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**SEC ROUNDTABLE DISCUSSION ON REGULATION
FD DISCLOSURE ISSUES**

SEC Commissioner Laura Unger recently released a report summarizing the views expressed at a roundtable discussion, convened by the SEC in New York in April 2001, to assess the impact of Regulation FD on corporate disclosure. The session focused on whether Regulation FD, which became effective in October 2001, had chilled corporate communications or given rise to any other negative, unintended consequences, and included a discussion of common concerns and recommendations to the SEC.

This memorandum summarizes the report and the recommendations made for the SEC's consideration.

Refining the Definition of "Materiality"

Uncertainty in applying the materiality standard under Regulation FD continues. Despite assurances by the SEC that enforcement actions would be authorized only in cases of clear-cut violations involving unquestionably material information, and the absence of any enforcement actions to date, registrants continue to take a conservative approach to corporate disclosure. With this conservative approach as a backdrop, the roundtable participants focused in particular on the difficulty of applying the Regulation FD disclosure standards to earnings and related nonfinancial information.

While there is agreement that quarterly earnings information is within the meaning of materiality, uncertainty persists in determining what information leading up to a registrant's announcement of final quarterly figures may be disclosed without triggering Regulation FD. The concerns relate principally to:

- confirming prior guidance;
- disclosing product-related and other nonfinancial information; and
- correcting outdated analyst estimates.

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Recommendations made to the SEC

- The SEC should consider providing more guidance on the definition of materiality, including issuing an interpretive release to make the definition clear and more precise. The guidance should include:
 - A definition of what is meant by “earnings information” (e.g., are certain income statement items more likely to be deemed material than others? Is it limited to end of quarter earnings announcements or does it include any information that may find its way into income statements?)
 - Clarification of the manner and circumstances in which a registrant may confirm prior guidance. Although the SEC staff previously has stated that it is safer to confirm guidance earlier in the quarter rather than later, and that relevant factors include the amount of time that has elapsed between public dissemination of the guidance and the private confirmation (and also whether there has been an intervening event), the SEC should clarify the general parameters of acceptable disclosure.
- The SEC should clarify the interplay between Staff Accounting Bulletin 99 and Regulation FD in determining materiality for Regulation FD purposes, particularly with respect to the relevance of stock price movement subsequent to an event or announcement.
- The SEC should discuss and clarify whether plant and factory private tours or visits by analysts are permitted.

Use of Technology to Disseminate Regulation FD Information

The roundtable participants urged the SEC to consider permitting greater use of technology to satisfy the dissemination requirement under Regulation FD, including allowing disclosure to be made solely by means of the Internet, and harmonizing incongruent rules of self-regulatory organizations (“SROs”), such as the NYSE and NASD, with Regulation FD. Currently, SRO rules require the use of a press release to disseminate material information, effectively limiting the options and flexibility permitted under Regulation FD. In view of the growing access and use of the Internet by investors, SRO rules requiring dissemination of material information through a press release (or equivalent wire service media) appears outdated and inefficient.

Recommendations made to the SEC

- The SEC should coordinate with the SROs to embrace technology as a means for public companies to disseminate material information.
- The SEC should consider encouraging use of the Internet as a prime dissemination tool, including deeming adequately noticed website postings, fully accessible webcasts (without an accompanying press release repeating the substantive information) and electronic mail alerts sufficient.

- The SEC should encourage registrants to post written transcripts of webcast presentations, as well as archive webcasts and transcripts for a uniform period of time.

Quantity and Quality of Information under the Present Regulation FD Regime

With regard to the flow of corporate information, panelists, while generally agreeing that Regulation FD has afforded greater access to information and generally not caused loss of analyst coverage, disagreed over whether Regulation FD has resulted in more information and improved quality of corporate disclosure.

Analysts tended to believe that registrants use Regulation FD as a shield, refusing to disclose virtually any information, as well as causing registrants to cease granting private (e.g., one-on-one) meetings with analysts and investors. In addition, analysts criticized post-Regulation FD disclosure as generalized and boilerplate, with little nuance, compromising the quality of information being made available.

In contrast, registrants and media participants expressed the view that the quantity of information has increased, citing statistics reflecting a more than tenfold increase in earnings guidance since the rule's effectiveness. Registrants noted, however, that if less public information is available, it is attributable to the shift in disclosure oversight from investor relations to their legal departments, which adopt a more conservative approach to disclosure.

The results of empirical studies presented at the discussion differed and provided no clear support for either position. The panelists urged the SEC to undertake an assessment of the rule's impact, and in so doing should examine both the amount of information being disclosed and the type of information being provided.

Recommendations made to the SEC

In connection with its examination, the SEC has been asked to consider the following under the current Regulation FD regime:

- Is the information being disclosed general or specific?
- How does the specificity and depth of information currently being disclosed compare to pre-Regulation FD disclosure?
- Have companies cut back on disclosing forecasts or discussing future business plans?

If the SEC should find that Regulation FD has caused companies to cut back on providing future projections, it should consider expanding current safe harbor rules to encourage more forward-looking disclosure.

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The SEC is to be commended for recognizing that the adoption of Regulation FD may have had unintended consequences on the quality and quantity of information that flows to the marketplace. There appears to be agreement recognizing that the marketplace would benefit from greater clarity on “materiality” and the general contours of the information that registrants can provide to help build their models without violating Regulation FD.

Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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