# Standards of Practice for Investor Relations

**DISCLOSURE**

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APPROVED BY THE NIRI BOARD OF DIRECTORS, MARCH 2014 (UPDATED SEPTEMBER 2016)

# 1. Introduction and Statement of Purpose

The National Investor Relations Institute's Working Group on Disclosure and the NIRI Board of Directors recommend that U.S. public companies review and adopt these voluntary disclosure recommendations.

Disclosure must be a core competency in the practice of investor relations. As the "gatekeeper" of all public disclosures, the investor relations (IR) practitioner must have a working knowledge of disclosure concepts, securities regulations, and court decisions that shape what information is disclosed, when, how, and to whom. The IR practitioner must at all times know what information has been disclosed to the public and what information remains nonpublic. For that reason the IR practitioner has often been referred to as the chief disclosure officer.

The purpose of these voluntary guidelines is to provide IR practitioners with a practical, working document designed to reflect current best practices in all forms of disclosure. The Working Group intended these voluntary standards to be unambiguous (to both new and experienced IR practitioners), reasonable, and fair.

NIRI began setting standards for the investor relations profession in 1996 with the Standards and Guidance for Disclosure, and continued with a 1998 edition, renamed the Standards of Practice for Investor Relations, followed by the 2001 and 2004 editions. Now, thousands of investor relations and other corporate executives use this reference for guidance on disclosure and interaction with analysts and investors. It is also a popular reference for securities lawyers.

In 2012, NIRI released a revised set of guidelines to replace the 2004 edition and reflect innovations in best practices, including the U.S. Securities and Exchange Commission's (SEC) guidance on website disclosure, social media compliance concepts, and recent case law. In March 2014, NIRI released this updated disclosure volume that includes new information on the disclosure of cybersecurity risks and conflict minerals, the SEC guidance on the use of social media for investor communications, and other regulatory developments.

NIRI wishes to acknowledge the contribution of the attorneys who have authored and updated chapters of this document: Brian V. Breheny, Skadden, Arps, Slate, Meagher & Flom LLP; Stephen Cooke and Michael Zuppone, Paul Hastings LLP; Brent Fassett, Cooley LLP; Andrew Moore, Perkins Coie LLP; Lawrence Levin and Mark Reyes, Katten Muchin Rosenman LLP; and Frank Zarb and Charles Lee, Proskauer Rose LLP. These attorneys are committed to working with NIRI on any necessary future updates to ensure the standards remain current.

These guidelines represent one component of NIRI's broader series of Standards of Practice for Investor Relations documents that are available on the NIRI website: (www.niri.org/StandardsofPractice.aspx). Additional guidance on disclosure issues can be found in NIRI's Regulations Library (https://www.niri.org/advocacy/regulations).

# 2. Working Group on Disclosure

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# 3. The Investor Relations Practitioner as “Chief Disclosure Officer”

NIRI defines investor relations as: “a strategic management responsibility that integrates finance, communication, marketing, and securities law compliance to enable the most effective two-way communication between a company, the financial community, and other constituencies, which ultimately contributes to a company’s securities achieving fair valuation.”

Communications excellence in the form of complete, consistent disclosure can yield strategic benefits including strengthened credibility, reputation, brand, and ultimately fair valuation. Positioned at the nexus of internal and external communications, IR practitioners have a unique opportunity to positively influence corporate transparency for the benefit of their companies and, ultimately, their shareholders.

Today’s IR practitioner must have a comprehensive understanding of disclosure, including:

- **Disclosure concepts –** Materiality, duty to update, etc.
- **SEC statutes and regulations that require disclosure –** Implicit disclosure obligations that arise from the provisions of the Securities Act of 1933; required/mandatory filings required by the Securities Exchange Act of 1934 that are triggered by certain corporate actions (including a company trading its own stock), or periodic filings such as the Forms 10-Q or 10-K; and disclosures required in the specific circumstances of Regulation Fair Disclosure (FD), Form 8-K, and Regulation G or by legal precedent (such as correcting a statement made previously that is now known to be false).
- **Voluntary disclosures –** Day-to-day communications with investors including earnings conference calls/webcasts, participating in investment conferences, one-on-one discussions with investors, sustainability reporting, etc.

To effectively represent the company to the investment community, the IR practitioner must also have a “seat at the table,” which means full access to senior management and familiarity with the company’s strategic direction. This includes extensive knowledge about the company’s strategy, budgets, forecasts, and corporate actions under consideration. This “need to know” equips the IR practitioner with information to speak authoritatively and credibly about the company’s current and future prospects.

The IR practitioner must also be familiar with the content of the company’s disclosures. This enhances the IR practitioner’s effectiveness on behalf of the company and shareholders by encouraging transparency while guarding against inadvertent or unauthorized disclosure of material, nonpublic information. In the case of unauthorized or inadvertent disclosure, the IR practitioner, in partnership with legal counsel, recommends necessary corrective action.

Credibility is earned. The IR practitioner must demonstrate knowledge of the company and its industry, and provide accurate and complete information to all investors on a timely basis.

# 4. Disclosure Concepts and Theories

*Author: Brent Fassett, Cooley LLP*

Before reviewing the rules and regulations governing the disclosure of information by public companies, it is important to gain an understanding of the basic concepts and theories that form the foundation of this topic. Unfortunately, there are not many "bright lines" to help IR practitioners in this area, but experience, knowledge of the company, and good legal counsel will help build expertise and guide sound IR practice.

## GOALS

IR practitioners should consider first the goals of disclosure. Obviously, compliance with applicable rules and regulations is an important goal. However, IR practitioners should view the primary goal of disclosure as informing investors and potential investors about a company's business and strategy, financial results, and prospects. Properly done, disclosure can add value for a company's stockholders by highlighting successes and it can limit the downside of negative news by placing the news in perspective and allowing management to inform the public regarding strategies to address negative results or news. A third goal of disclosure is to avoid liability from stockholder lawsuits by providing the public with a fair and balanced presentation of the material information about a company's results and prospects in the appropriate forum.

## MATERIALITY

Corporations must continually identify the information they desire or are required to publicly release and determine how and when to release that information. The first step in making a disclosure decision with respect to a certain piece of information is to understand if that piece of information is "material" to the company.

In determining whether facts are material, a company should apply the legal definition of materiality adopted by the *U.S. Supreme Court in TSC Industries Inc. v. Northway Inc.* as the standard for materiality for actions under SEC Rule 10b-5 (antifraud provisions), which has been stated as follows:

> *There must be a substantial likelihood that the disclosure of an omitted fact would have been viewed by the reasonable investor as having significantly altered the "total" mix of information made available.*

The Court further developed the following definition of materiality:

> *Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.*

Materiality issues can arise in connection with prospective or contingent events or developments. In making a decision about materiality, an IR practitioner must balance the probability that the event or development will occur with the magnitude of the event or development in light of the totality of company activity. For example, discussions of a possible large acquisition are likely to have a high magnitude if the acquisition is completed, but the probability may be low because the two parties have not entered into definitive agreements and there are still unsettled terms. In most cases, the pending acquisition would not be required to be disclosed until the probability was, or at least close to, 100 percent.

Materiality, in the world of corporate disclosure, should be viewed from the perspective of anyone making an investment recommendation or decision, not merely a decision to trade securities. For example, an analyst will consider such information in the context of making an investment recommendation, which may or may not result in a trade. The internal test should be "If I am an investor, would this information make me want to buy or sell our stock?"

In considering materiality, IR practitioners must also be sensitive to considerations of magnitude and directional shifts. For example, changing an element of forward-looking financial guidance by one cent or by one percent may seem innocuous on its face. But IR practitioners must be aware of the broader context of such moves. Does the change represent a directional shift to a long-term trend? Or does it mean that the specific financial element moves from a positive to a negative figure, or vice versa? IR practitioners must not be hesitant to voice their opinions regarding the need for disclosure in challenging materiality scenarios.

There are few "bright lines" from a legal standpoint to assist in determining what information is material and what is not. The SEC and courts have been careful to avoid bright line rules regarding materiality, instead placing the burden on the company to make determinations given their knowledge of the circumstances. However, in Regulation FD, the SEC provided a list of the types of information or events that should be carefully reviewed to determine whether they are material. The SEC cautioned that the list is not "exhaustive" but includes the following:

1. earnings information;
2. mergers, acquisitions, tender offers, joint ventures or changes in assets;
3. new products or discoveries, or developments regarding customers or suppliers (e.g., the acquisition or loss of a contract);
4. changes in control or management;
5. change in auditors or auditor's notification that the issuer may no longer rely on an auditor's audit report;

6. 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
7. bankruptcies or receiverships.

If the information being discussed is in one of these categories, an IR practitioner is well advised to suggest disclosure unless there is very clear evidence that the information is truly, completely unimportant to the public. For information that does not fall into these categories, judgment on the part of the IR practitioner and other members of management is required. Courts have repeatedly rejected a bright line test for materiality, such as whether a data trend was "statistically significant" — so practitioners should be careful to consider each disclosure situation on its own merits.

The adoption of new Form 8-K requirements (in 2004) expanded the list of what is required to be disclosed. Again, this list should not be considered an exhaustive list, but it gives a good idea of what areas should at least give rise to disclosure obligations, if only because these items require an 8-K filing within days of the event.

1. Entry into a material definitive agreement (or a material amendment of a material definitive agreement).
2. Termination of a material definitive agreement (unless expires on stated termination date).
3. Bankruptcy or receivership (same as 7. on previous page).
4. Completion of acquisition or disposition of assets.
5. Results of operations and financial condition.
6. Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement.
7. Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement.
8. Costs associated with exit or disposal activities.
9. Material impairments.
10. Notice of delisting or failure to satisfy a continued listing rule or standard/or a transfer of listing.
11. Unregistered sales of equity securities.

12. Material modification to rights of security holders.
13. Changes in certifying accountant.
14. Non-reliance on previously issued financial statements.
15. Non-reliance on previously issued audit report or completed interim review.
16. Changes in control.
17. Departure of a director as a result of a disagreement or removal for cause.
18. Any other departure of a director or any departure of a principal officer.
19. Appointment of a new principal officer.
20. Election of a new director other than by shareholder vote.
21. Amendments to the company's articles of incorporation or bylaws other than by shareholder vote.
22. Changes in fiscal year other than by shareholder vote.
23. Temporary suspension of trading under the company's employee benefit plans.
24. Amendments to the company's code of ethics or waiver of a provision of the code of ethics.
25. Change in shell company status.
26. Events related to asset-backed securities.
27. Information required to be disclosed by Regulation FD.
28. Certain other events, financial statements, and exhibits.

SEC Staff Accounting Bulletin (SAB) 99 (http://www.sec.gov/interps/account/sab99.htm), issued in August 1999, also discusses issues related to materiality and provides, among other things, that movement in a company's stock price may be evidence of materiality and that quantitative information, in addition to qualitative information, may also be material. Some contend that SAB 99 expands the definition of materiality by suggesting that stock price movement may be evidence of materiality and therefore, from the standpoint of SEC enforcement of Regulation FD, unusual stock price movement around a time a company held a private meeting with analysts and/or investors could be a red flag. From a prospective view, if the information is likely to move the stock price, it should be considered material.

The process of determining the materiality of information is made even more difficult by the fact that company officials often have little time for deliberation, particularly in voluntary disclosure situations such as meetings with analysts. For example, a company official may disclose information that analysts believe is material in response to questions during a meeting with analysts or investors even though the company does not view the information as material. The company must then promptly determine whether it has made an inadvertent disclosure of material, nonpublic information required to be disclosed under Regulation FD. This underscores the extreme importance that the IR practitioner, or someone who also knows the content of the company's disclosures, be present in all senior management meetings with analysts and investors.

Determining the materiality of information is clearly an area where judgment and experience are of great value. Consultation with inside and outside legal counsel can be an important aid in making a materiality determination. In some instances, courts and the SEC have given greater latitude to materiality decisions, even if they are wrong in hindsight or when viewed by a third party, if a company has sought legal counsel in making the determination. In addition to examining information in the context of the legal definition of materiality, one should use good judgment, and if it is a borderline decision, the information should probably be considered material and properly released. Similarly, if several company officials have to deliberate extensively over whether information is material, they should err on the side of materiality and release it publicly. A mantra has emerged that sums up this approach: "when in doubt, put it out!"

## DUTY TO DISCLOSE

Absent a disclosure obligation or legal requirement, a public company need not disclose material, nonpublic information. This treatment is designed to allow merger and acquisition negotiations, major joint venture negotiations, financing transactions, and research and development activities to proceed in confidence and secrecy. That said, public companies are subject to mandatory disclosure obligations under the SEC's periodic reporting regulations (see Chapter 7), which, at a minimum, require disclosure when 10-Qs and 10-Ks are due. Other disclosure obligations may arise under various circumstances (e.g., the public company is seeking to complete a financing or trading in its stock through a buyback program). Companies and their officers, directors, controlling shareholders, and other "insiders" in possession of material, nonpublic information that could affect the company's securities must disclose the information before trading those securities. If an insider cannot disclose the information, or otherwise chooses not to do so, the insider must abstain from trading in the company's securities (unless doing so under a pre-determined plan such as a 10b5-1 trading plan adopted when not in possession of material, nonpublic information).

A company is also not required to disclose information that is already public. For example, if a competitor announces a competing product, a company would not be required to also include this information in its public filings. However, a company may need to discuss such already public information in the context of its impact on the company's own results or prospects.

## DUTY NOT TO MISLEAD

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). More specifically, 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. Perhaps a more simple explanation is provided by the classic witness oath to tell the truth, the whole truth, and nothing but the truth. When considering disclosure, it is important not to “gloss,” understate, or overstate the weight of a particular piece of information. This also can mean that waiting on disclosure is a prudent and compliant decision. If a significant event happens, it may take time to determine the implications of the event. Premature disclosure can be extremely damaging if future events change the perception of the event. These circumstances call for judgment — disclosure too soon may mean a company has failed its current stockholders by failing to include all relevant information; disclosure too late may mean the company has missed a disclosure deadline or extended the class period for a potential class action lawsuit.

## DUTY TO CORRECT

Companies have a duty to correct their own prior statements when it is determined that they were false or misleading when made. The duty to correct differs from the duty to update (see below). The duty to correct typically applies only to statements of historical or “hard” fact that were false or misleading when made whereas the duty to update typically applies only to forward-looking statements. In *Ross v. A. H. Robbins Co.*, the company had reported in annual reports and other publicly disclosed documents on the safety and efficacy of a medical device, the Dalkon Shield. Once it was discovered that there were safety problems with the product, it did not promptly correct the previous public statements and was found liable in this regard. Generally, a company has no duty to correct statements made by a third party unless the statements are attributable to the company or when the company adopts or becomes entangled with the statements. Thus, if an analyst, blogger, or chat room participant makes a false claim, it does not create an obligation for the company to correct that false claim. In fact, a company may create an obligation to correct facts if they selectively correct third party claims, and therefore an IR practitioner should generally avoid the temptation to respond to third party statements.

## DUTY TO UPDATE

Companies, may, in some circumstances, have a duty to update prior material statements that have become misleading in light of new developments. Such a duty applies to any forward-looking statement containing an implicit representation that those statements remain “alive” in the minds of investors as a continuing representation. Such statements must be material and contain the sort of definitive positive projections that might require later revision. For example, "we intend to release our new software on September 1" is likely a statement that would need to be updated if a company became aware that it would not meet that deadline. However, "we intend to grow our market share" is not the type of definitive statement that would require updating. There must be some concrete, specific, and material representation concerning future events that, without updating, will likely mislead investors. Companies should protect themselves by including sufficient cautionary language in their forward-looking statements. This language operates to put investors on notice that the forward-looking statement is not a guarantee and is based on circumstances that may change. The duty to update does not apply to vague expressions of optimism or opinion. Courts have held there is no duty to update ordinary earnings guidance, which is inherently subject to change, assuming, however, that they were made reasonably and in good faith. However, early warning releases (for positive or negative developments) may be advisable as matter of good investor relations and may serve to limit the class size of potential plaintiffs in class action suits.

## DIFFERENTIAL DISCLOSURE

The concept of "differential disclosure" is based on the notion that, ordinarily, analysts and portfolio managers may use more detailed information to make their analyses and assessments regarding a company's performance and prospects than individual investors or financial reporters might require. It is appropriate to provide detailed nonmaterial information to those who request it. However, this practice can be detrimental to the financial markets when a company goes into greater detail in its discussions with analysts and portfolio managers, yet refuses to provide the same level of information to the media or the general public upon request. If the company determines a piece of information is nonmaterial and thus permissible to be disclosed in private meetings, it should also determine that it will provide such information to all parties who may request the information.

## THE MOSAIC THEORY

The mosaic theory is based on the concept that analysts may put together pieces of public information and nonmaterial, nonpublic information to create a mosaic from which a material conclusion may be drawn. The information used in creating the mosaic may be gathered from all of the sources at the analyst's disposal, including the company itself and sources outside the company, such as suppliers, customers, and competitors. An analyst may use conclusions reached under the mosaic theory as the basis for investment recommendations without the need for the company to release the information through broad, public means. A company is under no obligation to confirm or deny an analyst's conclusion reached under the mosaic theory.

The mosaic theory recognizes that analysts provide a valued service in culling and sifting available data, viewing it in light of their own knowledge of a particular industry, and ultimately furnishing a distilled product in the form of reports. Regulation FD suggests that skilled analysts can extract pieces of a "jigsaw puzzle" that would not be significant to the ordinary investor but are useful in constructing the analyst's ultimate judgment, and this remains a legitimate practice. The rule goes on to say, "an issuer is not prohibited from disclosing a nonmaterial 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." The SEC says that Regulation FD is not intended to discourage discussions between companies and analysts on the basis of nonmaterial information or information that is material, but fully public. However, recent SEC enforcement actions related to "expert networks" used by hedge funds and other institutional investors have led to questions on how far the mosaic theory can be extended. IR practitioners should be careful about relying on the mosaic theory when there are close calls on what information might be considered material, or if questions from analysts appear to be informed by nonpublic information obtained through an expert network.

# 5. Disclosure Laws and Rules

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## The Framework of the U.S. Securities Disclosure Laws

The federal framework for U.S. securities disclosure laws and regulations is constantly evolving, making it of critical importance for IR practitioners to keep abreast of current developments. The federal framework was first enacted, in large part, as a response to the Wall Street market crash of 1929 and the Great Depression that followed. Experts attribute "the number of fraudulent floating securities" as one significant contributing factor to this economic crisis.[1] Prior to the Wall Street crash and Great Depression, securities were mostly governed by state law. The Securities Act of 1933, commonly referred to as the "Securities Act", and the Securities Exchange Act of 1934, commonly referred to as the "Exchange Act" or the "1934 Act," were Congress' first entrance into the securities regulatory arena and initiated an ongoing journey toward increased transparency and disclosure in the securities market.[2]

Over time, changes to these laws and regulations have paralleled significant economic events, often precipitated by fraudulent practices and unregulated instruments. The two most significant economic crises of this century resulted in two of the most radical overhauls of the federal securities regulatory framework: the fraudulent corporate scandals of the early 2000s resulted in the Sarbanes-Oxley Act of 2002, commonly referred to as "SOX," and the credit and economic crises of 2008 resulted in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, commonly referred to as the "Dodd-Frank Act." In 2012, the Jumpstart Our Business Startups (JOBS) Act became law. The JOBS Act was adopted to "increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies." This law requires that the SEC adopt and revise certain rules and issue studies on capital formation, disclosure, and registration requirements for U.S. listed companies. As the laws continue to increase in scope and complexity, the role of IR practitioners continues to take on greater importance as companies and individuals work toward compliance.

1 Thomas Lee Hazen, ***Treatise on the Law of Securities Regulation*** §1.2, 35 (6th ed. 2009).

2 Id.

## SECURITIES ACT OF 1933

The Securities Act, which some people referred to as the "Truth in Securities" Act, was adopted by Congress in 1933 to establish regulations for the distribution of securities, including disclosure of important financial information through the registration of securities. The Securities Act has been characterized as the first true consumer protection law, and is focused on disclosure.[3] "The focus on disclosure was based on the belief that 'sunshine is the best disinfectant.'"[4] This law is limited in scope to the regulation of the distribution of securities, and does not address trading in the aftermarket.

According to the disclosure on the SEC's website, the Securities Act has two basic objectives:

- requires that investors receive transaction-specific disclosure about the securities, financial information about the company whose securities are being offered, and other significant information; and
- prohibits deceit, misrepresentations, and other fraud in the sale of securities.[5]

Pursuant to the Securities Act, securities sold within the U.S., subject to certain exemptions, must be registered with the SEC by filing a registration statement on a form designated by the SEC. These registration forms dictate the information that must be included in the document provided to investors who are offered the opportunity to purchase securities, commonly referred to as the "prospectus," as well as certain other information that needs to be filed publicly with the SEC. The disclosure requirements of registration statements and prospectuses typically call for such essential facts as:

- a description of the company's properties and business;
- a description of the security to be offered for sale;
- information about the management of the company; and
- financial statements certified by independent accountants.[6]

Of course, the driving force behind these disclosure requirements is the concept of materiality.[7]

The disclosed information enables investors to "make informed judgments about whether to purchase a company's securities."[8] While the Securities Act does not guarantee the accuracy of the information provided, it does provide recourse to investors who suffer losses due to such inaccuracies.

