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## Regulation FD: From an Investment Management Perspective

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### A. Regulation FD Adoption

Almost 16 years ago, the Securities and Exchange Commission (SEC or the Commission) adopted Regulation FD (Fair Disclosure) (Regulation FD or the Regulation) because it was concerned about a widespread practice of issuers selectively disclosing material nonpublic information.<sup>1</sup> The SEC implemented Regulation FD to curb this practice by requiring certain issuers that disclosed material nonpublic information about themselves to selected institutional investors and market professionals to make a full disclosure of that same information to the public.<sup>2</sup> The Commission was concerned that issuers were selectively disclosing such information in an attempt to curry favor with those recipients (for example, particular analysts and investors) and that such selective disclosures would erode investors' confidence in the fairness of the markets and, thus, adopted Regulation FD to seek to promote full and fair disclosure by issuers.

While the original focus of Regulation FD was mostly on publicly-traded operating companies, it is important to note that Regulation FD also applies to closed-end management investment companies registered as such under the Investment Company Act of 1940 (Closed-End Funds). Consequently, the Regulation may have an impact on the operations of

investment advisers of such funds as well as investment advisory firms who are themselves issuers. This article explores Regulation FD from an investment management perspective and the issues that covered funds and advisers may have to grapple with in connection with Regulation FD. Part B of this Article provides a refresher and overview of Regulation FD and Parts C and D discuss potential Regulation FD issues that may be faced by Closed-End Funds, investment advisers, and their affiliates as issuers. Next, Part E covers related enforcement cases involving Regulation FD and Part F provides a discussion of Regulation FD's relationship with insider trading liability under the federal securities laws. Finally, Part G discusses issues that may be faced by recipients of selectively disclosed material nonpublic information and the steps funds and advisers should consider taking in order to avoid potential Regulation FD pitfalls in connection with communications with issuers.

### B. A Refresher on Regulation FD

Regulation FD, promulgated under Section 13(a) of the Securities Exchange Act of 1934, as amended (Exchange Act), was adopted by the SEC in August 2000 and is comprised of Rules 100 to 103. Rule 100 provides the basic rule regarding selective disclosure,<sup>3</sup> and Rule 101 sets forth the definitions.<sup>4</sup> Rule 102

provides that a failure to make a disclosure required by Regulation FD cannot, on its own, be grounds for Rule 10b-5 liability.<sup>5</sup> Lastly, Rule 103 provides that a failure to comply with Regulation FD will not affect whether the issuer is considered current or timely in its Exchange Act reports for purposes of certain filings and disclosures required under the Securities Act of 1933, as amended (Securities Act).<sup>6</sup>

Generally, Rule 100 requires “public disclosure” when an “issuer” or a “person acting on its behalf” discloses “material nonpublic information” to certain “enumerated persons.”

**Disclosures by an “issuer” or a “person acting on its behalf.”** Regulation FD applies to issuers with securities registered under Section 12 of the Exchange Act and issuers subject to the reporting requirements under Section 15(d) of the Exchange Act, including Closed-End Funds, but not registered open-end management investment companies (Open-End Funds and together with Closed-End Funds, Funds).<sup>7</sup> Persons acting on behalf of the issuer include Senior Officials of the issuer, Senior Officials of the Closed-End Fund’s investment adviser, and any other officer, employee, or agent of the issuer “who regularly communicates” with securities market professionals or security holders.<sup>8</sup> Senior Officials are defined under Regulation FD to include any director, executive officer,<sup>9</sup> investor relations or public relations officer, or other person with similar function.<sup>10</sup>

In 2009, the SEC clarified that if an issuer has a policy that limits which Senior Officials are authorized to make disclosures on its behalf, then a selective disclosure to an enumerated person by a Senior Official who is not authorized to make such a disclosure would be a breach of a duty of trust or confidence by that Senior Official to the issuer.<sup>11</sup> In such a case, the selective disclosure would *not* trigger Regulation FD obligations for the issuer and could, instead, expose that Senior Official to liability under the insider trading laws.<sup>12</sup> The SEC has also clarified that the Regulation does not apply to those employees who have occasional communications with market professionals or security holders.<sup>13</sup> For example,

analysts researching a particular company have been known to inquire about company sales in various markets by questioning company personnel as part of the information gathering process. In this context, a store manager’s response to questions from an analyst who was seeking information about an issuer’s business would ordinarily not trigger any Regulation FD obligations.<sup>14</sup>

**Material nonpublic information.** Regulation FD does not define “material” or “nonpublic,” but instead relies on the definition of these terms as established in case law.<sup>15</sup> Referring to such case law, the 2000 Adopting Release explained that information is “nonpublic” if it “has not been disseminated in a manner making it available to investors generally.”<sup>16</sup> Information is “material” if “there is a substantial likelihood that a reasonable shareholder would consider it ‘important’ in making an investment decision.”<sup>17</sup> There must be “a substantial likelihood that a fact ‘would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.’”<sup>18</sup> In the 2000 Adopting Release, the SEC noted that it had rejected commenters’ requests for a bright-line test or an exclusive list of events or information types that are *per se* material.<sup>19</sup> However, the SEC did provide a non-exclusive list of examples of information or events that have a higher probability of being material (for example, earnings information, mergers, and changes in management or control), which will require the issuer’s careful review to determine their materiality.<sup>20</sup>

**Enumerated persons.** Regulation FD is designed to address the “core problem of selective disclosure made to those persons who would reasonably be expected to trade securities on the basis of the information or provide others with advice about securities trading.”<sup>21</sup> The Regulation applies to issuers’ selective disclosures to “any person outside the issuer” who is: (1) a broker-dealer, including their associated persons; (2) an investment adviser, certain institutional investment managers, and their associated persons; (3) an investment company, hedge fund, and their affiliated persons; or (4) a holder of

the issuer's securities under circumstances in which it is reasonably foreseeable that the person will trade in the issuer's securities on the basis of the information (Enumerated Persons).<sup>22</sup> In subsequent guidance, the SEC clarified that Regulation FD does not apply to the issuer's employees who may also be shareholders of the issuer because such employees are already subject to duties of trust and confidence and could be subject to insider trading liability if they were to misuse the information.<sup>23</sup>

In the 2000 Adopting Release, the SEC explained that the above identified Enumerated Persons should be covered by the Regulation, because these are the types of persons who are most likely to be the recipients of improper selective disclosures from the issuer.<sup>24</sup> The SEC recognized, however, that there are certain types of recipients who are not likely to receive improper selective disclosures from the issuer and believed that the Regulation should not cover these persons.<sup>25</sup> For example, persons engaged in ordinary-course business communications with the issuer, such as customers, suppliers, or strategic partners, are not covered by the Regulation.<sup>26</sup> Similarly, disclosures to the media or communications with government agencies are also not covered by the Regulation.<sup>27</sup> According to the SEC, even if a representative of a customer, supplier, strategic partner, media organization, or government agency were a *shareholder* of the issuer (that is, an Enumerated Person), then the Regulation would still not be triggered if the issuer disclosed that material nonpublic information to the representative in his or her representative capacity.<sup>28</sup> The SEC explained that "it ordinarily would not be foreseeable for the issuer engaged in an ordinary-course business-related communication with that [representative] to expect the [representative] to buy or sell the issuer's securities on the basis of the communication."<sup>29</sup> The SEC noted that the representative would likely face insider trading liability if he or she were to trade on the basis of the material nonpublic information obtained in his or her representative capacity.<sup>30</sup>

Regulation FD excludes, from its coverage, communications made in the following four circumstances:

