

September 7, 2000

MEMORANDUM

**Re: Regulation FD – Practical Issues Raised by
the SEC’s New “Selective Disclosure” Rule**

SUMMARY

SEC Regulation FD (for “fair disclosure”) becomes effective on October 23, 2000. The regulation provides that whenever a U.S. public company, or a person acting on its behalf, discloses material nonpublic information to a securities market professional, the company must make public disclosure of the information simultaneously if the disclosure is “intentional”, or promptly thereafter if it is “non-intentional”. The same requirement for simultaneous (or prompt) public disclosure applies to the company’s communication of material nonpublic information to a holder of its securities where it is reasonably foreseeable that the holder will purchase or sell the company’s securities on the basis of that information.

The regulation may cause many public U.S. companies to alter their disclosure practices *vis-à-vis* securities market professionals and investors, especially with respect to direct or indirect “guidance” regarding earnings estimates. Companies may have to curtail the information they provide to securities analysts or expand the scope of information they disclose to the public, or do both. Under the new regulation, “one-on-one” and other private communications with market professionals and investors will pose new risks for U.S. public companies, their senior officials and their public relations and investor relations personnel. We recommend that companies reexamine their disclosure policies and procedures in light of these new risks. Practices will no

doubt evolve as companies gain experience living with Regulation FD and as ambiguities in the SEC's adopting release¹ are clarified.

The first part of this memorandum contains an overview of Regulation FD. The second part (beginning on page 6) discusses common situations in which the new regulation will raise practical issues for most public U.S. companies. The third part (beginning on page 21) discusses the advisability of policies and procedures to address these practical concerns.

OVERVIEW OF REGULATION FD

Basic Requirement. New Regulation FD provides that

- ! whenever an **issuer**,² or any director, executive officer, investor relations or public relations officer, or other person with similar functions (collectively "senior officials"), or any other officer, employee or agent of the issuer who regularly

¹ Release No. 33-7881 (August 15, 2000), 65 *Fed. Reg.* 51716 (August 24, 2000). In this same release, the SEC also adopted new Rules 10b5-1 and 10b5-2 under the Securities Exchange Act of 1934 that are intended to clarify existing prohibitions against insider trading. New Rule 10b5-1 is described in our August 25, 2000 Memorandum regarding "Insider Trading: New SEC Regulation Specifies Conditions Under Which Issuers May Repurchase Securities and Insiders May Sell Securities While Aware of Material Nonpublic Information" and will also be the subject of a separate, more detailed, memorandum.

² The regulation applies to all U.S. issuers with securities (debt or equity) registered pursuant to Section 12 of the Securities Exchange Act of 1934 (for example, listed on the New York Stock Exchange or quoted in Nasdaq) or required to file reports under Section 15(d) of the Exchange Act by reason of having registered securities under the Securities Act of 1933, including closed-end investment companies as defined by the Investment Company Act of 1940, but not including other investment companies. The regulation does **not** apply to "foreign governments" or "foreign private issuers" as defined in Rule 405 under the Securities Act, even if their securities are listed in the United States. The definition of foreign private issuer excludes foreign companies whose assets or management are principally U.S.-based as described in Rule 405 and a majority of whose voting securities are held by U.S. residents. The SEC, however, has asked its Division of Corporation Finance to undertake a comprehensive review of the reporting requirements of foreign private issuers in light of the "new regulatory issues" posed by "today's global markets".

communicates with any “securities market professional” or with holders of the issuer’s securities,

! discloses **material nonpublic** information regarding the issuer or its securities,

! to any **securities market professional**, *i.e.* –

- any broker or dealer, or any person “associated with” a broker or dealer,
- any investment adviser, or any person “associated with” an investment adviser,
- any institutional investment manager that acts with discretion with respect to at least \$100 million of equity securities and therefore has filed with the SEC a Form 13F for the most recently completed quarter, or any person “associated with” such an institutional investment manager, or
- any investment company, including a hedge fund or other investment company that is not required to be registered because it has fewer than 100 security holders or all of its securities are owned by “qualified purchasers”, or any control affiliate, officer, director, partner, copartner, employee, investment adviser or member of an advisory board of an investment company (including a hedge fund or other unregistered investment company),

! *or* to any **holder of the issuer’s securities**, under circumstances in which it is reasonably foreseeable that the holder will purchase or sell the issuer’s securities “on the basis of” the information,³

! then the issuer must make **public disclosure** of that information,

! *unless* the recipient expressly agrees to maintain the information in confidence or owes a duty of trust or confidence to the issuer.

³ Under new Rule 10b5-1, any purchase or sale by a security holder will be deemed to be “on the basis of” material nonpublic information of which the holder was “aware” when he or she made the purchase or sale, unless the holder can demonstrate that the purchase or sale was made pursuant to a pre-existing arrangement that satisfies the conditions for an affirmative defense under Rule 10b5-1(c).

