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Regulation FD Will Result in Poorer Disclosure and Increased Market Volatility

I. INTRODUCTION

On April 27, 1999, a group of investors and an analyst from Credit Suisse First Boston ("CSFB") toured Compaq's headquarters.¹ One investor asked if it was true that sales for the quarter were weaker than expected.² A company representative affirmed the rumor.³ The CSFB analyst telephoned his key clients to give them the hot information about Compaq's expected quarterly earnings.⁴ The following morning, before most of Compaq's shareholders and analysts at other prestigious Wall Street firms received the projected earnings information, Compaq's share price fell sixteen percent.⁵ The Compaq share price drop led to an industry-wide drop in share price.⁶ In an effort to end this kind of selective disclosure and resultant unfair insider advantage, the Securities and Exchange Commission ("SEC") enacted Regulation FD (the "Regulation"), for "fair disclosure."⁷

The following Section briefly discusses securities regulation leading to the enactment of the Regulation.⁸ The Regulation is outlined and analyzed in Section III.⁹ Section IV discusses the impact of the Regulation.¹⁰ Finally, Section V concludes this article.¹¹

1. Susan Pulliam & Gary McWilliams, *Compaq Is Criticized for How It Disclosed PC Troubles*, WALL ST. J., Mar. 2, 1999, at C1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. Proposed Rule Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,591-92 (Dec. 28, 1999) (to be codified at 17 C.F.R. pts. 230, 240, 243, and 249).

8. *See infra* notes 12-20 and accompanying text.

9. *See infra* notes 21-175 and accompanying text.

10. *See infra* notes 176-244 and accompanying text.

11. *See infra* notes 245-251 and accompanying text.

II. HISTORY

The goal of securities legislation has always been the creation and maintenance of a fair market.¹² In the years directly preceding the market crashes of the late 1920s and early 1930s, investors both small and large purchased an aggregate of approximately fifty billion dollars in securities.¹³ About half of these securities were fraudulent and ultimately worth nothing.¹⁴ In the middle of the Great Depression, it was thought that the economy could not recover unless investors regained their confidence in the stock market.¹⁵ To restore investor confidence by providing government regulation, Congress passed the Securities Act of 1933 (the “‘33 Act”) and the Securities Exchange Act of 1934 (the “‘34 Act”).¹⁶

Regulation FD was proposed by the SEC on December 28, 1999.¹⁷ The comment period for the proposed regulation ended on March 29, 2000.¹⁸ On August 10, 2000, the SEC met to pass the final Regulation,¹⁹ which went into effect on October 23, 2000.²⁰

III. REGULATION FD

The Regulation (i) makes illegal (a) intentional²¹ dissemination of material,²² non-public²³ information by certain members of senior management of a reporting company²⁴ if the issuer does not contemporaneously make public disclosure of the information; and (b) failure to make public disclosure within twenty-four hours of information that a reporting company’s high level executive discovers has been inadvertently selectively disclosed;²⁵ (ii) resolves the split in case law created by the circuit courts regarding the scienter element of insider trading so that in order to be guilty of insider trading, a person must have traded “on the

12. See generally *infra* Sections III and IV and accompanying notes.

13. *Creation of the SEC*, at <http://www.sec.gov/asec/wwwsec.htm#create> (last modified Aug. 8, 2000).

14. *Id.*

15. *Id.*

16. *Id.*

17. Proposed Rule Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,590.

18. *Id.*

19. Kevin A. Hassett, *Outlaw Selective Disclosure? No, the More Information the Better*, WALL ST. J., Aug. 10, 2000, at A18.

20. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249).

21. See *infra* Section III(A)(3)(c) and accompanying notes.

22. See *infra* Section III(A)(3)(a) and accompanying notes.

23. See *infra* Section III(A)(3)(b) and accompanying notes.

24. See *infra* Section III(A)(2) and accompanying notes.

25. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see generally *infra* notes 113-120 and accompanying text.

basis of" insider knowledge;²⁶ and (iii) sets forth a three-factor test for determining when a duty of trust or confidence is owed by a person in a non-business relationship with the issuer.²⁷ Regulation FD does not create a private cause of action: only the SEC can bring an action to enforce the Regulation.²⁸ Registered offerings²⁹ and foreign issuers are exempted.³⁰ While the Regulation addresses both selective disclosure and insider trading law issues, most of the uproar in the securities community has been about ending selective disclosure.³¹

A. *Prohibition of Selective Disclosure*

1. Scope

The scope of the Regulation is designed to minimize the effects of the Regulation on communications in the issuer's ordinary course of business, communications between the issuer and the government, and disclosures to the media.³² The SEC concedes that although customers, suppliers, strategic partners of a company, news organizations, or government agencies could be holders of an issuer's securities, any use of selectively disclosed information by these parties would be an insider trading violation, regardless of the new law announced by the Regulation.³³ Therefore, issuer communications with these parties did not need to be covered by the Regulation.³⁴

a. *Covered persons*

The Regulation stated that, absent the showing of an exclusion,³⁵ selective disclosures may not be made to securities market professionals and their associated persons and, in certain situations, to holders of the issuer's

26. See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727-29; see generally *infra* notes 148-160 and accompanying text.

27. See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,729-31; see generally *infra* notes 168-175 and accompanying text.

28. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726.

29. *Id.* at 51,725 n.79-82.

30. *Id.* at 51,724-25.

31. See *infra* notes 176-193 and accompanying text.

32. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,724-25.

33. *Id.* at n.27.

34. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,724-25.

35. See *infra* Section III(A)(1)(c) and accompanying notes.

securities.³⁶ The Regulation applies to broker-dealers, investment advisers, some institutional investment managers, investment companies, and hedge funds and affiliated persons, including sell- and buy- side analysts and managers of large institutional investors.³⁷ The Regulation uses the definitions of these terms previously enacted into federal securities law,³⁸ with one exception.³⁹ The Regulation applies to other holders of an issuer's securities only if it is reasonably foreseeable that the other holder would purchase or sell securities based on the disclosure.⁴⁰

b. Issuers Subject to the Regulation

The Regulation applies to all issuers who have registered securities under Section Twelve of the '34 Act and all issuers who are required to file reports under Section 15(d) of the '34 Act. However, non-closed-end investment companies, foreign governments, and foreign private issuers are not subject to the Regulation.⁴¹ In the final draft of the Regulation, the SEC noted that foreign private issuers are required by self-reporting organization rules and policies to make timely disclosures of material information.⁴² Selective disclosure in connection with registered offerings and shelf offerings by issuers otherwise subject to the Regulation is not covered by the Regulation because relevant provisions of the '33 Act already curtail disclosures during the registration process.⁴³

c. Exclusions

The Regulation allows selective disclosure to broker-dealers, investment advisers, some institutional investment managers, investment companies, and hedge funds and affiliated persons, including sell- and buy- side analysts

36. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719-20.

37. *Id.* at 51,719.

38. *Id.* at 51,720 n.26.

39. The Investment Company Act of 1940 (the "Company Act") defines an "affiliated person" as (A) one who controls five percent of the voting securities of a company; (B) one who is five percent controlled by an investment company; (C) those under common control; (D) an officer, director, partner, copartner or employee of the person; (E) an investment advisor to an investment company; or (F) a depositor of an unincorporated investment company. Investment Company Act of 1940, 15 U.S.C. § 80a-2(3)(A)-(F) (2000). The Regulation narrowed the definition of "affiliated person" by eliminating (A) and (B) from the above definition. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 n.26.

40. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720.

41. *Id.* at 71,524.

42. *Id.* (citing NASDAQ Rules 4310(c)(16) and 4320(e)(14); and NYSE Listed Company Manual, § 2).

43. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,725-26. *See* Securities Act of 1933, 15 U.S.C. § 77e (2000).

and managers of large institutional investors in certain situations.⁴⁴ The first two exclusions apply to those who agree to keep information confidential.⁴⁵ The Regulation did not need to cover communications covered by the first two exclusions because insider trading laws already guard against misuse of information by those who have assumed a duty of confidence.⁴⁶

The first exclusion is for communications with “temporary insiders” such as attorneys, investment bankers, and accountants who owe the issuer a duty of trust or confidence when the communication is made.⁴⁷ The second exclusion applies to communications between the issuer and “any person who has expressly agree[d] to maintain the information in confidence.”⁴⁸ If the issuer and the recipient have a confidential relationship, but the issuer and an organization with which the recipient is involved do not, the Regulation will not be violated when selective disclosure is made to the individual, but not the organization, with whom the issuer enjoys a confidential relationship.⁴⁹ For example, suppose an issuer has a confidential relationship with a buy-side analyst for an investment banking firm.⁵⁰ If the issuer discloses information to the buy-side analyst, the issuer will not be deemed to have disclosed information to the investment bank generally or to other departments of the investment bank.⁵¹ Conversely, the confidential relationship with the buy-side analyst would not create a confidential relationship with the investment bank or other analysts in the investment bank.⁵² Therefore, if the issuer made a selective disclosure to a sell-side analyst on the basis of its confidential relationship with a buy-side analyst, the issuer would violate the Regulation.⁵³

The third exclusion covers selective disclosure to credit ratings organizations for the purpose of creating a publicly disclosed credit rating.⁵⁴ The SEC excluded these disclosures because the purpose of selective

44. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720.

45. *Id.*

46. *Id.* at 51,719.

47. *Id.* at 51,720.

48. *Id.* The agreement must be express, but it need not be written. *Id.* at n.28. Also, the issuer must secure the agreement before making the disclosure; however, an agreement obtained after disclosure but before the recipient discloses or trades on the basis of the information will be sufficient. *Id.* n.28.

49. *Id.* at n.29.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719.

disclosure to a ratings agency is to create public information.⁵⁵ Therefore, it is in the public interest to allow this flow of information to remain unhindered by the Regulation.⁵⁶

The fourth exclusion covers communications made in connection with a majority of offerings of securities registered under the '33 Act.⁵⁷ Communications in connection with public offerings are already closely regulated by Section Five of the '33 Act.⁵⁸

2. Issuer Persons Whose Communications Are Affected

The Regulation only governs communications from “persons acting on behalf of an issuer.”⁵⁹ While the proposed Regulation included in the definition of “person[s] acting on behalf of the issuer” all officers, directors, employees, and agents who disclosed material, non-public information “while acting within the scope of [their] authority,” the final draft of the Regulation narrows the scope of the Regulation.⁶⁰ Commenters within the legal community criticized the original definition as overly broad,⁶¹ but another commenter suggested the definition ought to be broader in order to prevent evasion.⁶² Yet another commenter suggested that the proposed definition would be acceptable only if the scope of the Regulation were limited to communications with analysts and institutional investors.⁶³ In response, the SEC changed the definition in the final draft of the Regulation.⁶⁴ The SEC’s goal in altering the definition of “persons acting on behalf of an issuer” was to ensure that the Regulation governs communications from senior management, investor relations personnel, and

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* Securities Act of 1933, 15 U.S.C. § 77e (2000).

59. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719.

60. *Id.* at 51,720.

61. *Id.* Comment letters from the American Bar Association, the American Corporate Counsel Association, and Cleary Gottlieb so criticized the proposed Regulation. *Id.* at n.31.

62. *Id.* PricewaterhouseCoopers suggested this change. *Id.* at n.32.

63. *Id.* The Business Roundtable made this suggestion. *Id.* at n.33.

64. *Id.*

others to whom market professionals and security holders look regularly⁶⁵ for company information.⁶⁶

In the final draft of the Regulation, the definition of “person acting on behalf of the issuer” included: (i) “any senior official of the issuer”;⁶⁷ or (ii) “any other officer, employee or agent of an issuer who regularly communicates” with any of the following persons: (a) broker, dealer, or anyone associated with a broker or dealer;⁶⁸ (b) investment advisor,⁶⁹ institutional investment manager⁷⁰ who filed a Form 13F⁷¹ “for the most recent quarter” ended before the disclosure,⁷² or any person associated with an investment advisor or an institutional investment advisor;⁷³ (c) investment

65. The Regulation provides some guidance as to what might be considered “regular” communication: the SEC states that the rule is meant to focus on “those whose job responsibilities include dealing with securities market professionals and security holders, acting in those capabilities.” *Id.* at n.36. The Regulation is not meant to cover communications from employees who do not and are not expected to communicate with market professionals. *Id.* For example, if an analyst sought out the store manager of a single retail franchise in a chain of stores owned by a company that the analyst was investigating, the store manager’s conversation with the analyst would not be covered by the Regulation. *Id.*

66. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720.

67. *Id.* “Senior officials” include directors, executive officers, investor or public relations officers, or those with similar functions. *Id.* With respect to closed-end investment companies, the Regulation applies also to senior officials of the issuer’s investment adviser. *Id.*

68. *Id.*; see also 17 C.F.R. § 243.100(b)(1)(i) (2000). The Regulation relies on the definition of these terms in Section 3(A) of the ‘34 Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000); and Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4)-(5) (2000).

69. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii). The Regulation relies on the definition given in Section 202(a)(11) of the Investment Advisers Act of 1940 (“Advisers Act”). Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000); and Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11) (2000).

70. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000). “Institutional investment manager” is defined in Section 13(f)(5) of the ‘34 Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000); and Securities Exchange Act of 1934, 15 U.S.C. § 78m(f)(5)(A) (2000).

71. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000). Subpart A of the ‘34 Act states that institutional investment managers who exercise discretion over accounts with an aggregate fair market value of at least \$100,000,000 on the “last trading day of any month of any calendar year” must file a report on Form 13F. 17 C.F.R. § 240.13f-1(a)(1) (2000). Reports on Form 13F are governed by Subpart D to the ‘34 Act. See 17 C.F.R. § 249.325 (2000).

72. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000).

73. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000). The Regulation uses the definition of “person associated with an investment adviser or institutional investment manager” given in Section 202(a)(17) of the Advisers Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; see also 17 C.F.R. § 243.100(b)(1)(ii) (2000); and 15 U.S.C. 80b-2(a)(17) (2000).

company⁷⁴ or affiliated person of an investment company;⁷⁵ or (d) issuer's security holder.⁷⁶ However, an issuer cannot evade the Regulation by directing an employee who is not otherwise covered by the Regulation to make a selective disclosure.⁷⁷ If a member of senior management were to direct a non-covered employee to make a selective disclosure, that member of senior management would be responsible for making the selective disclosure.⁷⁸ The SEC adopted as proposed the rule that an issuer would not be liable under the Regulation when an issuer employee made a selective disclosure in breach of a duty of non-disclosure to the issuer.⁷⁹

3. Definitions of key terms

a. "Material"

The Regulation did not alter the definition of "material" that has been established in securities case law.⁸⁰ Information as to a historical event is material if "there is a substantial likelihood that a reasonable investor would consider it important" when making an investment decision.⁸¹ If, in the view of a reasonable investor, the information would "significantly alter[] the 'total mix' of information," then it is material.⁸² With respect to prospective

74. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; *see also* 17 C.F.R. § 243.100(b)(1)(iii) (2000). The Regulation relies on the definition of "investment company" as used by Section 3 of the Company Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; *see also* 17 C.F.R. § 243.100(b)(1)(iii) (2000); and 15 U.S.C. § 80a-3(a)(1) (2000). However, the Regulation applies to those who are excepted from the definition of "investment company" by Sections 3(c)(1) and (7) of the Company Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; *see also* 17 C.F.R. § 243.100(b)(1)(iii) (2000); and 15 U.S.C. § 80a-3(a)(1) (2000).

75. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; *see also* 17 C.F.R. § 243.100(b)(1)(iii) (2000). "Affiliated person" is defined in Sections 2(a)(3)(C)-(F) of the Company Act. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; *see also* 17 C.F.R. § 243.100(b)(1)(ii) (2000); and 15 U.S.C. § 80a-2(a)(3)(C)-(F) (2000).

76. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720.

77. *Id.*

78. *Id.*

79. In other words, an issuer would not be liable under the Regulation if its employee improperly tipped. *Id.* However, the employee might still be liable under existing insider trading law and applicable law regarding controlling person liability. *See, e.g.,* Securities Exchange Act of 1934, 15 U.S.C. §§ 78t-1 and 78u-1 (2000); *see also generally* United States v. O'Hagan, 521 U.S. 642 (1997) (holding that a fiduciary is liable for insider trading when he trades on the basis of misappropriated material, non-public information).

80. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721; *see also, e.g., infra* notes 81-83 and accompanying text.

81. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721 (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); *see also* Securities Act Rule 405, 17 C.F.R. § 230.405 (2000); Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2 (2000); and Staff Accounting Bulletin No. 99 (Aug. 12, 1999), 64 Fed. Reg. 45,150 (defining materiality with respect to financial statement disclosures).

82. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721 (quoting TSC Industries,

or “soft” information, information is material if either the probability or the magnitude of the importance of the event is high.⁸³

Many commenters expressed opinions regarding the failure of the Regulation to define the term “material.”⁸⁴ Some commenters worried that an attempt to define materiality with respect to the Regulation would have implications in other areas of federal securities law.⁸⁵ Industry representatives, securities attorneys, and some issuers and issuer advocates claimed that using the materiality standard established by case law would cause difficulties for issuers.⁸⁶ The latter group of commenters expressed fears that issuer personnel, faced with the need to make real time judgments regarding the materiality of a disclosure (a task many attorneys would find daunting), would elect instead to make no disclosure at all.⁸⁷ These commenters predicted that the vagueness of the materiality standard would lead to litigation and a chilling effect on disclosure generally.⁸⁸ The SEC refused to give a bright-line test or to provide an exhaustive list of material communications.⁸⁹ The policy reason given for this refusal was that securities laws must be kept flexible so that enforcement of the laws can vary on a case by case basis.⁹⁰ Nevertheless, the Regulation contained a list of things that “should be reviewed carefully to determine” materiality.⁹¹ The

426 U.S. at 449).

83. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (holding that materiality for contingent or speculative events depends on a balancing of the probability of the event and the magnitude of the effect the event would have, considered in light of total company activity).

84. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721.

85. *Id.* The Regulation mentions specifically the Financial Executives Institute and the North American Securities Administrators Association.

86. *Id.* Specifically, the American Bar Association, the Association for Investment Management and Research, the Association of Publicly Traded Companies, Bank One, Cleary Gottlieb, Goldman Sachs, the Investment Company Institute, the New York City Bar Association, the Securities Industry Association, and Sullivan and Cromwell posed this criticism.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The SEC quotes the Supreme Court in this regard:

A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be over- or underinclusive.

Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988).

91. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721. The Regulation lists the following items:

(i) [e]arnings information; (ii) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (iii) new products or discoveries, or developments regarding customers

SEC noted that it “[did] not mean to imply that each of the[] items [listed] is per se material.”⁹²

The SEC specifically addressed earnings guidance communications with analysts.⁹³ An issuer who holds a private discussion with an analyst seeking earnings guidance “takes on a high degree of risk under [the Regulation],” regardless of whether the earnings are expected to be higher, lower, or equal to the analyst’s guess or whether the information is communicated explicitly or implicitly.⁹⁴

The Regulation foreclosed a loophole by which an issuer might have evaded the Regulation by breaking up material information into immaterial pieces for selective dissemination.⁹⁵ The Regulation specifically provided that an issuer would not be liable if he disclosed non-material information, even if the information, when taken together with other information in possession of the discloser, was material.⁹⁶ The materiality standard must be applied to the information actually disclosed, not to the significance of the information in the “total mix.”⁹⁷ The policy reason behind this allowance was that analysts play an important role in disseminating company information to the investing public by “sifting through and extracting information” whose importance would not be apparent to an ordinary investor.⁹⁸

The fact that an issuer uses a Form 8-K to disclose information will not be deemed an admission that the information contained in the filing is material.⁹⁹

or suppliers (e.g., the acquisition or loss of a contract); (iv) changes in control or in management; (v) change in auditors or auditor notification that the issuer may no longer rely on an auditor’s audit report; (vi) events regarding the issuer’s securities - e.g., 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 (vii) bankruptcies or receiverships.

92. *Id.* The SEC gives the example that certain new products or contracts might clearly be material to the issuer, but not all product developments and contracts are material.

93. *Id.*

94. *Id.*

95. *Id.* at 51,721-22.

96. *Id.* at 51,722.

97. *Id.* at 51,721.

98. *Id.* at 51,722.

99. *Id.* at 51,723; *see also infra* Section III(A)(3)(e)(i) and accompanying notes.

b. "Non-public"

Again, the Regulation does not vary from case law in defining "non-public."¹⁰⁰ Information that has not been disseminated so that it is available to investors generally is "non-public."¹⁰¹

c. "Intentional"

A person acts intentionally "only if the person knows, or is reckless in not knowing, that the information he or she is communicating is both material and non[-]public."¹⁰² The Regulation protects issuers by making the standard subjective.¹⁰³ Although some commenters¹⁰⁴ requested creation of a safe harbor provision "for good[] faith efforts to comply with [the] Regulation" or determinations regarding materiality, the SEC did not create a safe harbor.¹⁰⁵ The SEC noted that the Regulation "already provides greater flexibility" than other issuer provisions of federal securities laws regarding the timing of required disclosures in the event of a mistaken judgment.¹⁰⁶ Essentially, the mental state required for violation of the Regulation is that required for fraud.¹⁰⁷ With respect to fraud, federal courts have defined recklessness¹⁰⁸ so that "it is unlikely that issuers engaged in good[] faith efforts to comply with the [R]egulation will be considered to have acted recklessly."¹⁰⁹

100. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723; *see also, e.g., infra* note 101 and accompanying text.

101. *See Securities and Exch. Comm'n v. Texas Gulf Sulphur*, 401 F.2d 833, 854 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also generally* Investors Management Co., Exchange Act Release No. 34,9267, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,163 (July 29, 1971) (finding guilty of insider trading a defendant who traded on information privately transmitted to defendant from an investment banker).

102. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722.

103. *Id.* Issuers "need not fear being second-guessed by the Commission . . . for mistaken judgments about materiality . . ." *Id.*

104. *Id.* (citing comment letters of the American Society of Corporate Secretaries, the American Corporate Counsel Association, and J.P. Morgan).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991)); and *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977).

109. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722.