- *Disclosures to temporary insiders.* Regulation FD does not apply to disclosures to persons who owe the issuer a duty of trust or confidence, such as attorneys, investment bankers, or accountants.<sup>31</sup> The SEC explained that these persons could face insider trading liability if they were to misuse the material nonpublic information (for example, trading or advising others to trade based upon that information).<sup>32</sup>
- *Disclosures to persons subject to a confidentiality agreement.* Regulation FD obligations will not be triggered by disclosure of information to any person who expressly agrees to maintain the information in confidence.<sup>33</sup> A confidentiality agreement, whether written or oral, must expressly provide that the recipient agrees to keep the information confidential.<sup>34</sup> For example, private disclosures could be made to shareholders of the issuer, if the shareholder has made an express agreement to maintain the confidentiality of the disclosed information.<sup>35</sup> In subsequent guidance, the SEC clarified that issuers are not required to obtain an express agreement from recipients that they will not *trade* on the information and that an express confidentiality agreement will suffice.<sup>36</sup> Issuers that have mistakenly disclosed material nonpublic information can avoid the harm from that disclosure by obtaining from the recipient, before the recipient discloses or trades on that information, an express confidentiality agreement with respect to that information.<sup>37</sup> As with temporary insiders, a recipient of material nonpublic information who is subject to an express confidentiality agreement and who trades or advises others to trade on that information could be subject to liability under the insider trading laws.<sup>38</sup>
- *Disclosures to credit rating agencies.* Disclosures to credit rating agencies will not trigger Regulation

FD obligations, provided that the information is disclosed solely for the purpose of developing a credit rating and the agency's ratings are publicly available.<sup>39</sup> The SEC explained that it was appropriate to exclude ratings agencies from Regulation FD because ratings agencies have a mission of public disclosure and the SEC was unaware of any incidents of selective disclosure involving such agencies.<sup>40</sup>

- *Communications made in connection with offerings under the Securities Act.* Generally, Regulation FD does not apply to disclosures made in connection with a securities offering registered under the Securities Act.<sup>41</sup> The SEC had initially proposed that Regulation FD cover offerings under the Securities Act, but ultimately decided to exclude such offerings in the final version of the Regulation.<sup>42</sup> In the 2000 Adopting Release, the SEC noted commenters' concerns that the disclosures mandated by Regulation FD could violate Section 5 of the Securities Act, which limits the types of disclosures that may be made during a registered offering.<sup>43</sup> Further, the SEC believed that the Securities Act disclosure regime and civil liability provisions were adequate to reduce the opportunity for an issuer to selectively disclose material nonpublic information.<sup>44</sup> However, there are limits to this exclusion. Regulation FD obligations apply to communications that are not part of registered offerings, such as communications that occur outside the offering period or that occur during the offering period but are not related to the registered offering.<sup>45</sup> For example, Regulation FD would cover an issuer's communications about its future financial performance during a regularly scheduled conference call with analysts, even though the issuer was in the midst of a registered offering at the time.<sup>46</sup> Additionally, Regulation FD applies to registered offerings that are "of an ongoing and continuous nature," such as secondary offerings, dividend or interest reinvestment plans, employee benefit plans, or

the exercise of outstanding options.<sup>47</sup> The SEC was concerned that because of the nature of those offerings, issuers would otherwise not be subject to Regulation FD for extended periods of time.<sup>48</sup>

#### *Timing of Required Public Disclosures.*

The timing of the public disclosure required by Regulation FD depends upon whether the selective disclosure was "intentional."<sup>49</sup> Intentional selective disclosures require *simultaneous* public disclosure, while non-intentional selective disclosures require "prompt" public disclosure.<sup>50</sup> For purposes of Regulation FD, a selective disclosure is "intentional" if the issuer or the person acting on the issuer's behalf knows or is reckless in not knowing that the information is material and nonpublic.<sup>51</sup> An issuer would be reckless in not knowing that information was material and nonpublic when no reasonable person in those circumstances would have made the same determination.<sup>52</sup> For example, a mistaken materiality judgment would likely be reckless when made in a prepared written statement, but would not necessarily be reckless when made in an impromptu answer to an unanticipated question, unless there were a pattern of "mistaken" judgments.<sup>53</sup> The SEC noted that an issuer would likely be deemed not to be acting recklessly when it engaged in good faith efforts to comply with the Regulation.<sup>54</sup>

The SEC explained that "prompt" public disclosure requires public disclosure of the material nonpublic information by the later of 24 hours or the commencement of the next trading day on the New York Stock Exchange.<sup>55</sup> The requirement to make "prompt" disclosure is triggered when a Senior Official of the issuer: (1) learns that there has been a non-intentional disclosure of information by the issuer or a person acting on its behalf; and (2) knows or is reckless in not knowing that the information is both material and nonpublic.<sup>56</sup> Although not addressed directly in the 2000 Adopting Release, it is likely that an issuer's good faith efforts will be considered by the SEC when deciding whether a Senior

Official was reckless in not knowing that the information was material and nonpublic.

***Acceptable Methods of Public Disclosure.***

Regulation FD gives issuers considerable flexibility in determining how to make a required public disclosure. The Regulation allows issuers to make public disclosure by either filing or furnishing a Form 8-K or by disseminating 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.<sup>57</sup> The filing of a Form 8-K solely to satisfy Regulation FD would not, by itself, be considered an admission of the materiality of the information disclosed.<sup>58</sup> The SEC made this clarification in response to commenters' shared concern that, given the timing requirements for making materiality judgments under Regulation FD, issuers preferred to file a Form 8-K and "err on the side of filing information that may or may not be material."<sup>59</sup>

In the Regulation FD Guidance, the SEC stated that, in addition to Form 8-K filings, other public filings on EDGAR could be used to provide public disclosure for purposes of the Regulation. For example, an issuer could provide public disclosure under the Regulation by including the information in a Form 10-Q or proxy statement filing. The SEC noted that when an issuer discloses information through an EDGAR filing, other than a Form 8-K filing, the issuer must ensure that the information is not disclosed in piecemeal fashion and that the disclosure is not buried in the filing.<sup>60</sup> In the Regulation FD Guidance and in the 2000 Adopting Release, the SEC did not discuss whether a disclosure on an EDGAR filing, other than a Form 8-K filing, even when done solely for the purpose of satisfying Regulation FD, would be considered an admission as to the materiality of the information. Given this, issuers should be aware that if they are unsure about whether information is material, then they may be inadvertently admitting that the information is material by disclosing the information in an EDGAR filing, other than a Form 8-K filing.

Other acceptable methods of public disclosure are those that are "reasonably designed to effect a broad and non-exclusionary distribution of information to the public." These methods include press releases distributed through a widely circulated news or wire service,<sup>61</sup> or the issuer's website provided that the website satisfies certain elements.<sup>62</sup> When determining whether a disclosure is "reasonably designed" for broad and non-exclusionary distribution, the SEC stated that it will consider all relevant facts and circumstances.<sup>63</sup> For example, if an issuer knows that its press releases are routinely not carried by major business wire services, then disclosure to one of these wire services would likely not be sufficient for purposes of the "reasonably designed" standard.<sup>64</sup> In such a case, the issuer should instead distribute the information to local media, file a Form 8-K, or post the information on its website.<sup>65</sup> The SEC also stated that it will view skeptically the reasonableness of an issuer's method for public disclosure when the issuer chooses a method that deviates from its usual practice.<sup>66</sup> Issuers should have policies and procedures setting out the method or combination of methods that are reasonably designed to effect public disclosure of information for purposes of the Regulation. Additionally, these policies and procedures should ensure that the issuer's usual disclosure methods are followed.