Covered Recipients. The regulation is triggered only upon disclosures to securities market professionals and security holders. The definitions of these covered persons in the regulation are based on the definitions elsewhere in the federal securities laws, which include foreign broker-dealers and analysts, many foreign universal banks and other foreign securities professionals, even if not SEC-registered. They also include foreign security holders. Meetings conducted offshore are also covered. The definitions are broadly drafted to include affiliated entities of securities professionals, whether or not themselves engaged in securities businesses.

Yet uncertainties remain. For example, the definition specifically covers a broker-dealer's employees and its common control entities, but does not address employees of the common control entities. This leaves open the question whether a communication with an employee of a broker-dealer's affiliate is covered. In the case of investment advisers and institutional investment managers, control and controlled affiliates are covered (such as parents and subsidiaries) but not affiliates under common control (such as sister companies). As with broker-dealers, employees of these covered affiliates are not addressed. Finally, the definition covers holders of an issuer's securities, but is silent on whether the concept extends to affiliated entities or employees.

The safest course may be to assume that financial institutions of all types, wherever located, and their professional-level employees are covered recipients for purposes of Regulation FD.

Regulation FD expressly excludes from coverage communications made to a person who owes the issuer a duty of trust or confidence, such as an attorney, investment banker or accountant, and communications with a person who expressly has agreed to maintain the information in confidence.⁴

⁴ The adopting release indicates that, although the agreement must be express, it need not be written. The adopting release explains that the agreement must be not to disclose the information and not to trade on the basis of it (see footnote 3). The adopting release also notes that the agreement may be obtained after a disclosure is made, so long as it is obtained (continued...)

Timing of Disclosure. If the disclosure of material nonpublic information to a securities market professional, or to a security holder under the circumstances described above, is “intentional”, then the public disclosure must be made **simultaneously**. A disclosure is “intentional” when the individual making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.⁵ If the disclosure of material nonpublic information is non-intentional, then the issuer must make public disclosure of the information “**promptly**”, which 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 . . . learns that there has been a non-intentional disclosure . . . of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic”. Whether required to be effected simultaneously or promptly, the public disclosure must be made either by “filing” the information with, or “furnishing” the information to, the SEC on Form 8-K or by “disseminat[ing] 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”.

Penalties and Liability. Violators of Regulation FD will be subject to enforcement action by the SEC. Possible actions include administrative action against the company seeking a cease-and-desist order or a civil action seeking an injunction and/or civil monetary penalty. The SEC may also bring an enforcement action against the

⁴ (...continued)
before the recipient discloses, or trades on the basis of, the disclosed information. Accordingly, an agreement by the recipient to maintain material nonpublic information in confidence would effectively prohibit trading (other than pursuant to a pre-existing arrangement satisfying Rule 10b5-1(c)) until the information has been disseminated in a manner making it available to investors generally or is no longer material.

⁵ There is a risk that even an unplanned communication of material information would be considered intentional and require concurrent public disclosure so long as the person knew (or was reckless in not knowing) at the time of the slip that the information was material and nonpublic.

individual who is responsible for the violation, either as “a cause of” the violation in a cease-and-desist proceeding or as an “aider and abetter” in an injunctive action.⁶

Although Regulation FD provides that no failure to make public disclosure required *solely* by Regulation FD shall be deemed to be a violation of Rule 10b-5, the entire body of information that an issuer does disclose pursuant to Regulation FD *will* be subject to Rule 10b-5 and may result in liability if that information includes any materially false or misleading statement.⁷

COMMON SITUATIONS RAISING PRACTICAL ISSUES UNDER REGULATION FD

Selective Disclosure Has Become Unlawful. Regulation FD for the first time makes unlawful what is commonly referred to as “selective disclosure” of material nonpublic information to securities analysts. Although private disclosure of material information to stockholders has always been questionable prior to Regulation FD, U.S. Supreme Court decisions were widely interpreted as permitting many current practices involving private disclosure to securities analysts of material nonpublic information, including earnings guidance. Although these practices have been criticized by the SEC and others, could call into question a company’s public disclosures and may raise investor relations concerns, companies engaged in these practices with securities analysts would generally not have been acting illegally before Regulation FD.

⁶ In response to comments of ours and others, Regulation FD, as adopted, provides that a failure to make a public disclosure required *solely* by Regulation FD will not affect the issuer’s eligibility for registration on Form S-2, S-3 or S-8 under the Securities Act or the ability of its security holders to resell pursuant to Rule 144 under the Securities Act.

⁷ Depending on the public disclosure methods used to comply with Regulation FD, this information may also be subject to Section 18 of the Exchange Act and Sections 11 and 12(a)(2) of the Securities Act. These matters are discussed under “Disclosure Policies and Procedures—Methods of Public Disclosure” beginning on page 23. The adopting release also contains a statement of potential concern in a footnote to the liability discussion that the annual, quarterly and other reporting requirements of Sections 13(a) and 15(d) of the Exchange Act create a duty to disclose for purposes of Rule 10b-5.

