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Client Alert

SEC Publishes Guidance on Regulation FD

The Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) published in August 2009 several Compliance and Disclosure Interpretations (“C&DIs”) regarding Regulation FD (“Reg.FD”). Although the interpretations largely repeat prior statements, the updated guidance provides an excellent opportunity for companies to revisit their Regulation FD practices and policies. The interpretations are in a question

and answer format and may be found at www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm.

Confirmation of Forecasts

The SEC sought to clarify when an issuer may selectively confirm a forecast it previously made to the public without triggering Reg. FD’s disclosure requirements. To determine if Reg. FD disclosure is required, the issuer should examine whether or not the confirmation conveys any information above and beyond the original forecast and the materiality of the additional information. Materiality in this context depends on, in part, the amount of time that has elapsed between the original forecast and whether or not any intervening events have happened since the original forecast.

Statements that indicate the issuer has “not changed” or is “still comfortable with” the prior forecast constitute a confirmation of the prior forecast and may trigger a Reg. FD reporting obligation. A simple “no comment,” however, does not constitute a confirmation, and will not trigger a Reg. FD reporting obligation. Issuers wishing to refer to a prior forecast, without confirming it, should make clear that the prior forecast was as of the date it was first given and that the prior forecast is not being updated at this time.

Analyst Models

An issuer privately may review and comment on an analyst’s model without triggering Reg. FD’s disclosure requirements, provided the issuer does not convey in the process of review any material non-public information to the analyst. Where the issuer corrects publicly disclosed historical facts, it will not trigger a Reg. FD reporting obligation. Also, sharing inconsequential data about the issuer, even if the data allows the analyst, together with other known information, to divine material non-public information about the issuer, will not trigger a Reg. FD reporting obligation. Issuers, however, may not use the review of an analyst’s model as a device to selectively communicate, either directly or indirectly, material non-public information to an analyst. If material non-public information is conveyed in the review process, then a Reg. FD reporting obligation will arise. (See below: Intentional Disclosure)

Confidentiality Agreements

So long as an issuer obtains the agreement from the recipient of material non-public information to maintain that information in confidence, the additional agreement that the recipient will not trade on or tip to others the information is unnecessary in order for the issuer to rely on the exclusion to the reporting obligation contained in Reg. FD. On the other hand, if an issuer wishes to rely on the confidentiality agreement exclusion of Reg. FD, it is not sufficient that the recipient of the material non-public information only agrees not use the information in violation of the federal securities laws. In order for the issuer to be able to rely on this exclusion, the recipient must expressly agree to keep the information confidential.

Road Shows

Disclosures made "in connection with" a registered public offering are not subject to Reg. FD. This includes such items as the registration statement filed with the SEC, a free writing prospectus, a press release complying with SEC Rule 135, and road show materials consistent with the public offering materials. On the other hand, disclosures made in a road show for an unregistered offering and disclosures made in a road show while the issuer is not in registration and is not otherwise engaged in a securities offering are subject to Reg. FD. As always, if the recipients of road show materials expressly agree to keep the material non-public information confidential, then the disclosure is not subject to Reg. FD.

Employees and Senior Management

An issuer may disclose material non-public information to its employees (even if the employees are shareholders) without making public disclosure of the information. The SEC clarified that Reg. FD only applies to disclosures made to persons "outside" the issuer. Officers, directors and other employees, however, always are subject to duties of trust and confidence and face insider trading liability if they trade or tip others while in possession of material non-public information.

If an issuer has a policy limiting which senior officials are authorized to speak on behalf of the company, then selective disclosure of material non-public information made by an unauthorized spokesperson is not subject to Reg. FD. Nonetheless, those disclosures could be considered a breach of the duty of trust or confidence to the issuer by that person and may trigger liability under insider trading laws.

Conference Calls

If an issuer wants to make public disclosure of material non-public information under Reg. FD by means of a conference call, the issuer must provide advanced notice of the date, time, subject matter and call-in information for the conference call. In determining what constitutes adequate advance notice, issuers should consider the following factors:

Timing – Public notice needs to be given a reasonable period of time ahead of the conference call. For example, several days notice for a quarterly earnings announcement that the issuer makes on a regular basis would be considered to be reasonable.

Availability – If a transcript or re-play of the conference call will be available after the event, issuers should indicate in the notice how, and for how long, the record will be available to the public.

Exchange Act Reports

Exchange Act filings by an issuer, such as a Form 10-Q, Form 10-K, and information and proxy statements, may be used to satisfy the public disclosure requirements of Reg. FD. So long as the disclosure is made within the time frame that Reg. FD requires, an issuer may rely on its other Exchange Act filings and need not duplicate the information in a Form 8-K. When satisfying Reg. FD disclosure obligations through these other Exchange Act filings, issuers must take care to bring the disclosure to the attention of readers, and issuers must not bury the information or make the disclosure in a piecemeal fashion throughout the filing.

When using Exchange Act filings other than Form 8-K for purposes of Reg. FD disclosure, issuers do not need to wait any proscribed time period after the filing is accepted by the SEC and is available on EDGAR before making disclosure of the same information in a non-public meeting. This is consistent with the disclosure requirements, to date, when Reg. FD disclosure is made on Form 8-K.

Intentional Disclosure

The SEC clarified that a disclosure is considered "intentional" for purposes of Reg. FD when the person making it either knows, or is reckless in not knowing, that the information he is communicating is both material and non-public, even if the person did not originally plan to make such a disclosure.

Meetings

The SEC clarified that a meeting which is open to the public, such as a shareholders' meeting, but not otherwise webcast or broadcast by any electronic means, does not satisfy the Reg. FD public disclosure requirement. These kinds of meetings are not considered reasonably designed to provide broad, non-exclusionary distribution of the information to the public. Additionally, the presence of the press at an otherwise non-public meeting does not render the meeting public for purposes of Reg. FD.

Web Sites

In an earlier release on the use of web sites, the SEC provided the following guidance with respect to the circumstances under which information posted on a company's web site would be considered "public" for purposes of evaluating (i) whether and when information is "public" for purposes of the applicability of Reg. FD, and (ii) whether Reg. FD's "public disclosure" requirement is satisfied:

Applicability of Reg. FD – If information on a company's web site is public, then subsequent selective disclosure of that information – such as to an analyst in a private conversation – would not trigger Reg. FD because the information, even if material, would not be non-public. In order for information to be public, it must be disseminated in a manner calculated to reach the securities market place through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information. Therefore, when evaluating whether information on a web site is public for purposes of Reg. FD, companies should consider the following:

- Is the company's web site a recognized channel of distribution?

- Does the posting of information on a the web site disseminate the information in a manner that makes it available to the securities marketplace in general?
- Has a reasonable waiting period passed to permit investors and the marketplace to react to the posted information?

Public Disclosure Requirement – When Reg. FD was first adopted in 2000, the SEC did not believe that disclosure on a company’s web site would, in and of itself, be an acceptable method of “public disclosure” of material non-public information for purposes of compliance with Reg. FD. The SEC has softened its initial position, and now it believes that technology has evolved and the use of the Internet has grown, such that for some companies, in certain circumstances, posting of the information on the company’s web site may be a sufficient method of public disclosure under Reg. FD. Again, the analysis depends on whether the company’s web site is a recognized channel for information distribution and whether the information is “posted and accessible” and, therefore, “disseminated.” When making this evaluation, a company needs to consider its web site’s ability to meet the timing requirements for public disclosure once a selective disclosure has been made.

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