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The SEC's Regulation FD

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PANEL DISCUSSION: THE SEC'S REGULATION FD*

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*Jill E. Fisch***

Panelists
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*David Becker*****
*Harvey J. Goldschmid******
*Eric D. Roiter*******
*Susan Ellen Wolf********
*Alex Zisson*********

PROFESSOR FISCH: Good evening. I am Jill Fisch. As Dean Feerick told you, I will serve as Moderator for tonight's panel.

We are grateful to have Albert DeStefano here, and I thank him very much for his moving remarks. We are also grateful to the members of his family who could attend and to the members of his firm, and of course to the firm of Becker, Ross, Stone, DeStefano & Klein for its generosity in establishing this lecture series. Before

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we move on to the panel discussion, there are two people whose names you have not heard who should be acknowledged tonight. I think the empty chair next to me was intended to acknowledge the contribution of Professor Steve Thel to this program. Even though he is not up here on the panel, he probably should be. His role in organizing it was as great as mine, and I'm very grateful to him for all of his help, and I am sure the panelists are too. I would also like to thank Helen Herman, who was the administrative coordinator of this program, for all of the hours that she has put in and for the fabulous support that she has given to the program and to the lecture series.

In order to save time, I am not going to go through the detailed distinguished biographical information on our panelists. You have bios in your program. Let me just introduce the panel to you.

Starting from the far side, we have Susan Ellen Wolf, who is a Senior Attorney at Delta Airlines; next to her is Eric Roiter, who is Senior VP and General Counsel at Fidelity Management & Research Company; next to him, Professor Harvey Goldschmid, Dwight Professor of Law at Columbia Law School; next to him, David Becker, General Counsel of the SEC—who probably needs no introduction; Richard Anderson, Senior Vice President at Thomson Financial and finally, Alex Zisson, Managing Director, Research Department at J.P. Morgan.

For tonight's program, we will begin with a general discussion, which will include a brief overview of Regulation FD ("Reg. FD" or "FD").[1] Then we will discuss the current developments and recent experiences under the Regulation since the effective date. Following that discussion, we will open it up to a brief question and answer.

Let me begin with a very brief summary. I know you want to hear from the panelists, who obviously have a lot more to say about FD than I do, but just for those of you who are not familiar with it, FD, or Regulation Fair Disclosure, was adopted by the SEC on August 15, 2000, with an effective date of October 23, 2000. FD was designed to be an issuer disclosure rule, not an anti-fraud rule. In general, it prohibits issuers and those acting on the

1. SEC Regulation FD, 17 C.F.R. 243.100-103 (2001).

behalf of issuers from selectively disclosing material non-public information to securities industry professionals, to institutional investors, and to certain other persons.

For our purposes, the salient aspects of FD are as follows:

o Who is covered by FD?

FD applies to issuers with securities registered under Section 12 of the Exchange Act[2] and those required to file reports under Section 15(d).[3] FD covers communications by the issuer's senior management, its investor relations professions, and people who regularly communicate with market professionals and shareholders. It does not cover every low-level or mid-level employee.

o Which recipients are covered?

In an effort to narrow its original proposal,[4] which some criticized as unduly broad, the SEC limited FD to issuer disclosures made to four categories of persons: (1) brokers and dealers; (2) investment advisors and certain institutional investment managers; (3) investment companies and hedge funds; and (4) holders of the issuer's securities in circumstances in which it is reasonably foreseeable that the holder will purchase or sell the issuer's securities on the basis of the information.

Included within these four categories are analysts, institutional investors, and other market professionals. Not included are people owing a duty of trust and confidence to the issuer, such as professional advisors, lawyers, and so forth; persons subject to an express confidentiality agreement—and I think some of our panelists will have something more to say on these confidentiality agreements; and credit-rating agencies.

The SEC has stated that it believes FD should not cover those involved in ordinary business communications with the issuer, such as customers and suppliers, as well as the media.

o What is covered?

Covered is disclosure of material non-public information other

2. Exchange Act §12, 15 U.S.C. 78l (2000).

3. Exchange Act §15, 15 U.S.C. 78o(d) (2000).

4. Selective Disclosure and Insider Trading, Securities Act Release No. 33,7887, Exchange Act Release No. 34,42259, 64 Fed. Reg. 72,590, (Dec. 20, 1999).

than communications made in connection with a registered offering. The SEC did not clarify the definition of "materiality," although it was urged to provide a more precise definition. In its Issuing Release,[5] however, the SEC listed several categories of information for which close scrutiny is warranted, including disclosures related to earnings, mergers and acquisitions, new products or discoveries, changes in control or management, changes in auditors, events relating to the company's securities, and bankruptcies or receiverships.

The SEC singled out private one-on-one discussions between companies and analysts regarding earnings estimates as an area raising special concern, an area involving a "high degree of risk." The SEC noted that even indirect guidance, such as expressing comfort, can amount to selective disclosure.

• <u>What is required with respect to disclosure</u>?

There are two categories of disclosure. With respect to intentional disclosures, which include both knowing disclosures and reckless disclosures, the issuer must simultaneously disclose the information to the public. With respect to unintentional disclosures, the issuer must disclose promptly. "Promptly" is defined by FD to mean within twenty-four hours or before the beginning of the next trading day, whatever is later. This means an issuer would have additional time if, for example, an unintentional disclosure takes place over the weekend. Disclosure options include: filing the information in Item 5 of Form 8-K,[6] furnishing the information in an Item 9 of Form 8-K,[7] or otherwise disseminating the information in a way that is "reasonably designed to provide broad, non-exclusionary coverage."[8] Methods that satisfy this third option include press releases distributed through widely circulated news or wire services, conferences with public notice and access, and events in which the media is included.

5. Selective Disclosure and Insider Trading, Securities Act Release No. 33,7881, Exchange Act Release No. 34,43154, 65 Fed. Reg. 51,716 (Aug. 24, 2000)[hereinafter Final Release].

6. Exchange Act Form 8-K, Item 5, [1998-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 31,002, (Oct. 6, 2000)

7. *See* Exchange Act Form 8-K, Item 9 [1998-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 31,002 (Oct. 6, 2000).

8. 17 C.F.R. § 243.101(e).

Publication on a Web site alone is insufficient.

o Finally, what is the liability exposure under FD?

The SEC explicitly provided that failure to make a public disclosure as required by FD is not a violation of Rule 10b-5; therefore, FD should not expand the scope of antifraud liability. Nonetheless, the SEC can bring administrative or civil actions, and individual employees as well as analysts may be liable either for causing violations or for aiding and abetting violations.