Under Regulation FD, companies will continue to have a wide range of choices regarding their disclosure practices, albeit fewer than before, but will now risk being in violation of the new regulation if they disclose to securities professionals or stockholders material nonpublic information without concurrently disclosing it to the public. In response, some companies may choose to have fewer private contacts or make more public disclosures. Others may conclude that their current practices do not generally involve selective disclosure of material information. However, all companies should examine their current disclosure and investor relations practices in light of the new rule. The scenarios described below are intended to assist in this analysis. Companies also should periodically reassess their practices as they gain experience and as disclosure practices under the new regulation evolve.

Materiality Judgments Are Difficult But Important. One of the more difficult tasks will be assessing whether specific nonpublic information is “material”. While these judgments have always been important for public companies in conducting investor relations activities, Regulation FD heightens their importance. Regulation FD does not define the term “material”.⁸ Instead, the SEC chose to rely upon the meaning of that term as established by judicial decisions in cases arising under the federal securities laws.⁹ The adopting release lists certain types of information and events that the SEC believes should be reviewed carefully to determine whether they are material. The list

⁸ Regulation FD also does not define “nonpublic”. The adopting release states that information is nonpublic “if it has not been disseminated in a manner making it available to investors generally”.

⁹ In this regard, the SEC cites the statements of the U.S. Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), that information is material if “there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision and it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”. It is somewhat troubling, however, that the adopting release also cites, without further comment, SEC Staff Accounting Bulletin No. 99, which contains a “market-moving” test for materiality.

itself is straightforward,¹⁰ but provides little practical guidance regarding the types of materiality issues most likely to arise under Regulation FD. It is clear, however, that the SEC believes earnings information will virtually always be material information for purposes of Regulation FD, as discussed further below in the context of issuer meetings with small groups or one-on-ones.

Quarterly Earnings Calls

It is clear from the adopting release that the SEC considers an issuer's planned release of financial information to be material for purposes of Regulation FD in most, if not all, cases. Thus, issuers must take special care not to disclose this information selectively. It is also almost certain that the SEC would consider a major announcement, such as those relating to mergers or acquisitions, tender offers or changes in top management, to be material for purposes of the regulation.

Today, a typical quarterly earnings announcement will involve issuance of a press release summarizing the recent results and a conference call for securities analysts in which management provides additional detail through prepared remarks and a question-and-answer session. Often, the conference call will include disclosure of forward-looking information, possibly including earnings guidance, that is not contained in the press release. While disseminating an earnings press release in the usual way should comply with Regulation FD,¹¹ the issuer also must decide on the timing and

¹⁰ The list includes: (1) earnings information; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries, or developments regarding customers or suppliers (for example, the acquisition or loss of a contract); (4) changes in control or in management; (5) change in auditors or an auditor's notification that the issuer may no longer rely on an audit report; (6) events regarding an issuer's securities, for example, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits, changes in dividends, changes to the rights of security holders, and public or private sales of additional securities; and (7) bankruptcies or receiverships. The adopting release states that the SEC does not mean to imply that each of the items in this list is *per se* material.

¹¹ The SEC cautions in the adopting release that if an issuer knows its press releases are
(continued...)

content of the notice of the call and who will be permitted to participate, so that any additional material information discussed on the call is considered publicly disclosed.

The SEC encourages companies to provide listen-only public access to these calls, either through the telephone or Internet webcast, and to provide “adequate” notice of the call. The SEC states in the adopting release that these types of calls would generally constitute acceptable public disclosure to comply with Regulation FD if adequate notice of the call is given. Companies that are actively followed by analysts may conclude that no further action under the regulation would be required for disclosures made in this context.

In situations where a company wishes to avoid doubt regarding Regulation FD compliance, the SEC provides a “model” disclosure example that provides for the issuance of a press release as a first step. The SEC states that after issuing a press release the issuer may disclose “additional material details related to the original disclosure” in the following conference call without fear of engaging in selective disclosure. The SEC does not explain what it means by “related to” or whether discussion of unrelated information on the call would be considered publicly disclosed.

Under the SEC’s facts and circumstances analysis, whether the additional material information in the call is considered publicly disclosed may depend on: the extent to which the notice of the call (or press release if distributed sufficiently in advance) describes the intended subject matter of the call; the number and nature of the media representatives invited; whether replays of the call are made available for a time thereafter; whether the issuer has discussed the same types of forward-looking or other material information in previous quarterly calls; and the extent to which the subject matter of the forward-looking or other material information is logically connected to the

¹¹ (...continued)
routinely not carried by major business wire services, it must use additional dissemination methods, such as Form 8-K disclosure, website posting or distribution by a public relations service firm to a variety of media.

information in the press release. Accordingly, companies concerned with this issue may choose to make replays of the call available and may wish to note in their notice of the call that forward-looking or other material information may be discussed (but not the information itself).

Issuers will also need to decide what constitutes “adequate” notice of the conference call or webcast. This will vary by company and the subjects to be discussed. A company’s own past practices for similar calls will be relevant if for a particular call it wishes to shorten the notice period. Many companies give notice of the conference call prior to issuance of the earnings release itself. In those cases, reiteration of the notice in the earnings release would still be advisable.