For information posted on an issuer's website to be considered, in and of itself, publicly disseminated for purposes of Regulation FD the following two elements must be satisfied:

- *The issuer's website is a recognized channel of distribution.* In the 2008 Website Disclosure Guidance, the SEC explained that whether an issuer's website is a "recognized channel of distribution" depends on the steps that the issuer has taken to alert the market about its website, the issuer's disclosure practices, and the use of the website by investors and the market.<sup>67</sup>
- *The information is "posted and accessible" on the website.* When determining whether information

has been publicly disseminated on the issuer's website, the focus is on the manner in which the information has been posted to the issuer's website and the timely and ready accessibility of such information to investors and the markets.<sup>68</sup>

In the 2008 Website Disclosure Guidance, the SEC provided a non-exclusive list of factors that issuers should consider when determining whether their website is a "recognized channel of distribution" and whether the information is "posted and accessible" and is, therefore, publicly disseminated for purposes of Regulation FD.<sup>69</sup> Factors that issuers are to consider include how does the issuer inform investors and the market about the existence of its website and that they should look to the website for information.<sup>70</sup> For example, in the issuer's periodic reports, does it provide its website address and disclose that it routinely posts important information on its website?<sup>71</sup> Another factor to be considered is whether the issuer keeps the information on the website current and accurate, and the steps the issuer has taken to make its website and the information on it accessible (for example, using RSS feeds).<sup>72</sup> The SEC cautioned, however, that issuers still have the responsibility for determining whether a website disclosure would satisfy the public disclosure provisions of Regulation FD.<sup>73</sup>

### C. Closed-End Fund as Issuers

As discussed above, Regulation FD applies to Closed-End Funds.<sup>74</sup> However, the unique structure of Closed-End Funds, which depends on a separate investment advisory entity as well as other service providers for many of its primary functions, adds an additional layer of analysis for Regulation FD monitoring and enforcement. Unlike other issuers subject to the Regulation, a Closed-End Fund must also review the operations and functions performed by its service providers for potential exposure to Regulation FD issues.

Because Closed-End Funds do not have their own employees, officers of Closed-End Funds

typically are employees of the Closed-End Fund's investment adviser and are the persons most likely to have regular communication (if any) with the Enumerated Persons under Regulation FD. Indeed, Regulation FD itself recognizes this unique application of the Regulation to the Closed-End Fund, noting that "persons acting on behalf" of the Closed-End Fund include not only any Senior Officials of the Closed-End Fund, but also any Senior Officials of the Closed-End Fund's investment adviser.<sup>75</sup> As such, the principal officers of the Closed-End Fund's investment adviser, such as its CEO, chief investment officer, CFO, chief legal officer, COO, head of client relations, or chief sales/marketing officer, would fall under Regulation FD's purview if such persons disclose any material nonpublic information about the Closed-End Fund to an Enumerated Person. In addition, senior portfolio managers of the investment adviser may also come under this definition if they are performing policy making functions for the adviser (for example, if he or she makes policy through day-to-day involvement in the development and adoption of the investment adviser's policies, such as the firm's investment strategies).

With regard to the other service providers of a Closed-End Fund, such as its administrators, fund accountants, transfer agents, and principal underwriters, the applicability of Regulation FD to these entities depends on whether they meet Regulation FD's requirement that they "act on behalf of the [Closed-End Fund]." In addition to including "Senior Officials" as well as officers and employees of the Closed-End Fund, the definition of "person[s] acting on behalf of an issuer" also includes any agent of an issuer who regularly communicates with an Enumerated Person or a shareholder. As such, Closed-End Funds should consider whether any of their other service providers would meet this definition. However, and as discussed previously in Section B, the 2000 Adopting Release noted that this definition only includes persons who have *regular* interactions with Enumerated Persons and does not include persons who only occasionally communicate

with such a person on behalf of the issuer.<sup>76</sup> In addition, service provider agreements of Closed-End Funds typically have confidentiality provisions in place prohibiting the Closed-End Fund's service providers from divulging confidential information, which presumably includes any material nonpublic information about the Closed-End Fund, to outside parties, which could limit the potential exposure to Regulation FD issues by these service providers. As discussed previously in Section B, disclosures between the Closed-End Fund (which includes its directors, officers and employees) and its service providers, are generally not subject to Regulation FD, because these service providers typically owe "a duty of trust or confidence to the issuer."<sup>77</sup>

***Regulation FD Disclosures Applicable to Closed-End Funds.*** As described above, Regulation FD applies to disclosures of material nonpublic information about the issuer or its securities. While the 2000 Adopting Release declined to include a bright-line standard on what was material for purposes of Regulation FD, the 2000 Adopting Release did provide examples of information or events that should be reviewed carefully to determine whether they are "material" under Regulation FD, but emphasized that the issuer must still make its own materiality determination (see the related section in this Article covering materiality in Section E). Examples from this list that are more likely applicable to Closed-End Funds may include "changes in assets" (for example, significant increases/decreases in the fund's total assets), "changes in [the Closed-End Fund's] control or in management," "change in [the Closed-End Fund's] auditor or auditor notification that the [Closed-End Fund] may no longer rely on an auditor's audit report, and "events regarding the [Closed-End Fund's] securities" (for example, changes in dividends, preferred share issuances and redemptions, actions affecting the Closed-End Fund's net asset value (NAV) discount or premium, changes to the Closed-End Fund's permitted investments or risk profile, defaults, or public or private sales of additional securities).

***Adoption of Regulation FD Compliance Policies and Procedures by Fund Advisers.*** Given that the definition of "persons acting on behalf of" the Closed-End Fund includes the key personnel of the fund's investment adviser, Closed-End Fund investment advisers should consider implementing provisions addressing Regulation FD's requirements within its compliance policies and procedures. Similar to other narrowly tailored regulatory policies (*see*, for example, the pay to play requirements under Rule 206(4)-5 of the Advisers Act, whose requirements are targeted to specific types of employees and activities), an investment adviser's compliance policies covering Regulation FD can be specifically tailored to define which advisory personnel are covered by Regulation FD, designate certain authorized persons who may speak to Enumerated Persons about the Closed-End Fund, and give guidance and examples of the types of communications and audience that are covered under its provisions. For example, such a policy could apply to investment advisory personnel that actually perform services for the Closed-End Fund, which may include its senior officers (for example, the president/CEO, the chief investment officer), as well as other adviser personnel (for example, the applicable portfolio manager(s), client relationship personnel, etc.) who regularly communicate with market professionals or shareholders that may trade on any material nonpublic information received.

Coordination with the chief compliance officer (CCO) of the Closed-End Fund could also be emphasized in such Regulation FD policies so that any planned or contemplated communications between applicable advisory personnel with Regulation FD Enumerated Persons could be reviewed and analyzed for potential Regulation FD issues. Steps to include in these procedures could include, but are not limited to the pre-approval of any talking points by the CCO or other relevant division (for example, legal), the importance of avoiding any intentional disclosures of Regulation FD information and the proper notification and related procedures to follow in the

event of an unintentional disclosure of such information. The CCO also could incorporate Regulation FD training within his/her testing and monitoring compliance program, which may include mock interview preparation, a checklist of items or “Rules of the Road” applicable personnel should abide by and be mindful of when meeting with Enumerated Persons, as well as periodic reminders to advisory staff regarding not only Regulation FD matters but also of related issues such as insider trading.