Now, for further background about FD, let me turn first to Harvey Goldschmid, one of the principal forces behind FD. He has spoken widely on this subject, and will add a little flesh to the bone.

MR. GOLDSCHMID: Thank you, Jill.

I was General Counsel at the SEC when FD was first presented. I was a Special Senior Advisor to Chairman Levitt and, along with David Becker, helped to finalize FD, so you may notice a certain amount of bias in this presentation as I explain the policy behind fair disclosure.

There are two basic images that you should keep in mind. First is a conference room with one, two, or three analysts or a telephone call. A CEO or CFO simply calls or walks into the room and provides hard-core material information — "our earnings are going to be dramatically down, our sales are down, all of this is going to begin next week or be announced next week." That is an example of what Arthur Levitt correctly called "a stain on our markets."[9] The selected few can reap enormous benefits from selective disclosure. In terms of public policy, there is nothing good happening here.

The second image to keep in mind, though, is what made FD and selective disclosure complicated, at least for me. That is the image created by Justice Powell in the *Dirks* case[10] of the true

9. Former SEC Chairman Arthur Levitt, Jr., Quality Information: The Lifeblood of Our Markets, Address Before the Economic Club of New York (Oct. 18, 1999), *available at* http://www.sec.gov/news/speech/speecharchive/1999/spch304.htm (last modified Oct. 18, 1999) (raising the issue of market integrity, and also suggesting that selective disclosure "is a disservice to investors [and that it] undermines the fundamental principle of fairness").

10. Dirks v. SEC, 463 U.S. 646 (1983).

function of the analyst—to go out and question management, to check strategy, to ask questions of customers and competitors, to kick tires, to bring the kind of information back that the financial sector needs. The trick was to find a way to end, if possible, the unfairness of selective disclosure, but at the same time preserve channels of communication, so as not to chill unduly communications among analysts, investors, and public issuers.

Selective disclosure undermines investor confidence in the fairness and integrity of our markets. Fundamentally, the same policy rationale applies to insider trading. In addition, selective disclosure has been used as a way of currying favor with analysts. Instead of serious analysis, we had a dampening of enthusiasm for criticism because analysts feared that critical reviews would result in their being removed from those first in line to get material information early. Selective disclosure diminished and distorted the basic role of the analyst. Selective disclosure was very unfortunate when it occurred, and it was occurring too often. Moreover, if this information could be used as a commodity, then there was reason to hold it back longer than anyone could want. You could use it to keep more people in line. The whole practice creates an unsavory atmosphere and a feeling of distaste in the business community.

Now, thinking about what you can do about selective disclosure, there were two basic possibilities. One was the kind of rule making that we have gone through. The second was to take that *Dirks* case, that classic case from 1983, and extend it out.

Dirks involved a fraudulent scheme through which Equity Funding vastly overstated its assets. Equity Funding, an insurance company, was on the New York Stock Exchange. An insider tried to disclose the fraud. He went to Ray Dirks, an insurance analyst. Dirks clearly tried to disclose the fraud. During the roughly three-week period Dirks had the information, he went to *The Wall Street Journal* and the SEC. There is no doubt about his attempt to expose the fraud. However, during that period he also told his favorite clients the news, and, of course, they found it a good time to sell; they saved millions of dollars.

After three weeks, the fraud came out and the wrongdoers at Equity Funding were ultimately put in prison. The SEC, in what may not have been an ideal test case, decided to charge Dirks. The

Commission was gentle with him—a censure was all he would receive.

When the case reached the Supreme Court of the United States, Justice Powell, in effect, said: "Look, before we find a violation of Rule 10b-5 and insider trading, we want some kind of breach of fiduciary duty. We want the tipper, the person giving the information out, to have obtained some kind of"—and these are key words—"personal benefit or personal gain."

The bar took comfort in the word "personal"—at least the defense bar—arguing that this was not meant to cover entities at all; therefore, selective disclosures by corporations were okay. If I can put it bluntly, that was nonsense. Rule 10b-5[11] has always covered corporations. God help the corporation that knows it is going to make lots of money next month, and, without disclosure, decides it is a good time to buy. The entity was going to be covered.

The "gain" and "benefit" aspect was far more complicated in terms of what the Supreme Court would do in a selective disclosure case. Selective disclosure, as I have indicated, has been used to curry favor, to buy goodwill or to avoid volatility. Could Rule 10b-5 be extended to a situation where a corporation was giving out information for its own benefit? The Supreme Court defined "benefit and gain" broadly. It talked about pecuniary gain; it talked about reputational gain, a gift, and a quid pro quo on information. But the question was: could you extend *Dirks* and cover selective disclosure made for the corporation's benefit?

For me—and good minds can differ on this point—I thought we could win the extension-of-*Dirks* case at the Supreme Court. But I also thought there would or might be a heavy price to pay for doing so. If we were able to extend *Dirks*, the fraud stigma, private actions, and treble-damage disgorgement, would be available to plaintiffs and could have had a large chilling effect on communication. Large amounts of litigation could have been stimulated and harsh exposures to liability created. The fair and sensible thing to do, was a rule-making that could provide relatively clear and prospective guidance and could be carefully calibrated to preserve the flow of legitimate, non-material

11. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2001).

information.

Now let me quickly go through the list of ways that we tried to make sure FD would not chill communications.

First, as Professor Fisch indicated, selective disclosure was not made fraudulent conduct. There would be no stigma of fraud attached to selective disclosure.

Second, no private liability, no private right of action was created. The SEC enforcement program would be there, but the SEC had said time and again—and David Becker may speak to this—that it would go after the extreme, the egregious case.

Third, there was room for an inadvertent disclosure. It was perfectly possible, everyone understood, to get a question, answer, and not realize something in the answer was material. The possibility of inadvertent disclosure was built into FD. You would simply have to go public within roughly twenty-four hours.

Fourth, provision was made for confidentiality agreements that would allow you, for instance, if you blurted out something in a one-on-one to an analyst, to say "will you keep it confidential?" If he or she agreed, that would not be selective disclosure. Then, if the analyst misused the material information, the insider trading rules, which are much more onerous in terms of sanctions, would come into play.

Fifth, corporations could narrow their exposure by defining who could be talking to analysts and the investing public.

Sixth, public offerings were largely excluded. Public offerings are covered under the '33 Act,[12] and I would advise everybody that the technical aspects of FD in this area are tricky. Not all disclosures made during a public offering—and not all public offerings—are excluded.

