



Fundamentals of Investor Relations

January 13-14, 2020 | Newport Beach, CA



CORPORATE DISCLOSURES: ISSUES AND BEST PRACTICES

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January 13, 2020

Overview

- Principal Securities Laws and Filings
- Materiality
- Duty to Disclose
- Forward-Looking Information and Safe Harbors
- Regulation G and Non-GAAP Financial Measures
- Regulation FD

DISCLAIMER: The information contained herein or discussed during this session should not be relied upon as legal advice or regarded as a substitute for detailed advice in individual cases. The services of a competent professional adviser should be obtained in each instance so that the applicability of the relevant statutes or other legal developments to the particular facts can be verified.



PRINCIPAL SECURITIES LAWS AND FILINGS

Principal Federal Securities Statutes

- Securities Act of 1933 (33 Act) and Securities Exchange Act of 1934 (34 Act) serve as the bedrock of New Deal capital market reform legislation following the 1929 market crash.
- Replaced “buyer beware” framework with mandated transparency
- Substantial amendments to the 33 Act and the 34 Act following corporate scandals of the early 2000’s and credit and economic crisis of 2008.
 - Sarbanes-Oxley Act of 2002, commonly referred to as “SOX”
 - Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, commonly referred to as Dodd-Frank
- Modernization of regulations

Overview of the 33 Act and 34 Act

33 Act

Regulates the Primary Market:

- Offers and sales of securities
 - By issuers
 - By stockholders
- Registration of offerings
- Exempt transactions

34 Act

Regulates the Secondary Market:

- Creates SEC
- Ongoing public disclosure requirements
- Regulation of stock exchanges
- Regulation of broker-dealers

Statutes' aim is to remedy abuses with "full and fair disclosure" policy



MATERIALITY

Materiality: Pervasive and Elusive

Pervasive	Elusive
<ul style="list-style-type: none">• Requirements for registration statement, reports filed with the Commission, and proxy statements.• Securities Act<ul style="list-style-type: none">• Section 11• Section 12 (a)(2)• Section 17 (a)• Securities Exchange Act<ul style="list-style-type: none">• Rule 10b-5• Section 18• All of the implied civil liabilities	<p>"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But <i>I know it when I see it</i>, and the motion picture involved in this case is not that." (emphasis added)</p> <p>Justice Potter Stewart, concurring opinion in <u>Jacobellis v. Ohio</u> 378 U.S. 184 (1964).</p>

Materiality: “Defined”

- Information is “material” if a **reasonable investor** would consider it **important** in making an investment decision or if the information would significantly alter the “**total mix**” of information available
 - Material Misstatements
 - Material Omissions
- “The rule is clear – it is its application which is so difficult.”
 - Professor Homer Kripke

General Guidelines

- Fact-specific determination (No bright-line rules)
- View statements in context, not in vacuum
- No exception for lack of knowledge
- Prospective Events - Balance Probability with Magnitude
- SEC mandated disclosure is presumptively material
- Quantitative and Qualitative factors

Examples

- Earnings or other financial information
- Developments regarding material mergers, acquisitions, joint ventures, dispositions of assets, etc.
- Events regarding the company's securities (such as defaults, redemptions, stock splits, changes to the rights of security holders)
- Changes in directors and executive officers
- A change in auditors
- Defaults or covenant issues under a debt agreement
- Developments related to material refinancing, capital raising activities
- Material misstatements in prior reported financials
- Others

Materiality

Question: What about ESG Disclosures?



DUTY TO DISCLOSE

Philosophy

- “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

- Louis Brandeis

- “There cannot be honest markets without honest publicity.”

– SEC v. Texas Gulf Sulphur

General Duty to Disclose

- Absent a disclosure obligation, the general rule is that companies have no duty to disclose material nonpublic information
- ***Express sources:***
 - Companies are subject to mandatory disclosure obligations pursuant to which the timing, form and content is set by SEC rules (e.g., 10-Ks, 10-Qs, 8-Ks, proxy statements, etc.)
 - Rules of listing exchanges (e.g., NYSE, NASDAQ)
- ***Implicit source:***
 - Disclose or Abstain Rule: Companies and their officers, directors and other “insiders” in the possession of material non-public information must either abstain from trading in the securities or disclose that information before making any trades.