Registration statements and prospectuses are publicly available after they are filed with the

3 Id.
4 Id., quoting Louis D. Brandeis, ***Other People's Money***, Ch. 5 (1914).
5 ***The Laws That Govern the Securities Industry,*** Securities and Exchange Commission.
6 Id.
7 See, e.g., Securities Act Rule 408 ("In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.").
8 ***The Laws That Govern the Securities Industry,*** Securities and Exchange Commission.

SEC.[9] The filings are available on the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database accessible at http://www.sec.gov.[10] Registration statements are also subject to examination by the SEC for compliance with its disclosure requirements.[11]

Certain securities are exempt from the registration requirements of the Securities Act. For instance, securities of municipal, state, and federal governments are specifically exempted from the requirements of the Securities Act.[12] In addition, certain types of transactions are also exempt from the requirements of the Securities Act. In order to assist issuers that wish to structure transactions based on one of the available exemptions, the SEC has adopted a number of safe harbor provisions that issuers and other market participants often rely on when selling securities. For instance, it is common for issuers to structure securities offerings to comply with the requirements of Regulation D (Rules Governing the Limited Offer and Sale of Securities without Registration Under the Securities Act of 1933)[13] or, if the offering is being made outside the U.S., Regulation S (Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933).[14] Issuers also sell securities to investment professionals who then rely on Securities Act Rule 144A (Private Resales of Securities to Institutions)[15] to sell those securities publicly.

The full text of the Securities Act is available at: http://www.sec.gov/about/laws/sa33.pdf.

## SECURITIES EXCHANGE ACT OF 1934

In 1934, Congress enacted the Exchange Act, which addressed a broader array of regulatory matters than the Securities Act.[16] In contrast to the limited scope of the Securities Act, the Exchange Act is "directed at regulating all aspects of public trading of securities."[17] The extent of the Exchange Act was so vast that Congress created a new governmental entity, the SEC, to oversee securities regulation. The responsibility for U.S. securities regulation had previously belonged to the Federal Trade Commission.

The Exchange Act "not only focuses on securities, their issuers, purchasers, and sellers, it also regulates the marketplace, including the exchanges, the over-the counter markets and broker dealers generally."[18] The SEC's broad powers include the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's Self-

9 Id.
10 Id.
11 Id.
12 Id.
13 17 CFR 230.501 through 230.508..
14 17 CFR 230.901 through 230.905.
15 17 CFR 230.144A.
16 Hazen, 37.
17 Id., quoting a letter from President Franklin D. Roosevelt in support of the Exchange Act, dated February 9, 1934.
18 Id. at 37.

Regulatory Organizations (SROs).[19] The Exchange Act identifies and prohibits certain types of conduct in the market and provides the SEC with disciplinary power over regulated entities and persons associated with them.[20] The Exchange Act also empowers the SEC to require reporting of information by companies with publicly traded securities.[21]

The key reporting requirements for corporate issuers under the Exchange Act, as described by the SEC on its website, are:

### Periodic and Other Reporting

- The Exchange Act requires that companies, under certain circumstances, register a class of equity securities with the SEC pursuant to Section 12 of the Exchange Act. In addition, the Exchange Act provides that a class of securities, whether equity or debt, that is sold in a registered transaction pursuant to the Securities Act is deemed registered under Section 15(d) of the Exchange Act. Each of the Section 12 registration requirements are made by filing a form (Form 10 or 8-A) with the SEC.[22] These registration requirements are the gateway to the SEC public reporting requirements.
  - » Section 12(b) of the Exchange Act requires that a class of securities to be listed on a national securities exchange must be registered with the SEC.
  - » Section 12(g) of the Exchange Act requires that corporations with more than $10 million in assets and a class of equity securities held of record by more than 2,000 persons (or 500 or more persons who are not accredited investors) must register the class of equity securities with the SEC.[23]
  - » Section 15(d) of the Exchange Act requires issuers that sold securities in a transaction that was registered pursuant to the Securities Act to comply with the SEC's public reporting requirements.

19 *The Laws That Govern the Securities Industry,* Securities and Exchange Commission.

20 *The Laws That Govern the Securities Industry,* Securities and Exchange Commission.

21 *The Laws That Govern the Securities Industry,* Securities and Exchange Commission.

22 See the list of Exchange Act forms available at http://sec.gov/divisions/corpfin/forms/exchange.shtml

23 The Section 12(g) reporting threshold was raised by the Jumpstart Our Business Startups Act of 2012 (JOBS Act). More guidance can be found here: http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-12g.htm

- Companies whose securities are registered pursuant to Section 12 or that have a Section 15(d) reporting obligation must file annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K. Foreign private issuers that are subject to the SEC public reporting requirements file annual reports on Form 20-F (40-F for Canadian issuers) and under certain circumstances, current reports on Form 6-K. These reports are made available to the public through the SEC's EDGAR database. (A detailed discussion of the public reporting requirements is provided in Chapter 7.)
- There also are fairly detailed requirements for deregistering and discontinuing reporting with the SEC.

#### Proxy Solicitations

- The Exchange Act also governs the disclosures required in materials used to solicit shareholders' votes in annual or special meetings held for the election of directors and the approval of other corporate actions. This information, contained in proxy materials, must be filed with the Commission in advance of any solicitation. Solicitations, whether by management or shareholder groups, must disclose material information concerning the issues on which holders are asked to vote.

#### Tender Offers

- The Exchange Act requires disclosure of important information when issuers and persons seek to purchase securities directly from the shareholders. Such an offer often is extended in an effort to gain control of the company. These types of purchases are referred to as "tender offers." The SEC's tender offer rules also provide certain procedural protections, such as requiring that tender offers remain open for at least 20 business days. The disclosures in tender offers by issuers with equity securities registered with the SEC and certain third party tender offers are filed with the SEC on Schedules TO. As with the proxy rules, the disclosure requirements and procedural protections provide shareholders with material information so that they can make informed decisions on these critical corporate events.

The full text of the Exchange Act can be read at: http://www.sec.gov/about/laws/sea34.pdf.

### SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002, also known as "SOX," was enacted primarily in a response to a number of major corporate and accounting scandals in the early 2000s, such as those affecting Enron and WorldCom.[24] The scandals exposed significant problems with conflicts of interest and incentive compensation practices for corporate executives. These scandals cost investors billions of dollars, as the share prices of affected companies dropped, and also

24 Hazen, 44.

served to undermine market confidence. When President George W. Bush signed SOX into law, he characterized SOX as "the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[25] The law mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud, and created the Public Company Accounting Oversight Board, also known as the PCAOB, to oversee the activities of the auditing profession.[26] The Sarbanes-Oxley Act went "further than any of the earlier securities laws and amendments in dealing directly with corporate governance — an area that had traditionally been reserved to the states."[27]

The full text of SOX is available at: http://www.sec.gov/about/laws/soa2002.pdf. Links to all Commission rulemaking and reports issued under SOX can be found at: http://www.sec.gov/spotlight/sarbanes-oxley.htm.

The key disclosure requirements under SOX, as described by the SEC, are as follows:

#### Section 302: Disclosure Controls

- Section 302 of SOX mandates a set of internal procedures designed to ensure accurate financial disclosure. These procedures include a requirement for the CEO and CFO to certify, in connection with the filing of annual and quarterly Exchange Act reports with the SEC, that they are "responsible for establishing and maintaining internal controls" and "have designed such internal controls to ensure that material information relating to the company and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared."[28] The officers must "have evaluated the effectiveness of the company's internal controls as of a date within 90 days prior to the report" and "have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date."[29]

#### Section 401: Periodic Reporting of Off-Balance Sheet Items

- Pursuant to Section 401, companies are mandated to report "material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the company with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources or significant components of revenues or expenses."[30] Prior to the adoption of SOX, certain companies were accused of fraudulently using off-balance sheet instruments and then failing to report them.[31]

25 Elisabeth Bumiller, ***Bush Signs Bill Aimed at Fraud in Corporations***, The New York Times, July 31, 2002.
26 ***The Laws That Govern the Securities Industry,*** Securities and Exchange Commission.
27 Hazen, 44.
28 15 U.S.C. § 7241(a)(4).
29 Id.
30 ***SEC Proposes Rules to Implement Sarbanes-Oxley Act Reforms***, October 30, 2002, Securities and Exchange Commission Press Release No. 2002-155.
31 Andrew Hill and Stephen Fidler, ***Enron ties itself in knots, then Falls Over***, January 29, 2002, Financial Times Special Reports.

**Section 404: Internal Control Assessment**

- Under Section 404, companies are required to report on the adequacy of their internal controls over financial reporting. Management is required to produce an "internal control report" as part of each annual Exchange Act report.[32] The report must affirm "the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting."[33] The report must also "contain an assessment, as of the end of the most recent fiscal year of the Company, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting."[34] Section 404 is often regarded as the most costly provision of SOX to companies as it requires documentation and testing of internal controls."[35] External auditors also are required to issue an opinion on whether an effective internal control over financial reporting was maintained in all material respects by management.[36]

## DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which was enacted in large part as a response to the credit crisis of 2008 and subsequent financial meltdown, represents what President Barack Obama described as a "sweeping overhaul" of financial regulation in the United States.[37] The Dodd-Frank Act mandates a number of reforms to promote responsibility and accountability in the U.S. financial system. The Dodd-Frank Act spans a wide range of topics, including "providing for a regulatory body to oversee systemic risk, various consumer protection measures applicable to the extension of credit, regulation of mortgage lending, regulation of the previously unregulated over-the-counter derivatives markets, regulation of hedge funds, an overhaul of banking regulation, possible limitations on banking activities and activities of other financial institutions, increased protections regarding financial institution failure, and more effective enforcement of existing financial and securities regulation."[38]

Link to full text: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

Key disclosure requirements under the Dodd-Frank Act are as follows:

32 See 15 U.S.C. § 7262.

33 15 U.S.C. § 7262(a)

34 Id.

35 *Sarbanes-Oxley, Section 404 Post-Implementation — What You Should be Thinking About Now*, May 2004, Ernst & Young.

36 As provided by the Dodd-Frank Act, non-accelerated filers have been permanently exempted from Section 404(b), which requires companies to file an attestation report from their outside audit firm. The Jumpstart Our Business Startups (JOBS) Act has extended this exemption to "emerging growth companies" for five years after their initial public offering. Those companies include new issuers with total annual gross revenues of less than $1 billion during its most recently completed fiscal year. An issuer does not qualify as an "emerging growth company" if the first sale of its common equity securities occurred on or before December 8, 2011, according to the SEC. For more information on these companies, please see: http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm

37 Robert Schmidt and Hans Nichols, *Obama Lays Out 'Sweeping Overhaul' of Financial Rules*, Bloomberg News, June 17, 2009, available at www.bloomberg.com.

38 Hazen, 47.

### Executive Compensation

- The SEC adopted rules to require companies to hold three non-binding votes – on executive compensation ("Say-on-Pay" votes); on whether future Say-on-Pay votes should take place every one, two, or three years; and on merger-related compensation arrangements. Issuers are required to hold frequency votes at least every six years and disclose the pay vote frequency the company intends to adopt.[39] Companies also must provide new disclosure regarding conflicts of interest posed by compensation consultants. (For more information on compensation disclosure, please see Chapter 7: Structured Disclosure.)

### Specialized Disclosure Mandates

- In August 2012, the SEC finalized a rule to require companies to disclose their use of gold, tin, and other "conflict minerals" from the Democratic Republic of the Congo and adjoining countries. The Dodd-Frank Act also called for new disclosure mandates that relate to mine safety and resource extraction payments. (For more information on these rules, please see Chapter 7.)

### Regulation FD

- Under the Dodd-Frank Act, significant amendments were enacted that removed specific exemptions for nationally recognized statistical rating organizations (NRSROs) and credit rating agencies for the purposes of determining or monitoring credit ratings. (A detailed discussion of Regulation FD follows later in this chapter.)

### Other Provisions

- As mandated by Dodd-Frank, the SEC has adopted a rule to require issuers to determine the median annual total compensation of all employees and the ratio of that median to the total compensation of the company's CEO. Most companies will have to provide their first disclosures under this rule during the 2018 proxy season. The law also directs the SEC to adopt rules on mandatory compensation claw-back provisions, pay-for performance, and the hedging activities of certain company employees and directors.

Other SEC rulemaking and reports issued under the Dodd-Frank Act can be found via this link: http://sec.gov/spotlight/dodd-frank/accomplishments.shtml.

39 Companies must disclose their chosen pay vote frequency in a Form 8-K filing no later than 150 calendar days after the date of the annual meeting during which the vote took place, and no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting.

### JUMPSTART OUR BUSINESS STARTUPS ACT

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups (JOBS) Act. The JOBS Act consisted of a package of provisions intended to make it easier for small and emerging companies to raise public and private capital in the U.S. financial markets. Among the most significant provisions in the JOBS Act was the creation of a new category of issuers called "emerging growth companies" (EGCs) that are exempt from, or subjected to reduced, regulatory requirements for a limited period of time in an effort to encourage these companies to go public in the United States. The JOBS Act also included other measures intended to ease significantly private capital formation and reduce public reporting requirements for small and emerging businesses. For instance, EGCs are exempt from certain compensation-related disclosure requirements under the Securities Act and the Exchange Act and from certain rules under the Dodd-Frank Act. The law also sought to significantly simplify the initial public offering (IPO) process and reduce disclosure burdens on certain recently public companies. The JOBS Act also raised the registration thresholds under Section 12(g) of the Exchange Act.

The full text of the JOBS Act is available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf

## Overview of Selected Securities Regulations and Disclosure Rules

### REGULATION FD

Regulation FD, which is part of the Exchange Act, became effective on October 23, 2000. The regulation was implemented to promote the full and fair disclosure of information by issuers and to clarify and enhance existing prohibitions against insider trading.[40] Generally, if a company discloses material nonpublic information to certain enumerated persons (e.g., broker dealers, investment advisors, institutional investment managers, investment companies, stockholders, or bondholders) the company must:

- promptly make a public disclosure of the information if initial disclosure was non-intentional; and
- simultaneously make public disclosure of the information if the initial disclosure was intentional.[41]

There are exceptions to this regulation for disclosure to any person who owes the company a duty of trust or confidence (e.g., directors, officers and other employees, attorneys,

40 See SEC Release No. 33-7881 (Oct. 23, 2000), available at http://www.sec.gov/rules/final/33-7881.htm.
41 Id.

accountants, etc.) and any person who expressly agrees to keep the information in confidence (e.g., pursuant to a confidentiality agreement).[42] As discussed previously, the Dodd-Frank Act amended Regulation FD to remove the specific exemption from the rule for disclosures made to NRSROs and credit rating agencies for the purposes of determining or monitoring credit ratings.

Disclosure methods for Regulation FD include:

- SEC filings;
- properly noticed and open (accessible) conference calls;
- press releases;
- corporate website postings;[43] and
- any other combination of methods that are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[44]

The SEC has made clear that filing a Form 8-K will satisfy Regulation FD reporting requirements. Link to full text: http://www.sec.gov/rules/final/33-7881.htm

The SEC staff has provided interpretive guidance on Regulation FD, which can be found at: http://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm

In April 2013, the SEC issued a report of investigation concerning Netflix Inc.'s CEO that provided guidance on how Regulation FD applies to social media. The SEC stated that companies may use corporate social media outlets such as Facebook and Twitter "to announce key information in compliance with [Regulation FD] so long as investors have been alerted about which social media will be used to disseminate such information." That report can be found at: http://www.sec.gov/litigation/investreport/34-69279.pdf (For more details on this report, please see Chapter 8: Voluntary Disclosure Methods.)

## REGULATION G AND OTHER REGULATION OF NON-GAAP FINANCIAL MEASURES

### Regulation G

Regulation G, which was adopted pursuant to the requirements of SOX, became effective March 28, 2003. Regulation G applies to non-GAAP financial measures that are publicly disclosed (e.g., press releases, earnings conference calls, industry presentations, reports to stockholders, etc.) and applies whether or not such information is in a document filed with the

42 Id.
43 The SEC has also indicated that, under certain circumstances, a company's website could serve as the primary means of satisfying the requirements of Regulation FD. See SEC Release No. 34-58288 (Aug. 7, 2008), available at http://sec.gov/rules/interp/2007/34-58288fr.pdf.
44 Item 101 of Regulation FD.

SEC.[45] When a company discloses material information that includes a non-GAAP financial measure, such measure must be accompanied with:

- a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP; and
- a quantitative reconciliation to the most directly comparable historical GAAP measure and, for forward-looking non-GAAP measures, reconciliation must be provided to the extent available without unreasonable efforts.

Furthermore, the overall presentation must not misstate or omit important information about the non-GAAP financial measure.[46]

Disclosure methods for Regulation G and other regulation of non-GAAP financial measures are as follows:

- disclosure by oral, telephonic, webcast, broadcast or similar means;
- the required information must be provided on the company's website at the time the non-GAAP financial measure is made public and must remain on the company's website for a minimum of 12 months; and
- the location of the website is made public in the same presentation in which the non-GAAP financial measure is made public.[47]

### Item 10(e) of Regulation S-K

When a non-GAAP measure is disclosed in documents filed with the SEC, a more fulsome set of disclosure requirements and prohibitions, set forth in Item 10(e) of Regulation S-K, are applicable.[48] Item 10(e) of Regulation S-K requires the following disclosures:

- a presentation with equal or greater prominence of the most directly comparable financial measure or measures calculated and presented in accordance with U.S. GAAP;
- a reconciliation (as described above);
- a statement disclosing the reasons why management believes that the presentation of non-GAAP financial measure provides useful information to investors regarding the financial condition and results of operations; and
- to the extent material, a statement disclosing the additional purpose, if any, for which management uses the non-GAAP financial measure that are not disclosed pursuant to the statement referenced above.[49]

45 See SEC Release No. 33-8176 (Mar. 28, 2003) at footnote 38 ("Regulation G applies to any public disclosure of material information that includes a non-GAAP financial measure, regardless of whether it is in a filing with the Commission"). The release can be found at the following address: http://www.sec.gov/rules/final/33-8176.htm. In May 2016, the SEC staff released additional guidance on non-GAAP financial metrics, which can be found at: https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm

46 See Rule 100 under Regulation G, 17 CFR 244.100.

47 Id.

48 See Item 10(e) of Regulation S-K, 17 CFR 229.10(e).

49 Id.

If the filing is not an annual report, a registrant is not required to disclose the matters summarized in the last two bulleted items above, so long as the matters (i) were disclosed in the most recent annual report and (ii) were updated to the extent necessary at the time of the registrant's current non-GAAP disclosure.[50] In addition, when disclosing a non-GAAP measure that is subject to Item 10(e), a company shall not:

- Exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures. (This prohibition does not apply to the measures EBIT and EBITDA.)
- Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years.
- Present non-GAAP financial measures on the face of the financial statements prepared in accordance with GAAP or in the accompanying notes.
- Present non-GAAP financial measures on the face of any pro forma financial information.
- Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.[51]

### Non-GAAP Financial Measures Included in Form 8-K

With regards to the current report, non-GAAP disclosures under Item 2.02 of Form 8-K are subject to the disclosure requirements in Item 10(e)(1)(i) (items to be disclosed whenever one or more non-GAAP financial measure is included in a filing with the SEC), but not the prohibitions in Item 10(e)(1)(ii).[52] Item 2.02 of Form 8-K is triggered whenever a company publishes material nonpublic information regarding the company's results of operations or financial condition for a completed quarterly or annual fiscal period. The non-GAAP measures disclosed in documents that are "furnished" (not "filed") with the SEC are subject to the requirements of Regulation G, not Item 10(e) of Regulation S-K.[53] For example, non-GAAP measures disclosed in an Item 7.01 of Form 8-K (information that the registrant elects to disclose through Form 8-K pursuant to Regulation FD), are subject to Regulation G and not Item 10(e) of Regulation S-K.[54] (More information about Form 8-K is provided in Chapter 7.)

Link to final rule: http://www.sec.gov/rules/final/33-8176.htm

50 Id.
51 Id.
52 See Item 10(e)(1)(iii) of Regulation S-K.
53 See Item 10(e)(1) of Regulation S-K.
54 See SEC Release No. 33-8176 (Mar. 28, 2003). As the SEC explained in Section II.C.2 of that release, the most significant implications of "filing" a Form 8-K with the SEC, rather than "furnishing" a Form 8-K to the SEC, include: (1) information that is "furnished" in such a Form 8-K is not subject to Section 18 of the Exchange Act unless the registrant specifically states that the information is to be considered "filed"; (2) information that is "furnished" in such a Form 8-K is not incorporated by reference into a registration statement, proxy statement or other report unless the registrant specifically incorporates that information into those documents by reference; and (3) information that is "furnished" in such a Form 8-K is not subject to the requirements of amended Item 10 of Regulation S-K, while "filed" information would be subject to that requirement.

