VEDDER PRICE

Corporate Securities

A bulletin designed to keep corporate executive and investment banking professionals informed on major developments in the securities industry

© 2001 Vedder, Price, Kaufman & Kammholz. *Corporate Securities* is published by the law firm of Vedder, Price, Kaufman & Kammholz. It is intended to keep our clients and interested parties generally informed on important developments in corporate finance and securities matters. It is not a substitute for professional advice. Reproduction of this bulletin is permitted only with credit to Vedder, Price, Kaufman & Kammholz. For an electronic copy of this newsletter, please contact Mary Pennington, Marketing Coordinator, at her e-mail address: mpennington@vedderprice.com.

If you have questions regarding material in this issue of *Corporate Securities* or suggestions for a specific topic you would like addressed in a future issue, please contact Steven J. Gray, Esq. (312/609-7528), Jennifer R. Evans, Esq. (312/609-7686), John T. Blatchford, Esq. at (312/609-7605), Dan L. Goldwasser, Esq. at (212/407-7710), or any other Vedder Price attorney with whom you have worked.

March 2001

In This Issue:

Regulation FD and Its Impact

SEC Eases Integration of Public and Private Offerings

Equity Plan Disclosures are Proposed

REGULATION FD AND ITS IMPACT

Public companies have now been contending with Regulation FD, the SEC's rules banning selective disclosure, for almost six months. Regulation FD compels public companies to publicly disseminate all *intentional disclosures of material information*. Disclosure is "intentional" when the person making the disclosure knows, or is reckless in not knowing, that he or she is communicating material nonpublic information. The purpose of Regulation FD is to achieve broad, non-exclusionary disclosures of material information to the investing public. The legal principles embodied in Regulation FD are not new in that selective disclosure of material information has always been regarded as legally inappropriate. Nonetheless, since its adoption last October, Regulation FD has had a dramatic impact on the disclosure practices of public companies.

Scope of Required Disclosures

Disclosures of material nonpublic information fall under the purview of Regulation FD if the disclosures are both:

- *Communications to market professionals or security*

holders. Regulation FD applies only to communications made to securities market professionals (e.g., broker-dealers, investment advisers, certain institutional investment managers, investment companies, hedge funds, etc.) and to security holders under circumstances in which it is reasonably foreseeable that such holder will trade on the basis of the information. Regulation FD does not apply to communications to the press, government agencies, rating agencies, customers in the ordinary course of business, or persons who owe the company a duty of trust or confidence (i.e., attorneys, investment bankers, accountants, employees or persons who expressly agree to keep the information confidential); and

- *Communications made by specified company officials.* Regulation FD applies only to disclosures by "senior officials" or those employees who regularly communicate with securities market professionals or with security holders. It is important to note that all members of the board of directors are deemed to be "senior officials" for this purpose. Covered persons may not avoid the reach of Regulation FD simply by having others make selective disclosure. To the extent an employee is directed to make a selective disclosure by a covered person, that person will be responsible for having made the selective disclosure.

Inadvertent slips of the tongue or mistaken beliefs that the information was already public or immaterial will not constitute an intentional communication. However, "non-intentional" disclosures must be promptly disclosed to the public as soon as possible (but in no event after the later of 24 hours or the commencement of the next day's trading on the NYSE) after a senior official knows of the non-intentional disclosure.

Regulation FD does not apply to communications made in connection with registered public offerings other than shelf offerings.

Failure to comply with the requirements of Regulation FD will not, in and of itself, result in liability to private parties under the anti-fraud rules, nor result in the loss of short-form registration eligibility or the ability of security holders to resell under Rule 144. Failure to comply with Regulation FD can result in an SEC enforcement action against both the company and the individual responsible for the violation. Such actions can result in civil monetary penalties.

Satisfying the Disclosure Requirement

Companies can satisfy their public disclosure obligations under Regulation FD by one or more other methods that are reasonably designed to effect broad, non-exclusionary distribution of the information to the public. This standard is designed to provide companies with flexibility in determining the most appropriate means of disclosure. Generally accepted methods of public disclosure include:

- filing a Form 8-K with the SEC;
- press releases distributed through a widely circulated news or wire service;
- announcements made through press conferences; and
- conference calls that may be attended or listened to by the public either in person, by telephone or via the Internet (or some other electronic transmission); provided that adequate notice is given with respect to the conference call and the means for accessing it.

Posting information on a website, by itself, is not sufficient.

