into the following three categories:

- Communications to a person who owes the issuer a duty of trust or confidence. This would include counsel, financial advisers, and other so-called “temporary insiders.”
- Communications to any person who expressly agrees to maintain the information in confidence. There is no requirement that the individual agree not to trade on the information; a promise to maintain confidentiality is sufficient. Note, of course, that insider trading laws would still apply.
- Communications in connection with an offering of securities registered under the Securities Act of 1933 (the “Securities Act”).

Since Regulation FD’s adoption, communications to credit rating agencies have been exempt from its requirements; however, the SEC recently adopted an amendment to Regulation FD eliminating this exemption.⁴ Accordingly, issuers will need to consider whether a credit rating agency is among the enumerated persons covered by Regulation FD, and if the credit rating agency is among the enumerated persons, whether another exemption from Regulation FD is available whenever material nonpublic information is provided to the credit rating agency. See the discussion below.

⁴ The amendment to Regulation FD was mandated by Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and became effective upon publication in the Federal Register on October 4, 2010.

Under what circumstances may an issuer make disclosures to credit rating agencies?

Disclosures of material nonpublic information by an issuer to a credit rating agency will continue to 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. Before making any material non-public disclosures to a credit rating agency, issuers should confirm that an agreement between the issuer and the credit rating agency imposes a confidentiality obligation or establishes the requisite fiduciary duty, unless an issuer intends to publicly disseminate that information. See “What is the timing for required public disclosures under Regulation FD?”.

Regulation FD and Securities Offerings

Does Regulation FD apply to disclosures made in connection with a registered offering?

Except in certain limited circumstances, Regulation FD 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 under warrants and other convertible securities. The exemption operates by defining the starting and ending points of a registered offering and exempting disclosure made during that period, if the disclosure is made in connection with the registered offering.

Does the exemption extend to unregistered private offerings?

No. The SEC did not extend the offering exemption to unregistered private offerings. Thus, Regulation FD applies to disclosures made in connection with an unregistered offering. A reporting company subject to Regulation FD that is making an unregistered private offering must consider carefully the Regulation FD issues that may arise in connection with its discussions regarding a potential private or exempt offering. Generally, the company must either (i) publicly disclose any material information it privately discloses to investors or potential investors, or (ii) require that those who receive such information agree to maintain it in confidence. See Frequently Asked Questions About PIPEs — “Regulation FD and Other Legal Concerns.”

How are disclosures made in connection with proxy solicitations or tender offers treated under Regulation FD?

The SEC also did not exempt from Regulation FD disclosures that companies make in connection with proxy solicitations or tender offers. Accordingly, 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 that is required to be disclosed under 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.

Public Disclosure Under Regulation FD

Does Regulation FD require that a company make a public disclosure?

Regulation FD does not require that a company make a public disclosure. A company is not required as a result of Regulation FD to make a premature disclosure of information. Regulation FD is simply intended to “level the playing field” once a company has made selective disclosures; however, it does not impose an affirmative obligation to make an announcement. Reporting issuers should keep in mind their pattern of disclosures, and should, in the context of a securities offering, give special consideration to their disclosures. However, the “bad news” doctrine still provides important guidance in this regard.

What is the timing for required public disclosures under Regulation FD?

Regulation FD imposes different deadlines for disclosure depending on the nature of the selective disclosure.

Intentional selective disclosure: Issuers must make a simultaneous public disclosure of any private communication when the individual making the disclosure knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic. Thus, a CEO who makes an off-the-cuff remark that includes information he or she knows to be, or is reckless in not knowing is, material and non-public to select analysts would be violating Regulation FD even though the remark was not planned.

Unintentional selective disclosure: Issuers must make a public disclosure “promptly” after selective disclosures when the individual making the disclosure did not know, or was not reckless in not knowing, that the information he or she was communicating was material and nonpublic.

What does “promptly” mean?

Regulation FD defines the outer boundary for “prompt disclosure” to mean as soon as reasonably practical, but in no event after the later of (i) 24 hours or (ii) the start of the next day’s trading on the New York Stock Exchange (regardless of where or whether the company’s stock is traded), in both cases after a senior company official learns of the disclosure.

What qualifies as “public disclosure” under Regulation FD?

Regulation FD allows for two means of effecting public disclosure. A company required to publicly disclose information may do so by either of the following methods:

- *Exchange Act Filing:* A company may include the information in a public filing under the Exchange Act; (for example, a Form 8-K under “Item 7.01. Regulation FD Disclosure”); or
- *A Combination of Disclosure Methods:* A company may choose a method or combination of methods of public disclosure *reasonably designed to provide broad, non-exclusionary distribution of the information to the public.* These methods might include some or all of the following: (i) a press release distributed through a widely circulated news or wire service, such as Dow Jones, Bloomberg,

Business Wire, PR Newswire, or Reuters; (ii) a news conference to which the public is granted access and for which advance notice is given; (iii) a simultaneous webcast of a news conference or analyst conference call; (iv) posting of the information on the company’s website; and (v) making available to the public a replay of the company’s news conference or conference call.