Excluded, too, were foreign governments issuing debt and foreign private issuers. The idea was that those with different cultures, who reported under a 6-K,[13] which is different, should not be included yet. However, with respect to both the '33 Act areas and foreign private issuers, the SEC did make clear that it was rethinking those areas in general. In the future, the FD approach

12. The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2000).

13. Exchange Act Form 6-K, 17 C.F.R. 249.306 (2001) *reprinted in* 4 Fed. Sec. L. Rep. (CCH) ¶ 30,971.

could be extended into both areas.

The final area of protection was key for me. There has been a lot of commentary discussing the materiality issue and how difficult it can be to determine whether a matter is material. That is absolutely true. The formulation of materiality is easy—substantial likelihood a reasonable investor would find it important.[14] The application can be very hard. I love teaching it. Materiality is fun with students. Counseling is something else. It can be a very difficult area.

Built into FD's system was a culpability standard—a *scienter* standard—of intent or recklessness that takes all of the heat, or at least much of it, out of concerns about materiality. This was specifically put in to avoid the second-guessing of close materiality calls in the harsh light of hindsight. It was not necessary under Section 13.[15]

Before you can be liable under FD, you either must have been reckless, an extreme departure from standards of ordinary care, when you err with respect to what is material, or you have to act intentionally. The difficulty of materiality will remain, but the safeguard is that the Commission would have to prove that there was an extreme departure from standards of ordinary care in order to hold an individual liable. There can be no easy blind-siding of the corporate community.

With that, I guess it is time for me to cease.

PROFESSOR FISCH: As I listened to Harvey speak, I just could not help agreeing with everything he said. FD was extremely controversial both through the comment process and at the time that the SEC adopted it. Maybe we can hear a little bit from David Becker about that controversy and how things have panned out since the effective date.

MR. BECKER: Thank you very much. It is really a pleasure to give you my views on how we are doing with FD.

I must tell you that these are my views. These are not the views of the Commission, any Commissioner, or anyone else on the

14. *See* TSC Industries. v. Northway, Inc., 426 U.S. 438, 445 (1975) (holding that the question of materiality is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.)

15. Exchange Act § 13, 15 U.S.C. § 78m (2000).

staff. I hope I am not too far off, but this is not an official statement of the Commission.

Another reason that I stress the word "views" is that right now it is all anecdotal. There has not been a sufficient body of experience to make any definitive conclusions, and I happen to believe that we are in a period of adjustment with respect to this Rule, as we are with respect to all new Commission actions.

There is also the impact of a very interesting dynamic that has taken place over the last ten years owing to an increasing competition in the market for legal services. Every significant action of the Commission is accompanied by a series of letters from law firms advising the clients of the development and what, if any, traps there are to worry about.

It will not shock you—and it did not shock me, having written quite a few of these in my time—that none of these letters ever say "the SEC has come out with a major new regulation. Don't worry. There are no damages here. You don't need me at all." In fact, there is a natural tendency of lawyers to emphasize risks, particularly those risks that they can help potential clients with. Every public action of the Commission, certainly in the regulatory area, generally gets met with a wave of—I would not even call it criticism, but a wave of expressions of deeply felt, sincere, and intense fear, and a warning of all the bad things that might happen.

I can tell you for sure, in terms of what has happened with FD, the world has not yet ended. Someone is going to be right someday on that prediction; but, until that person is right, everyone else is going to be wrong, and the apocalyptic predictions for FD have not come to pass.

What do we know? We know that corporate America is doing its best to comply with FD. People wonder how FD is going to be enforced. Of course, enforcement is necessary and the availability of enforcement remedies may well affect people's willingness to comply with alacrity. Nonetheless, the single most important force for compliance with all our rules is the desire and the willingness of those subject to our rules to comply and adhere—with the enthusiastic assistance of the private bar—with the law. People want to comply with the law, and our sense is that, while people may have some questions as to what some of the nuances mean, they are doing their best to comply.

To me, the most interesting thing that has happened is that the publication of FD has caused many people, particularly in the analyst community, to rethink behavior that had been taken as a given for years. There are two paragraphs in the Release that talk about the risks that arise when there are one-on-one discussions with analysts. Some people were surprised by these sentences. While they are not that new, people just hadn't given the isssue much thought since the *Dirks* decision.

Among other things, in some quarters, there had arisen a practice of saying indirectly what one could not say directly.

Now, of course, if you are too obscure in this situation, you do not accomplish your goal of conveying information. You do not tell the analysts that something is going to happen. If you are clear enough, by saying "yes, I am comfortable with that projection"—and you do not have to say "get it?"—then what you have done is by code transmit material non-public information. I do not think people thought about that very much before these rules were promulgated. What we are finding, particularly in the investment relations community, is that people are thinking about that and are rethinking their roles and how the corporate community should be dealing with analysts.

I think life has gotten more arduous for analysts. There are folks who did not attend meetings before who have to now. There are folks who have to be not only conduits of the issuer, but who instead have to be wise, be analytical. I confess this does not trouble me very much. I think it is a good development. And I think that the market will discriminate among those analysts that are better at analysis than those who are not.

We—and I also think this is a positive development—are going to see less clustering over a consensus number. I do not understand, myself, given the vagaries of the stock market and life in general, how there can be a consensus number that makes sense. The one thing we know about conventional wisdom is that it is generally wrong.

Finally, we are finding some conservatism. I think right now, in part because of the comment process and the immediate aftermath, people have been emphasizing the risks and the dangers. I think initially we are finding that some folks are being more conservative than they are going to be six months from now.

When they find that the Enforcement Division has not done dreadful things to people who do not clearly deserve it, and as they get used to dealing with some of the complexities of FD, the corporate community will worry less and disclose more.

Let me end up with a prediction. I think that the long-term impact of FD, of technology, and of the ever-increasing pressure to get more information out, is that we will find issuers disclosing more information more regularly and at shorter intervals.

Thank you very much.

PROFESSOR FISCH: We are fortunate to have David Becker and Harvey Goldschmid on our panel. We are also fortunate to have a number of representatives of different perspectives who can speak to the view from the trenches.

Institutional investors are the largest players in today's securities markets, and Fidelity is one of the larger institutional investors. So, Eric Roiter, maybe you can tell us a little bit about how institutional investors have been affected thus far by FD.

MR. ROITER: Thank you, Jill.

Far be it from me to disagree in concept with my learned colleagues from the SEC, both past and present, so even if I did not believe in what I am about to tell you, I think I might just say it in order to be somewhat provocative. Speaking of selective disclosure, there will be selective parts of what I am saying that I actually do believe are true.

From the standpoint of an institutional investor, when speaking about FD it is really necessary to speak about two different versions of FD. By this, I do not refer to the proposed Rule and the adopted Rule. Rather, I speak of FD, the conceptual rule; and FD, the operative rule, or FD as observed in practice.

