

A Primer On Reg. FD And The Earnings Release Process

Law360, New York (December 05, 2013, 1:46 PM ET) -- Regulation FD requires issuers, and those acting on their behalf, to publicly disclose any material nonpublic information the issuer discloses to securities market professionals and to holders of the issuer's securities if it is reasonably foreseeable that the holders will trade on the basis of the information.

Public disclosure must be made simultaneously in the case of an intentional disclosure and promptly, in the case of a nonintentional disclosure. Earnings information has been specifically identified by the U.S. Securities and Exchange Commission as requiring careful review because it is likely to include material nonpublic information.

Therefore, companies should carefully consider the requirements of Regulation FD in planning their earnings disclosure process to ensure compliance with Regulation FD.

SEC Guidance

For information to be considered "publicly disclosed" under Regulation FD, it must be disclosed either by including it in a Form 8-K or disclosed through a method, or combination of methods, that is reasonably designed to provide broad, nonexclusionary distribution of the information to the public (such as a press release distributed through widely circulated news or wire services).

In SEC Release No. 33-7881 (Aug. 15, 2000), the SEC suggests a three-step model companies may use to ensure that information is publicly disclosed when making planned disclosures of material nonpublic information such as scheduled earnings releases:

- First, provide adequate notice, by a press release and/or website posting, of a scheduled conference call to discuss the announced results, giving investors both the time and date of the conference call, and instructions on how to access the call;
- Second, issue a press release, distributed through regular channels, containing the information; and
- Third, hold the conference call in an open manner, permitting investors to listen in either by telephonic means or through Internet webcasting. If a transcript of the call or a rebroadcast is made available, for example, on a company's website, then companies are encouraged to indicate in the initial notice of the call how, and for how long, the transcript or rebroadcast will be made available. (See

Compliance and Disclosure Interpretation (C&DI) 102.01 under Regulation FD issued by the SEC's Division of Corporation Finance in October 2000).

This three-step model allows a company to provide earnings information to the public and to discuss it with analysts without the danger of making selective disclosures in violation of Regulation FD. Additionally, companies may disclose and discuss additional information that was not disclosed in the advance press release so long as it is related to the disclosures made in the press release.

Compliance with the three-step model may not automatically result in all information that the company shared being deemed publicly disclosed. The SEC has emphasized that in determining whether a company's method of making a particular disclosure was reasonable, the SEC will consider all the relevant facts and circumstances, recognizing that methods of disclosure that may be effective for some companies may not be effective for others.

If, for example, as further explained in the release, a company knows that its press releases are routinely not carried by major business wire services, additional distribution methods such as distribution of the information to local media, furnishing or filing a Form 8-K with the SEC, posting the information on its website, or using a service that distributes the press release to a variety of media outlets and/or retains the press release may be warranted.

Similarly, if material nonpublic information is disclosed on an earnings call, and that information is not directly related to disclosures made in the earnings release, then companies should consider publicly disclosing the information through another release (and any other means deemed appropriate, including a posted rebroadcast of the call) and potentially furnishing or filing such information on a report on Form 8-K.

Additionally, companies may consider releasing a transcript of the earnings call on the company's website and/or furnishing or filing the transcript on a report on Form 8-K.

Disclosure on Form 8-K

Although the public disclosure requirements of Regulation FD may be satisfied through means other than furnishing or filing a report on Form 8-K, certain public disclosures will trigger an independent obligation to furnish or file a report on Form 8-K.

For example, if a company makes any public disclosure of material nonpublic information regarding the company's results of operations or financial condition for a completed quarterly or annual fiscal period, then Item 2.02 of Form 8-K requires that the company disclose such information on a report on Form 8-K and include:

- the date of the original disclosure;
- a brief identification of the disclosure; and
- the text of the disclosure as an exhibit.

The requirement that periodic information relating to results of operations or financial condition be disclosed on Form 8-K does not apply to certain circumstances where the disclosure was not made in writing and the following conditions are met:

- The information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to Item 2.02 prior to the presentation;

- The presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;
- The financial and other statistical information contained in the presentation is provided on the company's website, together with any information that would be required under Regulation G (regarding the use of non-GAAP, or generally accepted accounting principles, financial measures); and
- The presentation was announced by a widely disseminated press release that included instructions for when and how to access the presentation and the location on the registrant's website where the information would be available.

Earnings Day Timing

Companies should carefully consider the interaction of the various timing requirements under Regulation FD and Item 2.02 of Form 8-K. Under Item 2.02 of Form 8-K, a report on Form 8-K is not required to be furnished or filed until four business days after the initial disclosure, but to take advantage of the filing exception for nonwritten communications, such as statements made during an earnings call, the earnings call must take place no more than 48 hours after the earnings release is furnished or filed on Form 8-K.

On the other hand, Regulation FD requires intentional disclosures of material nonpublic information be made simultaneously available to the public. In practice, companies typically issue their earnings releases through a newswire service simultaneously with the filing (or furnishing) of the related Form 8-K and hold their earnings call within 48 hours after the release.

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