The SEC recommends that issuers using conference calls or webcasts also consider making replays available for a “reasonable period of time”. We believe that arranging for replays of earnings and similar calls would be a favorable element in the overall mix of techniques an issuer may select to effect adequate public dissemination. While some issuers may wish to post on their websites scripts of the prepared remarks or even transcripts of the question-and-answer session, the SEC does not mention this practice and we believe many issuers will choose not to do so. We recommend that any replays (or website postings of transcripts, if made) be made available for a limited period (*i.e.*, only for a few days or at most a week).¹²

The SEC does not discuss the possible tradeoff on costs that an issuer must make to increase the number of available lines for a telephone dial-in call to permit public access or whether the dial-in method would constitute adequate public access if a toll number (rather than a toll-free 800 number) were used. In view of the likely lower cost of Internet webcasts, many issuers may emphasize this method for public access.

¹² New commercial services may arise that seek to record or transcribe public access calls and make them available for replays to subscribers or the public without the permission of the issuer. Issuers may wish to consider a policy of reserving their proprietary rights in these disclosures. Such a policy should be noted at the beginning of the call.

Other Public Announcements

A broadly disseminated press release would ordinarily meet Regulation FD's public disclosure requirement. The SEC states that merely posting the information on the issuer's Internet website, however, would not by itself be a sufficient method of public disclosure. Nevertheless, the SEC encourages this practice as an adjunct to other disclosure methods, and indicates that at some point in the future, once "more investors have access to and use the Internet", the SEC may consider a website posting alone to be sufficient.

Where no prior notice of an analysts' conference call is given to the general public, specifically inviting members of the financial press would assist an issuer's argument that it made adequate public disclosure, but we believe an issuer should assume for planning purposes that inviting the press alone will not satisfy the public disclosure requirement of Regulation FD.

The SEC specifically notes that the methods of disclosure that are effective for some issuers may not be effective for others. Of course, an issuer not wishing to issue a broadly disseminated press release to publicly disclose material information, or possibly material information, can avoid the uncertainty associated with alternative disclosure methods by submitting a Form 8-K. Considerations for using Item 5 vs. new Item 9 of Form 8-K are discussed below under "Disclosure Policies and Procedures—Methods of Public Disclosure" beginning on page 23.

"One-on-One" and Small Group Discussions with Analysts

One of the most difficult practical questions associated with Regulation FD is whether, and, if so, how, an issuer should conduct one-on-one discussions or discussions with select groups of analysts or investors. In particular, the SEC in the adopting release singles out for special attention the practice of securities analysts seeking "guidance" from issuers regarding earnings forecasts. The release states:

When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the issuer official communicates selectively to the analyst nonpublic information that the company's anticipated earnings will be higher than, lower than, *or even the same as* what analysts have been forecasting, the issuer likely will have violated Regulation FD. This is true whether the information about earnings is communicated *expressly or through indirect "guidance," the meaning of which is apparent though implied. Similarly, an issuer cannot render material information immaterial simply by breaking it into ostensibly non-material pieces.*

At the same time, an issuer is not prohibited from disclosing a *non-material* piece of information to an analyst, even if, *unknownst to the issuer*, that piece helps the analyst complete a "mosaic" of information that, taken together, is material. (Emphasis added.)

Neither Regulation FD nor the adopting release provides any guidance as to how an issuer is to distinguish between "ostensibly non-material pieces" that are considered material and trigger Regulation FD obligations and truly non-material pieces of information that help an analyst complete a material "mosaic" of information. Faced with heightened risks of inadvertently disclosing material nonpublic information, some issuers may choose to avoid one-on-one and small group discussions altogether.

Certainly a one-on-one call that covers only information that is already public would not violate the regulation. This may involve, for example, showing an analyst where in the existing public disclosures the answers to a variety of questions may be found.¹³

On the other hand, one-on-ones involving earnings guidance through use of actual earnings figures or ranges (including indirectly through reference to "Street" estimates or confirmatory statements) would be regarded by the SEC as impermissible

¹³ Because of many practical issues, issuers are likely to be unable to obtain from "sell-side" analysts agreements to maintain material nonpublic information in confidence, given that the focus of their efforts is publication.

unless the guidance is also publicly disclosed. Private updates or subsequent confirmations of previously publicized guidance could be similarly problematic.

“Soft” guidance, which can take many forms, presents the greatest challenge. Guidance concerning important above-the-line income statement items, such as revenues, or operating statistics, such as backlog or order rates, may well have the same consequences as hard guidance. This may be particularly true where the issuer is familiar with the financial model used by the analyst to project earnings and knows that the income statement or operational item under discussion is a significant element in projecting results.