In response to comments received, the SEC emphasized in the final draft of the Regulation that an individual's failure to make a disclosure would not be regarded as intentional if the individual did not know that the information was both material and non-public.¹¹⁰ Thus, if a selective disclosure was due to a mistaken determination of immateriality, "liability [would] arise only if no reasonable person under the circumstances would have made the same determination."¹¹¹ Finally, the SEC noted that a pattern of "mistakes" as to materiality or of "unintentional" disclosures followed by a twenty-four hour time lag before public disclosure would "make less credible the claim that any particular disclosure was not intentional."¹¹²

d. "Prompt" Public Disclosure For Non-Intentional Selective Disclosures

The Regulation requires "prompt" public disclosure of a non-intentional selective disclosure.¹¹³ "Prompt" was defined in the Regulation to mean "as soon as reasonably practicable" after an issuer's senior official learns of the disclosure and knows, or is reckless in not knowing, that the disseminated information is both material and non-public, but not more than the later of twenty-four hours or commencement of "the next day's trading on the New York Stock Exchange" after the selective disclosure is made.¹¹⁴ During the comment period, the SEC received a variety of responses to the timing provision of the proposed Regulation.¹¹⁵ Some commenters thought the timing provision appropriate;¹¹⁶ others felt it too short;¹¹⁷ still others claimed the provision was too specific.¹¹⁸ In the final Regulation, the SEC disagreed with the latter commenters and stated its belief that a clear delineation is

110. *Id.*

111. *Id.* The SEC noted that circumstances play a large part in determining whether an illegal selective disclosure was made, saying, "We recognize, for example, that a materiality judgment that might be reckless in the context of a prepared written statement would not necessarily be reckless in the context of an impromptu answer to an unanticipated question." *Id.*

112. *Id.* at n.57.

113. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722.

114. *Id.* at 51,722-23. Language about the next trading day was added to the final Regulation to deal with non-intentional selective disclosures that are discovered on weekends or holidays. For example, if a senior official learns of a selective disclosure at six p.m. on Friday, public disclosure must be made before the beginning of trading on the New York Stock Exchange on Monday, not before six p.m. on Saturday. *Id.* at 51,723.

115. *Id.* at 51,722.

116. *Id.* (citing for example the letters of the Chicago Board Options Exchange and Gretchen Sprigg Wischart).

117. *Id.* (citing letters of Cleary Gottlieb, Credit Suisse First Boston, Emerson Electric, and Morgan Stanley Dean Witter).

118. *Id.* (citing letters of the American Bar Association, the American Corporate Counsel Association, the National Investor Relations Institute and PR Newswire). These commenters felt that a less stringent, "as soon as reasonably possible or practicable" standard was appropriate. *Id.*

better for both issuers and the investing public.¹¹⁹ The SEC felt that the twenty-four hour requirement “strikes the appropriate balance between achieving broad, non-exclusionary disclosure and permitting issuers time to determine how to respond after learning of the non-intentional selective disclosure.”¹²⁰

e. “Public Disclosure”

The Regulation does not narrowly define “public disclosure.”¹²¹ Instead, the Regulation attempts to ensure flexibility by allowing issuers to disseminate information using any of a variety of methods, including filing a Form 8-K,¹²² or “by any other non-exclusionary method or combination of methods of disclosure that is reasonably designed to provide broad public access,” such as allowing public access to conference calls and meetings in person or via telephone or internet.¹²³

i. Disclosure using Form 8-K

An issuer who wishes to use Form 8-K to comply with the Regulation may elect to “file” under Item Five or “furnish” the information under Item Nine.¹²⁴ The Regulation amended Item Five of the Form 8-K so that an Item Five filing will satisfy the requirements of the Regulation.¹²⁵ The Regulation also provided that, using Item Nine of the Form 8-K, an issuer might furnish information to the SEC and the investing public using a Form 8-K without filing the information.¹²⁶ The differences between filing under Item Five and furnishing under Item Nine are that: (i) information contained in “filings” under Item Five is (a) “subject to liability under Section Eighteen of the [‘34] Act,” and (b) “subject to automatic incorporation by reference into the issuer’s [‘33] Act registration statements, which are subject to liability under Sections 11 and 12(a)(2) of the [‘33] Act”; but (ii) information “furnished” under Item Nine is “not subject to liability under Section Eleven of the [‘33]

119. *Id.*

120. *Id.* at 51,722-23.

121. *See generally id.* at 51,723-24.

122. *See infra* Section III(A)(3)(e)(i) and accompanying notes.

123. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723; *see infra* Section III(A)(3)(e)(ii) and accompanying notes.

124. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723. The Regulation employs “file” and “furnish” as terms of art. *See infra* note 127 and accompanying text.

125. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723.

126. *Id.*

Act or Section Eighteen of the [‘34] Act,” unless the issuer includes the disclosure in a filed (as opposed to furnished) report, proxy statement, or registration statement.¹²⁷ All disclosures on Form 8-K, whether under Item Five or Item Nine, are “subject to the antifraud provisions of federal securities laws.”¹²⁸

Commenters expressed fears that disclosure on Form 8-K would be construed as an admission of materiality.¹²⁹ In response, the SEC provided in the final Regulation that “either filing or furnishing information on Form 8-K solely to satisfy [the Regulation] would not, by itself, be deemed an admission as to the materiality of the information.”¹³⁰

ii. Alternative methods of public disclosure

Issuers may employ any method of dissemination of information “reasonably designed” to ensure public disclosure.¹³¹ The SEC listed acceptable methods of disclosure¹³² and emphasized that an issuer could use any combination of methods to disseminate information.¹³³ The Regulation set forth a model for a planned disclosure.¹³⁴ Merely posting information to an issuer’s World Wide Web site would not be sufficient to comply with the Regulation.¹³⁵ The SEC also noted that a departure from an issuer’s usual method of dissemination of information could render the new method unreasonable.¹³⁶

127. *Id.*

128. *Id.*

129. *Id.* (citing for example letters of the American Corporate Counsel Association, the American Society of Corporate Secretaries, the Business Roundtable, Intel, and Dow Chemical).

130. *Id.*

131. *Id.*

132. *Id.* at 51,724. Acceptable methods included “press releases distributed through a widely circulated news or wire service, or announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephonic transmission, or by other electronic transmission (including use of the Internet).” *Id.* The Regulation states that “[t]he public must be given adequate notice of the conference or call and the means for accessing it.” *Id.*

133. *Id.*

134. *Id.* The model was a three-stage plan whereby first the information would be disclosed, then an announcement of a discussion of the information would be disclosed, and finally, the information would be publicly discussed. *Id.*

135. *Id.*

136. *Id.* For example, if an issuer usually disseminated quarterly earnings results in regular press releases but suddenly disclosed quarterly earnings in a last minute webcast, the SEC would “view skeptically [the] issuer’s claim” that there was “effective, broad, non-exclusionary public disclosure of the information.” *Id.*

4. Remedies

a. Who can pursue remedy for alleged violation of the Regulation

The Regulation was an issuer disclosure rule that created duties under Sections 13(a) and 15(d) of the '34 Act and Section 30 of the '40 Act.¹³⁷ The SEC emphasized that the Regulation was not an antifraud provision; nor was it "designed to create new duties under antifraud provisions of the federal securities laws or in private rights of action."¹³⁸ As such, there was no private cause of action implied by the Regulation.¹³⁹ Indeed, the Regulation was drafted to preclude 10b-5 actions that resulted solely from failure to comply with the Regulation.¹⁴⁰ Thus, only the SEC can bring an action for violation of the Regulation.¹⁴¹

b. Remedies

Violation of the Regulation would not render an issuer ineligible to use so-called "short" Forms S-2, S-3 or S-8.¹⁴² Also, issuers who violate the Regulation will still be permitted to resell controlled or restricted securities under Rule 144.¹⁴³

Failure to comply with the Regulation will render an issuer subject to an SEC enforcement action for violation of both the Regulation and Sections 13(a) or 15(d) of the '34 Act or Section 30 of the Company Act. The SEC might also "bring an administrative action seeking a cease-and-desist order, or a civil action seeking an injunction and/or civil money penalties."¹⁴⁴ When appropriate, the SEC could also bring an action against the individual(s) at the issuer responsible for the Regulation violation, either for

137. *Id.* at 51,726.