## NYSE DISCLOSURE REQUIREMENTS

Pursuant to the disclosure requirements set forth in Section 202 of the NYSE Listed Company Manual, NYSE-listed companies are required to quickly disclose any news or information that might “reasonably be expected to materially affect the market for such company’s securities.”[55] This requirement also includes a company’s responsibility to “promptly dispel unfounded rumors which result in unusual market activity or price variations.”[56] It is important to note that unfavorable news should be reported as promptly as favorable news.[57] NYSE-listed companies may use any Regulation FD-compliant method to make its disclosure. If such an announcement is made shortly before the opening or during NYSE market hours (9:30 a.m. to 5:00 p.m. Eastern Time (ET)), the company must notify its NYSE representative by telephone at least 10 minutes prior to release. Or, if the announcement is in written form, such announcement must be emailed to the NYSE representative (via nyxalert@nyx.com) at least 10 minutes prior to release of the announcement.[58]

Link to the NYSE Listed Company Manual: http://nysemanual.nyse.com/

## NASDAQ DISCLOSURE REQUIREMENTS

NASDAQ-listed companies typically must disclose promptly to the public any “material news” which would “reasonably be expected to affect the value of such company’s securities or influence investor’s decisions.”[59] The company may use any Regulation FD-compliant method (see above). NASDAQ-listed companies are required to provide notification to NASDAQ MarketWatch at least 10 minutes before the disclosure of such “material news,” during NASDAQ market hours (7 a.m. to 8 p.m. ET).[60] If the public release of material information is made outside of NASDAQ market hours, companies must notify NASDAQ MarketWatch of the material information prior to 6:50 a.m. ET.[61] The same guidelines apply in the case of certain “planned material news announcements.”[62] Notifications to NASDAQ MarketWatch must be submitted through the Electronic Disclosure submission system as NASDAQ MarketWatch does not accept material news disclosures by fax or phone, except in emergency situations.[63]

Link to NASDAQ regulatory requirements: http://nasdaq.cchwallstreet.com/NASDAQ/Main/

55 See Section 202.05 of the NYSE Listed Company Manual.
56 See Section 202.06 of the NYSE Listed Company Manual.
57 See Section 202.06(A) of the NYSE Listed Company Manual.
58 See Section 202.06(B) of the NYSE Listed Company Manual.
59 See NASDAQ Rule 5250(b)(1).
60 Id.
61 Id.
62 Id.
63 Id. See also NASDAQ IM-5250-1.

## DISCLOSURE REQUIREMENTS FOR SHARES OWNED BY OFFICERS, DIRECTORS, AND BENEFICIAL OWNERS

### Schedule 13D

Disclosure requirements for shares owned by beneficial owners are governed by Regulation 13D, which is promulgated under Section 13(d) of the Exchange Act. Individual beneficial owners who acquire more than five percent of any class of publicly traded securities in a public company must complete a Schedule 13D, which includes disclosure of the identity of the beneficial owner, the voting power of such owner and the aggregate amount of securities that are beneficially owned.[64] The Schedule 13D must be filed within 10 calendar days after any shares are acquired that trigger the more than five percent threshold (includes both direct and indirect ownership).[65]

### Schedule 13G

A beneficial owner who would otherwise be required to file a Schedule 13D may instead, under certain circumstances, file a short-form statement on Schedule 13G. For instance, certain institutional holders of securities (i.e., mutual funds and other defined financial institutions) who have acquired securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, may file a Schedule 13G, instead of a Schedule 13D.[66] The Schedule 13G must be filed within 45 calendar days after the end of the calendar year in which the entity's ownership in the securities crosses the five percent threshold.[67] Non-institutional holders of securities who acquired securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect may also file a Schedule 13G if they beneficially own more than five percent, but less than 20 percent of the outstanding shares of the class.[68] That Schedule 13G is required to be filed within 10 days after the acquisition of the threshold percentage.

64 *See* Schedule 13D of Regulation 13D of the Exchange Act
65 Id.
66 Rule 13d-1(b) of Regulation 13D of the Exchange Act.
67 Id.
68 Rule 13d-1(c) of Regulation 13D of the Exchange Act.

### Section 16(a) – Share Ownership Greater than 10%

Pursuant to Section 16(a) of the Exchange Act, officers, directors and certain stockholders owning more than 10 percent of an issuer's securities are required to file forms with the SEC in the EDGAR database to report such interests. Such ownership is disclosed on the Form 3 (Initial Statement of Beneficial Ownership of Securities), Form 4 (Statement of Changes of Beneficial Ownership of Securities) and Form 5 (Annual Statement of Changes in Beneficial Ownership).

Link to Section 16: https://www.sec.gov/divisions/corpfin/guidance/sec16interp.htm

## REGULATION M

Regulation M, which is promulgated under the Exchange Act, was adopted on December 10, 1996. The regulation prohibits a company from repurchasing its securities during periods when the company is deemed to be engaged in a distribution. A "distribution" is defined as an offering of securities by a company, whether or not subject to registration under the Securities Act, which is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods (e.g., registered public offerings, private placements, rights offerings and mergers involving an exchange of securities).[69] The regulation is designed to "preclude manipulative conduct by persons with an interest in the outcome of an offering."[70]

Link to final release: http://www.sec.gov/rules/final/34-38067.txt

## SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT

The Private Securities Litigation Reform Act of 1995 (PSLRA) was adopted by Congress as an attempt to limit frivolous shareholder lawsuits."[71] Among other things, the PSLRA revised the Securities Act and the Exchange Act by adding Section 27A and Section 21E, respectively. These sections provide a "safe harbor" from private securities liability for certain forward-looking statements made by or on behalf of SEC reporting companies.

Forward-looking statements, defined in the PSLRA to include statements related to projections, estimates, and future plans, will qualify for the PSLRA safe harbor if they are accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those anticipated in the forward-looking statements. Courts have held that boilerplate cautionary language is insufficient to bring forward-looking statements within

69 See Rule 100 of Regulation M, 17 CFR 242.100.

70 SEC Release No. 34-38067 (Dec. 20, 1996), available at www.sec.gov/rules/final/34-38067.txt.

71 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended within 15 U.S.C. 77, 78 (1994 & Supp. 1998)).

the safe harbor. "[72] Cautionary language must be tailored to the situation at hand, and should be both extensive and specific. Even where cautionary language is absent or insufficient, forward-looking statements will qualify for the safe harbor if they are immaterial, or if the investor plaintiff fails to prove that the forward-looking statements were made with actual knowledge that the statements were false or misleading.

The PSLRA safe harbor covers forward-looking statements in the non-financial statement portion of registration statements, as well as forward-looking statements in investor presentations and earnings calls. The safe harbor is only available to companies that are subject to the SEC's public reporting requirements, and, among other exclusions, the safe harbor does not apply to forward-looking statements made in connection with an initial public offering or a tender offer or contained in a registration statement of an investment company.

72 *See Slayton v. Am. Express Co.*, 2010 U.S. App. LEXIS 10072 (2nd Cir. May 18, 2010).

# 6. Forming a Disclosure Committee/ Writing a Disclosure Policy

*Author: Andrew Moore, Perkins Coie LLP*

Most widely traded public companies have followed a 2002 SEC recommendation (http://www.sec.gov/rules/final/33-8124.htm) to establish a non-Board “Disclosure Committee.” Though not legally required, this Committee of officers and employees develops and oversees the procedures that support the CEO’s and CFO’s Sarbanes-Oxley certifications. The Committee’s mandate is typically to:

- identify and analyze information for inclusion in 1934 Act reports;
- develop, implement and evaluate disclosure controls and procedures and internal controls over financial reporting (under the supervision of the CEO and CFO); and
- review all SEC filings, press releases containing financial information or a discussion of material events, correspondence broadly disseminated to shareholders, presentations to analysts and the investment community, and disclosure policies for the company’s corporate/investor relations website.

A Disclosure Committee typically consists of two to 10 officers or employees from the key functional areas in the company best able to gather and analyze material financial and other information. The SEC suggests that companies consider the following officers and employees for membership on the Disclosure Committee:

- controller or principal accounting officer;
- general counsel or lawyer responsible for disclosure;
- risk management officer;
- investor relations officer;
- human resource manager; and
- internal audit manager.

Normally, the committee is composed of senior-level professionals who have a strategic-level perspective and are familiar with what information is material and, therefore, must be disclosed.

Following the SEC’s suggestion to form Disclosure Committees, a 2003 NIRI survey reported that 85 percent of respondents’ companies had established a Disclosure Committee. Of those who reported having a Disclosure Committee, 91 percent reported that the investor relations officer was a member of the committee. To provide an example of the integration of these committees in corporate activities over time, 84 percent of respondents to a 2010 NIRI survey reported that Disclosure Committees were involved in preparing the Management, Discussion and Analysis (MD&A) portion of the annual report, with 41 percent characterizing the involvement as either “significant” or as a “leadership role.”

A Disclosure Committee will generally meet at least three times during each quarter to fulfill its three categories of duties:

1. **Information Gathering.** Put into place and oversee the internal procedures for gathering information for possible disclosure in the company's 1934 Act reports. For example, interview personnel who have authority over significant business functions or subsidiaries.

2. **Review and Communication.** Analyze the materiality of information collected and communicate recommendations to management to allow timely decisions regarding required disclosures.

3. **Evaluation and Improvement.** Evaluate the company's disclosure controls and procedures and internal control over financial reporting. Identify weaknesses and recommend improvements.

The Disclosure Committee or its chair will report its conclusions to the CEO, CFO, and, possibly, the Audit Committee.

### THE DISCLOSURE COMMITTEE CHARTER IDENTIFIES THE PURPOSE AND RESPONSIBILITIES

Although not required, many companies have adopted a Disclosure Committee Charter that defines the:

- purpose;
- membership and organization; and
- responsibilities of the Disclosure Committee.

Companies are encouraged to consult with counsel regarding posting charters on the IR portion of the company website. Some companies have opted to do so as a matter of improved transparency.

A sample Disclosure Committee Charter that can be tailored to meet a company's specific characteristics and needs can be found in Appendix A.

## USE A WRITTEN REGULATION FD DISCLOSURE POLICY TO MAINTAIN CONSISTENCY IN COMMUNICATIONS

Most public companies will want to adopt a corporate disclosure policy and investor relations practices that comply with Regulations FD, G, and M-A (which covers mergers, acquisitions, tender offers, and other transactions), and that take full advantage of the safe harbor for forward-looking disclosures.

It is important for companies to create and follow a written disclosure policy. According to the 2012 BNY Mellon Global Trends in Investor Relations survey, 79 percent of global respondents said they had a written disclosure policy, up from 59 percent in 2009.

Similar to Disclosure Committee Charters, companies are encouraged to consult with counsel regarding posting their Regulation FD policies on the IR portion of the company website. Some companies have opted to do so as a matter of improved transparency.

In preparing a written disclosure policy, companies should consider disclosure practices among industry peers and their own company before committing to a written policy. It is critical to build consensus for the disclosure, including the level of detail that will be provided to investors, with senior management. To be effective, the policy must reflect the company's actual disclosure practices, rather than a disclosure "wish list" with lofty goals that are unlikely to be achieved. Formal written disclosure policies are discoverable — a disclosure policy that isn't followed in practice affords little protection.

Although there is no "one size fits all" policy, a Regulation FD, G, and M-A compliant disclosure policy will include some variation of the following elements:

### 1. General Guidelines

*Limit Authorized Spokespersons*. The company should designate only specified individuals (for example, the chairman, chief executive officer, chief financial officer and chief investor relations practitioner) as spokespersons. Channeling all communications through a designated spokesperson can improve message consistency and reduce potential for unintentional disclosures. Regularly educate all other employees regarding this policy.

*Approval of Public Releases*. Companies should define their process for press release development and approval. A spokesperson and/or the Disclosure Committee (and when sensitive, counsel) should approve all press releases and scripted communications prior to any public release.

*Consideration of All Communications Channels.* Disclosure policies should address all communications channels including traditional and emerging channels such as social media.

### 2. Determination of Materiality and Need for Disclosure

The Disclosure Committee, with the assistance of company counsel and external counsel as necessary, will determine whether information is material and whether it needs to be disclosed. Consider providing applicable examples of material information in the written disclosure policy.

### 3. Use Cautionary Language

Include appropriate cautionary language in every financial press release and in every prospectus, registration statement, 1934 Act report, and every other company statement, oral or written, that contains or may contain forward-looking statements.

State the company's Regulation FD policy at the beginning of private meetings and set boundaries for discussions, including "off limit" topics, such as statements regarding earnings estimates.

### 4. Earnings Calls

Include an outline of the procedures for earnings calls that comply with Regulations FD and G.

### 5. One-on-One Calls or Non-Webcast Meetings

*Timing of One-on-One and Non-Webcast Meetings.* Whenever practicable, the company should limit the timing of conversations with analysts and/or investors to the period following an earnings conference call up until a blackout or "quiet" period.

*Limited Subject Matter Addressed.* The spokespersons should strictly limit their responses in these conversations to elaboration of previously disclosed or generally known information, so as not to disclose any material nonpublic information.

*Conduct of One-on-One and Non-webcast Meetings.* Whenever possible, two spokespersons should be present during any one-on-one or non-webcast interactions with an analyst or investor. When speaking with an analyst or investor on a one-on-one or non-webcast setting, the spokespersons should ensure that the analyst or investor understands that the company does not intend to disclose material information selectively.

### 6. No Comment on Previous Earnings Guidance

The company generally should not comment on or confirm previous earnings guidance. As discussed in Chapter 8, updating or confirming previous earnings guidance may be deemed material and thus require disclosure.

### 7. Do Not Distribute Analyst Reports

Companies are discouraged from commenting on, distributing, or referring to analysts' reports. The practice of distributing analysts' reports is fraught with potential legal problems. First, analysts' reports are proprietary and should not be distributed without the approval of the analyst or analyst's firm. In addition, distributing an analyst's report, even with permission, may expose the company to the appearance of "entanglement" with the report, meaning the company runs the risk of appearing to embrace or endorse the report's contents and conclusions. Further, the distribution of analysts' reports, particularly those that are more optimistic about a company's prospects for performance than may be warranted, may be cited as evidence in shareholder suits of a "conspiracy" between the company and the analyst (or perhaps the analyst's firm) to defraud investors.

Through fact sheets and/or the IR section on their website, companies can list those analysts and their firms that are covering them but should refrain from including analysts' reports. Whatever the mode of communication, a company's risk in distributing reports is the same. Individuals who request analyst reports from companies should be referred to the analyst's firm.

### 8. No Comment on Transactions, Unusual Market Activity, or Market Rumors

Unless required by law, the company should not respond to inquiries regarding potential financings, restructurings, acquisitions, mergers or other transactions, unusual market activity, or market rumors. (Companies generally have no legal obligation to respond to rumors unless the rumors emanate from the company). It is very important that the company adhere to this policy consistently. If the company denies rumors that are not correct, for example, the company will not be able to effectively give a "no comment" response to an inquiry regarding a rumor that is true or partially true. If contacted by someone outside the company and asked to comment, the response given by the company should simply be: "It is our policy not to comment on rumors (or other applicable item)" or "No comment." If requested to issue a statement by their listing exchange, companies should consult with counsel to determine an appropriate response.

### 9. Interviews with News Media

While Regulation FD exempts the media, generally treat the media as if communications were subject to Regulation FD. There may be circumstances in which it may be necessary to take advantage of the media carve-out offered in the regulation.

#### 10. Merger and Acquisition Transactions

The company should file any written communication that relates to a business combination transaction under the appropriate rule of Regulation M-A. In order to comply with Regulation FD, the company should file the communication before it publicly discloses the information. Each communication should have an appropriate legend advising investors to read relevant documents on the SEC's website for important information.

#### 11. Liability for Third Party Web Comments

A company is responsible for all communications that it makes on its own behalf under Rule 10b-5, including company blogs or electronic investor forums. The company will not be held liable for third party comments made on its website. For example, when an issuer allows reader comments in response to its CEO blog, it is not liable for the content of those comments.

A sample Disclosure Policy than can be tailored to meet a company's specific characteristics and needs is available as Appendix B.

Additional examples can be found in NIRI's Sample Document Library.

# 7. Structured Disclosure – SEC and SRO Requirements

*Authors: Stephen Cooke and Michael Zuppone, Paul Hastings LLP*

As noted previously, public companies with securities traded on a national securities exchange are required to register their securities under the Securities Exchange Act of 1934 and to become subject to the Exchange Act's periodic reporting and other disclosure requirements. These requirements form the centerpiece of the public company disclosure system overseen by the U.S. Securities and Exchange Commission. The Exchange Act and SEC regulations impose mandatory disclosure obligations on public companies and establish specific requirements as to when, how, and what information must be disclosed. IR practitioner involvement in the development and preparation of these structured disclosures is important in order to ensure consistency with ongoing investor communication.

## DISCLOSURE OBLIGATIONS

Simply stated, public companies have a duty to disclose under the mandatory disclosure obligations imposed by SEC regulations and must disclose the required information in a manner that complies with the anti-fraud provisions of the federal securities laws. As discussed in Chapter 5, the SEC's general anti-fraud regulation, Exchange Act Rule 10b-5, prohibits, in connection with the purchase or sale of a security, any person from making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Similarly, Exchange Act Rule 12b-20 requires that, in addition to the information expressly required to be included in an SEC filing, such further material information shall be disclosed as may be necessary to make the required statements, in light of the circumstances under which they are made not misleading. As a result, if a company discloses information to the public in an SEC filing or otherwise, it has a duty to furnish truthful, non-misleading information and avoid material misstatements or omissions of fact. This duty is sometimes referred to as the duty not to mislead, as noted previously. It is important to note that at least one federal circuit court has concluded that disclosures mandated by law are presumably material, which highlights the risk that violations of the SEC's disclosure requirements can result in potential violations of Rule 10b-5.

## FILER DESIGNATIONS AND FILING DEADLINES

The SEC has staggered the filing deadlines for public companies to file their Forms 10-Q and Forms 10-K based on the size of the company. SEC regulations designate public companies as "non-accelerated filers," "accelerated filers," or "large accelerated filers." Accelerated filers are companies with a non-affiliate public float of at least $75 million (but less than $700 million) and large accelerated filers are companies with a non-affiliate public float of at least $700 million. The public float values are calculated as of the last business day of the issuer's most recently completed second fiscal quarter. With respect to Form 10-K filings, large accelerated filers, accelerated filers, and non-accelerated filers must file within 60 days, 75 days, and 90 days after their fiscal year end, respectively. With respect to Form 10-Q filings, large accelerated filers and accelerated filers must file within 40 days after their fiscal quarter end. The deadline for non-accelerated filers is 45 days after the fiscal quarter end.

| SEC Designation | Non-Affiliated Public Float | 10-K Filing Requirement | 10-Q Filing Requirement |
|---|---|---|---|
| Large accelerated filers | At least $700 million | 60 days after fiscal year end | 40 days after fiscal quarter end |
| Accelerated filers | At least $75 million (but not more than $700 million) | 75 days after fiscal year end | 40 days after fiscal quarter end |
| Non-accelerated filers | Less than $75 million | 90 days after fiscal year end | 45 days after fiscal quarter end |

## QUARTERLY REPORT ON FORM 10-Q

Public companies must file a quarterly report on Form 10-Q with the SEC for each of the first three fiscal quarters of each fiscal year. The SEC does not require a Form 10-Q report for the fourth quarter of the fiscal year; the information for the final quarter is to be included in the Form 10-K annual report.

The Form 10-Q report consists of two parts. Part I requires the disclosure of financial information and Part II requires the disclosure of other information not previously reported to the SEC. Specifically, Part I requires disclosure of unaudited quarterly financial statements and management's discussion and analysis (MD&A) of the financial condition and results of operations. Part I requires the inclusion of balance sheets as of the end of the completed fiscal quarter and the prior fiscal year end, statements of income and cash flows for the completed period(s) and comparable period(s) of the prior fiscal year and a statement of changes in shareholders' equity from the latest fiscal year end to the fiscal quarter balance sheet date. Part I also requires disclosure of market risk to the extent there have been material changes from the information previously provided in the Form 10-K and disclosure about the company's disclosure controls and procedures and changes in internal controls.

Part II of Form 10-Q requires disclosure regarding: (i) material legal proceedings; (ii) unregistered sales and repurchases of equity securities by the issuer; (iii) defaults upon senior securities; (iv) mine safety violations and other regulatory matters; and (v) required exhibits (e.g. material contracts entered into during the fiscal quarter and XBRL formatted financial information and schedules). Companies also are required to disclose material changes to the risk factors previously disclosed in their Form 10-K. Public companies may, at their option, report on Form 10-Q most events not previously reported in a Current Report on Form 8-K (as long as the Form 10-Q is filed within the prescribed time period after the occurrence of the reportable event) and any other information that is deemed of material importance to their security holders. Disclosures about material changes to the procedures by which security holders may recommend board nominees are required in a Form 10-Q.

Form 10-Q is required to be signed on behalf of the company by an authorized officer and in addition must be signed by the company's principal financial officer or principal accounting officer. As required by rules adopted pursuant to the Sarbanes-Oxley Act of 2002 (SOX), certifications of the company's principal executive officer and principal financial officer must be included with the Form 10-Q.