Some issuers may also consider analysts’ invitations to review and comment on their financial models in the abstract, without reference to the actual values of the various inputs. In view of the SEC’s expressed sensitivity to the materiality of earnings guidance, there is considerable risk that even comments on the model as such or its methodology could be considered material. While commenting on or confirming the projections in a pre-publication draft of an analyst’s report would clearly implicate Regulation FD’s public disclosure requirements, merely correcting factual data could trigger Regulation FD disclosure if the data were considered material and not previously made public. Accordingly, we recommend against review of draft analysts’ reports.¹⁴

A discussion of nonmaterial details in a one-on-one would not trigger a Regulation FD obligation. Of course, small groups and one-on-ones can present risks even if an issuer attempts to avoid discussing earnings or other material information. A violation of Regulation FD could occur due to a slip in response to an unanticipated question or due to possible hindsight judgments by the SEC regarding materiality. An issuer wishing to reduce the likelihood of inadvertently disclosing material information about anticipated current period earnings in a one-on-one discussion may consider a

¹⁴ Apart from Regulation FD concerns, issuers engaging in these practices risk liability to private parties and enforcement action by the SEC for the analyst’s projections resulting from a reviewed model or the content of a reviewed report under an entanglement theory.

“blackout” of one-on-ones except during a window immediately following each earnings announcement. Other possible steps are discussed below under “Disclosure Policies and Procedures—Authorized Issuer Personnel” beginning on page 21.

“One-on-One” and Small Group Discussions with Investors

Neither Regulation FD nor the adopting release provides any guidance as to when the disclosure of information to a holder of the issuer’s securities will be deemed to be “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”. As a practical matter, an issuer should assume that Regulation FD will apply to all disclosures of material nonpublic information to a security holder, unless the security holder expressly agrees to maintain the disclosed information in confidence (*i.e.*, agrees not to disclose the information and not to trade on the basis of the information) or is otherwise in a special relationship with the issuer. For example, an issuer may be comfortable communicating with a controlling shareholder on the basis that the information would be used for the shareholder’s accounting and financial reporting, tax return preparation and similar purposes and not trading, especially given the Securities Act registration implications of possible sales.

An issuer’s discussions with “buy-side” analysts and security holders are subject to the same requirements under Regulation FD as its discussions with “sell-side” analysts. Issuers, however, may find it more difficult in practice to rebuff significant investors or buy-side analysts who wish to have a one-on-one discussion.¹⁵ In the absence of an express confidentiality agreement with the investor or analyst, which is likely to be

¹⁵ Companies that give pre-IPO or other private investors a contractual right of access to information should formally advise those investors that the information so obtained is nonpublic and they may not trade on the basis of the information. If the information is material, this effectively means that such an investor may not trade until the information has been disseminated in a manner making it available to investors generally or is no longer material, unless the investor can demonstrate that the trade was made pursuant to a pre-existing arrangement that satisfies the conditions for an affirmative defense under new Rule 10b5-1(c).

impractical to obtain, an issuer faced with such requests should consider the matters outlined in the previous section concerning discussions with sell-side analysts. To the extent that the discussion focuses on long-range plans or projections, and involves no material information regarding near-term results, the issuer is better able to argue that the information is not material. Where the investor or buy-side analyst visits the issuer for an in-depth review of a particular division or business unit, rather than a high-level review of the entire company, the issuer may, depending on its individual circumstances, also be able to take the position that the information shared is not material, particularly where the review focuses on operational rather than financial matters. These will involve difficult fact-specific judgments for issuers.

Industry and Issuer Conferences

Issuer-sponsored retreats and break-out sessions at industry conferences pose difficulties under Regulation FD. Prepared speeches can be appropriately scripted, and potentially material information can be publicly disseminated in a concurrent press release, Form 8-K submission or other combination of methods, which may be augmented by press attendance at the speech. However, “break-out” sessions involving small group or one-on-one discussions present the same concerns as one-on-ones with analysts discussed in the previous two sections and should be addressed in the same way. As a practical matter, it may be more difficult to forego attendance at these types of meetings than to avoid analyst one-on-ones. An issuer in these “break-out” sessions will need to discourage guidance-oriented topics in favor of subjects involving explanation and detail regarding existing public disclosures.

Unregistered Capital-Raising Transactions

Regulation FD does not provide an exception for communications made in connection with unregistered offerings, such as private placements, Rule 144A offerings and offshore offerings under Regulation S. Thus, when making an unregistered offering, an issuer must disclose publicly any material information it discloses to securities market professionals and security holders unless they expressly agree to maintain it in

confidence.¹⁶ The adopting release makes clear that disclosure pursuant to Regulation FD is appropriate even if it calls into question the private placement or other exemption from registration upon which an issuer is relying. In most cases, though, it should be possible to disclose the material information without also publicly disclosing offering details that would jeopardize the exemption.¹⁷

The requirement that a confidentiality agreement be “express” raises a question whether an offering circular legend creating a “deemed” agreement would suffice. Accordingly, in Rule 144A and Regulation S offerings, issuers will need to consider concurrent public disclosure of any material information in the offering circular because of the likely impracticality of obtaining an express confidentiality agreement. In a traditional private placement, such an agreement may be more easily obtained.