From the standpoint of the first version of FD, FD the conceptual rule, it is difficult – actually it is impossible – to oppose any of the objectives that underlie FD. More disclosure, parity of access to information, fairness and greater confidence in the integrity of the markets – no one can oppose these objectives. FD the operative rule is a different matter, for in practice FD poses problems and complications that, in turn, highlight some of the tradeoffs that were not fully anticipated by the SEC or not squarely addressed by the SEC in its consideration of FD.

To my mind, there are at least five areas where Reg. FD the operative rule falls short of Reg. FD the conceptual rule:

First, the conceptual rule contemplates the promotion of more public disclosure and, at the same time, preservation of what is called the "mosaic theory" for analysts. The mosaic theory, under the conceptual version of Reg. FD, remains alive and well. The SEC, in its Release adopting Reg. FD, said that "analysts can provide a valuable service in sifting through and extracting information that would not be significant to the ordinary investor to reach materiality conclusions. We do not intend by FD to discourage this sort of activity."[16]

In practice however, issuers, guided by their conservative outside counsel, do not see it quite this way. A segment of the issuer community—by no means all—sees this rule as a tradeoff. For various reasons, these issuers operate under a version of Reg. FD that pushes them toward open Webcasts and open telephone conference calls and away from one-on-one meetings with analysts. Some issuers see the SEC's rule as a zero sum equation: the more public access and public disclosure a company provides, the less opportunity need be given to analysts for one-on-one meetings.

One might ask: Why should this not be seen as a good result? If a company is holding open Webcasts and conference calls, why can't research analysts simply pose their questions in that forum? There are at least two answers to this, one fairly obvious, the other a bit less so. The obvious answer is that every analyst who wants to ask all of his or her questions will not have the chance to do so, given time and other constraints. This is not so much different from a presidential news conference, as we all know. The other reason is that an analyst, even if given an opportunity to ask all of his or her questions in a public forum, will not do so. At least speaking from the buy side, at least a buy-side analyst will not do so. This reflects recognition that the questions posed by an insightful, well-prepared, and skilled analyst have value, at times greater value than any particular answer that a company's executive may provide.

In an important sense, there exists intellectual capital that one might call analyst work product that is quite analogous to the attorney work product. In each case, only the client of the research

16. Final Release, *supra* note 5 , at 51,722.

analyst or the attorney, as the case may be, should have the benefit of his agent's analysis and guidance. Whereas the rules of evidence recognize and support the notion of attorney work product, Reg. FD, the operative rule, does not do so for analyst work product.

Secondly, to complicate matters, Reg. FD, the conceptual rule, recognizes a distinction that Reg. FD, the operative rule, does not. The former, for purposes of the materiality standard, distinguishes between an individual investor and an institutional investor or professional analyst. This is a critical conceptual point under Reg. FD, because what is material for an individual investor in making an investment decision differs from what is material from the standpoint of an institutional investor or professional analyst. However, Reg. FD, the operative rule, blurs this distinction, leading some issuers to say nothing to research analysts that they have not already said in their press releases or public conference calls.

In practice, the gap between materiality for an individual investor and materiality for an institutional investor with the advent of technological change is narrowing. This is particularly so in light of information now available to all investors, both retail and institutional, over the Internet and the immediacy of access to that information.

As issuers—at least some issuers—view materiality for individual investors and institutional investors as converging under Reg. FD the operative rule, such issuers become increasingly reluctant to make a distinction between the two types of investors for materiality purposes.

A third difference between Reg. FD, the conceptual rule, and Reg. FD, the operative rule, turns on the scope of the materiality standard. In concept, Reg. FD draws a contrast between material information, on one hand, and what I would call interstitial information on the other. The latter type of information is seen as rounding out the mosaic, filling in the bits and pieces, to present a full picture for the analyst. But Reg. FD, the operative rule, at least to some issuers, blurs this distinction and treats virtually any relevant piece of information as material if it relates in any way to the company's current fiscal quarter and likely performance for that current quarter.

The SEC Release accompanying the adoption of Reg. FD has led, in part, to this result by enumerating seven very broad categories of disclosure that most issuers, along with their counsel, have come to view as presumptively material. Among this list of seven categories of information is any information related, however indirectly, to earnings, and any information relating to "new products or developments regarding customers or suppliers."[17] Pretty hard to rule out anything under that standard.

A fourth difference between Reg. FD in concept and Reg. FD in practice relates to the culpability standard that Harvey mentioned, which turns on knowledge or recklessness.[18] This standard, like the standard of materiality, is viewed by many issuers to be amorphous and elusive—one which, in practice, should not be relied on. As a result, some issuers simply assume that every piece of information given in closed sessions with analysts will be seen to be given with knowledge of its materiality. This has led, at least among some issuers, to a demand that analysts agree in advance to confidentiality undertakings not to use or pass on any information for some period of time until issuers can in hindsight judge for themselves whether information has been knowingly or inadvertently disclosed that is material.

A fifth, and final, difference between Reg. FD in concept and Reg. FD in practice relates to the distinction between a senior officer and a mid-level officer. As Jill explained, Reg. FD covers only those disclosures that emanate from senior officers or those who have a particular role in investor or shareholder relations or those who regularly engage in discussions with analysts.[19]

The SEC, in theory, meant to carve out mid-level officers, regional sales managers, and officers of that sort to be open to analysts for one-on-one's without worry about the applicability of Reg. FD. In practice, we have seen for many companies, that distinction has also been ignored. Instead, companies typically designate those officers, senior or institutional relations, who are given the responsibility for speaking to analysts, and everyone else in the company is subject to a gag rule.

17. *See* Final Release, *supra* note 5, at 51,721. (listing all categories of presumptively material information.)

18. *See supra* p. 281.

19. *See supra* p. 275.

In short, those are five of the complications that we see coming out of FD, the Rule in practice, and it causes one to consider the tradeoffs that underlie it. Although the objectives, as I said at the outset, are all worthy of praise, in practice, Reg. FD does call for some tradeoffs and some compromises.

PROFESSOR FISCH: Thank you, Eric.

Issuers obviously are taking a variety of approaches at this point in designing their disclosure policies, doing different things. Susan, it is impossible to speak for all of them—and I am sure that Richard and Alex will give us more of the broad perspective—but maybe you can give us a little bit of a sense from the issuer's perspective of what the challenges are and how you are trying to meet them.

MS. WOLF: Sure.

I am coming from the perspective of large public companies, and most of the companies that I am familiar with essentially aim for scrupulous compliance with the securities laws. I am privileged to sit on the Securities Law Committee of the American Society of Corporate Secretaries and, through that, I do have the views of many of my in-house colleagues at other large public companies.

