

2002

Can Regulation Fair Disclosure Survive the Aftermath of Enron?

Marissa P. Viccaro

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Marissa P. Viccaro, *Can Regulation Fair Disclosure Survive the Aftermath of Enron?*, 40 Duq. L. Rev. 695 (2002).

Available at: <https://dsc.duq.edu/dlr/vol40/iss4/6>

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Can Regulation Fair Disclosure Survive the Aftermath of Enron?

In December of 2001, the story of Enron Corporation's implosion swept the news as the largest corporate bankruptcy ever.¹ Enron, a Houston-based energy commodities trading company and, at the time, the seventh largest company in the U.S., collapsed after its stock price plummeted and credit rating sank as a result of complex financial cover-up schemes generated by its top management.² Massive debt, shown only on its subsidiary partnerships' books, was visible only to investors in the partnership, and not to Enron's public investors.³ Investors lost over \$60 billion, and Enron's employees, misled by the company's executives, were stripped of their retirement savings.⁴ As a result, the Justice Department, the Labor Department, multiple congressional committees, and the Securities and Exchange Commission ("SEC") are investigating into just what went wrong and how.⁵ One of the greatest corporate scandals has shed new light on the need for investors to receive accurate information at an appropriate time so that the public is adequately protected in the event of another corporate debacle.

This comment will explore the requirements of Regulation Fair Disclosure ("FD") and the trends and market conditions that necessitated its promulgation. Its impositions on market analysts and issuers alike will prove minimal in comparison to the positive implications the regulation should, in theory, yield to investors. A realistic analysis will examine the practicalities of FD: can the regulation actually work to bring individual investors material information? Finally, this comment will discuss the effectiveness of the regulation in the aftermath of Enron's collapse, and the certainty of FD's future.

1. Thi Nguyen, *Investors Impatient with Corporate Debt*, SEATTLE TIMES, Dec. 25, 2001, at C3.

2. *ABC News: This Week* (ABC television broadcast, Jan. 13, 2002). See *The SEC Recommends Improvements to Regulation FD*, MANAGING THE GENERAL LEDGER, (Institute of Management & Administration, Feb. 1, 2002), available at 2002 WL 7354714.

3. Diana B. Hendriques with Kurt Eichenwald, *A Fog Over Enron, And the Legal Landscape*, N.Y. TIMES, Jan. 27, 2002, at section 3.

4. *ABCNews: This Week*, supra note 2.

5. *Id.*

I. FD FUNDAMENTALS

The average American's recent increased access to the Internet and other high-speed technology has revolutionized the American culture, including the economy.⁶ More Americans, due to the popularity and affordability of home computers having access to the Internet, and through such access receiving abundant information, arguably caused the bull market of the late 1990's.⁷ Individuals became more willing to invest in the stock market because of the availability of information and ease in researching their investments.⁸ However, until October 2000, it seemed that the proliferation of individual investors had not altered companies' approaches to disseminating material information, important to all investors, to only analysts and large market players, leaving the individual, small investor at a disadvantage.⁹ To protect the general investing public, the Securities and Exchange Commission adopted Regulation Fair Disclosure.¹⁰

6. Between 1998 and 2000 in every region across the country, the share of households with internet access increased significantly, especially in the Pacific, New England, and Mountain states. *Households' Internet Access Grows Across the U.S.*, WALL ST. J., Aug. 15, 2001, at B14. Discounted sign-up rates for internet service, higher education levels, and the ease of "staying in touch" from remote areas fueled increased household internet usage to a national average of 41.5%. *Id.*

7. Half of the households in the United States own equities. Christopher H. Schmitt, *A Handicapper's Guide to the New SEC Chief*, BUS. WK., May 21, 2001, at 40.

8. See Danny Hakim, *SEC Approves Regulation Against Selective Disclosure*, N.Y. TIMES, Aug. 11, 2000, at C8 (stating that "[o]ver the last few years, online trading, financial message boards and the rapid-fire dissemination of news from Web sites have helped close the gap between average investors and Wall Street"). See also Sara Hansard, *At Hearing, Industry Cries Foul Over Fair Disclosure: Companies, Analysts Join in Criticism*, INVESTMENT NEWS, May 28, 2001, at 8.