Suggested Practices

In disclosing information under Regulation FD, the SEC has suggested, and many public companies have implemented, the following procedures:

- issue a press release containing the material nonpublic information as well as the time, date and instructions on how to gain access to the conference call which will discuss such information. The press release should be issued several days prior to the conference call in order to provide adequate notice;
- conduct the conference call in an open manner, permitting all to listen by telephonic means or through Internet webcasting. Currently, many companies are webcasting their conference calls, either live or in an archive, through a variety of service providers, in an attempt to satisfy their disclosure requirements under Regulation FD. Note, however, that if a full press release has preceded the call and no new material information is provided during the call, an open replay is not mandatory;
- to the extent a replay of the conference call will be made available, the company should indicate, either in the press

release or on its website, the manner in which the replay will be available to the public and for how long; and

- if senior management discloses sensitive and possibly material information not disclosed in the initial press release, the company should issue a subsequent press release or furnish a Form 8-K.

In addition to adhering to the general model above, companies can also limit their potential for Regulation FD violations by implementing any one or more of the following "best practices":

- designate only a limited number of persons who are authorized to "speak" on behalf of the company, and maintain careful and thorough records of corporate communications;

- adopt and enforce a written policy which governs corporate communications with outsiders (such as analysts, shareholders and the press) and which indicates who are authorized spokespersons;

- educate board members about their coverage under Regulation FD;

- do not privately provide analysts with any "guidance" on earnings and avoid reviewing or commenting on analysts' reports except with respect to factual accuracy;

- script conference calls and have scripts pre-cleared internally and by legal counsel;

- consider imposing an analyst blackout period limiting communications with analysts during particularly sensitive periods, such as the end of a quarter;

- keep a record of the substance of private communications with outsiders;

- decline to answer questions that raise issues of materiality until the company has had an opportunity to consult with legal counsel;

- enter into agreements with analysts to keep information confidential until the company has had the opportunity to review the content of the conversation and reach a conclusion as to its materiality;

- have a game plan for making prompt dissementation of unintentional disclosures;
- continue to include "safe harbor" language in all oral and written forward-looking statements and disclaim any duty to update. Language designed to protect oral statements is not sufficient to protect written statements and, therefore, transcripts of conference calls should not be distributed or posted to a website; and
- remain mindful of traditional disclosure concerns (i.e., stock exchange and Nasdaq listing standards that require the prompt disclosure of material events and the issuance of press releases).

Return to Top of Document

SEC EASES INTEGRATION OF PUBLIC AND PRIVATE OFFERINGS

The SEC recently enacted new rules affording safe harbor protections to companies that switch from the public to private markets, and vice versa, when conducting a securities offering. Companies falling within the safe harbor can now promptly launch a public offering after terminating a private offering prior to sales, or conduct a private offering soon after abandoning a registered offering, without the risk of integration.

Integration is the doctrine under which separate securities offerings are combined and analyzed as part of the same offering for purposes of determining whether the registration provisions of

the Securities Act apply. This doctrine has long caused significant legal problems for companies wanting to move in and out of the public or private markets to take advantage of rapidly changing market conditions. Integration concerns such as "gun jumping" in registered offerings, or general solicitation in private placements, have created uncertainty and delays in the capital formation process. The new integration safe harbors, found in Rule 155 under the Securities Act, give companies greater flexibility when raising capital in today's financial markets. The SEC also amended the rule governing the withdrawal of registration statements and expanded the ability of companies to offset filing fees. Rule 155 and the amendments became effective on March 7, 2001.

Qualifying "Private Offerings"

The integration safe harbors apply only to private offerings made under Section 4(2) of the Securities Act or Rule 506 of Regulation D.

Switching to a Public Offering

Under the safe harbors, a company seeking to launch a registered public offering on the heels of a pulled private placement can avoid integration if:

- no securities were sold in the pulled private offering;
- all private offering activity terminates before the company *files* the registration statement;
- the prospectus to be used in the registered offering prominently discloses:
  - the size and nature of the private offering;
  - the date on which private offering activity was terminated;
  - that offers to buy were rejected; and
  - that the prospectus supersedes any selling material used in the abandoned private offering; and
- a registration statement is not filed until at least 30 days after termination of private offering activity (unless offers were made solely to persons whom the company reasonably

believes were accredited investors or financially sophisticated).

The SEC cautioned that companies in a registered offering may still be liable for any material misstatements or omissions in disclosure materials used in a pulled private offering. Underwriters are advised to include in underwriting agreements representations that the company has satisfied the conditions of the safe harbor and that the private offering materials are accurate and complete, and to expand the indemnification and contribution provisions to cover the private offering materials.

Before acting on requests for acceleration of effectiveness of a registration statement filed after an abandoned private offering, the SEC may request supplemental information regarding the termination of all offering activities in the pulled private offering and will carefully review the transaction for compliance with the safe harbors.