From our perspective, Reg. FD compliance has not been a problem, either in terms of the difficulty of complying or the cost or the administrative burden. I do understand from colleagues at smaller companies, particularly those lacking a professional investor relations staff, that they have much more difficulty in complying and are really racking up those outside counsel bills.

As David Becker mentioned, one of our biggest challenges, actually from the in-house viewpoint, was not FD itself, but the scare memos that went out from a large group of the largest law firms—and calming down our litigators and general counsel who did not have corporate backgrounds and convincing them that this was not a fundamental change in how we related to our investors.[20]

The primary change that I have noticed is that, prior to the SEC's Release that discussed implementing FD, giving guidance in the middle of a quarter that nothing changed in our initial outlook was not a material development. Now we are doing that by way of a press release or 8-K as confirmation.

20. *See supra* p. 282.

We and many of my colleagues at other companies are also (until we see how the SEC enforces FD) making public, by way of an 8-K or a press release larger volumes of information that we do not believe is material. We want to err on the side of safety. For companies like Delta, having that kind of a press release or an 8-K is not a big deal.

The variation in companies' responses, I think, is based quite a bit on their cultures. If you have a transparent culture and if you regularly compete for investors by providing information and disclosure, then I think that you should err on the side of the compliance mode. That is just make a lot more things public to the extent you were not already doing so. For example, at Delta we were Webcasting our earnings conference calls for a year before FD was proposed, just because it was something that our investors wanted, but we are now insisting that certain investor fairs and conferences where we participate are Webcast.

We are continuing to do one-on-ones, unlike some of the companies that Eric described, but we are very careful in looking at what the agenda is and what is to be discussed and making sure that if we need an extra filing or press release, we work it in.

I think that, slowly, there are some best practices developing at public companies. I think one of the main differences from what I call the Wall Street proposals to the actual best practices is that there is not one "cookbook" compliance program that works for all companies or all industries.

Certainly, if you have a management team that interacts regularly with members of the investment community and your large investors, you might have to do more updating. Intel, for example, has an undertaking on its Web site now to continuously update its earnings projections, and my counterpart at Intel has explained that the reason for the continuous update is that since his guys are going to be out there talking about it, this way they are sure that everybody is having access to everything at the same time.

Other companies are having very free-form compliance programs, where they feel like their spokespeople and senior management very well understand what is material and do not discuss it and are not likely to have an inadvertent intentional disclosure, or even an inadvertent unintentional disclosure where you have a short grace period to correct it. There the company may choose only to do a compliance program and create some minor modifications to its disclosure policy.

Among the other best practices, I think certainly Pfizer has been a model. They were also doing this before FD was adopted. They file Q&A's as a press release or part of an 8-K routinely covering all the subjects that their spokespeople and senior management expect to be asked about by investors. So again, when they are talking with Eric Roiter's people at Fidelity, they are probably not going to be demanding or asking for a confidentiality agreement because they feel like they have already covered it.

For other companies that have a culture of holding things close to the vest, that do not compete for investors with a free flow of information, they may be shutting down and they may be having less disclosures. Particularly where the lawyers and the senior management do not feel comfortable that those people who are going to be getting the questions and making the phone calls have a good sense of what is material and what is not, or what drives earnings and what does not, there may be a reluctance to follow a more free-form model.

I do think that forums such as this, where people can trade information on what they think and what they are doing about FD, are very important in terms of continuing to develop best practice. I know that many of us in the in-house community are also very appreciative to David Becker and his colleagues for coming out so regularly and being willing to answer our questions. That has made the initial experience much less of a problem.

PROFESSOR FISCH: We have heard a lot both about predicted and actual effects of Reg. FD on the Street. We have heard predictions that FD would cause information flow to analysts to dry up, that analysts would be less inclined to cover certain companies or certain types of companies if they could not be assured of selective disclosure and preferred access, that FD would increase price volatility, and that FD could significantly affect the accuracy of analysts' reports. Interestingly, those rumors have gone in both directions. Some people argue there is not going to be as much information so the analysts' reports will not be as good, and others argue analysts will no longer be concerned about currying favor with the issuer in order to get preferred access so they are going to be more candid and their reports will be more accurate.

We have two people to talk about what is happening on the Street, Richard Anderson and Alex Zisson, Richard from a more general perspective and Alex from a more experiential perspective of himself and his colleagues. I know that I can trust them not to steal each other's thunder too much because I understand that they both went to Brown, so they have some institutional loyalty here.

Richard, do you want to start off?

MR. ANDERSON: In the spirit of fair disclosure, I just learned when I first met Alex, about an hour-and-a-half ago, that his father and I went to the same high school in addition to Brown together. So he is definitely on my team!

I would not describe our experience, at least the experience that I am going to relate this evening, as more general. I would actually describe it as hands-on experiential, because we represent more than 700 publicly traded companies to the investment community and we are constantly, and have been for close to ten months, very much involved in the formulation of guidance and the implementation of FD.

What I wanted to play off today is this: Thomson Financial/Carson actually did two surveys, one before the implementation of Reg. FD in October,[21] and another in late December/early January[22], sort of an early return, to get an idea of how Reg. FD was going down, and what were the initial reactions. We sent out surveys to over 700 of our clients. We received eighty-one responses from a diverse mix of small-, mid-, and large-cap companies.

We can, at this point, assure you and Chicken Little that the sky has not fallen. Reg. FD is going down, I think, more smoothly than was originally anticipated.

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21. Investor Relations Survey on Regulation FD Practices conducted by Thomson Financial/Carson, dated October 6, 2000 (on file with the *Fordham Journal of Corporate & Financial Law*).

22. Investor Relations Survey on Regulation FD Practices conducted by Thomson Financial/Carson, dated January 17, 2000 (on file with the *Fordham Journal of Corporate & Financial Law*).

In our October survey, I think there was an 86 or 87 percent affirmative response that they felt that after the implementation of Reg. FD that they were going to see extreme fluctuations of their stock price in the market. That question was asked again in early January, and that 86 percent went down to about 25 percent.

I think there have been some very positive, good trends that have come out of FD. The problem, I think, emanated from some of the rhetoric. If you examine Harvey's earlier comments, about "the three or four analysts who were brought into the conference room and were given a heads-up on the company's earnings"[23]—I do not know what company that was, but I can assure you, as Susan would, that you are talking about the rare exception. But the fact that this perception exists at all is troubling. The whispers, the nods, the winks, were the issue and something had to be done about it.