Link to Form 10-Q: http://sec.gov/about/forms/form10-q.pdf

## ANNUAL REPORT ON FORM 10-K

Public companies must file an annual report on Form 10-K with the SEC for each completed fiscal year. The Form 10-K report consists of four parts. In Part I of Form 10-K, companies must make a variety of disclosures regarding their business, including disclosures about reportable business segments, principal products produced and services rendered, and information about major customers. Part I also requires risk factor disclosure regarding the most significant factors potentially impacting a public company and its financial condition and future results of operations. Companies are to identify and describe the material risks and uncertainties they face and should avoid disclosing risks that could apply to any issuer. Companies are also required to disclose in Part I information regarding any SEC staff comments that remain unresolved as well as information regarding their properties and material legal proceedings. If applicable, Part I of Form 10-K also requires disclosures about mine safety and other regulatory matters.

In Part II, companies need to provide market information regarding their common stock and other information about their stockholders and repurchases by the company of its equity securities. Part II also requires disclosure regarding selective financial data, financial statements, and the MD&A. The required financial statements and notes thereto to be disclosed pursuant to Part II of Form 10-K may also be included (as many companies do) at the end of the document as "F" pages. Companies are also required to include disclosures regarding their exposure to interest rate risks, foreign currency exchange risk, commodity price risk, and other market risks. Part II of Form 10-K also requires disclosures regarding changes in and disagreements with accountants and disclosures concerning a company's disclosure controls and procedures and internal controls. Moreover, Part II provides for disclosure of other material information, and as discussed below, companies may disclose in Part II certain information which might otherwise be contained in a Current Report on Form 8-K.

Over the past few years the SEC has provided substantial interpretive guidance designed to improve the disclosures in the MD&A. Companies should review and become familiar with this SEC guidance. The MD&A should be presented as a discussion and analysis of the business as seen through management's eyes. The SEC encourages companies to include an introduction or overview to facilitate the reader's understanding and to provide context for the disclosures. The MD&A must discuss the company's results of operations and explain significant differences in operating results between reporting periods and describe unusual or infrequent events which impact the results. Companies are required in the MD&A to provide disclosures about their liquidity and capital resources, including disclosures about cash flows, sources and uses of cash, and cash management, as well as disclosures about debt instruments, guarantees and covenants that are relevant to investors. Material known trends, demands, commitments, events, and uncertainties must be disclosed and analyzed. Off-balance sheet arrangements that have or are reasonably likely to have a current or future material effect on the company's financial condition, results, revenues, expenses, capital expenditures, or resources must be disclosed in the MD&A. The MD&A must address a company's critical accounting estimates. Companies are also required to include in the MD&A contained in a Form 10-K a contractual obligations table which provides aggregated information about their contractual obligations and contingent liabilities and commitments.

Part III of the Form 10-K requires disclosures regarding a company's directors, executive officers, and corporate governance matters, as well as disclosures regarding executive compensation. Disclosures about the security ownership of certain beneficial holders, certain relationships and related party transactions, director independence and other information regarding the company's accountants are also required in Part III of Form 10-K. A company is expressly permitted to incorporate by reference from its proxy statement information otherwise required in Part III of the Form 10-K as long as the company's definitive proxy statement is filed within 120 days of its fiscal year end. In the event the anticipated proxy statement filing is delayed, companies should disclose the information required by Part III by filing an amendment to Form 10-K on Form 10-K/A by the 120 days deadline. Part IV of Form 10-K requires the disclosure of exhibits and financial statement schedules, including XBRL formatted financial information and schedules.

Form 10-K is required to be signed by the company and on behalf of the company by the company's principal executive officer, principal financial officer and controller or principal accounting officer, and by at least a majority of the board of directors. Amendments need only be signed by an authorized officer. Similar to the Form 10-Q filing requirements, the certifications of the company's principal executive officer and principal financial officer must be included with the Form 10-K.

Link to Form 10-K: http://sec.gov/about/forms/form10-k.pdf

## CURRENT REPORT ON FORM 8-K

As discussed in Chapter 4, public companies must file current reports on Form 8-K to disclose a number of material events. Companies are required to make disclosures on Form 8-K regarding their business and operations, financial information, their securities and trading markets, and matters related to their accountants and financial statements. A number of matters involving a company's corporate governance and management, including the reporting of voting results from shareholder meetings, are Form 8-K reportable events. Form 8-K also provides for disclosures about asset-backed securities and Regulation FD disclosures, as well as other matters. Form 8-K requires disclosure of certain required financial statements and information along with certain exhibits.

Determining whether a Form 8-K reporting obligation has been triggered can at times be complicated. For example, some reporting obligations are triggered by the occurrence of specific events, while others may be triggered by a determination made by the board of directors, a committee of the board or management or by a notice. Given the number and types of events that can trigger an obligation to file a Form 8-K, it is crucial that public companies be able to quickly evaluate and identify potential Form 8-K reportable events and gather the information necessary to satisfy their Form 8-K disclosure obligations. (Please see Chapter 4 for more details.)

The information required to be described in the Form 8-K depends on the specific event being reported and certain Form 8-K disclosures require exhibits to be filed with the report. If events occur that trigger obligations to file a Form 8-K under more than one item, a company does not need to file multiple Form 8-K reports, but instead can file one Form 8-K that includes all the different events provided the company identifies by item number and caption all applicable items and provides the disclosures required by each item. A duly authorized officer of the reporting company must sign the Form 8-K.

As discussed in Chapter 5, in certain circumstances, information disclosed in a Form 8-K may be "furnished" to the SEC rather than "filed." The reportable events that may be "furnished" include disclosure under Item 2.02 of Form 8-K (results of operations and financial condition) and Item 7.01 of Form 8-K (Regulation FD disclosure). Information "furnished" on a Form 8-K is not subject to certain liability provisions under the federal securities laws.

Generally, companies have four business days from the day of the reportable event to file a Form 8-K. However, in certain cases a Form 8-K will need to be filed within a shorter time period. For example, a Form 8-K used to comply with Regulation FD disclosure requirements must be filed or furnished to the SEC at or before the time that the information is being disclosed to others (or within a 24-hour period if such information was disclosed unintentionally). In addition, issuers that desire to avoid filing a separate Form 8-K for earnings calls or webcasts that are "complementary" to a previous earnings press release must furnish with the SEC their earnings press releases under Item 2.02 of Form 8-K before their earnings calls or webcasts with analysts and investors (provided that the disclosure is not made more than 48 hours prior to the call or webcast).

The failure to timely file a Form 8-K can impact a company's eligibility to use a short form registration statement. With certain Form 8-K disclosure items, a company that does not timely file a Form 8-K will not lose its ability to use Form S-2 or S-3 as long as the company properly makes the required disclosure before the filing of its short form registration statement. If a company fails to timely file a Form 8-K that relates to other items, it will lose its eligibility to use a short form registration statement for 12 months.

If a Form 8-K reportable event occurs within four business days of the company's filing of a Form 10-Q or a Form 10-K, then the reportable event may (unless the item is required to be reported under Item 4.01 or 4.02 of Form 8-K) be disclosed under either Item 5 of Part II of Form 10-Q or under Item 9B of Form 10-K instead of in a Form 8-K. Reportable events required to be disclosed under Item 4.01 and 4.02 of Form 8-K must be disclosed by the filing of a Form 8-K, even if they occur within four business days of the filing of a Form 10-Q or a Form 10-K.

Link to Form 8-K: http://sec.gov/about/forms/form8-k.pdf

## PROXY REGULATION

Public companies are required to hold annual meetings of shareholders in accordance with applicable state corporate law and the rules of the principal securities exchanges. At these meetings, shareholders are presented with proposals to elect directors and to vote on other matters such as executive compensation and the ratification of the appointment of the company's registered public accounting firm to serve as independent auditor. In addition, companies may also convene special meetings of shareholders to act on significant matters that require shareholder approval. The SEC's proxy rules govern the solicitation of proxies from shareholders for use at any annual or special meeting of shareholders.

The basic purpose of the proxy rules is to ensure full disclosure to the shareholders by the persons soliciting the proxies. No solicitation subject to the proxy rules may be made unless the shareholders solicited are concurrently furnished or have previously been furnished with a written proxy statement (Schedule 14A) containing information specified by the SEC.

The SEC has implemented a "notice and access" based e-proxy delivery system for the dissemination of proxy materials to shareholders that allows companies to elect to follow a "notice only option" as opposed to a "full set delivery option." In substance, under the "notice only option," instead of mailing the definitive proxy materials to each shareholder, the notice and access rules authorize the mailing of a short written notice to shareholders advising them as to the availability of proxy materials on a publicly accessible site other than SEC's EDGAR. An issuer must maintain the Internet website on which it posts its proxy materials in a manner that protects the anonymity of a person accessing that website. More information is available in NIRI's Standards of Practice: Implementing Notice and Access, which is available at: https://www.niri.org/resources/publications/standards-of-practice-for-investor-relations

With certain exceptions, preliminary copies of the proxy statement and other soliciting materials must be filed with the SEC at least 10 days before they are distributed to stockholders. In the case of an annual meeting, copies of the proxy material in final form, and the annual report to stockholders (which must be made available under the e-proxy rules or, if the full set delivery option has been elected, mailed to the shareholders with or prior to the proxy materials for the annual meeting) are to be filed with the SEC when they are made available or mailed to shareholders.

The proxy rules contain detailed provisions regarding what must be included in the proxy statement and, to some extent, in the annual report to shareholders. Information regarding the identity of the person soliciting the proxy, the interest of such person in the matters to be acted upon, the company's voting securities, and its principal stockholders is required. When directors are to be elected, information must be disclosed with respect to each nominee relating to his or her ownership of the company's securities and the securities of any of its affiliates, his or her business experience and principal occupation, and certain related party transactions.

The proxy rules contain provisions that require extensive tabular and narrative disclosure on executive and director compensation, and a compensation discussion and analysis (CD&A) disclosure that is intended to provide a detailed overview of the company's compensation program and decisions. The SEC expects the CD&A to address the following questions:

- what are the objectives of the company's compensation programs;
- what is the program designed to reward and not reward;
- what is each element of compensation;
- how does the company determine the amount (specifying formulas as applicable) for each element; and
- how does each element and decision relating to that element fit into the company's overall compensation objectives and affect decisions regarding other elements of compensation.

The CD&A is intended to be comprehensive and should discuss and analyze the material factors underlying compensation objectives and policies provided elsewhere in the proxy statement. This overview should address these factors with respect to both separate elements of individual executive compensation and executive compensation as a whole. Since the arrival of marketwide Say-on-Pay votes in 2011, many U.S. companies have started to provide an executive summary of their CD&A in an effort to persuade investors to support management during these votes.

Following the 2008 global financial crises, the SEC amended the proxy rules to require proxy statement disclosure concerning, among other things, risk management, the risk inherent in executive compensation practices, and the qualifications of directors and nominees. Under these rules, companies are required to describe the board's role in risk oversight, including how the board carries out its risk oversight function, such as through a whole board or separate committee, and the effect this has on the board's leadership structure.

Companies also must provide narrative disclosure about compensation policies and practices for all employees (not just the named executive officers) as they relate to risk management practices and risk-taking incentives, if the risks arising from those compensation policies and practices “are reasonably likely to have a material adverse effect” on the company. In 2010, NIRI participated in the CFA Institute’s CD&A Working Group to develop a CD&A template designed as a guide to help make compensation disclosure clearer and more relevant to investors. The latest version of this template can be found in NIRI’s Sample Document Library at https://www.niri.org/resources/resource-libraries/sample-document-library.

Under the revised proxy rules, companies must disclose the particular expertise, qualifications, attributes, or skills that a director or nominee possesses that led the board of directors to determine that the individual should serve on the board. Companies also are required to state whether the board considered diversity in identifying director nominees. If the nominating committee or the board has a policy regarding the consideration of diversity in identifying director nominees, companies also are required to describe how the policy is implemented as well as how the nominating committee or the board assesses the effectiveness of the policy.

A company also is required to disclose whether and why it has chosen to combine or separate the principal executive officer and board chairman positions, and the reasons why the company believes that this leadership structure is the most appropriate structure for the board. If one person serves as both the company’s principal executive officer and chairperson of the board of directors, then the company also must disclose whether there is a lead independent director and the specific role that the lead independent director plays in the leadership of the board.

Finally, IR practitioners should be aware of future proxy disclosure mandates on the horizon. As directed by the Dodd-Frank Act, the SEC has finalized a new CEO pay ratio requirement and proposed rules related to corporate “clawback” policies, hedging by employees and directors, and “pay versus performance” disclosure. Please visit NIRI’s Regulations Library for more details on these rulemaking initiatives.

## NEW SPECIALIZED DISCLOSURE MANDATES

### Conflict Minerals

As required by Section 1502 of the Dodd-Frank Act, the SEC adopted a rule to require issuers with “conflict minerals” that are necessary to the functionality or production of a product manufactured by the company to disclose annually whether any of those minerals originated in the Democratic Republic of the Congo (DRC) or an adjoining country.

Key provisions of the conflict minerals rule include:

- A definition of "conflict minerals" that includes gold and metal ores used to produce tin, tungsten, and tantalum. These minerals are contained in mobile telephones, computers, electronics, circuits, and other products, so this new mandate will apply to many companies and industries. Minerals that are derived from recycled or scrap sources will not be considered "DRC conflict" minerals.
- Minerals used as a catalyst or in another manner in the production process are not considered "necessary to the production" if the mineral is not contained in the product itself. The rule sets forth a three-step process for compliance. First, a company needs to determine whether it is subject to the rule. Then, if it is subject to the rule, the company would make a "reasonable country of origin inquiry" to determine the source of the minerals used in its products. Finally, if the company finds that its minerals did not originate in the DRC countries (or came from scrap or recycled sources), it would have to disclose this determination and describe its inquiry to reach this determination. However, if the issuer determines that its minerals did originate in the DRC countries, or if it cannot conclude that its minerals did not originate in those nations, the issuer would disclose this conclusion and produce a Conflict Minerals Report. This report must provide, among other matters, a description of the products that contain these minerals, the entity that conducted the independent private sector audit, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin.
- Most issuers with necessary conflict minerals were required to make their first disclosure by May 31, 2014, in a new Form SD (Specialized Disclosure). The disclosure, which would cover the preceding calendar year, would be due every year by May 31. Companies also would have to post their Conflict Mineral Reports on their websites.
- If a company is unable to determine the origin of some of its minerals, it may classify the source as "DRC conflict undeterminable" for two years while it continues its inquiry. Smaller reporting companies, which are not otherwise exempt from the rule, may use this classification for four years.
- Issuers must obtain independent private sector audits of their Conflict Mineral Reports. The audits are to focus on whether a company followed recognized due diligence standards to determine the source and chain of custody for their minerals, and not examine whether the issuer's minerals are in fact "DRC conflict free."

After a lawsuit by business groups, a federal appeals court in April 2014 concluded that portions of the rule would violate companies' First Amendment rights. In response, the SEC staff issued a statement indicating that companies are not required to disclose on their websites that their products were not found to be "DRC conflict free." For more on this rule, please visit this SEC web page (https://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm#q1) and the staff statement (https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994).

### Resource Extraction Payments

As required by Section 1504 of the Dodd-Frank Act, the SEC adopted a rule to require disclosure of certain payments by resource extraction issuers. After a legal challenge by business groups, a federal judge vacated the rule in July 2013 and sent it back to the SEC for additional deliberations. The court disagreed with the Commission's view that Section 1504 mandates complete, public disclosure of all reported payment information.

In June 2016, the SEC adopted a revised rule on resource extraction payments. For details on the revised rule, please click on this SEC link: https://www.sec.gov/news/pressrelease/2016-132.html

### Mine Safety

In December 2011, the SEC finalized a rule that requires new mine safety disclosures. The rule, which was mandated by Section 1503 of the Dodd-Frank Act, applies to companies that are operators, or that have a subsidiary that is an operator, of a coal or other mine. Under this rule, companies must disclose in their periodic reports information on health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. In addition, the rule requires companies to disclose in a current report o8n Form 8-K the receipt of certain shutdown orders and notices of patterns or potential patterns of violations. The final rule can be found at this link: http://www.sec.gov/rules/final/2011/33-9286.pdf.

### Cybersecurity Risks

In October 2011, the SEC's Division of Corporation Finance released disclosure guidance on the obligations of issuers to disclose cybersecurity risks and cyber incidents.

The staff guidance stated that cybersecurity risk disclosure "must adequately describe the nature of the material risks and specify how each risk affects the registrant . . . [and] should not present risks that could apply to any issuer." As this staff guidance explained: "depending on the company's particular facts and circumstances, and to the extent material, appropriate risk factor disclosure might include:

- discussion of aspects of the registrant's business or operations that give rise to material cybersecurity risks and the potential costs and consequences;
- to the extent the registrant outsources functions that have material cybersecurity risks, description of those functions, and how the registrant addresses those risks;
- description of cyber incidents experienced by the registrant that are individually, or in the aggregate, material, including a description of the costs and other consequences;
- risks related to cyber incidents that may remain undetected for an extended period; and
- description of relevant insurance coverage.

The disclosure guidance also provides that registrants should address cybersecurity risks and incidents in their MD&A if the costs or other consequences associated with known incidents, or the risk of potential incidents, represent a material event, trend or uncertainty that is reasonably likely to have a material effect on a registrant's results of operations, liquidity, and financial condition. Disclosure also would be required if the costs or consequences of cybersecurity risks and cyber incidents would cause a company's reported financial information not to be necessarily indicative of future operating results or financial condition.

This disclosure guidance can be found at this link: https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm

### Iran Threat Reduction and Syria Human Rights Act of 2012

In August 2012, President Obama signed legislation that requires Exchange Act-reporting companies to disclose in their Forms 10-Ks and Forms 10-Qs and certain types of transactions and business dealings with Iran. Among other things, the law mandates disclosures about dealings and transactions by the registrant or any affiliate of the registrant with the government of Iran, relating to investments and other activities in Iran's petroleum sector; the transfer of goods, technologies, or services to Iran that are likely to be used for human rights abuses; and Iran's procurement of weapons of mass destruction and conventional weapons. Reporting companies need to closely scrutinize any activities that they or their affiliates might have with Iran or Iran-based companies to determine if disclosure is required as there is no *de minimis* exception to the disclosure requirements.

A link to the SEC's Compliance and Disclosure Interpretations on this law can be found here: https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm

# 8. Voluntary Disclosure Methods

*Authors: Lawrence Levin and Mark Reyes, Katten Muchin Rosenman LLP*

IR practitioners use various communications tools and techniques to keep the investor community familiar with developments at their companies. The most common disclosure methods or tools used by IR practitioners in routine communications with shareholders and investor audiences are voluntary. They are termed "voluntary" disclosures because these formal or informal communications are not required by the SEC, NYSE, or NASDAQ as part of periodic reporting or other mandatory reporting. Required or "mandatory" disclosures include periodic reporting and event-driven disclosures on such forms and schedules as Forms 10-Q, 10-K, 8-K, and Schedule 14A. (These mandatory disclosures are covered in Chapter 7.)

Voluntary disclosures are governed by various SEC rules including Regulation FD, Regulation G, Regulation M-A, and Rule 10b-5 under the Exchange Act. Voluntary disclosures are also subject to the listed company requirements for the exchange or other market on which a company's securities are listed or quoted.

In 2004, NIRI and the CFA Institute developed a series of guidelines for corporate issuers, analysts, and investors to encourage fair access to information and corporate management, and to encourage transparency and credibility in communications. The guidelines address topics such as reviewing corporate communications and access, reviewing sell-side analyst reports prior to release (this practice is discouraged), issuer-paid research and guidance for corporate issuers providing earnings guidance. Although compliance with the guidelines is not required by either NIRI or the CFA Institute, NIRI members should be aware that violating the guidelines might result in disciplinary actions under NIRI's Code of Conduct (Chapter 10).

The guidelines are available at: https://www.niri.org/NIRI/media/NIRI/Advocacy/CFAINIRIGuidelines.pdf

## QUARTERLY EARNINGS RELEASES

Quarterly earnings releases announce the company's financial results for the quarter to investors, sell-side analysts, the media, employees, and other constituencies. There are two factors related to issuing earnings releases – content and the dissemination process.

1. In December 2008, NIRI approved Standards of Practice for Investor Relations – Earnings Release Content, which includes voluntary guidelines covering basic content, format, and quality of information for quarterly earnings releases. These guidelines were updated in July 2013.