May a company use its website to effect “public disclosure” for purposes of Regulation FD?

Yes, under certain circumstances. When Regulation FD was first enacted, the SEC held a more limited view in the value of disclosures on a website: while Internet disclosure, such as a simultaneous webcast or a post on a company’s website, could be useful, such disclosure on its own might not be adequate “public disclosure” in all circumstances. The SEC has since adjusted its view with respect to online disclosure, and, in August 2008, published an interpretive release entitled “Commission Guidance on the Use of Company Websites,” which provides additional guidance on the use of company websites (the “2008 Guidance”). This 2008 Guidance addresses the circumstances under which information posted on an issuer’s website would be considered “public” for purposes of evaluating the (1) satisfaction of Regulation FD’s “public disclosure” requirement; and (2) applicability of Regulation FD to subsequent private discussions or disclosure of public information. See “Frequently Asked Questions About Liability of Public Companies and Companies in Registration for Website Content — Regulation FD and Company Websites.”

What should the company consider when using its website for purposes of making “public disclosures”?

The 2008 Guidance clarifies that websites can serve as an effective means for disseminating information if investors have been notified that they can locate the company information on the website. In determining whether information disclosed solely on the company’s website qualifies as “public” for Regulation FD purposes, the SEC 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.

It is the company’s responsibility to 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.

May a company use social media to effect “public disclosure” for purposes of Regulation FD?

Yes, under circumstances similar to making public disclosure via a company’s website as discussed above. On April 2, 2013, the SEC issued guidance providing that social media channels, such as Twitter and Facebook, may be used by companies to disseminate material information, without running afoul of

Regulation FD.⁵ The SEC emphasized that companies should apply the 2008 Guidance regarding the disclosure of material information on company websites when analyzing whether a social media channel is in fact a “recognized channel of distribution,” including that investors must be provided with notice of the specific channels that a company will use in order to disseminate material nonpublic information.

In its social media guidance, the SEC confirmed that Regulation FD applies to social media and other emerging means of communication used by companies in the same way that it applies to company websites. The SEC indicates that every situation must be evaluated on its own facts. The SEC further indicates that 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, is unlikely to qualify as an acceptable method of disclosure.

What should a company do in light of the social media guidance?

It may be prudent for companies to consider whether to address the use of social media in Regulation FD policies, including whether prohibitions, restrictions or oversight should apply to the use of social media by individuals authorized to speak for the company. If a company determines that social media channels may be useful for communicating information, it should begin providing notice that information about the company

⁵ The SEC issued the guidance in the form of a Report of Investigation under Section 21(a) of the Exchange Act. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69729 (April 2, 2013) (the “21(a) Report”) available at <http://www.sec.gov/litigation/investreport/34-69729.pdf>.

may be found on those channels. Companies should also advise individual officers, directors and employees that posting information about the company on social media channels could potentially implicate Regulation FD, and that such individuals must exercise caution when using social media for communications.

Enforcement of Regulation FD

What potential liabilities could result from violations of Regulation FD?

Regulation FD is a disclosure rule and not an antifraud rule. Companies that violate Regulation FD can be subject to an SEC enforcement action, as can the individual personnel at the company who were responsible for the violation. The enforcement might comprise an injunction or fines, along with the attendant obligations to disclose the violation.

There are several important limitations to potential enforcement:

- Because Regulation FD is not an antifraud rule, only conduct that is knowing or reckless can constitute a violation.
- A finding that a company has violated Regulation FD is not, on its own, sufficient to give rise to liability under other SEC rules. Regulation FD includes a provision expressly stating that the failure to make a public disclosure under Regulation FD does not in and of itself constitute a Rule 10b-5 violation.
- Regulation FD does not provide for a private right of action. Therefore, private plaintiffs — including shareholders — cannot make a claim

based on a company's violation of Regulation FD.

The SEC has been increasingly active in pursuing Regulation FD violations.

Will a Regulation FD violation cause a company to forfeit its Form S-3 eligibility?

No. The SEC has stated 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 under Rule 144.

Potential Preventive Measures

Are there preventive measures a company may consider?

Yes, there are a number of preventative steps companies can adopt to reduce the risks associated with Regulation FD. Below is a non-exclusive list of suggested measures.

- Review current disclosure policies to determine how information is currently disclosed to analysts, institutional investors, other shareholders, and the public, and evaluate those processes in light of Regulation FD.
- After identifying potential issues, prepare and follow a comprehensive disclosure policy, making sure to emphasize the seriousness and potential consequences of Regulation FD violations. This policy should be made available to senior officials, investor relations personnel, and anyone else responsible for speaking with analysts or investors.