Duty Not to Mislead

- ***Duty to Make Accurate Disclosures***
 - A company that discloses material information to the public voluntarily or pursuant to a disclosure obligation must do so truthfully and accurately (*i.e.*, must avoid material misstatements)
- ***Duty to Make Complete Disclosures***
 - A company cannot make partial, misleading disclosures that omit material facts that render the statements misleading (*i.e.*, must avoid material omissions)
- Disclosures containing material misstatements or omissions “reasonably calculated to influence investors” can give rise to Rule 10b-5 liability

Duty to Correct

- Companies have a duty to correct prior statements of historical fact that were false or misleading when made
- Duty to correct differs from the duty to update
 - Duty to correct typically applies only to statements of historical or “hard” fact that were false or misleading when made
 - In contrast, the duty to update typically applies only to forward-looking statements

Duty to Update

- Companies, may, in some circumstances, have a duty to update prior statements that were true when made, but have become misleading in light of new developments
 - Applies to forward-looking statements containing an implicit representation that remains “alive” in investors’ minds
 - Companies should keep forward-looking statements general, include cautionary language and disclaim obligation to update

Responding to Market Rumors & Statements by Third Parties

- Generally, companies are under no Duty to Correct statements by third parties, unless the company has adopted the statements or become entangled in the statements.
- Federal securities laws generally do not require a company to respond to market rumors or unusual trading in their stock, unless the company created the rumor.
- However, NYSE and NASDAQ listing requirements state that listed companies should investigate unusual trading and be positioned to confirm or deny market rumors.

Quiz: Name That Duty!



FORWARD- LOOKING INFORMATION

Forward-Looking Information

- General – Written and Oral Statements
 - Private Securities Litigation Reform Act of 1995 creates statutory “safe harbor” for certain forward-looking information
 - Forward-looking information includes:
 - projections of earnings, revenues or other financial information;
 - statements regarding management’s plans and goals for future operations, including new products and services; and
 - any statement regarding future financial performance, including those contained in a discussion and analysis of financial condition by management

Forward-Looking Information

- General – Written and Oral Statements (cont'd)
 - The safe harbor requires:
 - The information be **identified as forward-looking** and
 - **Be accompanied by meaningful cautionary statements identifying important factors that would cause actual results to differ materially from those in the forward-looking statement**
 - Cautionary statements should be specific and disclose relevant information that will inform investors of the risks

Forward-Looking Information

Key Takeaway Points:

- Identify forward-looking information
- “Accompany” forward-looking information with meaningful cautionary statements
- Update cautionary statements to include relevant risks
- Disclose material assumptions underlying forward-looking statements and related risks
- Distinguish between “historical” and “forward-looking” statements



REGULATION G AND NON-GAAP FINANCIAL MEASURES

Regulation G and Non-GAAP Financial Measures

- Reg. G and Item 10(e) of Reg. S-K govern the use of non-GAAP financial measures in public disclosures and documents filed or furnished to the SEC
- Reg. G applies when:
 - There is a public disclosure
 - Made by the registrant or someone acting on its behalf
 - That includes material information
 - That includes “non-GAAP financial measures”

Regulation G and Non-GAAP Financial Measures

- “Non-GAAP financial measures” are numerical measures (historical or future) of financial performance, financial performance or cash flows that:
 - Exclude (or makes adjustments that exclude) amounts that are included in the most directly comparable measure presented in accordance with GAAP in an income statement, balance sheet or cash flows
 - Include (or makes adjustments that include amounts) that are excluded in the most directly comparable measure presented in accordance with GAAP

Regulation G and Non-GAAP Financial Measures

- Common examples of “non-GAAP financial measures” include:
 - EBITDA and Adjusted EBITDA
 - Adjusted revenues
 - Adjusted operating income
 - Free cash flow
 - “Constant currency”
 - Funds from operations
- Examples of disclosures that are not considered to be “non-GAAP financial measures”