2. The dissemination process for the earnings release is evolving because of technology and the SEC's 2008 interpretive guidance on the use of company websites, and the SEC's report of investigation released in April 2013 pertaining to social media and Regulation FD, as well as changes in NYSE and NASDAQ listing requirements. Under Regulation FD, a company will be deemed to have made "public disclosure" of an earnings release by furnishing or filing the release on a Form 8-K or by otherwise 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. As described later in this chapter, posting an earnings release on the company's website or otherwise disseminating earnings information through social media outlets, such as Facebook and Twitter, may qualify as "public disclosure" if certain standards are met. Some companies have changed their disclosure practices to use their websites and SEC filings, rather than wire services, as their primary channel for distribution of quarterly earnings information. Most companies, however, distribute their quarterly earnings information via a wire service followed promptly (and no later than four business days later) with the filing of a Form 8-K with the SEC. While the SEC's recent guidance clarifies that companies also are permitted to publicly disseminate information using social media outlets that are "recognized channels of distribution," and some companies have used such social media outlets as an additional method to disseminate such information, to date companies have been reluctant in establishing social media outlets as their *primary* channel for distribution. Assuming distribution of quarterly earnings information is through a wire service, below is a sample template that should be adjusted based on your company, peer group, and other factors to coordinate the disclosure or filing with the timing of distribution. Emerging press release alternatives are discussed in the next section.

| Document/event | Sample timing | Your company’s timeframe |
|---|---|---|
| Announcement of quarterly earnings webcast/conference call | At least one week before earnings announcement date. | |
| Earnings release issued | At least one hour, but not more than 48 hours, before earnings conference call/webcast. | |
| Earnings release posted on website | Simultaneous with earnings “crossing” the wire (assuming press release). Moved to archive on website within one to two weeks. | |
| Form 8-K filed (earnings release furnished under Item 2.02 and filed as an exhibit under Item 9.01) | Approximately concurrent with earnings release distribution, and before earnings conference call/webcast. | |
| Earnings conference call/webcast | At least one hour, but not more than 48 hours, after earnings release is issued. | |
| Archive earnings release | SEC recommends archiving earnings releases on the website for at least one year. | |

## Forward-Looking Guidance

The NIRI Board of Directors has established a policy regarding the provision of forward-looking guidance. This policy can be found in Appendix C.

An October 2014 NIRI member survey found that 94 percent of respondents’ companies provided some form of forward-looking guidance (either financial, non-financial, or both). Among those respondents, the most commonly cited reasons for providing financial guidance are to increase transparency (81 percent), and ensure sell-side consensus and market expectations are reasonable (88 percent). There are a myriad of considerations about whether to participate in this practice such as how guidance will fit into the company’s comprehensive communications program, what specific guidance to offer, the company’s internal forecasting ability, investor needs, peer group practices, and the company’s comfort in providing guidance in times of both financial strength and weakness.

Companies choosing to provide guidance must then establish procedures for how and when they will discuss and answer questions about their guidance. One of the more challenging aspects, for example, concerns “confirming” guidance (which effectively updates the previously provided guidance, making it current as of the date of confirmation). In determining whether to confirm guidance given in the past, companies must consider whether the confirmation conveys additional material information, any intervening events, and the amount of time elapsed between the original disclosure and the confirmation. If companies refer back to previously disclosed guidance (rather than confirming it), they must make clear that the guidance was provided as of a specific date and that it is not being updated.

## OTHER PRESS RELEASES DISCLOSING MATERIAL ITEMS

Other press releases containing material, nonpublic information must also be disseminated by a method of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public (e.g., in a news release distributed via a wire service) and should be posted on the company's website. To satisfy Regulation FD disclosure requirements, such releases are generally required to be furnished to the SEC on Form 8-K.

### Use of Company Websites and Social Media Outlets for Disclosure

Under certain circumstances, disclosure made on corporate websites will be deemed an adequate means of public disclosure under Regulation FD, and such disclosure need not be furnished to the SEC on Form 8K or distributed via a wire service. In August 2008, the SEC issued an interpretive release (SEC Release No. 34-58288) entitled "Commission Guidance on the Use of Company Web Sites." This release acknowledges the use of a company website to satisfy Regulation FD disclosure requirements if the company has ensured that:

1. the website is a recognized channel of distribution of information to the market;
2. the website is a source of broad dissemination to the market; and
3. there has been a reasonable waiting period for investors and the market to react to the posted information.

NIRI believes that some companies that have established that the use of their websites satisfies Regulation FD have adopted a model of issuing brief advisory press releases via a wire service to direct investors to their websites to access their material news announcements.

In addition, some companies have incorporated Twitter, Facebook, LinkedIn, and other social media into their investor relations programs. If your company decides to participate, for example, by having an officer or other designated spokesperson blog or tweet, remember that all communications must be Regulation FD compliant. In April 2013, in connection with an investigation of Netflix Inc. and its chief executive officer regarding a possible violation of Regulation FD, the SEC issued a report of investigation, together with a related press release, providing guidance on the use of social media in compliance with Regulation FD. In that guidance, the SEC clarified that a company is permitted to use social media outlets, such as Facebook and Twitter, "to announce key information in compliance with Regulation Fair Disclosure so long as investors have been alerted about which social media will be used to disseminate such information." In the report of investigation, the SEC made clear that communications by issuers using social media outlets, just like communications made through more traditional channels, must be analyzed carefully. The SEC also reiterated the principles outlined in its 2008 interpretive release regarding the use of corporate websites in compliance with Regulation FD, and confirmed that such guidance also applies to the dissemination of information through social media outlets. In that regard, the SEC reminded companies that it expects them to "examine rigorously the factors indicating whether a particular channel is a recognized channel of distribution." Furthermore, the SEC emphasized that, consistent with its 2008 guidance, providing investors with appropriate notice of the forms of communication that a company plans to use to disclose material, nonpublic information (including any social media outlets that may be used for such purpose and the types of information that may be disclosed through these outlets) is "critical to the fair and efficient disclosure of information." One possible way to provide this notice to investors, as suggested by the SEC in the report of investigation, is to include disclosure on a company's corporate website identifying the specific social media outlets through which that company intends to disseminate material, nonpublic information. The SEC also stated that the personal social media accounts of corporate executives "would not ordinarily be assumed to be channels through which the company would disclose material corporate information."

As a result of the SEC's guidance on the use of company websites and social media outlets for disclosure, whether the use of a company website or social media account will satisfy Regulation FD disclosure requirements and obviate the need for a Form 8-K filing or distribution via a wire service will depend on the facts and circumstances related to the disclosure. However, the SEC has made clear that filing a Form 8-K will satisfy Regulation FD reporting requirements.

Though the SEC now permits this practice of disseminating material, nonpublic information on a company website or through social media, NIRI believes that disclosing material nonpublic information solely via a corporate website or social media still is an emerging practice rather than a "standard." Most companies continue to utilize multiple disclosure channels (including a Form 8-K filing) for this type of information in order to ensure the broadest possible non-exclusionary distribution of information to the public.

In a NIRI member survey released in October 2012, 88 percent of all respondents stated that their companies have no immediate plans to move toward the exclusive use of their corporate website for material information disclosure. Just 8 percent of respondents said they had used their corporate website as the only channel of disclosure for material information.

In a March 2016 survey, 73 percent of NIRI members said they do not use social media for IR work. These results have been consistent since NIRI began tracking social media use for IR in 2010.

The latest NIRI research on social media can be found at http://www.niri.org/analytics.

### Beware of Web-Crawling Dangers

Posting earnings information or other press releases to the company's website (or a hosted website) without adequate password and other protection, in advance of the intended release time, can result in it being susceptible to web-crawling and premature selective disclosure. You should therefore ensure that your company's website has strong password protection and firewalls for information that is posted before it is intended to be publicly released – and that your company's file names are not readily discernible. Take precautions so that your confidential information is not linked to a web server or other publicly facing servers until it is scheduled to be publicly released. Company disclosure policies and procedures should address confidentiality and security issues surrounding the disclosure and posting of materials to the company's website or its hosted website.

### Other Social Media Considerations

In addition to Regulation FD, there also may be other laws and rules that apply to public disclosures using social media. For example, if your company is contemplating or has begun a capital raise, Rules 134 and 135 under the Securities Act of 1933 are likely to apply. These rules permit companies to make limited announcements about public offerings.

Even if your company is not ready to tweet or blog, it should monitor what is being said about the company, its management, and its products/services, as well as its competitors who are doing so. Not monitoring what is being said about the company or its management could result in damage to your company's or its management's reputations. Companies should give serious thought to acquiring Twitter account names that their customers, clients, investors, and service representatives would likely consider to be company accounts.

A social media policy is essential for a company to minimize potential disadvantages from the use of social media and can help the company gain advantages. Ignoring the need for published social media guidelines can impede a company's ability to protect itself and hamper its efforts to compete effectively in the marketplace. To be effective, a company's social media policy should reflect the company's culture. Here are some issues to consider in developing a social media policy:

- Make sure that the policy is readily available on the company's website and intranet.
- Incorporate the company's existing disclosure policy into the social media guidelines.
- Describe the ways in which the company and its employees are authorized to use Twitter and other social media. Companies may find it beneficial to use social media to announce earnings calls or other material information, although any such announcement or disclosure must comply with the SEC's guidance. Investor relations tweets should include a hyperlink to full disclaimers and risk factors whenever the "tweet" involves forward-looking information – this needs to be considered within the 140-character limit.
- Tell employees what should not be discussed in tweets or other social media. This can be done by a clear reference to the company's disclosure policy, or the company may prefer to describe prohibited content more directly.

- Tell employees not to participate in social media when the topic being discussed may be considered a crisis situation or an area in which they are not authorized spokespersons and that disciplinary action may be initiated by the company if they do not follow the guidelines.
- However, companies should be mindful of the National Labor Relations Board's views on social media. In memorandums in 2011 and 2012, the NLRB stated that companies may not adopt social media policies that prohibit employees from talking "about working conditions, wages and hours, and management."
- Anyone who is going to be authorized to speak on behalf of the company in social media should have training in applicable securities laws and other applicable laws with examples of how to remain compliant with those rules while using social media.

## CONFERENCE CALLS AND WEBCASTS – ASSOCIATED WITH QUARTERLY EARNINGS

According to NIRI's July 2014 Earnings Call Practices Survey, 97 percent of respondents hold a quarterly earnings call, with 92 percent of these respondents indicating they believe holding a quarterly earnings conference call to be a best practice.

Conference calls/webcasts are typically used as forums in which companies provide additional "color" in order to expand on information contained in news releases issued prior to conference calls and to respond to call/webcast participants' questions.

The information from conference calls and/or webcasts should be made available to all interested parties, including investors, analysts, and members of the media. For purposes of compliance with Regulation FD, a fully accessible, non-exclusionary webcast or conference call is considered to be a means of real-time, full and fair disclosure. The rule calls for adequate notification of investors interested in upcoming webcasts or teleconferences. Although the SEC recognizes that there are circumstances in which a conference call must be held on short notice for the announcement of new material information (e.g., a merger), it believes that, under normal circumstances, interested investors should be given at least several days' notice of the upcoming call. Most companies notify investors at least one to two weeks in advance of earnings calls. Proper notification generally includes issuing a news release, using push technology and posting on the company's website the date, time, subject matter, and means for accessing the webcast and/or conference call. For more details on earnings call practices, please see NIRI's Standards of Practice: Earnings Release Content (updated July 2013), which is available at: https://www.niri.org/resources/publications/standards-of-practice-for-investor-relations

Many companies file or furnish their earnings news releases on Form 8-K prior to the start of conference calls in order to avoid the potential obligation to file transcripts of calls as exhibits to a Form 8-K as required by Item 2.02 of Form 8-K. Companies should issue safe harbor statements at the beginning of conference calls as well as statements disclaiming a duty to update information. Companies are also reminded to consider and comply with Regulation G requirements on conference calls, including publishing any necessary GAAP reconciliations in a

Form 8-K filed with the SEC or on their websites, in each case prior to calls.

If a transcript or a replay of a conference call will be available after it has occurred, the SEC encourages companies to indicate in the notice how, and for how long, such a record will be available to the public. Companies should review transcripts for transcription errors prior to posting. The SEC recommends archiving earnings releases on the company website for at least one year (see footnote 61 of SEC Release No. 33-8176). Many companies move their webcasts to archived website locations a week after the webcasts. Archiving a webcast for the same period as the quarterly earnings release will allow investors to make valid comparisons using both the earnings release and the webcast.

## ONE-ON-ONE MEETINGS, TELEPHONE CONVERSATIONS, ETC.

One-on-one meetings with individuals or groups are a common and indispensable way to disseminate information about a company and to answer legitimate requests for a discussion of long-term strategies, as well as to provide detailed information. One-on-one meetings help to increase transparency, build goodwill, and make a company more approachable in the eyes of the investment community.

These types of communications are best held following the release of quarterly results when the universe of material, nonpublic information is smaller. Nevertheless, companies should always avoid discussing material, nonpublic information in one-on-one meetings. Speakers should be limited to those with prior IR training. Companies should note that, as in all other types of meetings, there is the possibility that material, nonpublic information may be selectively disclosed. Companies should be aware that the mere presence of the press at an otherwise nonpublic meeting attended by analysts and other market professionals does not automatically render the meeting "public" for purposes of Regulation FD.

Prior to beginning a meeting, participants should be reminded about the company's safe harbor disclosure. Speakers should concentrate on previously disclosed information and should be debriefed following the meeting to confirm that no material, nonpublic information was discussed.

The company's disclosure policy should state that an IR practitioner should participate in meetings and telephone calls between senior management and members of the investment community to ensure that questions are not answered that may elicit material, nonpublic information. If there is an unintentional disclosure of such information, the company should issue a news release and/or file a Form 8-K containing that information promptly after a senior official of the company learns of such disclosure. "Promptly," for these purposes, means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the company's exchange). Many of the Regulation FD violations noted in court cases or SEC settlements (see Chapter 9) were the results of one-on-one meetings when material, nonpublic information was disclosed, but the unintentional disclosures were not remedied pursuant to Regulation FD.

## ANALYST/INVESTMENT CONFERENCES AND ROAD SHOWS

Participating in sell-side and investment conferences and non-deal road shows is an important way to reach out to current and potential investors. Typically, IR practitioners determine the calendar for conference participation and recommend when to go on the road and with whom. One or more members of senior management (typically the CEO/President and CFO) participate in these events. The IR practitioner scripts the presentations, prepares the slides, and is cognizant of what information will be presented. If material, nonpublic information will be discussed during these events, the IR practitioner should broadly disseminate a news release in advance of the presentation and post the news release and presentation on the IR portion of the company's website. The company should also consider including this information on a Form 8-K. If an unintentional disclosure of material, nonpublic information is made during the presentation, question-and-answer period, or in one-on-one meetings, in order to avoid violating Regulation FD, the company should issue a news release and/or file a Form 8-K containing that information as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the company's exchange).

The best practice at investment conferences is to webcast corporate presentations.

What options do companies have when webcasting is not available?

1. **Don't participate –** As a matter of policy, a company can choose not to participate in an investment conference that does not provide webcasting. This option can put small-cap companies or those in a particular industry sector at a disadvantage, but so can the perceived lack of transparency.

2. **Don't disclose any material, nonpublic information –** If the company is not disclosing any material, nonpublic information, Regulation FD is not triggered.

3. **Disclose in compliance with Regulation FD –** The responsibilities for Regulation FD rest squarely with the company and the IR practitioner.

**Whether or not webcasting is available, consider the following steps to avoid a Regulation FD violation:**

| | |
|---|---|
| **File an 8-K** | Prior to presenting at an analyst conference, disclose in a Form 8-K material, nonpublic information that the company wishes to be free to discuss. |
| **Issue a news release** | Disclose material information and announce where and when presentation slides will be posted. |
| **Announce webcast** | If you webcast the investment conference presentation, include the announcement in the news release that is sent out in advance. |
| **Post presentation slides, script, etc.** | Link the archive of the audio with presentation slides on your website. Though not required, it is worth the extra cost to have slides with the audio for investors to review. |

Regardless of whether or not the investment conference presentation is webcast, IR practitioners should conduct Regulation FD training with senior management prior to investment conference presentations and should prepare speakers to answer questions that are challenging to answer from a Regulation FD perspective. IR practitioners should also be present to listen for unintentional disclosures of material, nonpublic information, particularly during the question-and-answer session and in one-on-one meetings with senior management. The IR practitioner should be familiar with what information is public and be on hand to exercise judgment should a discussion lead to an unintentional disclosure of material, nonpublic information. Updating guidance or commenting on quarterly earnings estimates, for example, may be deemed material and thus require disclosure via the issuance of a news release and/or Form 8-K filing.

## STOCKHOLDER MEETINGS

Information communicated by management at annual and special meetings of stockholders presents Regulation FD issues similar to those discussed above in connection with investment conferences. Even if the meeting is open to the public, if it is not otherwise webcast or broadcast by electronic means with advance notice, the meeting itself will not be deemed to constitute a method of disclosure "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." As a consequence, any material, nonpublic information to be disclosed at such meeting should be disclosed in a news release in advance of the meeting via a wire service and the news release, and the presentation should be posted on the IR portion of the company's website. The company could also include this information on a Form 8-K.

## BLOGS AND ELECTRONIC FORUMS

Statements made by a company's representatives on blogs, whether company-sponsored or third-party blogs, must comply with the antifraud provisions of the federal securities laws. The company will be responsible for statements made by or on behalf of the company and cannot avoid liability by having employees speak in their "individual" capacities if employees are authorized company spokespersons. Further, companies should keep in mind the considerations discussed previously relating to the disclosure of material, nonpublic information and compliance with Regulation FD.

A company is not responsible for third party statements on blogs or on a company-sponsored blog and has no duty to correct misstatements made by a third party – but not responding to such information may not be practical or prudent from a business perspective. Also, if a company selectively edits or deletes blog entries other than on a pre-established, nondiscriminatory basis (for example, the posting is offensive), it might be considered to have approved of, or agreed with, the information that has been posted.

A company should establish a policy that clearly designates those employees who are authorized to represent the company in a blog or e-forum (whether sponsored by the company or a third party) and the content that the authorized employees are permitted to post.

If a company decides to sponsor or host a blog, it should establish and publish terms of use designed to limit the company's liability. As part of entering into the blog, users should be required to affirmatively accept these terms. If the company (or someone on behalf of the company) collects personally identifiable information from those who post comments, the company should post and adhere to a privacy policy. The company should note that it cannot prevent users from making investment decisions based on a blog's or e-forum's content, or require investors to waive antifraud protections to participate in a company-sponsored blog or e-forum.

Though some companies use blogs to discuss their products and services, most do not provide forums in which to discuss their results and prospects.

## CORPORATE WEBSITE AS INFORMATION REPOSITORY

With the dramatic growth in the use of the Internet, maintaining a corporate website has generally become a common best practice. Investors and others seeking information about public companies often include a review of corporate websites in their due diligence process. NIRI believes that by carefully maintaining and updating an investor relations area of a corporate website, companies have an opportunity to improve their IR departments' efficiency by establishing their websites as comprehensive repositories of all relevant corporate information. NIRI urges companies to include investor relations contacts on the IR areas of their websites, preferably including phone numbers and email addresses.

Companies should remember, however, that information on a company website is subject to the antifraud provisions of the federal securities laws. Furthermore, a company should be aware that it can be held liable for third party information included on its website and for third party information to which it hyperlinks from its website and which could be attributable to the company.

As such, companies should treat their websites with the same care as their SEC filings. The information on websites must be accurate — companies must avoid hype. Companies should not distribute, post, or provide links to analyst reports in order to avoid any implication of the adoption or approval of these reports. Companies may list the covering analysts and/or firms. Companies should also create special archive sections on their websites and regularly move out-of-date content into these areas to indicate that it is historical and not current.

## BOARD-SHARHOLDER COMMUNICATIONS

One upshot of the growing interest in corporate governance (including executive compensation) following the recent corporate and economic crises is that some shareholders have begun asking for direct communications with corporate boards. In an October 2013 NIRI member survey, 40 percent of respondents stated a board member has met with or spoken directly to a shareholder within the last two years.

For those companies electing to make their boards available for such communications, here are several recommendations:

- limit communications responsibility (to the lead director or certain board committee chairs, for example) to ensure consistent messaging;
- include at least one Regulation FD-trained member of management in all communications;
- follow legal requirements and Regulation FD rules; and
- restrict communications to director-level topics.

## CLIMATE CHANGE AND SUSTAINABILITY REPORTING

Socially responsible investors may request sustainability reports that detail the company's efforts to mitigate the external costs of doing business. This data may also be demanded in customer requests for proposals in certain industries. Some companies have begun engaging investors on sustainability trends, risks, and opportunities. Companies choosing to issue a sustainability report should consider following a widely recognized sustainability reporting standard to improve consistency and comparability. The Global Reporting Initiative is one example of a group that has issued sustainability reporting guidelines. In October 2012, the Sustainability Accounting Standards Board was formed. This organization is developing industry-specific sustainability accounting standards. In April 2016, the SEC issued a Concept Release on Regulation S-K that included various questions related to sustainability and whether the Commission should mandate additional disclosures.

# 9. Court Decisions and SEC Actions That Have Shaped Disclosure

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IR practitioners should have a basic understanding of the legal principles that are incorporated in the SEC's disclosure rules. In addition, IR practitioners should be aware of the types of selective communications that may be deemed by the SEC to be a violation of Regulation FD. This chapter includes summaries of important court decisions on disclosure, as well as details on notable Regulation FD enforcement actions.