9. "The democratization of investing has also exposed investors to an array of abuses as Wall Street's second-class players." Schmitt, *supra* note 7.

10. Regulation Fair Disclosure, known as Regulation FD, was adopted as a final rule by the Securities and Exchange Commission to take effect on October 23, 2000. Selective Disclosure and Insider Trading, Exchange Act Release No. 43154 (Aug. 15, 2000). The general rule concerns selective disclosure, which refers to the circulation of material information to analysts, institutional investors, and other major market participants and not to the general public; thus, the crux of Regulation FD states:

(a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e):

(1) Simultaneously, in the case of an intentional disclosure; and

(2) Promptly, in the case of a non-intentional disclosure.

(b)(1) Except as provided in (b)(2) of this section, paragraph (a) of this section shall apply to a disclosure made to any person outside the issuer

Basically, Regulation FD requires issuers,¹¹ that is, companies registered under the Securities Exchange Act of 1934 that have securities outstanding in the secondary market, to publicly disseminate,¹² via oral or written statements, any intentionally¹³

- (i) Who is a broker or dealer, or a person associated with a broker or dealer as those terms are defined in Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c (a));
 - (ii) Who is an investment adviser, as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)); an institutional investment manager, as that term is defined in Section 13(f)(5) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m (f)(5)), that filed a report on Form 13F (17 C.F.R. 249.325) with the Commission for the most recent quarter ended prior to the date of the disclosure; or a person associated with either the foregoing
 - (iii) Who is an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. § 80a-3), or who would be an investment company but for Section 3(c)(1) (15 U.S.C. § 80a-3(c)(1)) or Section 3(c)(7) (15 U.S.C. § 80a-3(c)(7)) thereof, or an affiliated person of either of the foregoing . . . ; or
 - (iv) Who is a holder of the issuer's securities under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information.
- (2) Paragraph (a) of this section shall not apply to a disclosure made:
- (i) To a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant);
 - (ii) To a person who expressly agrees to maintain the disclosed information in confidence;
 - (iii) To an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available; or
 - (iv) In connection with a securities offering registered under the Securities Act

Regulation FD, General Rule of Selective Disclosure, 17 C.F.R. § 243.100 (2000).

11. See Regulation FD, Definitions, 17 C.F.R. § 243.101(b) (2000).

12. Generally, placing the material information in a publicly filed document, such as a Form 8-K, Form 10-Q, or proxy statement constitutes sufficient disclosure, as long as the information is not buried within the document nor disclosed in a piecemeal fashion. SEC Division of Corporation Finance, *Manual of Publicly Available Telephone Interpretations*, Fourth Supplement (including interpretations issued in May 2001) available at <http://www.sec.gov/interps/telephone/phonesupplement4.htm> (last visited Aug. 13, 2001). Also, an issuer can make a public disclosure via a conference call, provided that adequate advance notice, that is, a reasonable time, is given, containing the date, time, and call-in information for the call, and a transcript or replay of the call is accessible after the call takes place. *Id.* Though a press release circulated through a widely-used news or wire service will most likely satisfy FD's requirement, however, a mere posting on the issuer's website disclosing the material information will probably be insufficient. Exchange Act Release No. 43154 at 16. The SEC intentionally drafted Regulation FD so as to furnish issuers with flexibility in the method of disclosure they choose to employ: "[any] method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public" is sufficient under the rule. *Id.* at 14 (quoting 17 C.F.R.

disclosed material nonpublic information¹⁴ simultaneously to the public and any market insider.¹⁵ Any non-intentional disclosure of material nonpublic information that the issuer makes must be promptly disseminated to the general public.¹⁶ In essence, Regulation FD curbs any closed discussions between issuers and market analysts seeking guidance regarding pricing trends, earnings forecasts, or other facts that an investor would consider material.¹⁷

§ 243.101(e)). Nonetheless, the SEC will consider all the relevant facts and circumstances, including the issuer's usual method of disclosure, to determine the reasonableness of the distribution, during an enforcement action. *Id.* at 16.