Regulation G and Non-GAAP Financial Measures

- Some key principles include:
 - GAAP measures must be presented with “equal or greater prominence”
 - Reconciliation to the most directly comparable measure calculated and presented in accordance with GAAP
 - Consistency from period to period
 - Need to describe the basis for the presentation
 - Cannot use GAAP similar names; must identify as “non-GAAP”



REGULATION FD

Overview

- Regulation Fair Disclosure (Regulation FD) generally prohibits the selective disclosure of material, nonpublic information to analysts and other persons

Persons Acting on Issuer's Behalf; Recipients

- Regulation FD covers disclosures by an issuer or a person acting on an issuer's behalf, including:
 - Any senior corporate official
 - Any officer, employee or agent of the company who regularly communicates with market professionals or company shareholders
 - Investor relations professionals
- Regulation FD covers disclosures made to those who would reasonably be expected to trade on the information or provide others with advice about the company's securities
- Practical Advice: Adopt a company policy setting forth your investor communications practices

Intentional Disclosures

- If the selective disclosure is “intentional,” the company must publicly disclose the same information before or simultaneously
- “Intentional” means the company or the person acting on its behalf making the disclosure either knows, or is reckless in not knowing, prior to making the disclosure, that the information is both material and nonpublic
- A disclosure may be intentional whether or not the person making the disclosure had initially planned to make the disclosure

Non-intentional Disclosures

- If the selective disclosure is “non-intentional,” the company must publicly disclose the same information promptly
- “Promptly” means as soon as reasonably practicable after a senior company official learns of the non-intentional selective disclosure that the official knows, or should know, is both material and nonpublic
- The public disclosure must occur before the later of:
 - 24 hours after the non-intentional selective disclosure
 - the commencement of the next day’s trading

How to “Publicly Disclose”

- Reg. FD compliant disclosure must be broad-based and non-exclusionary.
 - Form 8-K’s and other methods
- Examples of insufficient methods of public disclosure:
 - Shareholder meetings
 - Press presence at an otherwise nonpublic meeting
- Considerations for conference calls

Considerations for Websites and Social Media

- Posting information on a company website may not by itself be considered a sufficient method of public disclosure
- 2008 SEC interpretive release discussed relevant factors
- Social Media and SEC Guidance

Guidance on Earnings

- An official will likely violate Regulation FD if he or she selectively communicates information about earnings to analysts
 - This is true whether the information is communicated expressly or through indirect “guidance”
- Avoid confirming a forecast the company has given in the past
 - This may convey additional material nonpublic information.
- Adopting a consistently followed policy

Mosaic Theory

- If a company discloses a piece of information to an analyst, and that analyst, by some combination of skill, industry knowledge and insight, is able to use the information to complete a mosaic of information that, taken together, reveals material information about the company, the initial immaterial disclosure will not then be rendered material.

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Stephen Cooke is a partner in the Securities and Capital Markets practice group of Paul Hastings and concentrates his practice in securities and corporate law. His experience in all aspects of the capital formation process includes issuer and underwriter representations in public offerings, private placements, venture capital financings and Rule 144 transactions. Mr. Cooke has substantial experience in mergers, acquisitions, business combinations and other transactions involving public and private companies.

Mr. Cooke represents NYSE, Nasdaq and OTC-traded companies. He regularly advises boards of directors of public and private companies regarding corporate governance issues, including the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Recent Representations

- **Several Issuers** in their initial public offerings and listings on NASDAQ
- **NYSE Listed Issuer** in two common stock offerings and one senior convertible note offering
- **NASDAQ Listed Issuer** in two secondary offerings, the monetization of its largest shareholder, and four senior note private placements to institutional investors
- **Public Company borrower** in \$245 million senior credit facility
- **Issuer** in \$425 million private share repurchase
- **Issuer** in follow-on public offering
- **Issuer** in Rule 144A notes offering
- **Issuer** in 144A private placement of asset-backed notes