## DECISIONS AND ACTIONS PRIOR TO REGULATION FD

**SEC v. Texas Gulf Sulphur Co., 258 F.Supp. 262 (1966):** Beginning in November 1963, Texas Gulf Sulphur conducted exploratory drilling operations in an area that had potential to hold significant mineral and ore deposits. By April 9, 1964, three holes had been drilled, all of which were promising. Throughout this time, the president, vice president, various executive officers and other employees continued to buy and trade Texas Gulf Sulphur shares, and some accepted stock option grants from a company committee that was unaware of the digging operations. Rumors began to circulate about a major mineral find. On April 12, the company issued a misleading press release stating that the reports were exaggerated and that the find was just a "prospect." Late on April 15, it issued another press release announcing a major ore strike, but the news did not hit the market until April 16. Between April 12 and April 15, company executives continued to trade, and two company officials bought shares of Texas Gulf Sulphur immediately after the news was released. The SEC brought suit, alleging that the defendants traded on insider information.

The U.S. District Court for the Southern District of New York held that the defendants withheld information that was material to shareholders, so were acting on insider information when they purchased their shares. The conduct of the defendants was seen as evidence that the information was material: they purchased large quantities of shares; kept the information confidential; and continued to purchase shares when only they were aware of the information. Specifically, information is material where a reasonable person would believe that the information would be relevant to the price of the stock. Further, the defendants should not have acted upon the information until it was absorbed into the market, such that the public would have had a reasonable opportunity to act on it.

*Key Takeaways:* Information is material where a reasonable person would find it relevant to the price of the stock. Those in possession of nonpublic information should not act on it until it is public and has been absorbed into the market, so that the public has had a reasonable chance to act on it.

**TSC Industries Inc. v. Northway Inc., 426 U.S. 438 (1976):** TSC Industries Inc. was in acquisition discussions with National Industries Inc. National had previously purchased 34 percent of the outstanding securities of TSC and placed five directors on TSC's board. On October 16, 1969, TSC's board of directors voted to accept an acquisition proposal by which National would acquire all outstanding shares of TSC stock (with interested directors abstaining). The companies cooperated to distribute a proxy statement to TSC's shareholders. Northway Inc., a TSC shareholder, brought suit, alleging that the proxy statement was incomplete and materially misleading in violation of Section 14(a) and Rules 14a-3 and 14a-9 of the Exchange Act. Specifically, Northway alleged that the proxy omitted facts regarding National's control over TSC, and misrepresented if the deal was good or not for TSC shareholders.

In the Supreme Court's decision, Justice Marshall stated that shareholders need to understand what they are voting on, and misstatements or omissions in a proxy statement make this impossible. A misstatement or omission need not be decisive in the actual vote to be material; a fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.

*Key Takeaways:* Companies must carefully consider proxy statement language, avoiding misstatements or omissions, in order to ensure shareholders have all information necessary to make an informed voting decision.

**Ross v. A.H. Robins Co., 607 F.2d 545 (1979):** Robins Company was a manufacturer of medical devices, including an intrauterine birth control device called the Dalkon Shield. Between 1970 and 1974, Robins was named in several products liability lawsuits with regard to the Dalkon Shield, and, in 1972, a report was completed but never published that the Shield posed serious safety concerns. Throughout this time, the company's management continued to publish positive information about the Shield, including in their periodic reports under the federal securities laws. By the middle of May 1974, the public began to learn about serious problems with the device, which resulted in an investigation by the Food and Drug Administration, among others, and the filing of over 500 product liability lawsuits. Robins did not begin to correct its prior false and misleading statements until July 1974. Kalman and Anita Ross had bought shares of Robins' stock in 1973, and brought suit, alleging violations of Section 10(b) and Rule 10b5-1 of the Exchange Act on the grounds that Robins' false and misleading statements artificially inflated and manipulated the price of Robins' stock.

The court held that the company had a duty to promptly correct the false and misleading statements. Generally, companies have a duty to timely correct material information that they believed was correct when first disclosed but is later determined to be incorrect.

*Key Takeaways:* A company should correct material information promptly after finding out that it is no longer correct.

**In re Carnation Co., SEC Release No. 34-2214 (July 8, 1985):** Throughout July and August 1984, certain high-level directors and executives of the Carnation Company and Nestle S.A. were engaged in confidential discussions regarding a transaction whereby Nestle would acquire Carnation. In early August, rumors began that Carnation's major stockholder, Dwight Stuart, was planning to sell his shares and that Nestle, among others, was a possible acquirer of Carnation. Unusual activity in Carnation's stock increased and, on August 7, Carnation's stock price increased dramatically. That day, Carnation treasurer Michael Malone told the press that "there was no news from the company and no corporate developments that would account for the stock action." Malone was unaware of the merger negotiations and had not previously discussed this statement with anyone else at Carnation.

Merger discussions continued and Carnation's stock price continued to climb. On August 21, it was reported that, on the previous day, Malone had again stated that Carnation knew of "no corporate reason for the recent surge in its stock price." Further, he said that, to the best of his knowledge, there was no information to substantiate the rumors and that Carnation was not negotiating with anyone. The price of Carnation shares declined between August 21 and 24, and Malone was advised by chairman of Carnation's board of directors to respond with "no comment" to further questions.

The SEC found that Malone's statements were materially false and misleading. By August 7, merger talks had begun, and, by August 21, multiple meetings had occurred and transaction pricing and structure had been discussed. Despite the fact that Malone personally had no knowledge of these discussions, Carnation had a duty not to provide materially false and misleading information to the market. The omissions and misstatements altered the total mix of information available to investors, even in the stage of preliminary acquisition discussions, and so were material.

*Key Takeaways:* A company may not provide false or misleading information to the market. Lack of knowledge on the part of a speaker that information is false or misleading does not excuse the company represented by the speaker from compliance with this requirement.

**Basic Inc. v. Levinson, 485 U.S. 224 (1988):** Basic Inc. was in discussions with Combustion Engineering Inc. about a transaction whereby Combustion Engineering would acquire Basic. After several months of discussions, Basic asked the New York Stock Exchange to suspend trading in its shares, and issued a press release stating that it had been "approached" by another company in regard to an acquisition. Basic president Max Mueller publicly denied that Basic was participating in discussions. The following day, Basic's board of directors approved Combustion Engineering's tender offer for all outstanding shares of Basic. Basic shareholder Max Levinson brought suit against Basic and its directors, alleging that he and other shareholders were harmed by selling shares in reliance on the announcement, at an artificially depressed price due to Mueller's announcement, in violation of Section 10(b) and Rule 10b5-1 of the Exchange Act.

The U.S. Supreme Court held that a misrepresentation or omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information." It then articulated the fraud-on-the-market theory, which provides that there is a link between any misstatement and any stock purchaser because misstatements defraud the entire market and thus impact stock price. Material misstatements, then, affect individual investors as well as the entire market. Since investors rely on stock price, there is a rebuttable presumption of reliance by any investor in a sale or purchase of shares on any such misstatement.[73] The presumption can be rebutted by showing that there is no link between the misstatements and the sales price of the security in question.

*Key Takeaways:* Materiality is measured by its effect on the total mix of information available to an investor. Further, material misstatements impact the entire market through their impact on stock price, leading to a presumption that investors relied on those misstatements and the company could be liable under the federal securities laws.

**Rasheedi v. Cree Research (MD NC 1997):** Defendants alleged that Cree Research had made statements regarding its business prospects that were quoted in an article, as well as statements in a quarterly report on Form 10-QSB and in two press releases. The quarterly report contained cautionary language regarding "repeatability" issues with the company's manufacturing process; however, different design defect and quality issues later caused the company to fall short of its goals. The press releases predicted production goals, but cautioned that the company might not reach these goals. In 1997, the lawsuit was dismissed. In his opinion, Judge Richard Erwin held that the company's forward-looking statements in regard to its business prospects were protected under the safe harbor provided by Section 21E(c)(1)(A) of the Exchange Act because the filings and other documents contained cautionary language regarding the company's products and manufacturing. Even though it was other unmentioned factors that caused the company to materially fall short of these goals, the judge stated that, in the total mix of information, investors were warned of the risk involved in the investment via forward-looking statements. The company did not have to caution against every conceivable factor that may cause results to differ.

The court cited to the Private Securities Litigation Reform Act's "Statement of Managers," which says that lists of risk factors do not have to be exhaustive. Even if the risk factor that leads to a material change in a forward-looking statement is not provided, as long as investors are warned that there is risk involved as part of the total mix of information, the safe harbor will be satisfied.

*Key Takeaways:* Forward-looking statements should always be qualified by risk factors. Even if the specific risk that leads to a later problem is not named, investors must be aware that there is risk in the investment in order for a company to avoid liability for statements that later become untrue.

73 On November 15, 2013, the U.S. Supreme Court granted a petition for certiorari in ***Halliburton Co. v. Erica P. John Fund Inc.*** to consider the question of whether the Court should overrule or substantially modify the holding of ***Basic*** to the extent that it recognizes a presumption of class-wide reliance derived from the fraud-on-the-market theory. As of March 2004, the Court had not decided the case.

## DECISIONS AND ACTIONS SINCE REGULATION FD

**In the Matter of Raytheon Company and Franklin A. Caine, filed November 25, 2002:** On February 7, 2001, Raytheon Company held an investor conference where it repeated annual earnings guidance, but did not provide quarterly guidance. After the call, Chief Financial Officer Franklyn A. Caine asked his staff to contact analysts for copies of their quarterly reports about the company. The reports reflected a slight "seasonality" to Raytheon's quarterly earnings, with the first quarter being weakest and the fourth being strongest, but assumed that earnings would be more evenly distributed in 2001 than in 2000 - the earnings estimates were higher and less seasonally distributed than internal estimates. Caine then called each analyst and, in one-on-one conversations, told the analysts that earnings would be more seasonal, as in 2000, and that first quarter earnings estimates were "too high" or "aggressive." Each analyst then lowered first and/or second quarter earnings estimates and increased estimates for later in the year. The price of Raytheon's A stock fell 3 percent and the price of Raytheon's B stock fell 6 percent, and the company beat analysts' earnings estimates for the first quarter by an estimated $0.01.

Both Raytheon and Caine were ordered to cease and desist from any further violations of Section 13(a) of the Exchange Act and Regulation FD.

*Key Takeaways:* Care should always be taken in private conversations with analysts or investors to avoid any inadvertent disclosures. Any misunderstood information should be corrected publicly through a means of broad dissemination, rather than in a private manner. Further, annual earnings guidance is considered to be material for purposes of Regulation FD.

**In the Matter of Secure Computing Corporation and John McNulty, filed November 25, 2002:** In early 2002, Secure Computing Corporation reached a deal whereby its technology would be incorporated into a product manufactured by a large computing networking company. The networking company was required to give prior consent to an announcement of the deal. In early March 2002, Secure Computing's executive staff, including Chief Executive Officer John McNulty, discussed the concern that news of the deal would leak to the public because the networking company was selling beta versions of the product. On March 6, at the networking company's request, Secure Computing provided information and downloads to the company's sales team and beta customers on its website. Secure Computing's homepage did not mention the deal or provide a link to the new page. At the time, the deal had not been publicly announced.

Also on March 6, McNulty and Secure Computing's director of investor relations had a call with a portfolio manager and a salesperson at a brokerage firm. The IR director wrongly told McNulty that he could disclose the deal because of the new webpage, which he assumed meant the deal was public. McNulty then confirmed this information to the managing partner of the brokerage firm. McNulty later found out that he had mistakenly disclosed nonpublic information, and asked the managing partner to keep the information confidential. On March 7, McNulty asked for, but did not receive the networking company's consent to announce the deal publicly, but also failed to inform them of the previous disclosure. McNulty then confirmed the existence of the deal to four institutional investors. Secure Computing's shares rose seven percent in extremely heavy trading. Following the close of the market on March 7, Secure Computing received consent to disclose the deal. Between March 5 and 11, its shares rose a total of 35 percent.

The SEC held that the March 6 disclosure was not intentional, and, if a public announcement had immediately been made, no violation would have occurred. However, the March 7 disclosure was intentional and selective, and so violated Regulation FD. Both Secure Computing and McNulty were ordered to cease and desist from any further violations of Section 13(a) of the Exchange Act and Regulation FD.

*Key Takeaways:* Care should be taken in contract negotiations to allow for disclosure in cases where it is required by Regulation FD or other rules. Further, companies should always take care to avoid disclosure of material, nonpublic information privately, and should always promptly disseminate such information to the public should an inadvertent disclosure occur.

**In the Matter of Siebel Systems Inc., filed November 25, 2002:** On November 5, 2001, the CEO of Siebel Systems Inc. made positive comments about the company's business outlook to attendees at a private technology conference. Prior to the event, Siebel's CFO and director of investor relations had a call with the Goldman Sachs & Co. analyst who organized the conference. The analyst then sent an internal email to others at Goldman Sachs that the company's remarks would likely be positive. The conference was not webcast, and the CEO's comments were not simultaneously broadcast to the public (which Siebel's investor relations staff knew, and which the CEO knew or was reckless in not knowing). The rosy statements conflicted with negative statements about the state of Siebel's business publicly made by the CEO three weeks earlier. This changed perspective resulted from the CEO's personal knowledge of internal nonpublic information regarding Siebel's sales pipeline. This information was not included in the "talking points" provided to the CEO for his remarks. In addition, Siebel had been provided with a list of attendees at the event as well as a list of questions that the CEO would be asked, including if Siebel had "any evidence that the software market [was] getting any better or worse." On the day of the event, Siebel's shares closed 16.5 percent higher in heavy trading.

Siebel was ordered to pay a $250,000 penalty and agreed to a cease-and-desist order of Section 13(a) of the Exchange Act and Regulation FD.

*Key Takeaways:* When inadvertent disclosure occurs, correct information should be promptly disseminated to the market. Further, those speaking for a company should refrain from including nonpublic information based on their personal knowledge in private conversation, even if they feel such information is appropriate given the circumstances of their remarks.

**Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 into Motorola Inc., released November 25, 2002:** In February 2001, Motorola Inc. issued a press release and held a public conference call in which it said that sales and orders were experiencing "significant weakness" and that it was likely to miss earnings estimates. The director of investor relations then reviewed analyst reports, concluding that the analysts had not understood the severity of the statements and were still overstating quarterly results. Between March 6 and March 12, the IR director privately called several sell-side analysts to discuss their models, repeated his advice from the February call, and clarified that “significant” as used in the previous call meant “25 percent or more.” No press release or public announcement was made at this time. Before the calls, the IR director consulted with Motorola’s in-house legal counsel, who concluded that the quantitative definition of “significant” was not material, so no public disclosure was required. Counsel also concluded that Motorola’s definition of “significant” was already public for Regulation FD purposes.

Because counsel’s opinion was sought and provided in good faith, the SEC declined to bring an action against the company and instead issued an investigative report. However, the disclosure of the quantitative definition of “significant” did constitute selective disclosure of material nonpublic information. The SEC stated that the definition needed to be considered under circumstances the director believed it was important enough to call analysts to make them understand this detail.

*Key Takeaways:* Care should always be taken in private calls, and public disclosure should not be enhanced with additional material, nonpublic information in after-the-fact private communications. Companies should think about the reasons for making the private disclosure and the circumstances giving rise to the disclosure when determining if information is material and so should be released publicly.

**SEC v. Schering-Plough Corp.; In the Matter of Schering-Plough Corp. and Richard J. Kogan, filed September 9, 2003:** On August 2, 2002, the patent for Schering-Plough’s best-selling drug, Claritin, was found invalid. In its Quarterly Report on Form 10-Q for that period, the company disclosed the invalidity and stated that generic versions of the drug could be sold as early as December 2002, which would have an immediate material, chilling effect on the company’s revenue. By late September, internal earnings predictions were much lower than analyst’s predictions. On September 30 and October 1, CEO Richard J. Kogan and senior vice president of investor relations met with analysts and portfolio managers from three of Schering-Plough’s largest institutional investors. At these meetings, Kogan provided specific information about the company’s business and gave attendees the impression that the company’s results would be worse than previous predictions, including that current analyst predictions were not sufficiently low to reflect the loss of the patent. Following the meeting, analysts lowered their forecasts for the company. Schering-Plough shares fell by 17 percent between October 1 and October 3 in very heavy trading.

On October 3, the company gave a previously scheduled talk to analysts and investors that was not webcast or otherwise made available to the general public at which Kogan reiterated his negative statements about the company’s earnings and business. Following the conference, Schering-Plough received numerous inquiries, which prompted it to issue a Form 8-K disclosing that earnings guidance was materially lower than current analyst predictions and the company’s previous guidance.

In the SEC's complaint, it called attention to the CEO's "statements, demeanor and general expression of concern" for the company as selective disclosure of material information. Both Schering-Plough and Kogan agreed to cease-and-desist orders of Section 13(a) of the Exchange Act and Regulation FD; the company paid a $1,000,000 fine while Kogan paid a fine of $50,000.

*Key Takeaways:* Language and tone, in the context of the statements, can give rise to Regulation FD violations. Even if nonpublic information is not being directly revealed, companies should be sure such information is not being relayed through the context and wording of other private statements.

**SEC v. Siebel Systems Inc., dismissed September 1, 2005:** The SEC alleged that, in 2003, while Siebel Systems Inc. was still operating under the cease-and-desist order from an earlier Regulation FD action, Chief Financial Officer Kenneth Goldman provided material nonpublic information at two private meetings with investors. Specifically, the SEC argued that the private statement that "there were some $5 million dollar deals in Siebel's pipeline" differed from the public statement "I suspect we'll see some greater than five," partially because of the present tense wording; with "suspect" being a forward-looking word rather than a present fact. The SEC alleged that following these statements, both Siebel's stock price and trading volumes increased, indicative of materiality and Regulation FD violations. The SEC also charged Siebel senior vice president Mark Hanson, who was then responsible for investor relations, for violation of a duty to maintain disclosure controls and Regulation FD compliance.

The U.S. District Court for the Southern District of New York dismissed all charges. Judge George B. Daniels said that the SEC had used Regulation FD in an "overly aggressive manner," and that the statements made by Goldman were not materially different than those made publicly, so did not alter the total mix of information available to investors. For example, the private statement regarding sales pipeline growth would have already been known to a reasonable investor based on public statements predicting increased revenue because of the sales pipeline. He went on to criticize the SEC's heightened analysis of Goldman's statements, including the focus on verb tenses and sentence structure, stating that companies must have freedom to act without an unreasonable burden, and to do more than repeat previous public statements exactly. He stated that such strict enforcement of Regulation FD could have a "chilling effect" on public disclosure, an undesirable result. Further, the court held that, while changes in share price can be indicative of materiality, this alone cannot be the deciding factor.

*Key Takeaways:* The principals established by Schering-Plough regarding tone and language of nonpublic statements still remain sound, but are not unbounded. Companies should continue to determine materiality by looking at the total mix of information available to investors, and ensure that public disclosure is broad enough to encompass anything that may be said on the same subjects privately.

**In the Matter of Flowserve Corporation, C. Scott Greer and Michael Conley; SEC v. Flowserve Corporation and C. Scott Greer; filed March 24, 2005:** Flowserve Corp. lowered its earnings estimates in both July and September of 2002. On October 22, 2002, it reaffirmed the September guidance in a press release. On November 18 and 19, Flowserve held private analyst events. At the November 19 event, in the presence of the company's director of investor relations, Michael Conley, the company's chief executive officer, C. Scott Greer, reaffirmed the guidance in the October 2 press release. This reaffirmation was contrary to the company's policy, adopted in 1999, that provided that earnings guidance only be confirmed publicly and provided specific language to that effect. Conley, who was responsible for implementing the policy, did not remind Greer of the policy during the meeting. The following day, an analyst issued a report that the company had confirmed the previous earnings guidance. On November 21, shares of Flowserve closed 6 percent higher in increased trading. Following the market close that day, the company issued a Form 8-K stating that it had reaffirmed earnings guidance to analysts earlier in the week.

The SEC pointed out that there was a long delay between the confirmation and the Form 8-K release (53 hours, and 26 hours following the analyst's report). In addition, it cited the lack of cooperation from the company with the SEC's investigation (specifically, inconsistently with the Form 8-K, both Greer and Conley denied that the reaffirmation happened at a private analyst meeting). Flowserve, Conley, and Greer each consented to cease-and-desist orders of Section 13(a) of the Exchange Act and Regulation FD; Flowserve paid a $350,000 penalty and Greer paid a $35,000 penalty.

*Key Takeaways:* All companies should have and comply with written Regulation FD policies, as well as appropriate disclosure controls and procedures. In addition, if an inadvertent disclosure should occur, companies should act promptly to disseminate complete and correct information publicly to the marketplace, and comply with any resulting regulatory action.

**SEC v. Christopher A. Black, filed September 24, 2009:** On June 11, 2007, American Commercial Lines Inc. (ACL) issued a press release revising its 2007 annual and second quarter earnings guidance, stating that the second quarter results would "look similar" to the first quarter. Christopher Black, the chief financial officer of ACL, then spent several days in analyst meetings. Following the meetings, he agreed with ACL's CEO that he would send a summary email to analysts, provided that the email was first reviewed by ACL's outside counsel. Black did not complete the email as scheduled that Friday, June 15. In the meantime, Black received revised earnings guidance that ACL's second quarter earnings would be substantially lower than its first quarter earnings ($0.10 vs. $0.20 per share).