When we first went out and queried investor relations officers and CFOs, we asked them specifically "what major changes are you going to make in your investor relations communications policies with the investment community as a result of FD?" Back in October, approximately 75 percent of them said "none" or "just minimal changes," because they interpreted the question to be "have you stopped beating your wife?" The implication was that all along they were violating something, so, therefore, if they admitted that they were going to change their procedures or practices, this appeared to confirm that what they were doing all along was wrong.

However, when we asked the same question again in late December, two months after FD went into effect, 81% of the respondents indicated that they had made procedural and policy changes in their investor elations practices.

I think most people agree that it is going to take a few quarters before we really understand the impact of Reg FD. We have begun to see certain trends coming out of earnings calls in December/January, and I think we are going to see more concrete trends coming out in this quarter as to the adoption or change in certain communication practices.

Let me talk about some of the positive trends our polls show.

23. *See supra* p. 277.

Our surveys show that most companies have willingly adopted the push by the SEC to go out and broadcast earnings conference calls to the investing public. Most people have done this. Most companies have invited the investing public into their earnings conference calls or provided simultaneous Webcasts.

Another concern was would the investment banking firms that sponsor investment conferences for their clients open them up for the general investing public. In fact, we had some survey respondents say that they would not be attending investment banking conferences unless they were simulcast/Webcast at the same time. The fact is that now, most investment banking firms have made webcasts a condition of attendance, as opposed to a precondition requested by the issuers?

MR. ZISSON: We just had a big health care conference in San Francisco, and we offered all the companies the option to either telephone simulcast or Webcast, or both, their regular presentations. Almost every company took us up on that, although it was not mandatory. We also had Q&A breakout sessions afterwards which we did not allow them to simulcast, but we said, "Remember, keep Reg. FD in mind when you are talking to clients."

MR. ANDERSON: Let me talk about where I think other substantive changes have taken place.

If we go back, let's say, six months ago, and if I am on the phone helping a client prepare for their third quarter earnings call, which would take place sometime in October, I would get that call maybe three or four days before they were due to have it. I would then work on the earnings release, then we would prepare management, the CEO and the CFO, as we had done in the prior quarters, to basically review the earnings release on the call. Then maybe we would add a little bit about operations that you would not put in your earnings release for the participants on the call, but, by and large, keep it down to a quick twelve minutes, and then open up the floor for questions — because that was the whole purpose of the call, was to open it up for questions from the buy side and the sell side.

This planning process has changed, I believe, dramatically. Now we get the call two weeks before: "Come on down; we're going to spend two days preparing for the earnings call." In addition, the preparation for the earnings call is a lot different. Number one, now you do not just read the press release. You go in, and each person—normally, you usually have two people on the call—three people is okay; four people, forget it; five people, no one is going to listen. Now you are involving not just the CEO and the CFO, but you are involving the head of sales, you are involving operations and so on. It is obviously at the discretion of the company, but the whole idea is to provide more insights, more people, more information.

We are going through and preparing a much more structured call and script. We are anticipating all the questions, as many questions as we can, from both buy-side and sell-side analysts in terms of what information can we provide that would give them guidance in those areas that we know they are going to ask. So that, by and large, these calls—at least the ones that we have been involved in and the ones that we have been monitoring—are, really doing what FD has asked us to do.

What has also changed is that now when you announce your earnings, whether it is at the close, end of the market, and then you have a conference call the following morning, normally you have one-on-ones with the buy side and the sell side. I cannot tell you exactly what is going on with those one-on-ones, but I do think that a lot of them are "wait until we have a call tomorrow and we will go into more detail." Moreover, the earnings release also includes guidance. Most companies did not include references to earnings guidance in their releases previously. It is not specific guidance that will come in the call; it is more guidance in terms of either meeting the analysts' numbers for the quarter or what they see for the following year. However, the interpretation has been to put that general guidance in the earnings calls so that you can speak about what is out there and speak more specifically in your earnings call. This is, again, a positive change that a lot of companies have adopted.

So I think that there are some very positive trends that have come out of FD so far. There are some negatives. There has been a limit to the flow of information, especially to the sell side. It is interesting to listen to Eric, because what our survey found was that there was more squawking on the sell side than there was on the buy side. For those who do not know it, it is the buy side that put their money up; it is the sell side that makes the recommendations. Although for years it has been the sell side, maybe, that has been getting the first call and the attention, it is always the buy side that at the end of the day is there for you or against you.

MR. ROITER: I would just add this Rule does not draw any distinction between buy side and sell side. However, when you look at the SEC reasons for adopting FD, those reasons typically apply much more to the sell side than to the buy side because the latter typically are the last ones who would want to urge public investors to go out and buy stock of a particular company. We would want to keep our insights on a particular company to ourselves to use for the benefit of our funds' shareholders.

MR. ANDERSON: Which, I guess, explains why your questions might be more value-laden than others'.

I will stop there.

MR. BECKER: Keeping it to yourself has a certain negative when you are using it.

MR. ZISSON: Thanks. I have plenty more comments than that.

It was very interesting for me to hear, as a sell- side analyst—I have been a sell-side analyst for ten years—to hear Mr. Becker's comments from the SEC. I think I disagree with almost everything he said, and that is possibly even a tribute to the fact that, just a few short months ago, I was a lazy sell-side analyst who did not have to go to meetings and did not have to do any independent work, and that has all changed.

The one thing I agreed strongly with him on is that it is really too early to be reading the jury verdict on this. We are only partially through the first earnings reporting season post-Reg. FD implementation, and I think, if we come back next year, everyone will have a much better idea of what has really transpired.

I can understand why the SEC's sensibilities were offended by the perception that there was a lot of almost insider trading occurring and people were profiting from it. I guess it is hard for me, as an individual analyst, to really comment on how big of a problem that was perceptually and whether it is worth it to change the system to avoid that. It is possible that it is.

I think if the main goal of Reg. FD was to protect the individual investor, I think it is too early to figure out whether that will be true or not, or whether Reg. FD will disadvantage the individual investor. I do think we will have a better sense next year.

I think that companies have had three main reactions to Reg. FD. I think over half of the companies that I deal with, or that my colleagues deal with, have said, as a couple of people have mentioned, "Well, our policy has never been to disclose material information selectively, so we don't really need to change our policy. Maybe we need to fine-tune a little of the wording by referring to being comfortable with consensus, being comfortable with a specific number or a specific range, but, in general, I think most of the companies, probably 50 or 60 percent, have not really changed anything.