Speaking Engagements and Publications

- Frequent speaker to business and professional groups including for the National Investor Relations Institute, the largest professional investor relations association in the world

Professional and Community Involvement

- Lecturer, The Paul Merage School of Business, University of California Irvine (MBA - Board Governance)
- Lecturer, University of California Irvine School of Law (Business Principles for Lawyers)
- Served as the chairman of the Board and as general counsel for the Orange County Chapter of the American Red Cross

Education

- University of California at Los Angeles School of Law, J.D., 1985
- University of California Los Angeles, M.B.A., 1985
- University of California Davis, A.B., 1980

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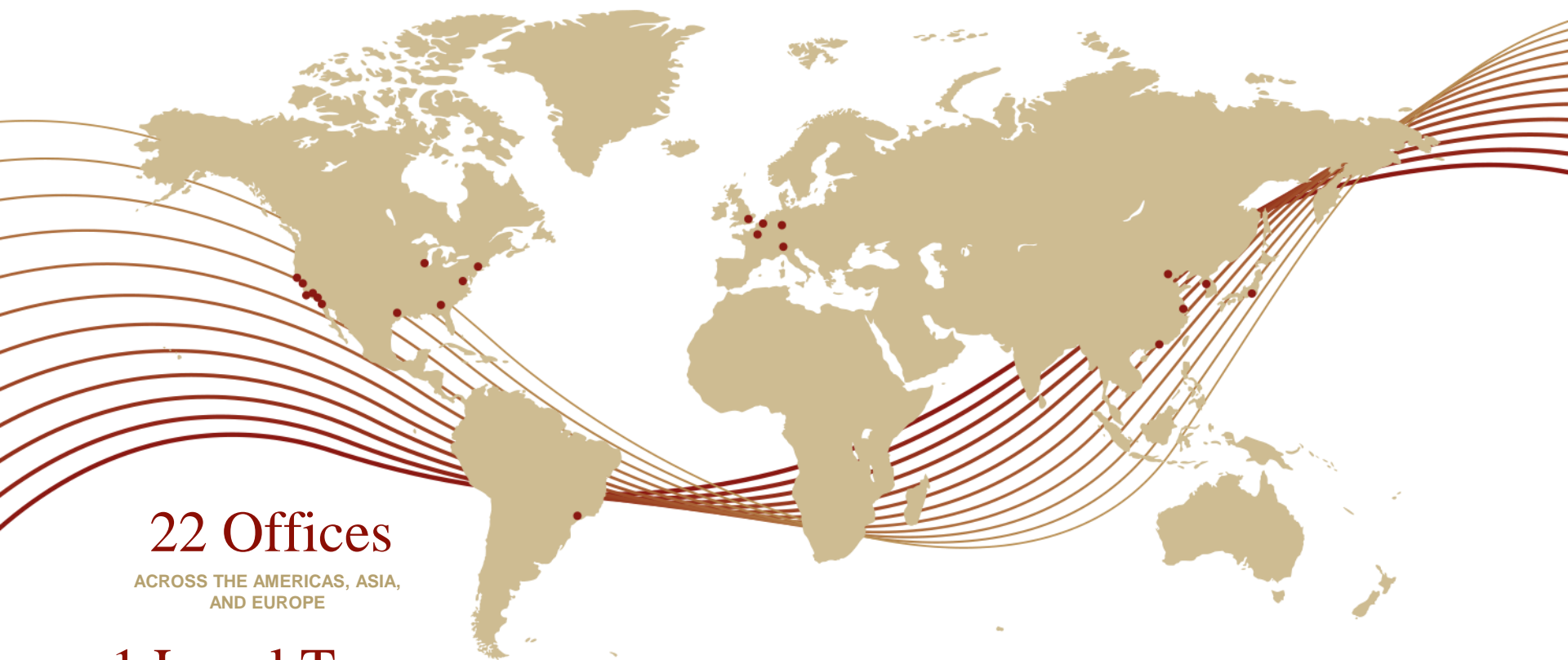
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