

Client Advisory

October 23, 2000

SEC Answers Questions Regarding Regulation FD (Fair Disclosure)

On October 19, 2000, the SEC published answers to several questions relating to Regulation FD in a supplement to its Manual of Publicly Available Telephone Interpretations. This Client Advisory discusses a few of the select issues addressed by the supplement. You can view the full supplement by visiting the SEC's Web site: <http://www.sec.gov/offices/corpfin/phonits4.htm>. Please bear in mind that the SEC states that its telephone interpretations represent responses given by members of the SEC staff and do not necessarily represent the views of the Commission. As the SEC staff receives additional questions concerning Regulation FD, it may add to or revise the interpretations.

Confirmation of Forecasts

The SEC indicated that Regulation FD allows selective (i.e., only to analysts or other securities industry professionals) confirmation by an issuer of its own forecasts only if the confirmation does not convey any new material information. The materiality of a confirmation depends on the amount of time that has passed since the forecast was first made, as well as any intervening events that may have taken place during that time. For example, a confirmation of expected quarterly earnings made near the end of the quarter might convey information as to how the issuer actually performed, whereas a confirmation made a few days following the forecast and early in the relevant quarter may not contain any new information.

Notice of Conference Calls

Under Regulation FD, material nonpublic information may be disclosed through conference calls open to the general public (e.g., by Webcasting). The SEC requires that companies give adequate advance public notice of any such conference calls. The SEC clarified that adequate advance notice is notice that includes the time, date and call-in information for the call and that is provided "a reasonable period of time ahead of the conference call." For announcements made on a regular basis, such as quarterly earnings announcements, several days' advance notice is reasonable. The SEC recognized, however, that a shorter notice period may be acceptable when unexpected events occur. The SEC also encouraged companies to inform the public of when, and for how long, transcripts or re-plays of conference calls will be available.

Public Filings other than Form 8-K

Form 8-K is not the exclusive form for disclosing material information in an SEC filing under Regulation FD. Companies may also satisfy the requirements of Regulation FD by including information in any public filing on EDGAR, such as a quarterly report on Form 10-Q or a proxy statement. However, for the disclosure to be sufficient, the information must be highlighted for readers in the filing.

Waiting Period Following Disclosure

As soon as a filing containing material nonpublic information has been made, an issuer may disclose the same information in private conversations with analysts. However, the issuer does need to confirm that the report received a filing date that is no later than the date of such conversations.

Agreement to Maintain Confidentiality

An issuer may make disclosure of material nonpublic information to an analyst if the analyst *expressly* agrees to maintain confidentiality. The SEC reaffirmed that any recipient of material nonpublic information must agree only to keep the information confidential and need not also agree not to trade on the information or use it in violation of the federal securities laws.

Disclosures Made to Employees

The SEC reaffirmed that disclosures made to employees are not subject to Regulation FD. The Regulation only covers disclosures made to persons “outside the issuer.”

Follow-up

Katten Muchin Zavis is prepared to assist companies in understanding and complying with Regulation FD, including by reviewing or preparing appropriate disclosure policies. If you have any questions regarding these issues or if you wish to be on our distribution list for future Client Advisories relating to Regulation FD or other securities law topics, please contact one of us.

	Direct Dial Number	E-Mail
Jeffrey P. Bilas	312 902 5260	jeffrey.bilas@kmz.com
Robert J. Brantman	312 902 5289	robert.brantman@kmz.com
Matthew S. Brown	312 902 5207	matthew.brown@kmz.com
Mark A. Conley	310 788 4690	mark.conley@kmz.com
Marguerite M. Elias	312 902 5519	marguerite.elias@kmz.com
Kurt W. Florian, Jr.	312 902 5580	kurt.florian@kmz.com
Brian M. Hoye	310 788 4747	brian.hoye@kmz.com
David J. Kaufman	312 902 5564	david.kaufman@kmz.com
Adam R. Klein	312 902 5469	adam.klein@kmz.com
Howard S. Lanznar	312 902 5696	howard.lanznar@kmz.com
Lawrence D. Levin	312 902 5654	lawrence.levin@kmz.com
Jeffrey R. Patt	312 902 5604	jeffrey.patt@kmz.com
Andrew J. Sherman	202 625 3790	andrew.sherman@kmz.com
David R. Shevitz	312 902 5257	david.shevitz@kmz.com
Ernest W. Torain, Jr.	312 902 5473	ernest.torain@kmz.com
Herbert S. Wander	312 902 5267	herbert.wander@kmz.com
Maryann A. Waryjas	312 902 5461	maryann.waryjas@kmz.com
Linda J. Wight	312 902 5563	linda.wight@kmz.com
Bruce G. Wilson	312 902 5446	bruce.wilson@kmz.com
Mark D. Wood	312 902 5493	mark.wood@kmz.com

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Katten Muchin Zavis

525 West Monroe Street
Suite 1600
Chicago, IL 60661-3693
Tel 312 902 5200
Fax 312 902 1061

1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067-6042
Tel 310 788 4400
Fax 310 788 4471

245 Park Avenue
39th Floor
New York, NY 10167
Tel 212 764 6886
Fax 212 382 3395

1025 Thomas Jefferson St. NW
East Lobby, Suite 700
Washington, DC 20007-5201
Tel 202 625 3500
Fax 202 298 7570