Registered Public Offerings

Regulation FD does not apply to disclosures made *in connection with* most securities offerings registered under the Securities Act.¹⁸ However, communications

¹⁶ Equity offerings and large debt offerings in markets outside the United States are regularly preceded or accompanied by the dissemination outside the United States of research reports prepared by analysts in the underwriting syndicate on the basis of detailed information provided by the issuer. While the 1998 amendments to Regulation S have largely curtailed offshore Regulation S equity offerings by U.S. companies, Regulation FD will make this practice untenable for an offshore Regulation S debt offering by a U.S. company unless the company concurrently publicizes the information in the United States. In a Securities Act-registered offering involving a concurrent offshore offering, an issuer will need to become comfortable that any such research or marketing material disseminated outside the United States satisfies the “in connection with” and timing elements of the Regulation FD exception for disclosures in Securities Act-registered offerings. Depending on the particular circumstances, we believe it should often be reasonable for an issuer to reach this conclusion.

¹⁷ Where the fact of the offering itself may be considered material, Rule 135c would permit a Form 8-K filing containing basic information about the terms of the securities offered, the size and timing of the offering and a brief statement of its purpose (without naming the underwriters or placement agents).

¹⁸ Certain registered shelf offerings under Rule 415 do not qualify for the exemption from the operation of Regulation FD. These include secondary offerings, dividend or interest

(continued...)

made concurrently with a registered offering but outside the offering context, such as a communication about future financial performance that an issuer makes during a quarterly conference call with analysts, are *not* exempt. Moreover, communications that take place in connection with a registered securities offering but outside the times that Regulation FD establishes as the times that registered offerings are deemed to begin and end¹⁹ also are not exempt from Regulation FD.

One effect of the exemption for registered offerings is to exclude investor “road show” presentations and other marketing efforts such as investor one-on-ones from Regulation FD.²⁰ The Division of Corporation Finance is currently reviewing “the Securities Act disclosure system as it relates to communications during the offering process”, and the SEC believes it would be more appropriate to address selective

¹⁸ (...continued)
reinvestment plans, employee benefit plans, the exercise of outstanding options, warrants or rights, the conversion of outstanding securities and pledges of securities as collateral.

¹⁹ In the case of underwritten offerings, the offering commences when an issuer reaches an understanding with a broker-dealer that it 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 earlier terminated. In the case of non-underwritten offerings: (1) if a shelf-registered primary offering covered by Rule 415(a)(1)(x), the offering 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 earlier terminated; (2) if a business combination as defined in Rule 165(f)(1), the offer 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, unless the transaction is earlier terminated; and (3) if not covered by (1) and (2), the offering commences when the issuer files a registration statement and continues until the end of the period during which each dealer must deliver a prospectus or, if later, the sale of the securities, unless the offering is earlier terminated.

²⁰ In what is probably an oversight, the exemption for registered offerings is not available to underwritten secondary offerings employing the “shelf registration” procedure. Accordingly, unless the SEC addresses that gap, an issuer conducting a road show in such a secondary underwritten offering not also involving a concurrent primary offering must consider whether any road show content or other private investor discussions trigger Regulation FD obligations.

disclosure concerns in connection with registered offerings “in the context of a broader Securities Act rulemaking”.

Business Combinations

The effect of Regulation FD on disclosures in the business combination context may depend on whether the transaction is an exchange offer or stock-for-stock merger involving registered securities, in which case the Regulation FD exemption for Securities Act offerings may be available, or whether the transaction is a cash tender offer or cash merger, for which no Regulation FD exemption is available.

Nevertheless, cash mergers, tender offers and other business combinations subject to Regulation FD should not pose particular difficulties at the time of initial announcement because of the substantial publicity that normally accompanies these events. Current rules under Regulation M-A already require all *written* communications regarding a business combination to be filed with the SEC on the date of first use. For example, slide and other investor or analyst presentations are now filed pursuant to Rule 14a-12 in connection with cash mergers or Rule 14d-2 in the case of cash tender offers.²¹ Note, however, that *each* party to the transaction that is a U.S. public company must comply with Regulation FD.

²¹ Parties to business combinations need to follow appropriate procedures in convening a conference call or analysts’ meeting to announce the transaction (for example, providing adequate advance notice of the call or meeting in the press release and public access on a listen-only basis). The parties need to be comfortable that the disclosure in the conference call or meeting will not be considered “selective” disclosure or otherwise need to make sure that all material information to be provided in the call or at the meeting is simultaneously publicly disseminated or submitted to the SEC on Form 8-K at the time of the call or meeting. Although the SEC has generally urged issuers to make replays of the call available to enhance public disclosure, parties may be reluctant to do this in the business combination context because of the SEC staff’s position that replaying live video or audio presentations triggers the Regulation M-A requirement to file transcripts with the SEC on the date of first use. In addition to issuer concerns about the permanence of such filings, preparing transcripts in this time frame may not be logistically feasible. SEC Division of Corporation Finance, *Manual of Publicly Available Telephone Interpretations, Third Supplement* (July 2000), Regulation M-A Release, Section B, Question 2.

As previously noted, however, Regulation FD also covers *oral* communications. Accordingly, oral statements to analysts or investors made during the period between signing or commencement and closing could trigger disclosure obligations under Regulation FD unless covered by a specific exemption. For example, business combinations involving only cash or involving securities to be issued in an exempt transaction will be subject to Regulation FD. Private discussions with securities analysts regarding interim progress in obtaining a regulatory approval for a cash merger could under certain circumstances trigger a Regulation FD disclosure obligation. Standard confidentiality arrangements should suffice in most circumstances to avoid Regulation FD issues in respect of exchanges of information between the potential parties to the combination (and their advisors) prior to public announcement.