138. *Id.*

139. *Id.*

140. *Id.* Of course, if 10b-5 was otherwise violated, the fact that selective disclosure was incidentally involved in the 10b-5 violation would not preclude the 10b-5 action. *Id.*

141. *See infra* Section III(A)(4)(b) and accompanying notes.

142. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,725-26.

143. *Id.* at 51,725-26.

144. *Id.*

causing¹⁴⁵ or for aiding and abetting the violation.¹⁴⁶ The SEC stated that the severity of the sanctions sought would be directly proportional to the length of time in which an issuer was in violation of the Regulation.¹⁴⁷

B. Changes to Insider Trading Rules

1. Definitive Scienter Element to Insider Trading

In the final Regulation, the SEC discussed the historical importance of insider trading rules.¹⁴⁸ An unsettled issue of insider trading law had been the level of causal connection a prosecutor was required to show between a “trader’s possession of inside information and his . . . trading.”¹⁴⁹ The SEC had argued, in enforcement cases, that the standard of liability should be “trading while in ‘knowing possession’ of the information.”¹⁵⁰ The opposing view had been that a trader should not be exposed to liability unless it was shown that the trader “‘used’ the information for trading.”¹⁵¹ The Supreme Court had held previously that liability arose when a trader traded “on”¹⁵² or “on the basis of”¹⁵³ inside information, but the Court never addressed the “‘knowing possession’/‘use’” controversy.¹⁵⁴ Circuit Courts had split on the issue.¹⁵⁵ The Regulation resolved the ambiguity between “knowing

145. *Id.* (citing Securities Exchange Act of 1934, 15 U.S.C. § 78u-3).

146. *Id.* at 51,725 (citing Securities Exchange Act of 1934, 15 U.S.C. § 78t(e)).

147. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 n.91.

148. *Id.* at 51,727. The final Regulation states that prohibitions against insider trading in our securities laws play an essential role in maintaining the fairness, health, and integrity of our markets. We have long recognized that the fundamental unfairness of insider trading harms not only individual investors but also the very foundations of our markets, by undermining investor confidence in the integrity of the markets. Congress, by enacting two separate laws providing enhanced penalties for insider trading, has expressed its strong support for our insider trading enforcement program. [(citing Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264; Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677)]. And the Supreme Court in *United States v. O’Hagan* has recently endorsed a key component of insider trading law, the “misappropriation” theory, as consistent with the “animating purpose” of the federal securities laws: “to insure honest securities markets and thereby promote investor confidence.” *United States v. O’Hagan*, 521 U.S. 642, 658 (1997).

149. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727.

150. *Id.*

151. *Id.*

152. See *Dirks v. SEC*, 463 U.S. 646, 654 (1983).

153. See *O’Hagan*, 521 U.S. at 651-52.

154. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727.

155. *Id.* (citing for comparison *United States v. Teicher*, 987 F.2d 112, 120-21 (2d Cir.), *cert. denied*, 510 U.S. 976 (1993) (employing a “knowing possession” standard); *SEC v. Adler*, 137 F.3d 1325, 1337 (11th Cir. 1998) (announcing a median standard whereby “use” must be shown, but proof of possession gives rise to an inference of use); and *United States v. Smith*, 155 F.3d 1051, 1069 (9th Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999) (holding that “use” must be shown in a

possession” and “use”: the Regulation created an absolute “awareness” standard based on knowing possession of inside information.¹⁵⁶

Additionally, the Regulation defines “on the basis of” inside information to mean that “[a] trade is on the basis of material[,] non[-]public information if the trader was aware of the material, non[-]public information when the person made the purchase or sale.”¹⁵⁷ The SEC stated that this “awareness standard” “reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information.”¹⁵⁸ The SEC also felt that this standard “provides greater clarity and certainty than a presumption or ‘strong inference’ approach.”¹⁵⁹ The SEC noted that “aware” “is a commonly used and well-defined English word, meaning ‘having knowledge; conscious; cognizant.’”¹⁶⁰

2. Creation of Affirmative Defenses to Insider Trading

The Regulation created several affirmative defenses to a charge of insider trading.¹⁶¹ The objective of these defenses is to provide an affirmative defense to those who can show that inside information was not a factor in their trading decisions.¹⁶²

First, a purchase would not be considered to be “on the basis of” inside information if the person who made the purchase or sale could demonstrate that before he became aware of the inside information, he “(1) [e]ntered into a binding contract to purchase or sell the security[;] (2) [i]nstructed another person to purchase or sell the security for the instructing person’s account[;] or (3) [a]dopted a written plan for trading securities.”¹⁶³ The Regulation closely defined the terms “pursuant to a contract, instruction, or plan”; “amount”; “price”; and “date.”¹⁶⁴ For example, someone would not be guilty of insider trading who set forth in writing a plan of trading or exercise of

criminal case)).

156. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at n.105.

161. *Id.* at 51,727.

162. *Id.* at 51,728.

163. *Id.* at 51,737; *see also* 17 C.F.R. § 240.10b5-1(c)(1)(A)(1-3) (2000).

164. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,728; *see also* 17 C.F.R. § 240.10b5-1(c)(1) (2000).

employee stock options and gave that plan to an agent, instructing the agent to trade based on the plan, but later, before the trades were consummated, became aware of inside information.¹⁶⁵

Second, the Regulation set forth an affirmative defense whereby a person

other than a natural person . . . [might] demonstrate that a purchase or sale of securities [was] not “on the basis of” material non[-]public information if the person demonstrate[d] that: (i) the individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and (ii) [that] person had implemented reasonable policies and procedures . . . to ensure that individuals making investment decisions would not violate [insider trading laws].”¹⁶⁶

For example, a brokerage firm would not be guilty of insider trading if someone in the firm knew the inside information, but another employee of the firm made a trading decision, so long as there was a “Chinese wall” separating the two employees.¹⁶⁷

3. Existence of Certain Relationships Makes a Person a Per Se Constructive Insider

The Regulation resolved a split in case law that produced an anomalous result.¹⁶⁸ The SEC noted that in all of the instances described below, “the trader’s informational advantage stems from ‘contrivance, not luck,’ and the information disadvantage to other investors ‘cannot be overcome with research or skill.’”¹⁶⁹ Previously, a family member who was a “tippee” as defined in *Dirks v. SEC* violated Rule 10b-5,¹⁷⁰ as did a family member who traded in breach of an express promise of confidentiality.¹⁷¹ However, a family member who traded in breach of a reasonable expectation of confidentiality did not violate Rule 10b-5.¹⁷² The Regulation created a duty of trust or confidence (i) as a result of express agreement; (ii) where there existed a history, pattern, or practice of sharing confidences; and (iii) between spouses, parents, children, and siblings.¹⁷³ The SEC stated that the

165. See 17 C.F.R. § 240.10b5-1(c)(1)(iii) (2000).

166. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,728; see also 17 C.F.R. § 240.10b5-1(c)(2)(i-ii) (2000).

167. See 17 C.F.R. § 240.10b5-1(c)(2)(i-ii) (2000).

168. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,729.

169. *Id.* at 51,729 (quoting *O’Hagan*, 521 U.S. at 658-59).

170. See generally *Dirks*, 463 U.S. at 646.

171. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,729.