***Adoption of Regulation FD Compliance Policies and Procedures by Closed-End Funds.***

Consideration should also be given as to whether the Closed-End Fund itself should have its own, stand-alone Regulation FD policies, particularly if persons other than advisory personnel or service providers act on behalf of the Closed-End Fund and regularly communicate with Enumerated Persons. This could potentially include, for example, Closed-End Fund directors who regularly have meetings with key fund shareholders (such as large institutional shareholders). As noted in Question 101.11 of the SEC Staff’s Regulation FD Guidance, fund directors that are authorized to speak on behalf of the fund and plan on speaking privately with a shareholder, or group of shareholders, should consider implementing policies and procedures intended to help avoid Regulation FD violations.<sup>78</sup> The Regulation FD Guidance went on to further suggest that these policies could include a preclearance process for discussion topics or a requirement that certain compliance/legal personnel also attend and/or participate in the meeting (such as the fund CCO or fund counsel).<sup>79</sup> In addition, the Regulation FD Guidance indicated that funds could take advantage of Regulation FD’s confidentiality exception to possibly avoid Regulation FD issues, noting that Regulation FD would not apply to private communications made by a fund director to a shareholder if such shareholder expressly agreed to maintain such disclosed information in confidence.<sup>80</sup> A Fund-level Regulation FD and related communications policy could cover these types of interactions between Closed-End Fund Directors,

personnel, and other agents, as well as provide guidance and monitoring mechanisms to seek to prevent potential Regulation FD violations.

**D. Investment Advisers and Affiliates as Issuers**

Many of the same considerations that Closed-End Funds have when evaluating Regulation FD issues also occur when the investment advisers themselves are subject to the Regulation (for example, they are publicly traded issuers). Material nonpublic information that might raise Regulation FD issues for adviser issuers may potentially include, depending on the facts and circumstances, the inadvertent or selective disclosure about key operational matters relating to the adviser such as (for example) positive/negative developments regarding the adviser’s assets under management, management changes or key personnel departures, new product developments (for example, new strategies, new funds), regulatory investigations or potential bankruptcy/restructuring issues affecting the adviser.

Given the above, publicly traded advisers also should consider implementing compliance policies and procedures to seek to prevent Regulation FD violations. Similar to those implemented for Closed-End Funds, such policies can include provisions: requiring coordination with the relevant adviser compliance or legal department regarding the preclearance of communications and talking points with enumerated entities; assigning specified authorized spokesman to centralize and better monitor such communications; imposing confidentiality obligations when communicating with Enumerated Persons; and providing guidance and specific examples of the types of communications, personnel and audience to whom Regulation FD would apply.

***Corporate Financial Enterprises—Potential Regulation FD Issues.*** An additional complication may present itself in the case of an advisory firm with a publicly traded parent. While a non-issuer adviser is not subject to Regulation FD, an adviser that is an affiliate of a publicly traded firm may still have to be

mindful of potential Regulation FD issues when operating as a component of the parent company's entire financial enterprise. Under this scenario, the selective disclosure of material information regarding an issuer's affiliate to an Enumerated Person may have Regulation FD implications for the affiliate's publicly traded parent that is subject to the Regulation. For example, an investment advisory subsidiary that is a significant component and revenue generator of a publicly traded company would need to evaluate whether the selective disclosure of key information about itself to external market professionals would implicate the parent company's Regulation FD obligations. Under these circumstances, key nonpublic information regarding the subsidiary, such as a significant increase or drop in its assets under management, a management restructuring change, or a pending regulatory investigation or settlement against the subsidiary, may be, in fact, material to the public company's stock. As such, a materiality analysis might need to be undertaken in these situations to consider whether the release of such information is within Regulation FD's purview and whether it is reasonably foreseeable that the Enumerated Person recipient would trade in the public company's stock based on such information. In addition, adviser affiliates may need to carefully analyze and coordinate responses to questions raised in due diligence questionnaires sent to the adviser by clients in an effort to ensure that the release of sensitive information about the adviser or its publicly traded parent company does not raise selective disclosure issues under Regulation FD and if it does, whether a relevant exclusion is available (for example, confidentiality provisions).

Given the above, the parent company might also consider adopting a complex-wide Regulation FD policy or coordinate with its various affiliates regarding joint policies and procedures in an effort to limit Regulation FD exposure. For example, many large corporate groups adopt an enterprise-wide Code of Ethics or insider trading procedures for both the parent and key operating subsidiaries, which could include Regulation FD matters as well.

***Contractual Representations and Obligations—Potential Regulation FD Issues.*** Advisory firms with a publicly traded parent as well as advisers that are issuers should carefully review their contractual obligations and representations within their investment advisory contracts for potential Regulation FD issues. For example, investment advisory agreements with clients might require the advisory firm and its employees to provide notice of “key man” changes and regulatory actions against the firm as well as require that such notice be provided under a specified time period (for example, within 10 business days). These advisory firms should evaluate whether disclosure of these events in the time and manner specified under their advisory agreements would trigger a selective disclosure of material nonpublic information under the Regulation.

This may be particularly acute if the adviser is an affiliate of a publicly traded parent company and shares key investment advisory personnel that perform services for both or multiple affiliated entities (for example, a global Chief Investment Officer or president). For example, a “dual hat” individual that performs policy functions at both the parent company and its affiliate may be deemed to be a “person acting on behalf of the issuer” and thus limited in selectively disclosing material matters affecting the parent company or its affiliate to advisory clients that are also Enumerated Persons. As such, firms may need to evaluate whether the advisory agreement's disclosure obligations raise selective disclosure issues that would apply to the parent company as an issuer. If so, care should be taken regarding the specified disclosure timing periods under the affiliate adviser's advisory agreements and whether these timing provisions should be revised to be no later than after such information has first been publicly disclosed by the advisory firm or its parent company pursuant to Regulation FD.

## **E. Enforcement of Regulation FD**

The consequences for violating Regulation FD can be severe. The SEC Division of Enforcement

has brought enforcement actions for violations of Regulation FD in both federal court and through the SEC's own in-house administrative proceedings. The sanctions imposed for violations of Regulation FD typically include a financial penalty and either a federal court injunction against future violations or a cease-and-desist order issued by an administrative law judge in an administrative proceeding.

The SEC may bring enforcement actions based on violations of Regulation FD not only against the issuer that commits the violation but also against employees of the issuer or other third parties who aid and abet or cause the issuer's violation. Section 20(e) of the Exchange Act, which authorizes the SEC to bring enforcement actions against those who aid or abet violations of the federal securities laws, provides that "any person that knowingly or recklessly provides substantial assistance to another person in violation of... [the federal securities laws] shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." To prevail on a claim of aiding and abetting, the SEC must prove: (a) the existence of a securities law violation; (b) knowledge of this violation on the part of the aider and abettor; and (c) substantial assistance by the aider and abettor in the achievement of the primary violation.<sup>81</sup> Alternatively, the SEC may enter a cease-and-desist order in an administrative proceeding under Section 21C of the Exchange Act against a person who causes a violation of Regulation FD. Section 21C provides that the SEC may bring an administrative cease-and-desist proceeding against "any... person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation..."<sup>82</sup> In order to establish liability for causing a violation, the SEC must prove: (a) a primary violation of the securities laws occurred; (b) an act or omission by the defendant that was a cause of the primary violation; and (c) the defendant knew, or should have known, that his or her conduct would contribute to the violation.<sup>83</sup>

The SEC could also bring an enforcement action against an issuer's employees or third parties based on violations of Regulation FD, pursuant to Section 20(b) of the Exchange Act. Section 20(b) titled, *Unlawful Activity Through or by Means of Any Other Person* provides that, "It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of... [the federal securities laws] or any rule or regulation thereunder through or by means of any other person." In the 2000 Adopting Release, the SEC explained that although Regulation FD prohibited selective disclosures by an issuer or certain covered persons acting on behalf of an issuer, it also warned that, "of course, neither an issuer nor such a covered person could avoid the reach of the regulation merely by having a non-covered person make a selective disclosure. Thus, to the extent that another employee had been directed to make a selective disclosure by a member of senior management, that member of senior management would be responsible for having made the selective disclosure."<sup>84</sup> The SEC specifically referenced Exchange Act Section 20(b) in connection with this warning.