As noted above, communications, including oral communications, made “in connection with” exchange offers and stock-for-stock mergers involving securities that will be registered under the Securities Act are exempt from Regulation FD from the time of first public announcement until the vote of stockholders is taken or the exchange offer has expired. Nevertheless, communications with investors not made “in connection with” the Securities Act registration of the business combination are not exempt from Regulation FD. These would include regular quarterly earnings conference calls, as well as communications in connection with a stock-for-stock merger that occur after the stockholder meeting. The issues previously discussed for small group discussions and one-on-ones with analysts and investors would be applicable in these situations as well.

Communications with the Media

Members of the media are not “securities market professionals”. Moreover, although a representative of a news organization may be a security holder of the issuer, the adopting release states that “it ordinarily would not be foreseeable for the issuer engaged in an ordinary-course business-related communication with that person to expect the person to buy or sell the issuer’s securities on the basis of the communication”.

Thus, an issuer would be free under Regulation FD to communicate material nonpublic information even to a single journalist without making other disclosure.

Communications with Ratings Agencies

Regulation FD expressly exempts the disclosure of material nonpublic information to an entity whose primary business is the issuance of credit ratings. This exemption is available only on the conditions that the information is disclosed *solely* for the purpose of developing a credit rating *and* the agency's ratings are publicly available. Satisfying these conditions should not be an issue in the case of the major rating agencies.²² As long as these conditions are satisfied, the exception is not affected by the rating agency's public disclosure or nondisclosure of the information it receives.

Foreign Private Issuers

Regulation FD does not apply to foreign private issuers, even if their securities are listed in the United States and they file Form 20-F annual reports with the SEC.²³ Nevertheless, many foreign private issuers will wish to monitor evolving practices under Regulation FD in the United States. Foreign issuers may be covered by the same analysts who follow U.S. companies, and U.S. disclosure practices may be relevant to foreign issuers' own practices. In some cases, local practices may already reflect some of the principles underlying Regulation FD; in other cases, local practices may be influenced by U.S. practices. Foreign private issuers should also be aware of the statements concerning materiality, including those regarding earnings guidance, in the adopting release (as noted above beginning on page 7) to the extent these issuers make materiality determinations under the U.S. securities laws.

²² A submission of material nonpublic information to a rating agency to obtain a *non*-public rating would trigger a Regulation FD obligation unless made subject to a confidentiality agreement.

²³ Guaranteed finance company subsidiaries of foreign private issuers are also not subject to Regulation FD, even if organized in the United States, because these subsidiaries would normally not be required to file annual or quarterly reports with the SEC under the Exchange Act.

DISCLOSURE POLICIES AND PROCEDURES

Regulation FD does not expressly require issuers to adopt disclosure policies and procedures. The adopting release, however, states that the SEC expects “most issuers will use appropriate disclosure policies as a safeguard against selective disclosure” and that “[t]he existence of an appropriate policy, and the issuer’s general adherence to it, may often be relevant to determining the issuer’s intent with regard to a selective disclosure”. Accordingly, companies should review their policies concerning the personnel who are authorized to speak with analysts, other securities market professionals, the media and/or investors and with respect to other disclosure practices and the dissemination of material information. If the policies have not been reduced to writing, we believe they should be.

Authorized Issuer Personnel. The term “person acting on behalf of an issuer” encompasses “senior officials”, which is defined as directors and executive officers (whether or not they regularly communicate with market professionals), investor relations or other public relations officers and persons with similar functions, and any other officer, employee or agent who regularly communicates with market professionals and security holders. However, the adopting release cautions that disclosures by persons otherwise outside the definition are covered by Regulation FD to the extent that they are directed to make a selective disclosure by a senior official or other person within the definition of “persons acting on behalf of the issuer”. The regulation expressly excludes from coverage communications by any officer, director, employee or agent “who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer”.

Issuers that do not already have a policy should consider adopting one that formally identifies the issuer personnel authorized to communicate with securities professionals and investors. This should enable the issuer better to control its disclosures and narrow the group of employees whose communications could trigger Regulation FD obligations. Also, if an issuer employee who is not authorized to speak to analysts does

disclose material nonpublic information to an analyst, the issuer may be able to conclude no Regulation FD obligation has been triggered on the grounds that the employee has violated a duty of trust or confidence.²⁴

Issuers may wish to apply special procedures to one-on-ones and similar small group discussions, given their heightened sensitivity under Regulation FD. For example, an issuer may wish to require that more than one official attend all or some of these discussions. A second person may help control the course of the discussion and avoid possible miscommunications. A second person may also help to reconstruct the conversation after it is completed, which may be useful in assessing whether anything material was inadvertently disclosed. We recommend that these communications not be recorded, even if the purpose is to permit subsequent review by others. In our view, the risks of second-guessing by regulators, discoverability in unrelated proceedings and possible lapses in internal review or retention practices outweigh any potential benefits of recording. Alternatively, an issuer might consider adopting a practice of “debriefing” its personnel after they participate in small group and one-on-one discussions.