172. *Id.*

173. *Id.* at 51,730.

relationships described in (i) and (ii) above could arise between any people, including step-siblings and domestic partners.¹⁷⁴ The reason that only spousal, parental, and sibling relationships were singled out for specific enumeration in the Regulation was that “most instances of insider trading between or among family members involve spouses, parents and children, or siblings.”¹⁷⁵

IV. IMPACT

A. *Conjectured Impact Prior To Effectivity*

During the comment period, nearly six thousand groups and individuals commented on the proposed regulation to the SEC.¹⁷⁶ Opinion varied widely.¹⁷⁷ Small investors lauded the proposed regulation, claiming that it would level the playing field.¹⁷⁸ Armed with all the latest news about a company, investors would be able to make their own decisions, freed from the tyranny of favored Wall Street analysts and publications.¹⁷⁹ Small investors would be empowered to jump off a sinking ship before steorage was flooded: they wouldn't be forced to sit helplessly watching the price of a stock crash, wondering if it was a market blip or a reaction to information other people had.¹⁸⁰

Analysts, industry insiders, and securities attorneys darkly predicted a number of apocalyptic outcomes of the proposed regulation.¹⁸¹ Industry professionals feared that the ban on selective disclosure, long an integral element of Wall Street relationships between issuers and analysts on one side and the press on the other side, would have a chilling effect on

174. *Id.*

175. *Id.*

176. *Id.* at 51,717.

177. E.g. Hasset, *supra* note 19; and Robert J. Shiller, *Outlaw Selective Disclosure? Yes, Markets Must be Fair*, WALL ST. J., Aug. 10, 2000, at A18.

178. The Motley Fool, *Victorious Disclosure*, DALLAS MORNING NEWS, Aug. 28, 2000, at 4D.

179. See Bill Barnhart, *Fair Disclosure Rule Dilutes Analyst Advantage*, CHI. TRIB., Aug. 20, 2000, at 3.

180. See Jeff Brown, *Investors In the Know: SEC's Full-Disclosure Regulation Aims to Level the Playing Field for Regular Folks*, CHI. TRIB., Sept. 7, 2000, at 3.

181. Michael Schroeder and Randall Smith, *Disclosure Rule Cleared By the SEC – Wall Street Firms Say Fairness Issue Skirted*, WALL ST. J., Aug. 11, 2000, at C1; see also *Criticism of Reg. FD Continues – Disclosure Regulation Needs More Work, Trade Organizations Say*, INVESTOR REL. BUS., Sept. 11, 2000; Rick Appin, *SEC's Fair Disclosure Regulation Controversial for HY Market*, HIGH YIELD REP., Sept. 19, 2000.

information.¹⁸² If companies could no longer selectively disclose, they would not disclose at all.¹⁸³ Additionally, it was suggested that the Regulation would lead to market volatility.¹⁸⁴ Small investors, lacking educational backgrounds in finance and frequently lacking a complete understanding of markets and securities generally,¹⁸⁵ would react quickly and drastically to information that was, in actuality, innocuous.

Since the Regulation was enacted, companies have changed their policies in anticipation of the Regulation's effectiveness.¹⁸⁶ Some companies, typically those in the technology industry, have moved to webcast their conference calls.¹⁸⁷ This approach has been criticized, however.¹⁸⁸ Not all investors are savvy enough to take advantage of Internet-based dissemination of information.¹⁸⁹ This criticism is without force, however, because there will always be some investors who will not have the means to instantly access a particular method of dissemination of information, whether by press release, World Wide Web site publication, or SEC filing.¹⁹⁰ A stronger criticism is that these webcasted conference calls will not be the same as the private conference calls.¹⁹¹ Instead, these

182. See Kris Frieswick, *Information For All – Will Companies Clam Up?*, CFO, THE MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, Sept. 1, 2000, at 22; see also Matt Roush, *Public Companies Can't Inform Only Favored Analysts*, CRAIN'S DETROIT BUS., Sept. 11, 2000, at 7; and *Healthcare IR Communication In the New Age of Fair Disclosure*, HEALTHCARE PR & MARKETING NEWS, Sept. 14, 2000.

183. A recent survey conducted by the National Investor Relations Institute indicated that forty-two percent of the companies surveyed "will probably limit communication practices," and additional twelve percent said "they would limit their practices 'significantly'" in response to the Regulation. Shareholder.com, *NIRI Survey Finds Adoption of Regulation Full Disclosure Likely to Limit Amount of Information Disclosed To Market Participants*, available at <http://www.niri.org/publications/alerts/EA080800.cfm> (last visited Oct. 2, 2000).

184. Thomas Coyle, A "Pleasant Surprise" On Earnings?, UPSIDE TODAY, Sept. 14, 2000, available at 2000 WL 4725763.

185. See Holman W. Jenkins, Jr., *Business World: Smart Investors Let Others Do the Work*, WALL ST. J., Aug. 16, 2000, at A23.

186. See Healthcare PR & Mktg. News, *supra* note 182; see also, e.g., Joseph Weber, *Full Disclosure For All: The Web Allows Corporations To Share Information Quickly and Cheaply*, BUSINESS WEEK, Sept. 18, 2000, at 106 (outlining American Home Products Corp.'s new corporate policy with respect to disclosure of vital corporate news).

187. Weber, *supra* note 186.

188. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723.

189. See Sam Ali, *New Disclosure Rule Eludes Low-Tech Investors*, STAR-LEDGER (Newark, N.J.), Sept. 6, 2000, at 25 (reporting the filing of a lawsuit by the American Association of Retired Persons (the "AARP") against the SEC, charging that the Regulation does not protect investors who are unable to use the Internet).

190. *Id.* An SEC spokesperson addressed the AARP's concerns in a statement in the article.

191. Investor Relations Business, *supra* note 181.

conference calls will be little more than scripted statements.¹⁹² Certainly, analysts may ask questions, but the company might simply refuse to answer.¹⁹³

B. *The First Year Post-Effectivity*

1. Less Quantity and Quality of Disclosure Since Effectivity

As discussed above, prior to the Regulation's becoming effective, both commenters and media alike anticipated that the Regulation would have a chilling effect on companies' disclosure.¹⁹⁴ This fear has been realized to some extent. United Airlines ("United") claims that before the Regulation was enacted, United "gave out more information than other airlines."¹⁹⁵ However, United has used the Regulation as an excuse to stop disclosing any information the Regulation does not require.¹⁹⁶ Similarly, before the Regulation, Sears Roebuck ("Sears") "would give [analysts] sales estimates, credit, gross-margin trends. They were very explicit about it."¹⁹⁷ After the Regulation went into effect, Sears "clammed up for the fourth quarter, and there [was] almost [no earnings guidance] for the next year."¹⁹⁸ On the other hand, some mutual fund firms have reacted to the Regulation by increasing the size of their research teams, worrying that "companies [will release] a lot of unimportant information just so they won't have to worry about saying the wrong thing."¹⁹⁹

Anecdotal evidence supports this uneasiness.²⁰⁰ "Conference calls are laden with arcane questions, chock-a-block full of statistics and minutiae so inside-baseball that 'your eyes glaze over'," reported one analyst.²⁰¹ Another

192. Weber, *supra* note 186.

193. Dennis Taylor, *SEC Brewing Rules That Could Affect Disclosure*, PUGET SOUND BUS. J., Mar. 17, 2000, at 31A.

194. See *supra*, Section IV(A) and accompanying notes; see also *supra* notes 86-88 and accompanying text.

195. Robert McGough & Cassell Bryan-Low, *Analysts' Earnings Estimates Are Diverging, and SEC Disclosure Rule May Be the Reason*, WALL ST. J., Nov. 2, 2000, at C2.

196. *Id.*

197. *Id.* (quoting Michael Exstein, a retail analyst at CSFB).