I think 20–30 percent of companies have said, "Well, we don't really know what material information is, what materiality is." I think the SEC did a very good job giving a very specific example with earnings guidance and specific examples of what language was acceptable or problematic. I think the mosaic metaphor was very unfortunate. I think it is such a broad term—where any one piece of the mosaic may be deemed material if it completes the mosaic—I think that is one reason why all the scare letters by lawyers have to be taken seriously by companies. I would say 20–30 percent of companies have just said, "Well, we don't know what material is, so we are not going to say anything at all. If we have a conference call, it will be open to everyone, but we are not going to say anything meaningful, and we are just going to have a no-talking-to-analysts policy throughout the quarter." I would say maybe 15-20 percent of companies have gone the other way and said, "Well, we don't know what material is, so we are going to disclose everything and every piece of the mosaic will be disclosed in our conference calls," and they have given ultra-specific guidance about what their projected "SG&A"[24] is, their "R&D"[25], corporate goals as far as individual acquisitions — total open book on everything.

If companies do not change anything, there is really no impact, positive or negative, on the individual investor, so I think it is the

24. "Sales, General and Administrative."

25. "Research and Development."

other two where you really need to look and see what the impact is. I have two thoughts on the matter. First, is I do not really think there was a huge problem to begin with that Reg. FD was fixing. I think, in general, information flow is capitalized on so quickly by Wall Street, that there was not a situation where institutional investors or certain individual investors had extended periods of time—days or weeks or hours—to trade, buy or sell stocks, based on whispers or rumors. I think that as soon as anyone starts to talk about or make public the information, it spreads like wildfire through Wall Street. Whether a company puts out a press release at 10:00 a.m., in the middle of the market, or some analyst in the morning call says, "Well, I've learned the company is going to miss the quarter, and you can take it from me because I just talked to the company and they gave their blessing," I think the stock moves so quickly that no one was really disadvantaged over a broad scheme.

There may be one or two examples everyone can point to. I have actually had one of those examples in ten years, where a company literally got three analysts together and disclosed something selectively and materially. But I think that was very, very rare.

When we are talking about individual investors, I think the only people who are really going to benefit from the design of Reg. FD are day traders, because most average investors watch CNBC during the day. I do not think they take an hour out from work to dial in to conference calls that their companies are sponsoring or investments that they own. I just think that is a real minority of investors.

I think most individual investors either understand that they do not need to be day trading or do not want to be day trading, and that is why they give their money to Fidelity or companies like that; or the way they invest is to buy stocks that they know, they come home and read the paper, watch the news, think about whether stocks have been going up or down, and generally make their decisions over time—they do not constantly call up their brokers and get the latest information.

So I think, even within the individual investors, we are really talking about a small segment. Perhaps, you can argue that they need protection too.

I think the tradeoff is for that segment of companies that will not disclose anything—and I actually thought it was interesting that Mr. Becker noted that perhaps one of the tradeoffs will be analysts' estimates are no longer around a tight consensus.[26] I think if you admit that is a possibility, or even a likely outcome, that must mean increased volatility, because I think the companies that are most likely to clam up, as it were, are the smallest companies that are going to have the fewest analysts covering them. There is going to be the widest disparity for what analysts' estimates are, not only for earnings, but for general expectations. I think when companies like that report—and, chances are, they are not right on the mean—they are going to have the most volatility intra-day, and it is going to be the individual investors who are least able to deal with that.

My general perception is that there is not a ton of benefit from Reg. FD for the average individual investor. There might be some for the day trader who really is watching his screen constantly. I think there is some chance that some investors will be disadvantaged by the increase in volatility. I guess, with that said, I generally agree with the panel that there is not going to be a big impact either way, and, in any event, it is too early to really tell what the impact is.

I know Mr. Becker has been taking notes throughout my own talk and I know I am the last speaker, so—

MR. BECKER: Notes, but not names.

MR. ZISSON: I would like to close with that and turn back to Jill to moderate the Q&A.

PROFESSOR FISCH: You have been a very patient audience. Even though I can think of a dozen questions that I would like to continue to ask, at this point I think we should open it up to you for questions. Before I do that, however, if there is anything that any of the panelists have to add let me give you the opportunity to do that.

MR. BECKER: There is a lot I could say. I think I would rather hear the questions from the folks in the audience first however.

MR. GOLDSCHMID: I want to make sure everybody who is

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26. *See supra* p. 283.

counseling here understands the reason for that mosaic. The language in the SEC release was helpful language. It said that if you have gone around, kicked tires, and gotten information as analysts, and the last piece, which would not be important to the reasonable investor but is important to you, if you get that last piece from the company, it is perfectly okay. It emphasizes the proper function of the analyst, which is to go out, get information, work it through, kick tires, and if you get information from the company, that is okay, as long as it is just a piece and not something that would be important to the reasonable investor.

In general, there is an enormously greater amount of better information coming out to the public. I think it is time to get questions.

PROFESSOR FISCH: Yes?

COMMENT: Trust me, the sell-side analysts put their money up. We are market makers; we put our money up. We have to create liquidity in the marketplace. We don't believe our sell-side analysts do that. We have to do some. There are 200 intended consequences.

I listened to what Eric Roiter was saying on the work product of an analyst. There is pride. There is professionalism. He talked a little bit about what they are doing. What we are hearing is that there is a lot of global disequilibria, because foreign analysts are getting information that domestic analysts cannot because they have a different mode of seeking information and, under the guise of translation from a foreign language, they can come up with information that domestic analysts feel very disadvantaged about.

A balancing here is taking place between the efforts of getting information out there. We are finding from our clients that in many instances they are going into chat rooms, and the translation of what a company says and what comes back to us is in a foreign language. We are worried that this information is free-form because there is a lot of resistance to explain things that investors can understand, rather than creating communication and guidance that perhaps an institutional or professional analyst can understand. In other words, plain English is not being communicated.

Finally, there is Rule 10b5-1, which is an awkward rule. There is a major problem because of how FD is written. The

Commission, unlike Rule 10b-18,[27] where it creates a safe harbor, in Rule 10b5-1[28] created only an affirmative defense. You may think you have a "safe harbor," but we reserve the right to come after you under state securities laws.

So what is being held against the investing populace and insiders is trying to reconcile—and that is the issue, reconciliation between what is perceived to be a safe harbor and then an affirmative defense, and the propriety of disclosure that can be made so that wealthy insiders can sell where they think that they have the protection of the Rules—they really do not have that—and the investing populace, who will now go to Fidelity, to us, to other firms, and say, "Please translate this. What does it really mean?" We are having a problem communicating what the language really means.

MR. BECKER: Let me respond very quickly. We did make a call to exempt foreign issuers, but that is not a call to exempt foreign analysts. If issuers are conducting their disclosures under two sets of rules, I think they may find that they are having a conversation with our Enforcement Division.