On Saturday, June 16, Black sent an email to eight analysts from his personal home account, without review by anyone at ACL or by outside counsel. The email stated that he wanted to "provide some additional color" on the June 11 press release, and discussed ACL's business, including that second quarter earnings could be "a dime below that of first quarter" based on business pressures. Following the email, ACL's stock declined 9.7 percent in very heavy trading. On Monday, June 18, when ACL discovered that the email had been sent, it issued a Form 8-K including the information from the email.

Black paid a $25,000 fine and consented to cease-and-desist order of Section 13(a) of the Exchange Act and Regulation FD. Interestingly, ACL was not named as a defendant in the suit.

The SEC stated that the following factors contributed to this decision: (i) ACL had provided Regulation FD training to its employees (including Black); (ii) Black acted alone in his violation, outside of ACL's disclosure controls; (iii) ACL immediately issued the Form 8-K when it became aware of the disclosure; (iv) ACL self-reported Black's actions; and (v) ACL enacted remedial measures, including additional controls to prevent future similar conduct.

*Key Takeaways:* Again, companies should be sure to enact and comply with written Regulation FD policies and procedures, as well as any other appropriate disclosure controls and procedures, and provide training regarding these policies. Companies should respond by publicly disseminating correct information when any material, nonpublic information is accidentally disclosed. Further, self-reporting and cooperation with the SEC in such cases will likely help mitigate any civil or administrative repercussions from the disclosure.

**SEC v. Presstek Inc. and Edward J. Marino, filed March 9, 2010:** In September 2006, Edward Marino, the president and CEO of Presstek Inc., was told that Presstek's margin and operating income would be substantially lower than previously forecasted. Presstek intended for this material information to remain nonpublic until an announcement in October. On September 28, Marino discussed the revised income predictions in a private phone call with Michael Barone, the managing partner of Sidus Investments. Specifically, Marino said that "the summer was not as vibrant as they expected in North America and Europe," and that Presstek's overall performance was a "mixed bag." Barone sent text messages of this information during the call and, immediately after the call, advised Sidus' broker to sell its entire investment in Presstek, although he did not disclose the information to any other analyst or investor. Following Presstek's announcement of the revised forecast, its stock dropped almost 30 percent.

Presstek agreed to a cease-and-desist order of Section 13(a) of the Exchange Act and Regulation FD and a $400,000 fine. As in *Black* (above), the SEC specifically pointed to Presstek's remedial measures in the complaint, including strengthening compliance controls, which it considered in the settlement. Marino later agreed to pay a $50,000 fine.

*Key Takeaways:* Companies should place an importance on having strong compliance programs, and react quickly and effectively when an inadvertent disclosure occurs.

**SEC v. Office Depot Inc.; In the Matter of Stephen A. Odland; In the Matter of Office Depot, Inc.; In the Matter of Patricia A. McKay, filed October 21, 2010:** In early 2007, CEO Stephen A. Odland and Patricia A. McKay, the chief financial officer of Office Depot Inc., learned that the company could not sustain its growth rate of recent years. Throughout the spring, they publicly warned investors and analysts of this information. Ten days before the close of the second quarter, Odland suggested that McKay call analysts, point them to the recent low earnings releases by similar companies, and stress Office Depot's earlier growth warnings in order to prompt analysts to lower their earnings estimates. The director of investor relations then called multiple analysts and Office Depot's top 20 institutional investors, relaying the information per the CFO's instructions. Fifteen out of 18 analysts lowered their estimates, resulting in an overall decrease from $0.48 to $0.45 per share, which caused shares to drop

7.7 percent in heavy trading. Office Depot issued a Form 8-K disclosing that earnings would be negatively impacted by economic conditions six days after the analyst calls began.

The SEC issued a cease-and-desist order against Office Depot for violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, and Regulation FD; and a fine of $1,000,000. The former CEO and CFO each paid a $50,000 fine and agreed to cease-and-desist orders of Section 13(a) of the Exchange Act and Regulation FD. The SEC specifically highlighted Office Depot's lack of a written Regulation FD compliance policy or training in the settlement. In addition, consistent with past actions, the action focused on higher level employees – the director of investor relations was apparently not sanctioned for his involvement. Lastly, the action directly pointed to Regulation FD's prohibition on "indirect guidance," as analysts were simply referenced to past announcements and the earnings reports of similar companies, rather than being directly informed that Office Depot would not meet earnings forecasts.

*Key Takeaways:* The SEC views the existence of and compliance with a written Regulation FD policy, as well as appropriate training, as being extremely important. Further, companies should be aware of language and tone in providing indirect guidance, and be sure that such statements do not lead to an inadvertent disclosure of material, nonpublic information.

**Matrixx Initiatives Inc. v. Siracusano, 131 S. Ct. 1309 (2011):** Matrixx Initiatives Inc. received reports from three medical professionals and researchers about more than 10 patients who lost their sense of smell after using Zicam, a cold remedy Matrixx manufactured. In addition, four products liability lawsuits had been filed against Matrixx. Matrixx also knew that researchers had presented a report linking Zicam to loss of smell at a national conference, and was aware of studies linking the ingredients in Zicam to loss of smell, but did not conduct any studies of its own. Despite this, Matrixx publicly responded to reports linking Zicam to loss of smell as being "completely unfounded and misleading" and issued positive predictions for the product's future success. A lawsuit was brought alleging violations of Section 10(b) and Rule 10b5-1 of the Exchange Act. Matrixx argued that the negative reports were not material, so it had no duty to disclose them.

The U.S. Supreme Court applied its previous definition of materiality, namely that a misrepresentation or omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information." Materiality is a fact-based case-by-case decision – it must be measured not only through statistical significance, as Matrixx argued, but must also include "source, content and context" of the information. Even statistically insignificant reports could alter the total mix of information available to investors, and so be material. However, the Court held that evidence must still be "reliable," showing "causation," and there was no need to disclose trivial, unfounded information.

Further, the Court held that "deliberate recklessness" met the scienter, or intent to deceive, element of a suit under Rule 10b5-1. The volume of negative reports and information, taken as a whole, was enough to give rise to an inference that Matrixx did not disclose the information not because it was immaterial, but because it knew the effect it would have on the market.

*Key Takeaways:* Materiality is a factual analysis, not a bright line rule. A company must think about the context, source and content of information to determine if it is material. A company does not need to specifically intend to deceive to become liable for violations of Rule 10b5-1— rather, recklessness is sufficient.

**Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013):** The U.S. Supreme Court ruled in a case involving biotechnology company Amgen that investors do not have to prove the materiality of a company's alleged misrepresentations before obtaining class certification in a securities lawsuit.

At issue in this case was the interpretation of Federal Rule of Civil Procedure 23(b)(3), which requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members," for a court to grant class certification. To meet this predominance requirement, Amgen argued that the investors had to do more than plausibly plead that the company's alleged misrepresentations and misleading omissions materially affected its stock price. According to Amgen, certification must be denied unless investors proved materiality, because immaterial misrepresentations or omissions would have no impact on Amgen's stock price in an efficient market.

While noting that the investors must prove materiality to prevail on the merits, the Court held that such proof is not a prerequisite to class certification. As the Court observed: "Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class [the investor plaintiff] would represent. The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class."

The U.S. Chamber of Commerce and industry groups backed Amgen in this case. They argued that allowing these class actions to proceed would punish "innocent defendants (and their current shareholders) who must settle cases after certification to avoid the massive risks and expense of litigation."

*Key Takeaways:* The Supreme Court's decision will make it more difficult for many companies to get these lawsuits dismissed before the costly pre-trial discovery process.

**In the Matter of Lawrence D. Polizzotto, filed September 6, 2013:** The SEC reached a Regulation FD settlement with Lawrence D. Polizzotto, a former investor relations officer with First Solar Inc., an Arizona-based company that manufactures and sells solar modules. On September 21, 2011, Polizzotto selectively disclosed to approximately 20 sell-side analysts and institutional investors that First Solar would not receive a significant loan guarantee from the U.S. Department of Energy (DOE) that company officials and industry analysts had previously anticipated First Solar would receive, according to the SEC settlement. The Commission alleged that Polizzotto also directed a subordinate to make similar calls, and provided the subordinate with a list of talking points. The next morning, the company publicly disclosed the loss of the DOE loan guarantee and its stock price dropped by 6 percent.

Under the settlement, Polizzotto agreed to pay a $50,000 penalty and agreed to a cease-and-desist order to refrain from violating Section 13(a) of the Exchange Act and Regulation FD. The SEC said it decided not to bring an enforcement action against First Solar, citing the company's "extraordinary cooperation with the investigation among several other factors." According to the SEC: "the company immediately discovered Polizzotto's selective disclosure and promptly issued a press release the next morning before the market opened. First Solar then quickly self-reported the misconduct to the SEC. Concurrent with the SEC's investigation, First Solar undertook remedial measures to address the improper conduct. For example, the company conducted additional Regulation FD training for employees responsible for public disclosure."

*Key Takeaways:* When Regulation FD violations occur, companies can minimize their liability if they make prompt corrective disclosures, self-report any misconduct to the SEC, and cooperate with the investigation.

# 10. NIRI Code of Ethics

**As a regular member of the National Investor Relations Institute, I will:**

1. Maintain my integrity and credibility by practicing investor relations in accordance with the highest legal and ethical standards.

2. Avoid even the appearance of professional impropriety in the conduct of my investor relations responsibilities.

3. Recognize that the integrity of the capital markets is based on transparency of credible financial and non-financial corporate information, and will to the best of my ability and knowledge work to ensure that my company or client fully and fairly discloses this important information.

4. Provide analysts, institutional and individual investors, and the media fair access to corporate information.

5. Honor my obligation to serve the interest of shareholders and other stakeholders.

6. Discharge my responsibilities completely and competently by keeping myself abreast of the affairs of my company or client as well as the laws and regulations affecting the practice of investor relations.

7. Maintain the confidentiality of information acquired in the course of my work for my company or client company.

8. Not use confidential information acquired in the course of my work for my personal advantage nor for the advantage of related parties.

9. Exercise independent professional judgment in the conduct of my duties and responsibilities on behalf of my company or client.

10. Avoid any professional/business relationships that might affect, or be perceived to potentially affect, my ethical practice of investor relations.

11. Report to appropriate company authorities if I suspect or recognize fraudulent or illegal acts within the company.

12. Represent myself in a reputable and dignified manner that reflects the professional stature of investor relations.

NIRI urges compliance with its Code of Ethics by positively communicating the ideals of professional ethics and practice rather than through negative sanctions. However, members of NIRI who are sanctioned by an appropriate governmental agency or judicial body for violating laws or regulations affecting their professional activities may, upon recommendation of the NIRI Ethics Council, have their membership terminated by the NIRI Board of Directors following procedures in the institute's bylaws. (Reaffirmed January 8, 2010)

# Appendix A. Sample Disclosure Committee Charter

**[COMPANY NAME]**

**CHARTER OF DISCLOSURE COMMITTEE**

## PURPOSE

[Company Name] (the "Company") has formed the Disclosure Committee (the "Committee") to assist senior management with (1) the identification and consideration of material information for disclosure in the Company's periodic reports and other filings necessary under the federal securities laws, and the identification and consideration of information for voluntary disclosure, (2) the preparation of such reports, filings and voluntary disclosure in compliance with federal securities laws, and (3) the ongoing evaluation of the disclosure controls and procedures maintained by the Company for the collection, processing and disclosure, within the applicable time periods, of the information required to be disclosed in such reports and filings, and of the Company's internal controls. The Committee may also have additional functions as assigned to it from time to time.

## CREATION AND MEMBERSHIP

The Committee members shall be appointed by the Company's Chief Executive Officer (the "**CEO**")/Chief Financial Officer (the "**CFO**"). The members of the Committee shall be officers and employees of, and advisors to, the Company or any subsidiary of the Company who are not also directors of the Company or any subsidiary of the Company. Without limiting who may serve on the Committee, the membership of the Committee may include any or all of the following:

- chief executive officer;
- chief accounting officer or controller of the Company;
- general counsel of the Company or assistant general counsel of the Company with responsibility for disclosure matters who reports to the general counsel, and/or external securities counsel;
- principal risk management officer of the Company; and
- director of investor relations of the Company.

The CEO/CFO may designate other officers or employees of, or advisors to, the Company to serve as members of the Committee as the CEO/CFO deems appropriate. Committee members shall serve at the pleasure of the CEO/CFO.

## GENERAL DUTIES AND AUTHORITY

The Committee will hold at least [4] meetings per year, timed to allow for adequate fulfillment of its duties relating to the Company's filing of periodic reports with the Securities and Exchange Commission (the "**SEC**") and the evaluation of the Company's disclosure controls and procedures and internal controls. Actions of the Committee will be taken at meetings held in person or by telephone. A majority of the Committee shall be necessary to constitute a quorum for the transaction of business. An adequate record of the Committee's processes and procedures shall be maintained and furnished to members of the Committee, the Company's Chief Executive Officer (the "**CEO**"), the CFO and, at the request of any member, the Audit Committee of the Board of Directors of the Company (the "**Board**"). The Committee shall report on its actions at least quarterly to the CEO and CFO and the Audit Committee of the Board together with such recommendations as the Committee may deem appropriate. The Committee should annually review and reassess the adequacy of this charter, in light of the Company's operations and its reporting obligations under the Securities and Exchange Act of 1934 (the "**Exchange Act**") and any related statutes, rules or regulations, and submit any proposed changes to the CEO/CFO for approval. The Committee shall also perform such additional functions as may be assigned by the CEO or CFO or as directed by the Board.

## SPECIFIC DUTIES

### Process and Evaluation

1. The Committee shall develop, institute and be responsible for maintaining controls and procedures (the *"Disclosure Controls and Procedures*") designed to enable the Company to (i) collect, record, process, summarize and report, within the time periods specified in the SEC's rules and forms, the information, including non-financial information, that is required to be disclosed in the Company's periodic and current reports filed pursuant to the Exchange Act and in proxy statements and annual reports to shareholders provided pursuant to the proxy rules under the Exchange Act, or that is otherwise provided to investors (collectively, the "*Disclosure Materials*") and (ii) verify the accuracy and completeness of such information. Such information should include:

- information necessary to prepare the Company's financial statements or otherwise potentially subject to disclosure under SEC Regulation S-X;
- information potentially subject to disclosure under SEC Regulation S-K;
- information regarding developments and risks that pertain to the Company that is potentially subject to disclosure;
- other material information required to be disclosed to make the statements included in the Disclosure Materials not misleading in light of the circumstances under which they are made; and

- any other information that the Committee believes would be important to a reasonable investor in deciding whether to invest in the Company's securities or vote on a matter regarding the Company.

2. The Disclosure Controls and Procedures shall ensure that information is accumulated and communicated to the Company's management, including the CEO and CFO, pursuant to a schedule that allows them to make timely decisions regarding required disclosure.

3. An outline of the current Disclosure Controls and Procedures is attached to this Charter and may be revised from time to time as determined by the Committee. The Committee shall develop mechanisms for gathering information on an ongoing basis about the Disclosure Controls and Procedures that will enable it to: (a) issue reports regularly to the CEO and CFO on the effectiveness of the Disclosure Controls and Procedures, and (b) revise the Disclosure Controls and Procedures as necessary to meet the objectives of this Charter.

4. Without limiting the subjects of the ongoing information-gathering and the resulting reports, at a minimum the Committee should seek to identify:

- any material weakness in the Disclosure Controls and Procedures, together with correlative suggestions for correction;
- any significant deficiency or weakness in the design or operation of the Company's internal controls which could adversely affect the Company's ability to record, process, summarize and report financial data, together with any corrective actions; and
- any significant changes in the Company's internal controls, or in other factors that could significantly affect internal controls subsequent to the date of the applicable report.

### Responsibility for Considering Information and Determining Disclosure Obligations

1. The Committee shall consider whether the information gathered pursuant to the Disclosure Controls and Procedures needs to be disclosed in the Disclosure Materials, including the Company's annual or quarterly reports, current reports or proxy statements based on (a) the materiality and importance of the information to reasonable investors and (b) whether the information is necessary in order for the Company's financial statements to fairly present the financial condition, results of operations and cash flows of the Company for the periods presented in the report.

2. When considering the information gathered, the Committee shall review the certifications to be made by the CEO and CFO pursuant to the Exchange Act relating to the Disclosure Materials. In so doing, the Committee shall note that information is considered material if:

- there is a substantial likelihood that a reasonable investor would view the information as significantly altering the total mix of information in the Disclosure Materials; or
- the report would be misleading to a reasonable investor if the information were omitted from the Disclosure Materials.

For contingent or speculative events, the Committee shall bear in mind that materiality will depend upon a balancing of the probability that the event will occur and the anticipated magnitude of the event in light of all the Company's activities.

The Committee shall also note that "fair presentation" is not limited to compliance with generally accepted accounting principles, but encompasses:

- selection of appropriate accounting policies, and
- disclosure of financial information that:
- is informative and reasonably reflects the underlying transactions and events, and
- provides investors with a materially accurate and complete picture of an issuer's financial condition, results of operations and cash flows.

### Reporting

Prior to the filing of any periodic report, the Committee shall communicate to the CEO and CFO: (a) its recommendations regarding disclosures in such periodic report, (b) the results of the ongoing evaluation of the effectiveness of the Company's Disclosure Controls and Procedures, (c) any significant deficiencies or material weaknesses in the design or operation of the Company's internal controls, and (d) any significant changes in internal controls, including any corrective actions taken or recommended.

# DISCLOSURE CONTROLS AND PROCEDURES

**LAST UPDATED: [DATE]**

The following Disclosure Controls and Procedures shall apply with respect to the preparation of periodic reports (the "**Reports**") filed pursuant to the Securities Exchange Act of 1934 (the "**Exchange Act**") by [Company Name] (the "**Company**") until amended and updated by the Disclosure Practices Committee (the "**Committee**").

## INITIAL MEETING

- The Committee shall hold a meeting at least quarterly to initiate the process of information collection and review sufficiently in advance of the due date for each Report to ensure timely completion of the process before filing the Report.

## INFORMATION COLLECTION AND REVIEW

- **Personnel Interviews**. The Committee shall conduct interviews of appropriate personnel of the Company identified by the Committee, including those officers or managers who have decision- or policy-making authority over business functions or subsidiaries that may significantly affect the Company's financial results or operations (e.g., [Tailor following list to specific Company] Human Resources, Accounting/Auditing, Claims/Risk Management, Legal and Environmental, Finance, External Affairs, Operations, and Corporate Development). Topics for discussion may include:
    - » Assessment of the materiality of specific events, developments or risks;
    - » Financial reporting issues that are significant to the Company;
    - » The "Management's Discussion and Analysis" section of the Report, including the Company's critical accounting policies, any known trends, uncertainties or events that could have a material effect on revenues, income or liquidity, and the Company's liquidity and capital resources;
    - » Internal audit procedures and adequacy of internal controls;
    - » The Company's principal accounting policies;
    - » Procedures used to ensure that financial statements comply with applicable accounting principles; and
    - » Material reporting matters where the person primarily responsible for the matters, either alone or in consultation with other personnel or advisors, made significant judgments.
- **Audit Committee Interview**. As part of the interview process, one or more representatives of the Committee shall meet with the Chair of the Audit Committee of the Company's Board of Directors to discuss whether the Audit Committee has any material concerns about the accuracy, completeness and reliability of the financial and other information, the process of preparing the Report, or the internal controls and financial systems that generate the information in the Report. This may occur in conjunction with the meeting of the Audit Committee at which it reviews the relevant report
- **Committee Review and Analysis**. Following the interviews and information gathering process, the Committee shall meet to consider the materiality of information collected and determine the Company's disclosure obligations. The CEO/CFO shall either attend this meeting or, promptly following the meeting, shall meet with representatives of the Committee to review the Committee's conclusions with respect to the materiality of information and the Company's disclosure obligations.
- **Follow-up Interviews and Meetings**. The Committee shall conduct such follow-up interviews and investigations as it deems necessary, or as may be directed by the Company's CEO or CFO, to confirm or refine its conclusions with respect to the materiality of information and the Company's disclosure obligations, and shall convene additional meetings, as necessary, to review disclosure contained in the Reports.

### LEGAL LETTERS AND LEGAL COMPLIANCE REVIEW

- As part of its information gathering and review process, the Committee may (and will at least annually) obtain letters from the Company's outside legal counsel detailing all pending or threatened litigation, claims and assessments and any unasserted claims or assessments which, in each case, meet a materiality threshold established by the Committee.
- The Committee will work with the Company's outside legal counsel to confirm that each Report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act.

### INDEPENDENT ACCOUNTANT REPORT

Prior to the filing of each Report, the Company shall obtain an audit or review report, as applicable, from their independent accountant covering the financial statements and related financial information and footnotes included in the Report. The audit or review report shall be presented to the CEO and CFO in connection with their review of each Report prior to filing.