***Disclosure of Material Nonpublic Information.***

As noted above, Regulation FD only prohibits the selective disclosure of material nonpublic information. It does not prohibit issuers or persons acting on their behalf from disclosing information that is not material. Moreover, materiality is determined by an objective test based on a hypothetical reasonable investor not whether a particular analyst or investor finds the information useful when combined with other information. The SEC explained in the 2000 Adopting Release for Regulation FD:

An issuer is not prohibited from disclosing a non-material piece of information to an analyst, even if, unbeknownst to the issuer, that piece helps the analyst complete a 'mosaic' of information that, taken together, is material. Similarly, since materiality is an

objective test keyed to the reasonable investor, Regulation FD will not be implicated where an issuer discloses immaterial information whose significance is discerned by the analyst. . . . The focus of Regulation FD is on whether the issuer discloses material nonpublic information, not on whether an analyst, through some combination of persistence, knowledge, and insight, regards as material information whose significance is not apparent to the reasonable investor.<sup>85</sup>

The SEC Staff has provided guidance on information an issuer may selectively disclose under some circumstances without triggering Regulation FD's disclosure requirements. For example, according to SEC Staff an issuer may under certain circumstances confirm selectively a forecast it has previously made to the public or review and comment on an analyst's model privately without triggering Regulation FD's disclosure requirements.<sup>86</sup> The Staff advised that in assessing the materiality of an issuer's confirmation of its own forecast, the issuer should consider whether the confirmation conveys information beyond the original forecast, and whether any additional information conveyed is itself material, which in turn may depend on, among other things, the amount of time elapsed between the original forecast and the confirmation.<sup>87</sup> Similarly, when determining whether an issuer may review and comment on an analyst's model privately without triggering Regulation FD's disclosure requirements, the issuer must determine whether it is communicating material nonpublic information. According to SEC Staff guidance, an issuer "ordinarily would not be conveying material nonpublic information if it corrected historical facts that were a matter of public record" or "shared seemingly inconsequential data which, pieced together with public information by a skilled analyst with knowledge of the issuer and the industry, helps form a mosaic that reveals material nonpublic information."<sup>88</sup> The Staff warned however, that an issuer may not use "a discussion

of an analyst model as a vehicle for selectively communicating—either expressly or in code—material nonpublic information."<sup>89</sup>

In addition, the SEC Staff cautioned that issuers and persons speaking on an issuer's behalf should carefully consider certain types of information to determine its materiality. This information includes earnings, mergers, acquisitions, tender offers, joint ventures, changes in assets, new products or discoveries, developments regarding customers or suppliers (for example, the acquisition or loss of a contract), changes in control or in management, change in auditors, or auditor notification that the issuer may no longer rely on an auditor's report, events regarding an issuer's securities (for example, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities, and bankruptcies or receiverships).<sup>90</sup> Similarly, shortly after Regulation FD was adopted, SEC Division of Enforcement Director Richard H. Walker, warned that the Enforcement Division would be looking out for Regulation FD violations "involving the intentional or reckless disclosure of information that is unquestionably material" including the selective disclosure of "information regarding mergers or acquisitions, earnings, or other matters that the courts or the Commission have long held to be material."<sup>91</sup>

**Enforcement Actions.** The SEC has brought numerous enforcement actions for violations of Regulation FD based on the selective disclosure of the kind of information it cautioned was likely to be material. For example, in *SEC v. Presstek, Inc. et al.*, the SEC sued Presstek, Inc. and its former president and CEO in federal court, alleging that the president and CEO selectively disclosed material nonpublic information regarding Presstek's financial performance to a managing partner of a registered investment adviser.<sup>92</sup> Within minutes of receiving the information, the partner decided to sell all of the shares of Presstek stock managed by the investment adviser. The SEC's complaint alleged that

Presstek violated Section 13(a) of the Exchange Act and Regulation FD by not simultaneously disclosing to the public the information provided by its president and CEO to the partner, and that the president and CEO aided and abetted those violations. Presstek settled the charges by consenting to a judgment enjoining it from further violations and ordering it to pay a \$400,000 civil penalty. Presstek's president and CEO agreed to pay a \$50,000 penalty to settle the civil action, and separately consented to the issuance of an administrative order, finding that he caused Presstek's violations, and directing him to cease and desist from committing or causing any violations and any future violations of Exchange Act Section 13(a) and Regulation FD.<sup>93</sup>

One of the SEC's first Regulation FD enforcement actions was against Secure Computing Corporation and its CEO after the CEO allegedly disclosed material nonpublic information about a significant contract to a portfolio manager at an investment advisory firm and a salesperson at a brokerage firm.<sup>94</sup> The CEO later called the brokerage firm and requested that the information be kept confidential but, the next day, he confirmed the same information with a portfolio manager of another advisory firm. The company and its CEO settled with the SEC in an administrative cease-and-desist order, finding that the company violated Section 13(a) of the Exchange Act and Regulation FD, and that the CEO caused those violations.

Another early Regulation FD enforcement action was brought against Siebel Systems, Inc. in 2002.<sup>95</sup> Siebel consented to an order finding that it violated Section 13(a) of the Exchange Act and Regulation FD after its CEO made positive comments regarding the company's sales pipeline and transaction trends at an invitation-only technology conference, which contrasted with negative statements he had made in a public conference call three weeks earlier. Immediately after the disclosures, certain attendees, including broker-dealers, investment advisers, investment companies, and institutional shareholders purchased Siebel stock or shared the

information with others who purchased Siebel stock. The SEC entered a cease-and-desist order against Siebel, and filed and settled a civil action in which Siebel agreed to pay a \$250,000 penalty.<sup>96</sup>

Two years later, the SEC brought another Regulation FD case against Siebel, alleging that six months after the cease-and-desist order was issued, the company's CFO made comments to institutional investors about Siebel's business activity levels and transaction pipeline that materially contrasted with negative public statements the company made about its business in the preceding several weeks.<sup>97</sup> According to the complaint, based on the CFO's comments, an institutional investor converted its 108,200 share short position in Siebel stock into a 114,200 share long position—a net change of 222,400 shares. The complaint also alleged that the investor relations director, who was in charge of the company's Regulation FD compliance, failed to take any precautions to ensure that the CFO did not selectively disclose material nonpublic information. The SEC alleged that Siebel violated Section 13(a) of the Exchange Act and Regulation FD, as well as Exchange Act Rule 13a-15,<sup>98</sup> and that the CFO and investor relations director aided and abetted Siebel's violations. The Court, however, dismissed the case, finding that the private and public comments were virtually identical.<sup>99</sup>