Switching to a Private Offering

A company withdrawing a registration statement may now raise funds in a private offering if:

- no securities were sold in the public offering;
- the registration statement is formally withdrawn;
- the private offering does not begin until 30 days after the effective date of such withdrawal;
- each *offeree* in the private offering is notified that:
  - the offering is not registered under the Securities Act;
  - the securities will be restricted securities which cannot be sold without registration or an applicable exemption;
  - purchasers in the private offering will not have the protections of Section 11 under the Securities Act; and
  - a registration statement for the abandoned offering was filed and withdrawn; and
- the private offering materials disclose changes in the

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 190 attorneys in Chicago, New York City and Livingston, New Jersey. The firm's corporate finance and securities attorneys regularly represent underwriters and issuers, both foreign and domestic, in a wide variety of matters, including:

- debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;

- private placement of securities, including Rule 144A and Regulation S transactions;
- tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- international offerings of securities and compliance by foreign issuers with the U.S. securities laws; and
- litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters.

Principal Members of the Corporate Securities Group

Chicago
Jennifer R. Evans
Steven J. Gray
John T. Blatchford
Thomas P. Desmond
John T. McEnroe
Robert J. Moran
Michael A. Nemeroff
John R. Obiala
Daniel O'Rourke
Guy E. Snyder
Robert J. Stucker
Richard L. Williams III
Jennifer Durham King

New York
Dan L. Goldwasser

Vedder, Price, Kaufman & Kammholz
A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

company's business or financial condition occurring after the filing of the withdrawn registration statement.

Rule 144A Transactions and A/B Exchange Transactions

The SEC was silent as to how the integration safe harbors may apply to offerings structured as Rule 144A transactions or A/B exchange transactions. There is some question as to whether the safe harbors will apply in these situations. The SEC will likely be called upon to answer these questions in the near future.

Amended Rule for Withdrawing Registration Statements

The SEC rules, which relate to the withdrawal of registration statements, have been amended to provide that applications for withdrawal of pre-effective registration statements will be effective immediately upon filing, unless the SEC notifies the company within 15 days of its filing that the application has been denied. As in the past, companies must state fully the grounds for withdrawal. Companies now must also state that no securities were sold under the registration statement. Companies who anticipate a private offering following the withdrawal of the registration statement must state that the company may undertake a private offering in reliance on the safe harbor.

Amended Filing Fee Offset Provisions

The SEC also amended its fee offset rules by permitting companies to apply fees for a withdrawn registration statement to future offerings of the same or different securities. The fee offset rules were also amended to:

- require that any fee offset occur within five years of the initial filing date;
- clarify that the aggregate total dollar amount of the filing fee associated with unsold securities may be offset against the total filing fee for a subsequent registration statement, regardless of how the original fee was computed; and
- permit the offset in connection with subsequent registration statements filed by the same company (including a successor company), its majority-owned subsidiary or a parent that owns more than 50 percent of the company's outstanding voting securities.

Return to Top of Document

EQUITY PLAN DISCLOSURES ARE PROPOSED

The SEC has proposed that proxy statements and Form 10-Ks be required to contain information about the total number of securities that have been authorized for issuance under equity compensation plans. The proposal stems from concern about the potential for significant dilution caused by the issuance of shares under these plans. The proposal applies to plans in effect as of the end of the last completed fiscal year, whether or not the plans have been approved by security holders. The purpose of the proposals is to promote investor understanding of a company's equity compensation policies and practices, and of potential dilution represented by unexercised options, so that investors can then make more informed voting and investment decisions.

This disclosure would be set forth in a tabular format:

- in a proxy statement whenever the company is seeking security holder action regarding a compensation plan; or
- in an annual report on Form 10-K in years when the company is not seeking security holder action regarding a compensation plan.

The proposal would require a company to provide a table identifying each equity compensation plan in effect as of the end of the last completed fiscal year and containing the following information with respect to each plan:

- the number of securities authorized for issuance by the company's board of directors;
- the number of securities issued pursuant to equity awards made during the last completed fiscal year, plus the number of securities to be issued upon the exercise of options, warrants or rights granted during the last completed fiscal year;

- the number of securities to be issued upon the exercise of outstanding options, warrants or rights; and
- the number of securities remaining available for future issuance.

- Return to: Corporate Securities
- Return to the Vedder Price: Publications Page.
- Return to: Top of Page.

Home | Legal Services | Attorneys | **Publications** | Recruiting | Seminars | Speakers | Alumni
Contact Us | Search

Top of Page

© 2001 Vedder, Price, Kaufman & Kammholz
Please read our disclaimer.