Regulation FD

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What is Regulation FD?

- **Purpose of Regulation FD:**
  - To put investors on a level playing field with market insiders so that all investors receive the information at the same time.
  - To provide investors confidence in the fairness of the markets when they know that other participants may not exploit their access to corporate insiders

- **General Rule:** Regulation FD prohibits public companies from selectively disclosing material non-public information to certain investors or securities professionals without broad prior public disclosure.

How does Regulation FD work?

- **Intentional Disclosures**: If the company discloses material, non-public information to investors and securities market professionals, the company must make simultaneous disclosure by press release, previously announced public conference call or webcast or by an 8-K.

- **Unintentional Disclosures**: If an unintentional disclosure is made, the company must cure it by filing a press release with the information (or on an 8-K) by the later of 24 hours or the next day's opening of the trading market after the disclosure is "recognized" as both material and nonpublic.

Exceptions to Regulation FD

- **Regulation FD does <u>NOT</u> cover communications to:**
  - Customers and suppliers if ordinary course
  - Employees and consultants if ordinary course
  - Press, if broadly disseminated (although best practice is to observe same practices with news media as with analysts and investors)
  - People who owe a duty of trust – outside bankers working on a transaction, lawyers and accountants
  - People who expressly agree (written or verbal NDA) to maintain the disclosure in confidence
  - Communications in connection with offerings of registered securities
  - Credit rating agencies, if results are publicly available

What is Material?

- **Material Information**:
  - Anything that a reasonable investor would consider relevant in deciding to buy or sell company securities could be deemed material.
  - Is it likely to affect the stock price?
  - SEC Guidance on what is LIKELY material:
    - Financial results (historical results or guidance)
    - M&A, joint ventures, major transactions
    - Significant new products, product candidates or clinical developments
    - Changes in executive officers
    - Developments (+ or -) in significant litigation or regulatory matters
    - Anything to do with securities (splits, offerings, repurchases, added to index, etc.)

When should you think about Regulation FD?

- Analyst or investor conferences/analyst days
- One-on-one discussions with analysts or investors
- Press/media interviews
- Industry conferences/trade shows/events
- Stockholder meetings

Regulation FD Best Practices

- Limit officers authorized to discuss the company's business with analysts
- Don't affirm guidance unless you do it publicly
- When in doubt, webcast, and advance notice webcast
- Be cautious in one-on-one conversations
- Avoid follow-up calls to make sure they "get it"
- Avoid reviewing draft analyst models, except to check historical facts that are already public
- Use a chaperone (i.e. a "witness") from IR Department for one-on-one or small group meetings with investors or analysts
- Avoid attending investor conferences or speaking to analysts or investors during sensitive time periods

Websites and Social Media

- Whether a website disclosure is "public" depends on three questions:
  - Is the website a recognized channel of distribution?
  - Disseminates information in a manner that is available to general securities market?
  - Has reasonable time passed for market to react to website information?

- 2013 SEC Guidance on Social Media:
  - Social media is subject to Reg FD.
  - 2008 guidance on disclosures via corporate websites applies to social media outlets as well.
  - If a company intends to use social media to disclose material information, it should inform investors and the market ahead of time (typically by 8-K).

Consequences of Violating Regulation FD

- Liability to company and officer.
  - Receiving analyst/investor not subject to Reg FD; if they trade, however, potential liability under insider trading laws.
- SEC enforcement, not private actions, but violations nevertheless present private litigation risk.
- Even if no enforcement action is filed, SEC investigations are expensive and burdensome.
- Possible results: injunction, cease and desist, monetary penalties (e.g., company fines up to $25,000,000, personal fines up to $5,000,000).

Thank you!

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