Unintentional Disclosures. Issuers should consider how best to comply with Regulation FD’s requirement that unintentionally communicated material nonpublic information must be publicly disclosed within 24 hours after a senior official learns of the unintentional communication or, if later, by the start of the next day’s trading on the New York Stock Exchange. All senior officials are covered, even if not authorized by the issuer to speak to analysts. It would be advisable for an issuer to communicate this responsibility to all senior officials, including its outside directors, periodically to refresh this communication and to designate a specific person (such as the general counsel or an

²⁴ In addition, to the extent that an analyst has a one-on-one conversation with an employee of the issuer, such as a store manager, who is also not a “person acting on behalf of the issuer”, the adopting release states that the person’s responses to an analyst’s questions about the issuer’s business ordinarily will not trigger any Regulation FD obligations (and similarly, that an employee who routinely deals with customers or suppliers would not come within the scope of Regulation FD merely because one of those customers or suppliers happens to be a security holder of the issuer).

assistant general counsel) for officials to call if they believe there may be a reportable disclosure or otherwise have questions about Regulation FD. In practice, though, issuers may have difficulty with this aspect of Regulation FD. There will be many senior officials whose knowledge is imputed to the issuer. They may have trouble making accurate materiality determinations or knowing whether the information is already public. If they are wrong and it is later determined that they acted recklessly, the issuer's Regulation FD obligation will have been triggered at the time of the disclosure.

Methods of Public Disclosure. Another question that issuers will face under Regulation FD is whether a disclosure qualifies as a “public disclosure” under the regulation. The most certain way to ensure that a disclosure qualifies is either to (1) “file” a report under Item 5 of Form 8-K or (2) “furnish” the information to the SEC under Item 9 of Form 8-K. In situations where a broadly disseminated press release is not contemplated, “filing” or “furnishing” the information on Form 8-K will avoid second-guessing about whether the issuer's method of disclosure satisfied Regulation FD's “public disclosure” requirement.

Whether an issuer chooses to “file” or “furnish” the information, the regulation provides that the use of Form 8-K for this purpose will not be deemed an admission as to the materiality of the information. If an issuer chooses to “file” under Item 5, however, the information disclosed will be subject to the liability provisions of Section 18 of the Exchange Act and will be subject to automatic incorporation by reference into the issuer's registration statements on Form S-3 and S-8 under the Securities Act, and will be subject to the liability provisions of Sections 11 and 12(a)(2) of the Securities Act. If the issuer instead chooses to furnish the information, it will not be subject to liability under Section 18 of the Exchange Act or Section 11 or 12(a)(2) of the Securities Act for the disclosure, unless it takes affirmative steps to include the disclosure in a filed report, proxy statement or registration statement. The issuer would remain liable for the disclosures under Rule 10b-5 in all cases. If the information includes earnings estimates or other forward-looking information, whether in a Form 8-K,

press release or other written or oral publication, the issuer should identify them and include appropriate cautionary statements to be able to claim the statutory safe harbor for forward-looking statements under Section 21E of the Exchange Act.

We believe that an issuer should “furnish” any Form 8-K material under new Item 9, rather than file it under Item 5, *unless* the disclosure has been vetted by counsel (and auditors, as appropriate), it is needed promptly to update a registration statement and the information will not be included in a prospectus supplement *and* the registration statement is being continuously used or is otherwise about to be used to offer securities.²⁵

Under the proposed regulation, the issuance of a press release through a widely circulated news or wire service, such as Dow Jones, Bloomberg, PR Newswire, Business Wire and Reuters, would have satisfied Regulation FD. The final regulation, however, does not expressly bless any one alternative method or methods of public disclosure.²⁶ Rather, issuers must choose alternative methods in light of their “particular circumstances”. In light of this case-by-case, totality of the circumstances approach to determining reasonableness, issuers will bear the risk that the SEC, after-the-fact and after considering “all the relevant facts and circumstances”, will determine that a particular alternative method or combination of methods was not “reasonably designed to provide broad, non-exclusionary distribution of the information to the public” and, therefore, that the issuer violated Regulation FD.

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²⁵ Even if a Regulation FD disclosure is made by press release or other non-Form 8-K method, the issuer should consider whether an active registration statement should be updated through incorporation of a Form 8-K filing under Item 5.

²⁶ The adopting release does, however, indicate that “[i]n many cases, a widely-disseminated press release will provide the best way for an issuer to provide broad, non-exclusionary disclosure to the public”.

The adopting release was published in the *Federal Register* on August 24, 2000 (65 *Fed. Reg.* 51716), is being published in various securities law reporting services and is available on the SEC's website (<http://www.sec.gov/rules/final/33-7881.htm>). Copies of the release are also available from Ivy Moreno (212-558-3448) in our New York office.

If you have any questions regarding Regulation FD, please call any of our lawyers, including those listed below.

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