In another enforcement action, the SEC charged Flowserve Corporation with violating Regulation FD and Exchange Act Section 13(a) after its president/CEO and director of investor relations both reaffirmed Flowserve's earnings guidance during a private meeting with analysts from investment and brokerage firms, 42 days before the end of Flowserve's fiscal year. At the meeting, the attendees discussed various aspects of Flowserve's business, including recent acquisitions, debt covenants, and free cash flow. At one point, one of the analysts asked about the company's earnings guidance for the year. Neither of Flowserve's officers gave the response required by the company's policy—that earnings guidance was effective at the date given and

would not be updated until the company publicly announced updated guidance. Instead, in response to the question, the director of investor relations remained silent while Flowserve's president/CEO reaffirmed the previous guidance and provided additional nonpublic information. The next day, one of the analysts released a report to the investment firm's subscribers, highlighting Flowserve's reaffirmation of its earnings guidance. The SEC filed a lawsuit in federal district court charging Flowserve with violating Regulation FD and Section 13(a). The SEC also charged Flowserve's president/CEO with aiding and abetting Flowserve's violations. The company and the president/CEO agreed to pay civil penalties of \$350,000 and \$50,000, respectively. In addition, Flowserve, the president/CEO, and the director of investor relations agreed to the issuance of an administrative cease-and-desist order finding that Flowserve violated the same provisions, and that Flowserve's president/CEO and director of investor relations were each a cause of Flowserve's violations.<sup>100</sup>

In the most recent Regulation FD enforcement action, the SEC charged the former head of investor relations for First Solar, Inc. with causing First Solar to violate Section 13(a) of the Exchange Act and Regulation FD after he disclosed in phone conversations with a select group of sell-side analysts and investors that the company was unlikely to receive a much-anticipated loan guarantee from the US Department of Energy.<sup>101</sup> First Solar's CEO had publicly expressed confidence that the company would receive loan guarantees totaling \$4.5 billion, but executives later learned that the company would not be receiving at least one of the guarantees. First Solar's lawyer noted that the company would be restricted by Regulation FD from disclosing this information to analysts and investors before publicly disclosing it. Nonetheless, First Solar's head of investor relations drafted talking points signaling that the company would not receive one of the loan guarantees, delivered these talking points in one-on-one calls with analysts and institutional investors, and

directed a subordinate to do the same. The head of investor relations settled the SEC action by agreeing to pay a \$50,000 penalty and to cease and desist from causing any violations of Regulation FD and Section 13(a) of the Exchange Act. In this case, the SEC decided not to take enforcement action against the company, and noted in a press release that First Solar "cultivated an environment of compliance," self-reported the misconduct, and cooperated with the investigation.<sup>102</sup>

## F. Relationship with Insider Trading

Regulation FD does not change the scope of liability for insider trading. The SEC adopted Regulation FD to address the selective disclosure of material information by issuers. The agency expressed concern in its 2000 Adopting Release that many issuers are selectively disclosing important nonpublic information,<sup>103</sup> such as advance warnings of earnings results to securities analysts or selected institutional investors or both, before making full disclosure of the same information to the public.<sup>104</sup> The SEC viewed issuer selective disclosure as closely resembling tipping and insider trading in that both of these practices lead "to a loss of investor confidence in the integrity of our capital markets," and allow "a privileged few [to] gain an information edge—and the ability to use that edge to profit—from their superior access to corporate insiders."<sup>105</sup> However, the SEC also noted that while "tipping and insider trading can be severely punished under the antifraud provisions of the federal securities laws ... the status of issuer selective disclosure has been considerably less clear."

The SEC implied in its 2000 Adopting Release that the perceived lack of clarity regarding issuer selective disclosure resulted from the United States Supreme Court decision in *Dirks v. SEC*, which addressed insider trading liability in the tipper-tippee framework.<sup>106</sup> *Dirks* involved a corporate insider who disclosed material nonpublic information to an analyst in order to expose corporate fraud. The analyst in turn disclosed the information to clients and

investors who relied on it when trading shares of the corporation. The Supreme Court found that because the insider did not receive a benefit for disclosing the nonpublic information to the analyst, neither the insider nor the analyst were liable for insider trading. The Court held that “the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by a tippee].”<sup>107</sup> The SEC specifically pointed out in the 2000 Adopting Release that, in light of the personal benefit test set forth in *Dirks*, “many have viewed issuer selective disclosures to analysts as protected from insider trading liability.”<sup>108</sup>

In light of the Supreme Court decision in *Dirks*, the SEC adopted Regulation FD as a non-fraud based disclosure rule to address selective disclosures of material nonpublic information by issuers.<sup>109</sup> Significantly, Regulation FD specifically states that “no failure to make a public disclosure required solely by [Rule 100] shall be deemed to be a violation of Rule 10b-5 under the Securities Exchange Act.”<sup>110</sup> It also provides that “an officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer” and, therefore, the selective disclosure of such information would not cause the issuer to violate Regulation FD. However, insider trading liability may still exist if the selective disclosure is made under circumstances that meet the *Dirks* personal benefit test.<sup>111</sup> Regulation FD also permits selective disclosures made to, *inter alia*, a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant) and to a person who expressly agrees to maintain the disclosed information in confidence.<sup>112</sup> Yet, as the 2000 Adopting Release points out “any misuse of the information for trading by the persons in these two exclusions would thus be covered under either the “temporary insider” or the misappropriation theory of insider trading. Thus, Regulation

FD provides the SEC with an enforcement tool to address selective disclosures which, at least in effect, are frequently similar to insider trading but that may not be subject to insider trading laws.

## G. Recipients of Selectively Disclosed Material Nonpublic Information

It is not unusual for Funds and other large institutional investors to seek information from issuers in private meetings to gain an investing advantage. For example, earlier this year, Elon Musk, CEO of Tesla Motors Inc., publically acknowledged discussing with some of Tesla’s largest shareholders the possibility of merging Tesla with SolarCity, a solar energy company, before announcing the merger publicly.<sup>113</sup> A research report prepared last year by David Solomon of the University of Southern California has received considerable press because it concludes that private meetings with issuers help certain investors make more informed trading decisions.<sup>114</sup> This study found that investors, particularly hedge funds who meet with management, trade in a more correlated fashion and display better timing ability.<sup>115</sup> Based on these findings it is not surprising that institutional investors, including funds and their advisers, seek to obtain information in private meetings with issuers.

Though Regulation FD is aimed primarily at issuers, recipients of selective disclosure, including Funds, their investment advisers, and other service providers should take precautions when communicating with issuers to ensure that they do not expose themselves to liability for aiding and abetting or causing an issuer’s Regulation FD violation. Moreover, even if they avoid entanglements with Regulation FD, they must still exercise caution so as not to incur insider trading liability based on their communications with issuers. These precautions should apply to all fund personnel including directors and officers as well as Fund service providers.