198. *Id.*

199. Allison Bisbey Colter, *Fund Firms Strengthen Research Teams*, WALL ST. J., Jan. 2, 2001, at C19.

200. See *infra* notes 201-207 and accompanying text.

201. Jeff D. Opdyke, *Individuals Pick Up on Conference Calls*, WALL ST. J., Nov. 20, 2000, at C1 (quoting Denise Farkas, a partner at Spero-Smith Investment Advisers).

complained that “instead of asking ‘big strategic questions’ in . . . conference calls, . . . she now has ‘to ask dumb questions about tweaking the tax rate by [twenty] basis points.’”²⁰² Conference calls have consistently run past the time allotted for them because executives discuss “corporate trivia” for hours on end.²⁰³ The reason for this is that “corporate investor-relations officials worry that answering what sounds like a simple question will constitute an SEC violation, because nearly everything a company does can affect earnings estimates.”²⁰⁴ Thus, although “there has been a dramatic increase in telephone and webcast conference calls open to the public and analysts alike,”²⁰⁵ the quality of the information disseminated has decreased as the quantity has increased. Everything may affect earnings estimates, but the information is meaningless to many small investors.²⁰⁶ Small investors were admonished in one Wall Street Journal article to draw conclusions based upon the investors’ determination of whether the “analysts sound[ed] really concerned about something.”²⁰⁷ The goal of the Regulation was to level the playing field.²⁰⁸ It is difficult to comprehend how, by requiring small investors to go from benefiting from analysts’ reports to attempting to guess if analysts “sound really concerned,” the playing field has been leveled.

2. Share Price Volatility Has Resulted

Additionally, as commenters and the media feared,²⁰⁹ the Regulation has resulted in greater volatility of share prices. Analysts’ estimates have varied more since effectivity of the Regulation because analysts use less information and more inferences in creating their estimates.²¹⁰ As a result, the estimates, already greatly varied, may be completely erroneous, resulting in share prices reacting first to each earnings forecast and then to the actual

202. Jeff D. Opdyke & Emily Nelson, *Conference Call Crunch: New SEC Rule Turns Analysts’ Rite into a Hectic Affair*, WALL. ST. J., Oct. 31, 2000, at C1 (quoting Heather May Murren, a Merrill Lynch consumer products analyst).

203. *Id.*

204. Miriam Hill, *New Rule Aims To Keep Investors In the Know But Wall Street Analysts Wonder How It Will Affect Their Work*, CHI. TRIB., Nov. 21, 2000, at 3.

205. Andrew Leckey, *Investors May Choose Better As Word Gets Out*, CHI. TRIB., Nov. 4, 2000, at 1.

206. See Opdyke, *supra* note 201.

207. *Id.*

208. See Arthur Levitt, Opening Statement at the Open Meeting on Regulation Fair Disclosure, Aug. 10, 2000, available at <http://www.sec.gov/news/extra/seldisal.htm>.

209. See Section IV(A), *supra* and accompanying notes.

210. See Hill, *supra* note 204.

earnings news from the company.²¹¹ Additionally, volatility may be caused by insiders trading on news that is not inside information but also is not subject to wide disclosure.²¹²

Gateway's share price performance this fall illustrates this volatility.²¹³ First, Wit Soundview downgraded Gateway, and the share price slid.²¹⁴ Gateway responded that "[they were] confident that [their] sales . . . [were] ramping at expected levels."²¹⁵ Nine days later, the company announced that "dismal Thanksgiving sales would cause fourth-quarter earnings to be [forty percent] less than expected, and the chill descending on consumer purchases of personal computers would hammer next year's sales, too."²¹⁶ In response, Gateway's share price fell thirty-six percent.²¹⁷

3. Predictions in early 2001

The Regulation will likely have a large impact on the market. For example, on September 22, 2000, Intel's shares dropped twenty-two percent, based on the chip-maker's warning that revenues would be weaker than anticipated.²¹⁸ Intel had previously put in place policies compliant with the Regulation, before the Regulation went into effect.²¹⁹ In the past, Intel might have arranged for a narrower circulation of the news, which would have enabled company insiders, key investors, and clients of favored analysts to get out before the share price plunged.

In the short term, the Regulation will result in market volatility, as the Intel and Gateway stories illustrate.²²⁰ Securities attorneys will profit from the increased guidance required by their clients.²²¹ To be on the safe side,

211. *Id.*

212. See Cassell Bryan-Low, *SEC Weighs Electronic Filing of Insider Trades To Help Push the System Into the Internet Age*, WALL ST. J., Nov. 8, 2000, at C1.

213. See Greg Ip, *Stocks Pay Price For Firms' Excessive Optimism: More Profit Reversals Could Undermine the Market Further*, WALL ST. J., Dec. 4, 2000, at C1.

214. *Id.*

215. *Id.* (quoting John Todd, Chief Financial Officer of Gateway).

216. *Id.*

217. *Id.*

218. Molly Williams and Robert McGough, *Intel's Jolt Shows Shifts in Market's Dynamics - New Disclosure Rules Mean More Legwork Ahead For Analysts*, WALL ST. J., Sept. 25, 2000, at C1.

219. *Id.*

220. See *supra* notes 213-219 and accompanying text.

221. Ellen L. Rosen, *FD's Aftermath: Busy Lawyers*, NAT'L L.J., Aug. 28, 2000, at B1.

companies will likely avoid making any disclosures.²²² Instead of reacting to analyst leaks and expectations statements, as well as earnings announcements, prices will react only to earnings announcements.

In the long term, however, the Regulation will be just one more hoop for reporting companies to jump through. As securities attorneys observe enforcement of the Regulation and read No-Action Letters and Releases relating to the Regulation, they will devise ways their clients can avoid both compliance with goals of the Regulation and enforcement actions for violating the Regulation. Nearly seventy years of securities legislation has shown that there is no magic law that will level the playing field. Moreover, the ineffectiveness of this law due to failure to create a private cause of action or to ban violators from using a short form in future registrations²²³ ensures that the only parties to benefit from the Regulation will be securities lawyers. As a National Law Journal article wittily suggested, the Regulation ought to have been called FE, for “full employment” for securities attorneys, due to the amount of attorney time required to determine whether each disclosure is adequately made.²²⁴

However, the long term future of the Regulation is in doubt. In the beginning of 2001, Arthur Levitt, chairman of the SEC during the Clinton administration, agreed to step down to clear the way for President Bush to appoint his own SEC chairman.²²⁵ The Regulation was Levitt’s baby²²⁶ and opposed by many in the securities industry.²²⁷ As early as November 10, 2000, attendees at a Securities Industry Association convention speculated that, if Bush were elected and Levitt stepped down, the Regulation would be rolled back.²²⁸

C. *One Year Later*²²⁹

1. The Unger Report

On April 24, 2001, Laura Unger, then acting chairman of the SEC, convened four separate panels of issuers, analysts, investors, and information disseminators to discuss their experiences to date with the

222. See *supra* notes 86-88 and accompanying text.

223. See *supra* Section III(A)(4)(b) and accompanying notes.

224. Rosen, *supra* note 221.

225. Michael Schroeder, *SEC Chief’s Valediction: Beware Of the Investment World’s Pitfalls*, WALL ST. J., Jan. 17, 2001, at C1.

226. See *id.*; see also Levitt, *supra* note 208.

227. See *supra*, Section IV(A) and accompanying notes.

228. *Looking Ahead*, WALL ST. J., November 10, 2000, at C16.

229. The sections discussing the Unger Report and the new corporate disclosure rules were added in March 2002, one year after the rest of the article was drafted.