- Engage in periodic Regulation FD compliance training.
 - Establish an earnings guidance policy.
 - Designate a compliance officer to be responsible for deciding whether information is material, determining whether it already has been disclosed to the public, and answering any other questions about compliance with Regulation FD.
 - 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.
 - Establish a framework for Regulation FD disclosures so that the company is prepared to navigate Regulation FD's accelerated filings schedule. 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).
 - Given this timeline, identify in advance a team that will be responsible for public disclosures. This team should include members from legal, investor relations, and finance. Make sure that the team includes someone who is up to date on the company's safe harbor warnings, because Regulation FD disclosures should include that language.
 - If using outside vendors is anticipated to make disclosure, choose them now. Do not wait until the company has 24 hours to start looking for a webcasting service.
 - Whenever possible, those speaking to analysts should take a "bodyguard" — someone familiar with making determinations about materiality who will listen for any unintentional disclosures that might trigger the need to prepare a Regulation FD disclosure — and serve as a witness.
 - Review the company's directors' and officers' insurance policy to ensure that the definition of "claim" includes an SEC investigation into alleged violations — many (and sometimes, most) of the expenses are incurred during the investigation. If possible, seek out a policy that provides coverage for the investigation.
 - In addition, review the company's indemnification agreements with directors and officers to determine if they covered the situation where costs associated with an SEC investigation are incurred.
 - Review by counsel of proposed communications with analysts and shareholders.
- Are there any specific preventative measures to focus on when speaking with analysts?*
- Yes. Private meetings with analysts or institutional investors are particularly risky from a Regulation FD perspective, and as a result special precautions should be considered whenever such meetings take place.

When speaking with analysts:

- consider preparing detailed scripts for the speaker to use in meetings and other communications with analysts, including answers to anticipated questions;
- remember to give the safe harbor warnings;
- ensure that the analyst understands that the speaker does not intend to disclose material nonpublic information selectively;
- tell the analyst that, in the speaker's view, he or she is not disclosing any material nonpublic information;
- 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 and the analyst do not violate Regulation FD;
- consider making all analyst and investor calls and meetings open to the public, with adequate advance notice; and
- make transcripts (written or audio) of these calls and meetings available to the public for some period of time afterwards through webcast or broadcast to the public.

What Regulation FD considerations should companies be aware of when providing or confirming "guidance" to analysts?

The SEC has drawn particular attention to the practice of providing guidance to analysts. In the SEC's words, an issuer takes on a "high degree of risk under Regulation FD" when it engages in private discussion with an analyst seeking guidance. Even seemingly benign comments that earnings match analysts' forecasts could trigger a violation of Regulation FD. For this reason, issuers may elect to avoid providing guidance to analysts outside of methods that meet the definition of "public disclosure" as discussed above. In light of the recent guidance from the SEC staff, which we discuss below, companies should consider whether it is prudent to implement a "no comment" policy regarding confirmation of prior guidance, particularly in those situations where there is a heightened risk for selective disclosure regarding prior guidance.

To what extent may companies permissibly confirm prior public guidance to analysts or investors on a selective basis?

The staff of the Division of Corporation Finance of the SEC published C&DIs regarding Regulation FD. Question 101.01 in the C&DIs⁶ addresses the extent to which a company may permissibly confirm prior public guidance to analysts or investors on a selective basis. The C&DIs indicate a few key principles for companies to consider when confirming guidance and drafting or updating its Regulation FD policies:

- Whether a Regulation FD disclosure obligation is triggered depends on the materiality of the company's confirmation of the guidance.

⁶ See footnote 3.

- In assessing the materiality, a company must consider the extent to which the confirmation (including the related circumstances and context around the confirmation) conveys additional material information.
- In examining these circumstances, the amount of time that has elapsed since the original guidance was given, and the extent to which there have been intervening events since that time may be relevant factors.
 - For example, the confirmation of quarterly guidance at the end of a quarter may be material, while confirmation in the middle of the quarter may not be deemed as material, given differing inferences that could be drawn, based on the relative timing of the confirmations.
 - An intervening loss of a customer since the publication of the original guidance may make a subsequent confirmation of the original guidance material.

While it should be acceptable to confirm guidance privately within a short time after guidance is announced publicly, outside of those parameters, there may be significant risks associated with engaging in private discussions with analysts or investors regarding guidance. The narrow window for permissibly confirming guidance would not exist in circumstances where there has been a subsequent intervening event that would call into question the guidance, or where the timing of the confirmation itself conveys additional material information.

Should companies be alert to specific language that may be deemed to be confirming prior guidance?

Yes. Question 101.01 in the C&DIs addresses the types of language that may be deemed to be confirming prior guidance. A statement by the company that it has “not changed” or that it is “still comfortable with” prior guidance is the same as providing a direct confirmation of the prior guidance. Further, the C&DIs note that merely a reference to the prior guidance may imply confirmation of that guidance. In the event that a company does not wish to confirm the prior guidance, the 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.

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