In terms of investors not understanding what companies tell them; one of the things that the analysts community told us in the comment period—and I do not doubt the truth of it—is that a lot of times things come out and investors either do not understand it or misunderstand it, and as a result, it is very useful to have information filtered through analysts before it becomes public.

We made the decision quite consciously that there is no other alternative to trusting the investors. There is nothing in the law that permits us to single out a group and say "you have the opportunity to receive information and to realize trading profits on that information—an opportunity that is not available to the general public." Everyone is going to adjust to this, and when investors find themselves getting it wrong, I think that will reaffirm, rather than undercut, the value of analysts and analysis.

MS. WOLF: One thing that is very frustrating is that when you see the discussion in the chat rooms, it is obvious that many people do not bring the historical background and the understanding of

27. 17 CFR § 240.10b-18 (2001).

28. Id. § 240.10b5-1

the complexities of an industry to reading a news release or an 8-K. Also, because of the fear of entanglement and adoption, the company also cannot say, "Gee, you know, this analyst really got it right. Maybe you should look at what he did."

To try to frame every news release in the right context for the unsophisticated reader would mean that they would be thousands of pages long. It is an unsolved issue. I do not think it is particularly new because of FD or 10b5-1. I think it is just perhaps highlighted a little bit.

MR. BECKER: Yes. The markets have a wonderful ability to adjust, and that will be the long-run focus of analysts. Analysts are not there merely to get information anymore. Modern communications puts information in everyone's hands. That is the wonder of the Internet. But analyzing the information, really using it for constructive purposes, that is where the pay dirt is and that is what one hopes analysts are going to really do.

PROFESSOR FISCH: Yes?

QUESTION: Are most issuers reluctant to have their Q&A broadcast?

MR. ANDERSON: You mean on their conference calls?

QUESTIONER: Yes.

MR. ANDERSON: No. They are Webcast.

QUESTIONER: They want them to be known?

MR. ANDERSON: They are. When they Webcast the conference call, the Q&A is part of it.

MR. BECKER: There has been a dramatic, increase in public Webcasts, and for very good reasons. You cannot do anything wrong in terms of FD if it is a public meeting. You can put out material information or non-material information. It is all perfectly safe.

QUESTION: Mr. Zisson, you said that you were Webcasting your health care conference, but not the Q&A sessions.

MR. ZISSON: That wasn't the Q&A of an earnings announcement or a company announcement. Our health care conference is just an opportunity for companies to give general updates. So during the general update session, which lasted for thirty minutes, it was simulcast. During the Q&A breakout session afterwards, there was no simulcast. That was for our clients to ask general questions. At that point it was incumbent on the company not to disclose material information. If they did, they had to update investors appropriately.

PROFESSOR FISCH: Other questions?

QUESTION: Was there any concrete data that showed a rampant problem with selective disclosure?

MR. BECKER: Both with insider trading and selective disclosure it is possible to get at what the impact of a public disclosure is and, as result, what benefits go to people who trade on material non-public information. What you cannot get is the incidence of selective disclosure, how much of it is going on. I think, from a public policy standpoint, that is the critical question, and I think that people at the Commission had to rely on perspective, experience, and judgment on that issue.

I agree with Alex that this does not happen particularly often, but it happens often enough, and often enough—"enough" is, in essence, a social judgment. What one perceives really is a function of where one sits.

I was surprised, when I came to the Commission, at the number of people who I would have thought were otherwise quite sophisticated—and maybe they are—who hold really deeply cynical views about how the market works. People participate in the market and I think, by and large, they would not do it if they thought it were rigged. Yet, there is a lot of cynicism out there.

Harvey talked about the number one purpose of FD was enhancing investor confidence.[29] I think what we have heard from investors and what we have seen so far suggests that there was a need and that this is having an impact.

PROFESSOR FISCH: Any other questions?

QUESTION: It appears that fears about enforcement have led a lot of the companies to more or less clam up. Do you feel that will continue to happen or do you see it just over time going away?

MR. BECKER: Well, there will be a first company. I do not know when. If I did know, I probably would not tell you. I think that you will find that we are going to be sensible about this and that the actions that we bring will be pretty clear.

I do not think, as a practical matter, that 20 percent of the public companies in the United States are going to get away with

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29. *See supra* p. 278.

clamming up. I do not think you can do that in this market and expect investors to invest in your company, rather than in another company that does not clam up. I think that is an understandable, short-term, conservative reaction that over time is not sustainable and will not be sustained.

MR. ROITER: I would add that, to the extent that companies themselves do not give out information directly, it simply places greater importance on the indirect ways that analysts get insights into companies and information. We have seen at Fidelity—and I do not think it is unique to our institution—that there is a great deal more leg work being done doing surveys, and I mean global surveys. It is important to have geographic dispersal of your research personnel, to talk to customers and suppliers and distributors of companies, to get the information indirectly that perhaps in the pre-Reg. FD days you could get directly from companies.

I think not getting information from those companies that clam up will not really lead to less interest in those companies. In fact, I think it creates a greater comparative advantage for those institutions that have deep resources and research to do that leg work indirectly so that they can get to judgments about the prospects of that company that the market generally cannot do.

MR. ANDERSON: I think that you have to be careful when you characterize a company as clamming up. It could be a relative term. It could be that a company might be characterized as clamming up when they have changed their policy with respect to giving guidance, where previously, before FD, they would give guidance up to a certain point and now they only give guidance on their earnings call at the beginning of the quarter and that is it.

We found in our survey that the most difficult areas were in terms of providing guidance dealing with FD, as well as providing input to analysts' models, as well as reviewing their reports. A good number of companies now just review the models for factual information and do not comment on projections.

As far as the guidance, there is a growing trend that companies are now giving mid-quarter guidance just to update the market, so it gives them a benchmark from which they then can go out and initiate one-on-one conversations with the analysts under this umbrella of fresh guidance. I think that we heard before that the big issue is one of timing, and this gives them more time.

I think, overall, we found that only eight percent of those people we surveyed literally said that they stopped doing one-on-ones with analysts. It is really premature to make any judgments.

MR. ROITER: What percentage have you found that are asking for confidentiality agreements?

MR. ANDERSON: None.

MR. ROITER: I can add to your survey. We are seeing that, and we think it is an unfortunate result.

MS. WOLF: Are you seeing a trend in any particular industries or companies with certain kinds of issuers that are asking for this, or is it scattered?

MR. ANDERSON: I do not think you can break it down by industry, or even break it down between those companies that have favorable developments or unfavorable developments that have not yet been disclosed. I think it really is the result of simply who is providing the legal advice to the particular company.

PROFESSOR FISCH: I think we have kept our panelists long enough. Let me end this by thanking the panelists for their very insightful remarks.

Notes & Observations

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