As noted above, the SEC has warned that recipients of selective disclosure could, in certain

circumstances, be charged with aiding and abetting or causing violations of Regulation FD. Shortly after Regulation FD was adopted, Division of Enforcement Director Richard H. Walker publicly stated that “conduct intended to threaten an issuer into revealing information may draw our attention” and “if the issuer succumbs to this kind of pressure and selectively discloses information to avoid economic harm, the issuer will have violated [Regulation] FD and the analyst may have caused or aided and abetted the issuer’s violation.”<sup>116</sup> Thus, Funds, investment advisers, or their personnel could incur aiding and abetting or causing liability by threatening to make negative recommendations or refusing to support a company’s stock unless the company selectively discloses material nonpublic information. The SEC may even view a well-timed reminder to company personnel that an adviser or analyst previously issued favorable recommendations about the company’s stock as an implied threat that might provide a basis for secondary liability if the issuer selectively discloses material nonpublic information.<sup>117</sup>

Of course, Funds and investment advisers may also incur aiding and abetting or causing liability for an issuer’s Regulation FD violations if they actively conspire with an issuer to have the issuer funnel to them material nonpublic information. The SEC Staff has warned that it would view as suspect comments by an analyst to an issuer along the lines of “you can tell me, the SEC will never find out.” Comments of this sort raise red flags and convey an intention by the analyst to induce the issuer’s violation of FD.<sup>118</sup> Although the SEC was speaking specifically about analysts, presumably the warning applies to all Fund and investment advisory personnel. Furthermore, attempts to selectively disclose or receive material nonpublic information by talking in code may also lead to direct and secondary violations of Regulation FD.<sup>119</sup>

Avoiding direct and secondary violations of Regulation FD is not enough. Recipients of material, nonpublic information (which could include Funds

and their service providers, investment advisers, and their personnel) must also be careful to comply with the prohibitions on insider trading. They should not assume that they are insulated from charges of insider trading when they receive material nonpublic information from issuers and trade on that information. “Liability for ‘tipping’ and insider trading under Rule 10b-5 may still exist if a selective disclosure is made in circumstances that meet the *Dirks* ‘personal benefit’ test.”<sup>120</sup> As previously discussed, to establish insider trading under the tipper-tippee framework, the tipper must have received a “personal benefit” for disclosing the information. Courts, however, have differed in their interpretations of what constitutes a “personal benefit.” Moreover, the Second Circuit has held that the government must prove that the tippee knew that the tipper disclosed confidential information in exchange for a personal benefit in order for the tippee to incur liability for insider trading.<sup>121</sup> The Supreme Court recently heard oral arguments in a case that could clarify the nature and type of personal benefit sufficient to establish insider trading,<sup>122</sup> but for the time being, it remains an uncertain area of the law. In addition, Funds, investment advisers, and their personnel must also be aware that if an issuer provides them with material nonpublic information pursuant to a confidentiality agreement, they should neither disclose nor trade on that information. Trading based on material nonpublic information received pursuant to a confidentiality agreement can result in insider trading liability because the confidentiality agreement creates a duty of trust and confidence with the source of the information.<sup>123</sup>

Funds, their investments advisers, and other service providers should address in their compliance policies and procedures the risks of insider trading and secondary liability for Regulation FD violations based on communications with issuers. They should consider including as part of their insider trading and Regulation FD compliance policies a requirement that analysts, portfolio managers, and others pre-clear participation in selective communications with issuers. The policies and procedures should

also direct personnel to avoid asking issuers questions that are reasonably likely to elicit the disclosure of material nonpublic information. It may also be advisable for compliance policies and procedures to require personnel questioning an issuers' officers, directors, and employees, either alone or in small groups, to begin the discussion by specifically asking them not disclose material nonpublic information. Under no circumstances should Funds, advisers, or their employees encourage an issuer to disclose material nonpublic information either through threats or promises of favorable treatment. An adviser should also consider requiring its personnel to consult with the compliance department immediately if they believe they have come into possession of material nonpublic information either through selective disclosure by an issuer or otherwise.

Advisers should annually review and revise as necessary their policies and procedures for compliance with insider trading laws and Regulation FD, as well as the implementation of those policies. An adviser should consider providing its employees with periodic training in insider trading and Regulation FD compliance. These policies and procedures also should apply to Fund directors and any employees of service providers that may communicate with issuers. Funds also should consider including in written agreements with third-party service providers provisions requiring the service providers to comply with insider trading laws and Regulation FD, and to refrain from sharing material nonpublic information regarding issuers with the Fund and its investment adviser. Finally, as noted above, agreements with Fund service providers usually should include provisions further prohibiting the service providers from disclosing confidential information about the Fund to any third party.

## H. Conclusion

Closed-End Funds, investment advisers, and their affiliates should consider the implications of Regulation FD on their operations, both as potential recipients and providers of material nonpublic

information. Closed End-Funds, investment advisers, and their affiliates should also evaluate whether their compliance policies and procedures adequately address potential Regulation FD issues and whether such policies and procedures need to be enhanced or revised to include safeguards to prevent such violations.

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This article is for general informational purposes only and does not constitute legal advice as to any particular set of facts.

### NOTES

*Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51716, 51717 (Aug. 24, 2000) [hereinafter *2000 Adopting Release*].

*Id.* at 51716.

17 CFR § 243.100.

<sup>1</sup>17 CFR § 243.101.

17 CFR § 243.102.

17 CFR § 243.103; *see also* *2000 Adopting Release*, <sup>2</sup>*supra*, at 51726.

<sup>3</sup>*2000 Adopting Release, supra*, at 51724.

<sup>4</sup>*Id.* at 51720 & n.34.

<sup>5</sup> “Executive Officer” is defined under 17 CFR § 240.3b-7 to “mean the president, any vice president in charge of a principal business unit, division or

<sup>7</sup>function (such as sales, administration or finance), any other

<sup>8</sup>officer who performs a policy making function, or any

<sup>9</sup>other person who performs similar policy making functions for the issuer.”

<sup>10</sup> 17 CFR § 243.101(f).

<sup>11</sup> *Regulation FD: Compliance and Disclosure Interpretations*, SEC [hereinafter *Regulation FD Guidance*] (response to Question 101.10), available at <https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm> (last updated June 4, 2010).

- 12 *Regulation FD Guidance, supra*, (response to Question  
101.10).
- 13 *2000 Adopting Release, supra*, at 51720 n.36.
- 14 *Id.* at 51720 n.36.
- 15 *Id.* at 51721.
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 *Id.* at 51719.
- 22 17 CFR § 243.100(b).
- 23 *See Regulation FD Guidance, supra* (response to  
Question 101.09).
- 24 *2000 Adopting Release, supra*, at 51720.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Id.* at 51720 & n.27.
- 29 *Id.* at 51720 n.27.
- 30 *Id.*
- 31 *Id.* at 51720.
- 32 *Id.* at 51720 & n.29.
- 33 *Id.* at 51720.
- 34 *Id.* at 51720 n.28.
- 35 *Regulation FD Guidance, supra* (response to Question  
101.11).
- 36 *Id.* (response to Question 101.05).
- 37 *2000 Adopting Release, supra*, at 51720 n.28.
- 38 *Regulation FD Guidance, supra*, (response to Question  
101.05).
- 39 *2000 Adopting Release, supra*, at 51720.
- 40 *Id.*
- 41 *Id.* at 51725.
- 42 *Id.*
- 43 *Id.*
- 44 *Id.* at 51720, 51725.
- 45 *Id.* at 51725 & n.82.
- 46 *Id.* at 51725 n.82.
- 47 *Id.* at 51725 n.80.
- 48 *Id.*
- 49 *Id.* at 51722.
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 *Id.*
- 55 *Id.* at 51723.
- 56 *Id.*
- 57 17 CFR § 243.101(e).
- 58 *2000 Adopting Release, supra*, at 51723.
- 59 *Id.*
- 60 *Regulation FD Guidance, supra* (response to Question  
102.02).
- 61 *2000 Adopting Release, supra*, at 51724.
- 62 *Commission Guidance on the Use of Company Web  
Sites*, 73 Fed. Reg. 45862, 45868 (Aug. 7, 2008)  
[hereinafter *2008 Website Disclosure Guidance*].
- 63 *2000 Adopting Release, supra*, at 51724.
- 64 *Id.*
- 65 *Id.*
- 66 *Id.*
- 67 *2008 Website Disclosure Guidance, supra*, at 45867.
- 68 *Id.*
- 69 *Id.*
- 70 *Id.*
- 71 *Id.*
- 72 *Id.*
- 73 *Id.* at 45868.
- 74 17 CFR § 243.101(b).
- 75 17 CFR § 243.101(c).
- 76 *See discussion supra* Section B.
- 77 17 CFR § 243.100(b)(2).
- 78 *Regulation FD Guidance, supra* (response to Question  
101.11).
- 79 *Id.*
- 80 *Id.*
- 81 *SEC v. Apuzzo*, 689 F.3d 204, 211 (2d Cir. 2012)  
(citing *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir.  
2009)). The knowledge element may be satisfied  
by recklessness on the part of the aider and abet-  
tor. Recklessness may be found if the aider and  
abettor “encountered ‘red flags,’ or ‘suspicious  
events creating reasons for doubts’ that should  
have alerted him to the improper conduct of the  
primary violator, or if there was a ‘danger ... so