Regulation.²³⁰ The result of these roundtables, as reported in Commissioner Unger's report, are that the SEC should (i) provide more guidance regarding the materiality standard; (ii) "make it easier for issuers to use technology to satisfy" the Regulation; and (iii) listen to what issuers are saying about the effect of the Regulation.²³¹ Of these three issues, the last tracks most closely with the predicted impact of the Regulation. The early anecdotal evidence summarized above was born out in the report: Polly Pearson, Vice President of Global Investors Relations of EMC Corp., in a statement representative of other issuers who attended the Roundtable, said,

[W]hat [the Regulation] is doing is it is throwing [investors and analysts] in the arms of the absolute worst spokesperson for good communication about your shares, i.e., a random salesperson for that company. So what we are having happen is sell side analysts might just unearth a random salesperson and ask them how the quarter is or ask them how margins are, or "Hey, did you do much golfing this quarter?" Anything they can do to get a pulse on the quarter. And that elevates volatility.

Or sell side might do a survey of 50 people and say it represents our whole business, and it is erroneous data based on a subset of the world, whereas if they asked the corporate office, we could give them a much more thoughtful answer. So the perception of reality of Reg FD means corporations might be clamming up; therefore, go find a random employee and have them spill their guts. And it is one of our ongoing biggest challenges is how to train our salespeople, "Don't talk to investors about the company, send them to us."²³²

The confusion reported by issuers is made less troubling for companies by the SEC's reticence to bring any cases for violations of the Regulation.²³³ However, "issuers and their corporate counsel have taken little comfort from

230. COMM'NR LAURA S. UNGER, SPECIAL STUDY: REGULATION FAIR DISCLOSURE REVISITED, December 2001, at <http://www.sec.gov/news/studies/regfdstudy.htm> [hereinafter "Unger Report"]

231. *Id.*

232. Transcript of Regulation FD Roundtable, Alexander Hamilton U.S. Customs House Auditorium, New York, New York, April 24, 2001, available at <http://www.sec.gov/news/studies/regfdconf.txt> [hereinafter "Transcript"].

233. Unger Report, *supra* note 230.

the [SEC]'s assurance at the Roundtable and in subsequent public statements that they would only authorize cases of clear-cut violations involving unquestionably material information."²³⁴

2. Enron Fallout

In the months following Enron's meltdown,²³⁵ many have recused themselves from the investigation into Enron's demise, including Attorney General John Ashcroft, whose department will investigate the Enron players for criminal wrongdoing.²³⁶ SEC Chairman Harvey Pitt is not among the ranks of a senator²³⁷ and several attorneys general recusing themselves from Enron investigations. This is facially logical: those who have recused themselves, together with the majority of congressmen and senators and the President, received campaign contributions from Enron.²³⁸ Chairman Pitt came from twenty years of private practice at Fried Frank Harris Shriver & Jacobson to the SEC, so there are not any campaign contributions about which to worry.²³⁹ However, in those decades of practice, Chairman Pitt did legal work for Arthur Andersen, Enron's auditor, as well as a wide array of big corporations and investment banks.²⁴⁰ Legal ethics prevent Chairman Pitt from using the information he gained while serving those clients in the private sector,²⁴¹ but the recent miasma of distrust pervading Washington will provide a breeding ground for suspicions that Chairman Pitt is using information gained in private practice every time the SEC opens an investigation or brings an enforcement action. As one New York securities lawyer described it, "'It's impossible to see Harvey Pitt as anything but Prometheus bound. Pitt is shackled to a rock, and the harpies are going to come and pick his guts out.'"²⁴²

234. *Id.*

235. For a summary of the Enron debacle, see Peter Coy et al., *Enron: Running on Empty*, BUS. WK., Dec. 10, 2001, at 80.

236. Robert O'Harrow Jr. & Jackie Spinner, *Enron Witness Points to Lay; Lawmakers Told of 'Fundamental Default of Leadership'*, WASH. POST, Feb. 5, 2002, at A-1.

237. Mitch Frank, *The [Enron] Spillover: Can Lawmakers Now Afford To Be Obstacles To Reform?*, TIME MAG., Feb. 4, 2002, at 33 (reporting Sen. Phil Gramm's recusal); see also *National Briefing Enron: One Down, How Many To Go?*, AM. POL. NETWORK, THE HOTLINE, Jan. 16, 2002, at 1 (reporting recusals by Texas Attorney General John Cornyn and the entire Attorney General's staff in Houston and mentioning Attorney General John Ashcroft's recusal).

238. See *supra* note 237 and accompanying text.

239. Gary Weiss, *Special Report: The Enron Scandal: COMMENTARY: A Regulator with His Own Conflicts of Interest*, BUS. WK., Feb. 4, 2002, at 39.

240. *Id.*

241. *Id.*

242. *Id.* (quoting Bill Singer).

Recently, Prometheus attempted to fight off the harpies: on February 13, 2002, Chairman Pitt announced his intent to change corporate disclosure rules to improve financial reporting and disclosure.²⁴³ The new disclosure rules include provisions to:

- Provide accelerated reporting by companies of transactions by company insiders in company securities, including transactions with the company;
- Accelerate filing by companies of their quarterly and annual reports;
- Expand the list of significant events requiring current disclosure on existing Form 8-K. Such events could include changes in rating agency decisions, obligations that are not currently disclosed and lock-out periods affecting employee stock-ownership plans;
- Add a requirement that public companies post their Exchange Act reports on their web sites at the same time they are filed with the SEC; and
- Require disclosure of critical accounting policies in Management's Discussion and Analysis of Financial Condition and Results of Operations, contained in annual reports.²⁴⁴

At first blush, the rules, which appear tailored to preventing another company exactly like Enron from doing exactly what Enron did, seem beneficial. However, the rules, as they stand in proposed form, are subject to some of the same criticisms offered against Regulation FD: these new rules will *also* increase market volatility, for exactly the same reasons. Inexperienced, unsophisticated investors will overreact to a company's releasing any of the information listed in the press release, thinking they are holding securities in another Enron. Given Chairman Pitt's rush to create more, rather than fewer, disclosure regulations, it seems unlikely that the hope of a year ago, that a Republican SEC would rescind Regulation FD, will be realized.

243. Press Release, U.S. Securities and Exch. Comm'n, SEC To Propose New Corporate Disclosure Rules (Feb. 13, 2002), *available at* <http://www.sec.gov/news/headlines/corpdiscrules.htm>.

244. *Id.*

V. CONCLUSION

Regulation FD attempted to provide a level playing field by requiring issuers to publicly disclose any information they privately disclose.²⁴⁵ It has resulted in confusion among issuers as to how to avoid investigation or enforcement actions by the SEC;²⁴⁶ a glut of information, mostly useless;²⁴⁷ an increased skill level in the gamesmanship of analysts;²⁴⁸ and, without doubt or need for anecdotal evidence, higher legal bills.²⁴⁹ It seems that the only thing that has changed is the amount of securities regulation operating on American markets. The investors are no better off; the analysts are no worse off; the lawyers are the only ones who may have benefited. Although the author is personally in favor of lawyers benefiting,²⁵⁰ it is difficult to see how a regulation that does nothing other than increase paperwork, red tape, and legal fees fulfills the SEC's mission to protect investors and maintain market efficiency. The existence of the new corporate disclosure rules appears to close the door on any potential rescission of the Regulation.²⁵¹ For good or ill, it appears Regulation FD is here to stay.

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245. Section III, *supra*, and accompanying notes.

246. See Transcript, *supra* note 232 and accompanying text.

247. See *supra* notes 201-207 and accompanying text.

248. See Transcript, *supra* note 232 and accompanying text.

249. See Rosen, *supra* note 221 (joking about the "full employment" aspect of the Regulation).

250. See *infra* note 252.

251. See *supra* note 243.

252. J.D. Candidate, Pepperdine University School of Law 2002. The author would like to thank Thomas G. Bost, professor at Pepperdine University School of Law, for his help and support in writing this article, and Andrew Nagel of Kirkland & Ellis for suggesting the topic.