### SUBCERTIFICATIONS

The Committee may obtain written "subcertifications," in which appropriate personnel of the Company identified by the Committee certify information (or the absence of material information) to support the CEO and CFO certifications of the Reports. The subcertifications shall be prepared by the Committee and shall only cover matters as to which the subcertifier can reasonably attest. The subcertifications shall be presented to the CEO and CFO in connection with their review of each Report prior to filing.

### DOCUMENTATION

- A representative of the Committee shall prepare a memorandum detailing the procedures used to review each Report and to conduct an evaluation of the disclosure controls and procedures to support the CEO and CFO certifications of each Report. This memorandum shall be presented to the CEO and CFO in connection with their review of each Report prior to filing.

### EVALUATION OF DISCLOSURE PRACTICES AND CONTROLS AND PROCEDURES AND INTERNAL CONTROLS

- Within 90 days prior to the filing of each Report, the Committee shall evaluate the effectiveness of the Company's disclosure controls and procedures and internal (financial) controls, compare them with applicable SEC rules, and address identified deficiencies with improved procedures and appropriate documentation.

- The Committee's conclusions regarding the effectiveness of the Company's disclosure controls and procedures and internal (financial) controls shall be reviewed with the CEO and CFO and appropriate changes shall be made to this Appendix A to outline any revised or additional procedures.

## CEO AND CFO REVIEW

- **Review and Supervision**. In order to provide the certifications mandated by relevant laws, rules and regulations, the CEO and CFO shall carefully review all Reports and the procedures used to gather and process relevant information and prepare the Reports. The CEO and CFO shall monitor the activities and conclusions of the Committee.
- **Meeting with Disclosure Practices Committee**. Prior to the filing of each Report and the execution by the CEO and CFO of their certifications to be included with such Report, representatives of the Committee shall meet with the CEO and CFO to review the following matters:
    - » the content of the Report, including the financial statements and other financial information included in the report, and the Committee's conclusions with respect to the materiality of information it collected and the Company's disclosure obligations;
    - » the Company's disclosure controls and procedures, the Committees' assessment as to the effectiveness of such disclosure controls and procedures, including any material weaknesses, and, if applicable, suggestions for correction and improvement; and
    - » the Company's internal (financial) controls, including any significant deficiencies or weaknesses in the design or operation of such internal controls, significant changes in the Company's internal controls or other factors that could significantly affect internal controls in the future, and, if applicable, suggestions for correction or improvement.
- **Meeting with Outside Auditors and Audit Committees**. Prior to filing each Report, the CEO and CFO shall meet with the Company's outside auditors, the Audit Committee and other personnel of the Company (as the CEO or CFO may deem necessary) to discuss whether they have any material concerns about the accuracy, completeness and reliability of the financial or other information in the Report, the process of preparing the Report, or the internal controls and financial systems that generated the information in the Report. To the extent applicable, the CEO and CFO shall disclose to the outside auditors and the Audit Committee all significant deficiencies in the design or operation of the internal controls and any fraud.

# Appendix B. Sample Disclosure Policy

**[COMPANY]**

**POLICY AND PROCEDURES FOR PUBLIC DISCLOSURES AND COMMUNICATIONS WITH ANALYSTS, INVESTORS, AND MEDIA**

## 1. OBJECTIVE AND APPLICATION

### (a) Objective

The objective of this Disclosure Policy is to ensure that communications to the public by or on behalf of [Company] (the "Company") are:

- Factual and accurate;
- Disseminated on a timely basis and in a manner reasonably designed to provide broad, non-exclusionary distribution of information to the public; and
- Made in a manner that complies with Regulation FD and other applicable laws.

### (b) Application

This Disclosure Policy applies to all employees, directors, contractors, temporary contract workers, and other business affiliates with knowledge of the Company's business activity.

## 2. GENERAL GUIDELINES

### (a) Company Spokesperson(s)

The Company has designated each of the Chief Executive Officer (the "CEO"), the Chief Financial Officer (the "CFO"), the Chief Marketing Officer (the "CMO"), and the Head of Investor Relations (the "IR practitioner ") as a Company spokesperson (collectively, the "Spokespersons"). All public disclosures of material nonpublic information about the Company, and communications with analysts, market professionals (e.g., securities analysts, institutional investors, investment advisors, brokers and dealers), shareholders, investors, media and other members of the public will be made by or at the direction of the Spokespersons. All requests for information from analysts, market professionals, shareholders, investors and financial media will be directed to the Spokespersons. No other individual is authorized to disclose material, nonpublic information regarding the Company to any third party without consent by one of the Spokespersons. The Company will maintain procedures designed to ensure that the Spokespersons are kept informed of material developments affecting the Company.

Notwithstanding clause (a), above, Company representatives assigned to the Company's investor relations and marketing groups may respond to routine inquiries for publicly available information and disseminate information in a manner consistent with guidelines established from time to time by a Spokesperson.

#### (b) Approval of Public Releases

All press releases and scripted communications that will disclose material nonpublic information or that are directed primarily to analysts, market professionals, shareholders, investors or the financial media will be approved by the Disclosure Committee or by a Spokesperson and internal/external securities counsel prior to any public release.

#### (c) No Comment Policy

The Company shall follow the "no comment" policy detailed in Sections 9 and 10, which prohibits the Company from disclosing or responding to inquiries or commenting on rumors concerning analyst or Company projections, potential transactions or unusual market activity.

#### (d) Failure to Comply

Any Company representative who discloses Company information in violation of this policy shall be subject to disciplinary action, up to and including termination for cause.

### 3. DETERMINATION OF MATERIALITY AND NEED FOR DISCLOSURE

The Company's Disclosure Committee will determine whether Company information is material and whether it needs to be disclosed.

#### (a) Definition of "Material" Information, Examples

Information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to buy, hold or sell a security. In simple terms, material information is any type of information that could reasonably be expected to affect the price of Company securities. While it is not possible to identify all information that would be deemed "material," the following types of information ordinarily would be considered "material":

- financial performance, especially quarterly and year-end earnings and key financial metrics, and significant changes in financial performance or liquidity;
- company projections and strategic plans;
- defaults on outstanding debt or preferred stock;
- bankruptcy filing;
- mergers and acquisitions or the sale of Company assets;

- changes or disputes with the Company's independent auditor;
- new major contracts, suppliers, customers, or finance sources or the loss thereof;
- significant changes or developments in products or services, including significant product defects and changes in the price of the Company's products or services;
- significant changes in the price of the Company's products or services offered;
- stock splits, public or private securities/debt offerings, or changes in Company dividend policies or amounts;
- significant changes in senior management;
- actual or threatened major litigation, or the resolution of such litigation; and
- updates regarding any prior material disclosure that has materially changed.

### (b) No Disclosure Required

If it is determined that disclosure of certain material nonpublic information is not required, it is the Company's general policy not to release the information unless (i) the Company has regularly released that type of information in the past; and (ii) such release is made in compliance with this policy.

### (c) Forward-Looking Information

The Company may provide guidance regarding the Company's expected future financial performance and such other key metrics of the Company's business that the Board of Directors, the CEO or the CFO determines from time to time is appropriate for public disclosure.

Except as may otherwise by determined from time to time by the Board of Directors, the CEO or the CFO, the Company shall not provide guidance regarding the Company's expected future financial performance other than in the manner described herein.

Except to the extent imposed by law, the Company shall not undertake, and shall specifically disclaim, any obligation to update any forward-looking information provided by the Company.

### (d) Other Required Disclosure

The Company will disclose other nonpublic Company information that a Spokesperson and the General Counsel/securities counsel determine must be disclosed on a case-by-case basis.

### (e) No Selective Disclosure

Material nonpublic information about the Company will not be selectively disclosed at any time to any third party or select audience, be it analysts, market professionals, investors, shareholders, media, friends, relatives or others.

### (f) Exclusions

Specifically excluded from this policy are communications made to a person who owes the Company a duty of trust or confidence, such as attorneys, investment bankers or accountants.

## 4. MANNER OF DISCLOSURE

The Company shall make disclosures of material nonpublic information only:

- by means of a press release which is distributed in a manner reasonably designed to ensure wide dissemination;
- on a conference call or in another forum that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public and for which adequate advance notice has been provided;
- in a filing with the SEC on an appropriate form;
- by any other means which, after consultation with the General Counsel/securities counsel, is believed to provide broad, non-exclusionary distribution of the information to the public in a manner satisfying the requirements of Regulation FD and other applicable laws; or
- pursuant to a written nondisclosure agreement provided by the Company or by such other means which, after consultation with the General Counsel/securities counsel, is believed to be in compliance with Regulation FD and other applicable laws.

## 5. SOCIAL MEDIA

The Company recognizes that employees may wish to participate in online discussion forums, blogs, social networking and other similar sites for personal and professional development. [In addition, the Company participates in various online forums, including blogs and social media platforms, as a part of its marketing, communications and investor relations strategy.] Employees should refer to the Company's Social Media Policy for specific guidelines and restrictions regarding their use of online forums, blogs, social networking and other similar sites. It is important to note that communications made by or on behalf of the Company in these forums are subject to Regulation FD and other securities law rules and regulations. Unless specifically authorized by the Company, the Company prohibits all persons subject to this Disclosure Policy from discussing business information that belongs to the Company in these forums. Persons subject to this Disclosure Policy need to know that unless they are a Spokesperson, their discussion of material nonpublic information regarding Company's business and financial condition in any of these forums may compromise sensitive Company information, have a detrimental impact on the Company, and could be considered selective disclosure in violation of Regulation FD or other securities laws.

## 6. STATEMENT PREPARATION AND CONTENT

### (a) Preparation and Content

One or more of the Spokespersons will draft scripts for analyst meetings and prepare other Company statements with the assistance of and/or review by the Disclosure Committee and General Counsel/securities counsel.

### (b) Completeness and Accuracy

Company statements will be the product of good faith best efforts of all persons involved to present the information fully and fairly.

### (c) Appropriate Cautionary Language

All public disclosures of forward-looking information, oral or written, will include cautionary language that acknowledges the uncertainty of forward-looking statements.

Written statements must be accompanied by the risks that may have a negative bearing on the subject matter of the statement or on the Company's overall performance as it relates to the statement. Oral statements need only specifically reference the most recent SEC filing that details the applicable "risk factors" as substantially set forth in Attachment A hereto.

## 7. CONFERENCE CALLS OR WEBCASTS WITH ANALYSTS

### (a) Public Access to Webcasts/Conference Call

When hosting a webcast/conference call, whether pertaining to the Company's periodic financial results or other significant events that arise it the course of the Company's business, the Company will allow any interested investor or press representative to listen to the webcasts or conference calls through either a dial-in number or via link to the webcast. The Company will provide advance public notice of the date, time and access procedures of the conference call or webcast by issuing a broadly disseminated (i.e., wire service disseminated) press release and posting this information on its website. The conference call or webcast press release should also state whether and for how long the Company will make a replay of the call available on its website. For regularly scheduled quarterly conference calls or webcasts, this notice should be given at least a week before the call.

The Company may limit those participants who may ask questions and restrict others' participation to a listen-only mode. However, the Company will not discriminate among persons or groups in determining who may participate.

#### (b) Press Release to be Disseminated Prior to Conference Call or Webcast

The Company will not hold the conference call or webcast until after the press release that is the subject of the call or webcast has been broadly disseminated.

#### (c) No Selective Additional Disclosure

The Company will not selectively disseminate any additional material nonpublic information after the call or webcast.

#### (d) Cautionary Statement Regarding Forward-Looking Information

The Company Spokesperson will begin each conference call or webcast by reading the cautionary statement referenced in Section 6(c) that warns of the uncertainty of forward-looking statements in light of "risk factors" and identifies the most recent SEC filing detailing those risk factors.

#### (e) Replays and Archives of Conference Calls and Webcasts

The Company will make available a replay of conference calls and webcasts, either through a dial-in number or over the web, for a period to be determined by a Spokesperson or the Disclosure Committee. The Company will also archive quarterly and other investor conference calls and webcasts, either through a dial-in number or over the web, for a period to be determined by the Disclosure Committee.

### 8. ONE-ON-ONE CALLS OR MEETINGS WITH MARKET PROFESSIONALS, AND INVESTORS, SHAREHOLDERS, AND FINANCIAL MEDIA

#### (a) Timing of One-on-One and Other Non-Webcast Interactions

The Company will, whenever practicable, limit the timing of these conversations to the period following the earnings release and related conference call or webcast. The Company will generally not, whenever practicable, engage in these conversations during any Company "blackout" period, including the two-week period before the end of the quarter, or such period determined by the Disclosure Committee.

#### (b) Limited Subject Matter Addressed

The Spokespersons will limit questions answered in these conversations to information that has been publicly disclosed or is not material and will not disclose any new material nonpublic information.

- **Previously Disclosed Factual or Generally Known Information.** In the course of any one-on-one or non-webcast interaction, the Spokesperson may educate analysts, investors and others about the Company using previously disclosed historical factual information, or facts that are generally known. However, analysts must independently formulate their estimates of the Company's future performance or stock price.
- **No Assistance With or Pre-Release Comment on Projections.** The Company will inform securities analysts that it is the Company's policy not to review draft reports in advance of their publication and shall request that such drafts not be sent to the Company.

### (c) Conduct of One-on-One and Non-webcast Interactions

Whenever possible, two Spokespersons will be present during any oneonone or non-webcast interaction with an analyst or other market professional, investor, shareholder or member of the financial media. When speaking with any of these persons on a one-on-one or non-webcast basis, the Spokesperson shall:

- Read the cautionary statement concerning forward-looking information referenced in Section 6(c), if the Spokesperson is sharing forward-looking information;
- Ensure that the person understands that the Spokesperson does not intend to disclose material information selectively;
- Advise the person that, in the Spokesperson's view, he or she is not disclosing any material nonpublic information; and
- If the person disagrees with the Spokesperson's assessment of the information that the Spokesperson has disclosed, ask the analyst or investor to notify the Spokesperson before publishing or otherwise acting on the information so that the Company can determine whether it needs to make a Regulation FD disclosure so that the Company and the person do not violate Regulation FD.

### (d) Documentation of Communications

Whenever communicating with analysts or other market professionals, investors, shareholders or members of the financial media by telephone or in person, the appropriate Spokesperson will whenever practicable submit a file memorandum detailing the time, place and nature of the communication, together with a summary of the information discussed or, if available, a transcript of the discussion.

#### (e) Confirm No Inadvertent Disclosure Occurred

The Spokesperson should consult with the General Counsel or other Company counsel following a one-on-one or non-webcast interaction to confirm that no material nonpublic information has inadvertently been disclosed.

## 9. PUBLIC COMMENT ON ANALYST PROJECTIONS

#### (a) No Comment

The Company generally will not comment on analyst projections or disclose its own projections. As part of this general policy, the Company will not refer to or distribute analyst projections. If contacted by someone outside the Company and asked to comment, the response will be "It is our policy not to comment on these items" or "No comment." These questions should always be referred to a Spokesperson.

## 10. PUBLIC COMMENT ON TRANSACTION DISCUSSIONS OR UNUSUAL MARKET ACTIVITY

#### (a) General Policy

The Company generally will not comment on unusual market activity or market rumors and generally will not disclose ongoing discussions regarding potential transactions. The Company's no comment policy is stated more fully below. It is very important that the Company adhere to this policy consistently. If the Company denies rumors that are not correct, for example, the Company will not be able to effectively give a "no comment" response to an inquiry regarding a rumor that is true or partially true. If contacted by someone outside the Company and asked to comment, the response given by the Company should simply be "It is our policy not to comment on rumors (or other applicable item)" or "No comment." These questions should always be referred to a Spokesperson.

This no comment policy covers inquiries regarding, but is not limited to, the following:

- potential financing;
- restructuring;
- partnership, acquisition or merger discussions; and
- trading activity in the Company's stock or in the stock of any company associated with the Company.

### (b) Statement of "No Comment" Policy

To allow the Company to respond to inquiries regarding potential financing, restructuring, acquisition or merger discussions, other business activities or unusual market activity in an appropriate, consistent way that will not inadvertently force premature disclosure, the Company's policy is that, unless required by law, the Company will not comment on whether or not such discussions are under way and will not comment on the reasons for any such unusual market activity. Accordingly, except as required by law, whether or not discussions (preliminary or otherwise) are under way and whether or not the reasons for the unusual market activity are known to the Company, the Company will not comment with respect to inquiries regarding the offer or sale of its securities, the acquisition, merger, sale of assets, or other change of control of the Company or its subsidiaries or of other entities by the Company or on unusual activity in the market for the Company's stock.

## 11. PRIVATE COMMENT ON COMPANY PROJECTIONS

### (a) No Private Comment

The Company will not comment on or reaffirm previous Company projections to a limited audience. If asked to comment on or reaffirm previous Company projections, the Spokesperson shall respond "Company projections are effective as of the date publicly announced and it is our policy not to comment until the Company publicly announces updated projections."

### (b) Inadvertent Reaffirmation

In the event a Spokesperson inadvertently comments on or reaffirms previous Company projections to a limited audience in contravention of the Company's policy, the Spokesperson and the General Counsel/securities counsel are authorized to publicly disseminate the material nonpublic information by filing a Current Report on Form 8-K with the SEC or press release within 24 hours. In all other respects, the Spokesperson and the General Counsel/securities counsel shall follow the procedures and guidelines discussed in Section 6 above in preparing and making the statement.

## 12. INTERVIEWS WITH THE NEWS MEDIA

The Company will treat the media as if they are subject to Regulation FD. Therefore, the guidelines for one-on-one communications with analysts and investors described in Section 8 above will be followed in connection with news media interviews. For example, whenever the Company provides advance information to a single reporter or a limited sector of the press so that a more in-depth article may be published concurrently with an anticipated public announcement, the Company will obtain an express written or oral agreement from that reporter or those news agencies to keep the information confidential until the authorized release date.

### 13. DISCUSSIONS WITH POTENTIAL INVESTORS IN NONREGISTERED OFFERINGS

Disclosures made to investors in connection with certain “shelf” and all unregistered offerings (e.g., Regulation S and PIPE offerings and private placements) shall not include any material nonpublic information unless the investor has executed an express written agreement to keep the information confidential until the authorized release date.

### ATTACHMENT A

#### Cautionary Language to Accompany Oral Statements

“Various remarks we make about future expectations, plans, and prospects of the Company constitute forward-looking statements for the purposes of the safe harbor provisions under the Private Securities Litigation Reform Act of 1995. Actual results may differ materially from expectations, plans, and prospects contemplated in these forward-looking statements as a result of various factors including those discussed in our latest Annual Report on Form 10-K and Quarterly Reports on Form 10-Q filed with the Securities and Exchange Commission.”

# Appendix C. NIRI Policy Statement — Forward-Looking Guidance Practices

## NIRI POLICY STATEMENT — FORWARD-LOOKING GUIDANCE PRACTICES

NIRI has long advocated for public companies to provide full, fair and consistent disclosure of financial information to increase transparency, engender informed investor expectations, and, ultimately, reduce volatility and lower the cost of capital. NIRI encourages companies to define their own unique set of financial and non-financial metrics. NIRI supports the notion that undue volatility around a short-term focus is undesirable and that all audiences — investors, financial analysts, and the media — should focus on the long-term value drivers of businesses. The purpose of this policy statement, adopted by the NIRI Board of Directors in July 2008, is to enunciate this view and share it with external audiences.

NIRI encourages public companies to provide a variety of information to assist investors with understanding and interpreting current results and assessing future prospects. Each public company must carefully consider its internal forecasting abilities, industry practice, the needs of the financial community and other constituencies in the context of stock exchange and federal disclosure regulations when establishing guidance practices as part of an effective disclosure policy. Such forward-looking information should cover a spectrum of time frames including long, medium, and short-term, based on circumstances applicable to the company and industry. Once a company determines the breadth of financial and non-financial metrics that best disclose current and future prospects, NIRI recommends uniform disclosure to a broad spectrum of financial publics. NIRI does not propose, however, that a prescribed set of financial information or a particular format is suitable for every public company or every situation.

NIRI recognizes that the decision of public companies to provide or not provide quarterly earnings per share guidance alone will not reduce the increasingly short-term focus of the marketplace, which may be as short as intra-day in some cases. Furthermore, the influence of additional factors such as quarterly reporting requirements, quarterly compensation targets of many investment managers, publishing of quarterly earnings estimates by financial analysts and media focus on public companies “beating” or “missing” these quarterly estimates continue to place undue emphasis on quarterly results. NIRI supports a focus on long-term business value drivers by all financial markets participants — public companies, financial analysts, investors, and the media — a focus that will lead to reduced volatility and a lower cost of capital.

Adopted by the NIRI Board of Directors, July 2008.

## LEGAL DISCLAIMER

These Standards of Practice are intended for information purposes only. This information is not intended to be, nor should be interpreted as, legal advice or opinion. You should not rely on the information in this publication for any purpose other than a summary of best practices and the general regulatory framework. These standards are intended only as general information and may not reflect legal developments after the publication date. The law is changing constantly and varies depending on the facts; statements in this publication regarding a specific legal issue may not be current or applicable to your particular situation. You should consult an attorney for advice regarding your individual circumstances.

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