- obvious that the [aider and abettor] ... must have been aware of the danger.” *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (*internal citations omitted*).
- <sup>82</sup> Exchange Act, Section 21C.
- <sup>83</sup> *Robert M. Fuller*, Release Nos. 33-8273, 34-48406, 80 S.E.C. Docket 2748 (Aug. 25, 2003).
- <sup>84</sup> *2000 Adopting Release*, *supra*, at 51720.
- <sup>85</sup> *2000 Adopting Release*, *supra*, at 51722.
- <sup>86</sup> *Regulation FD Guidance*, *supra* (response to Question 101.01).
- <sup>87</sup> *Id.*
- <sup>88</sup> *Id.* (response to Question 101.03).
- <sup>89</sup> *Id.*
- <sup>90</sup> *2000 Adopting Release*, *supra*, at 51721.
- <sup>91</sup> Richard H. Walker, “Regulation FD—An Enforcement Perspective,” Address Before the Compliance & Legal Division of the Securities Industry Association (Nov. 1, 2000), available at [www.sec.gov/news/speech/spcb415.htm](http://www.sec.gov/news/speech/spcb415.htm). Director Walker further warned that the Enforcement Division was interested in pursuing cases “against those who deliberately attempt to game the system either by speaking in code, or stepping over the line again and again, thus diminishing the credibility of a claim that their disclosures were non-intentional.” *Id.*
- <sup>92</sup> Complaint, *SEC v. Presstek, Inc. and Edward J. Marino*, 1:10-cv-10406 (D. Mass. Mar. 9, 2010).
- <sup>93</sup> *Former CEO of Presstek, Inc. Settles Regulation FD Charges*, Litigation Release No. 22369 (May 15, 2012), available at <https://www.sec.gov/litigation/litreleases/2012/lr22369.htm>.
- <sup>94</sup> *In re Secure Computing Corporation and John McNulty*, Exchange Act Release No. 46895 (Nov. 25, 2002), available at <https://www.sec.gov/litigation/admin/34-46895.htm>.
- <sup>95</sup> *In re Siebel Systems, Inc.*, Exchange Act Release No. 46896 (Nov. 25, 2002) available at <https://www.sec.gov/litigation/admin/34-46896.htm>.
- <sup>96</sup> *SEC Files Settled Cease-and-Desist Order Against Siebel Systems, Inc. Finding that It Violated Regulation FD; Siebel Systems, Inc. Also Agrees to Pay a \$250,000 Civil Penalty*, Litigation Release No. 17860 (Nov. 25, 2002), available at <https://www.sec.gov/litigation/litreleases/lr17860.htm>.
- <sup>97</sup> *SEC Charges Siebel Systems, Inc. with Second Violation of Regulation FD; Siebel’s CFO and Former Investor Relations Director Charged with Aiding and Abetting Violations; SEC Also Charges Siebel with Failing to Maintain Adequate Disclosure Controls and Procedures*, Litigation Release No. 18766 (June 29, 2004), available at <https://www.sec.gov/litigation/litreleases/lr18766.htm>; see also Complaint, *SEC v. Siebel Systems, Inc.*, 384 F.Supp.2d 694 (S.D.N.Y. 2005).
- <sup>98</sup> Exchange Act Rule 13a-15 requires the maintenance of controls and other procedures to ensure that information required to be disclosed in Exchange Act reports is processed and reported timely. 17 CFR § 240.13a-15.
- <sup>99</sup> *SEC v. Siebel Systems, Inc.*, 384 F.Supp.2d 694 (S.D.N.Y. 2005).
- <sup>100</sup> *SEC Files Settled Regulation FD Charges Against Flowserve Corporation, Its CEO, and Director of Investor Relations*, Litigation Release No. 19154 (Mar. 24, 2005), available at <https://www.sec.gov/litigation/litreleases/lr19154.htm>.
- <sup>101</sup> *In re Lawrence D. Polizzotto*, Exchange Act Release No. 70337 (Sept. 6, 2013), available at <https://www.sec.gov/litigation/admin/2013/34-70337.pdf>.
- <sup>102</sup> Press Release, “SEC Charges Former Vice President of Investor Relations With Violating Fair Disclosure Rules” (Sept. 6, 2013), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539799034>.
- <sup>103</sup> *2000 Adopting Release*, *supra*, at 51716.
- <sup>104</sup> *Id.* at 51721.
- <sup>105</sup> *Id.* at 51716.
- <sup>106</sup> *Dirks v. SEC*, 463 U.S. 646 (1983).
- <sup>107</sup> *Id.* at 662.
- <sup>108</sup> *2000 Adopting Release*, *supra*, at 51721.
- <sup>109</sup> *Written Statement Concerning Regulation FD Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Committee on Financial Services, United States House of Representatives* (May 17, 2001), available at <https://www.sec.gov/news/testimony/051701wssec.htm>.

- <sup>110</sup> 17 CFR § 243.102.
- <sup>111</sup> *2000 Adopting Release*, *supra*, at 51720, 51726.
- <sup>112</sup> 17 CFR § 243.100(b)(2)(i), (ii).
- <sup>113</sup> “Big US Investors Strive for Edge in Private CEO Meetings,” Reuters (July 11, 2016), available at <http://www.reuters.com/article/us-usa-companies-disclosures-idUSKCN0ZR211>; “Funds Testing Reg FD Limits in Private CEO Meetings, Ignites” (July 13, 2016).
- <sup>114</sup> *Id.*; “Funds Testing Reg FD Limits in Private CEO Meetings,” Ignites (July 13, 2016); David Solomon & Eugene Soltes, “What Are We Meeting For? The Consequences of Private Meetings with Investors” (Mar. 2015) [hereinafter “What Are We Meeting For?”], available at <http://poseidon01.srn.com/delivery.php?ID=543090115005100083075121098095089031000088051011052055098092020112029116031086096022038102053054023043125068122127073018120095105039082035013118031094027074009118042050053065079083011116112094067114001090012025074116093087101004125002126069017008064&EXT=pdf>.
- <sup>115</sup> “What Are We Meeting For?,” *supra*, at 34.
- <sup>116</sup> Richard H. Walker, “Regulation FD – An Enforcement Perspective,” Address Before the Compliance & Legal Division of the Securities Industry Association (Nov. 1, 2000), available at [www.sec.gov/news/speech/spch415.htm](http://www.sec.gov/news/speech/spch415.htm).
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.*
- <sup>119</sup> *Id.*
- <sup>120</sup> *2000 Adopting Release*, *supra*, at 51726.
- <sup>121</sup> *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).
- <sup>122</sup> *Salman v. United States*, No. 15-628 ( U.S., Dec. 2015).
- <sup>123</sup> *2000 Adopting Release*, *supra*, at 51720; 17 CFR § 240.10b5-2(b)(1).

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