13. *See supra* note 10. A disclosure is intentional when the person making the disclosure knows, or is reckless in not knowing, that the information communicated is both material and nonpublic. 17 C.F.R. § 243.101(a).

14. The standard for materiality is that which is typically used under the federal securities laws, as defined by the United States Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Information is material if a substantial likelihood exists that a reasonable investor would have viewed the disclosure of the omitted fact to significantly alter "the 'total mix' of information made available," or, in other words, the information would have been considered important in making the investment decision. *Id.* *See also* Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (adopting the *TSC Industries* definition of materiality in the Rule 10b-5 context). The SEC also relies on the materiality concept discussed in its Staff Accounting Bulletin 99 ("SAB99"). Though SAB99 apparently explains materiality with respect to financial statements, qualitative and quantitative factors, including the anticipated market reaction, should be considered in assessing the materiality of information for Regulation FD. Paul D. Tosetti, *The SEC's Regulation FD — Fair Disclosure*, in *CORPORATE LAW*, at 152 (PLI Corp. Practice Course, Handbook Series No. 1259, 2001). *See also* SEC Staff Accounting Bulletin No. 99 (Aug. 12, 1999) (amending 17 C.F.R. pt. 211B).

Nonpublic information is that which has not been disseminated in a manner making it available to investors generally. Exchange Act Release No. 43154 at 9.

15. *See supra* note 10.

16. *See supra* note 10. "Promptly" means as soon as is reasonably practicable, but not after the later of 24 hours or the start of the next day's trading on the New York Stock Exchange, after a senior official of the issuer learns of the non-intentional disclosure, made by or on behalf of the issuer, of information known, or reckless if not known, to be both material and nonpublic. 17 C.F.R. § 243.101(d).

17. In the adopting release, the SEC listed seven major events providing nonpublic information that "should be reviewed carefully to determine whether they are material":

- (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; (4) changes in control or in management; (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's report; (6) events regarding the issuer's 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.

Exchange Act Release No. 43154 at 10.

But most importantly, what may be material to one company may not be material to another, depending on its size or industry, for example, so materiality remains a fact-based, company-specific standard with no bright-line rule. The Director of the SEC's Division of Enforcement asserted in a speech that a company should begin its materiality assessment by

The SEC adopted Regulation FD “to level the playing field” in the secondary markets by providing individual investors with the same access to information that companies had given directly to market insiders.¹⁸ Believing that an issuer’s selective disclosure can compromise the market’s integrity, the SEC wanted to enhance investors’ confidence in the capital markets by reducing any incentive that analysts may have in reporting favorably about a company merely as a means to ensure continued access to the unique, selectively disclosed information from the reported company.¹⁹

Most significantly, the SEC reasoned that broad access to information technologies mandates full and fair disclosure by public companies.²⁰ Specifically, Internet webcasting and teleconferencing, specifically, provide real time dissemination of market information,²¹ thereby diminishing the customary functional role of analysts as intermediaries.²² Though one could argue that a

asking three questions: (1) Where is the company in its earnings cycle? (2) How much time has passed since the public guidance was given? (3) Has any event occurred between the release of the initial estimate and the confirmation that would probably cause a reasonable investor to question the accuracy of the initial estimate? Richard H. Walker, Regulation FD — An Enforcement Perspective, Address to the Compliance & Legal Division of the Securities Industry Association (November 1, 2000) in CORPORATE LAW, at 515 (PLI Corp. Practice Course, Handbook Series No. 1250, 2001).

18. Exchange Act Release No. 43154 at 2. For example, the SEC notes that market insiders, who are privy to information from a company, such as advance negative earnings results, were able to “make a profit or avoid a loss at the expense of those kept in the dark.” *Id.* A more succinct explanation comments, “[t]here used to be a divine order to the stock market. Analysts would hear a company’s earnings forecast first, then the forecast would filter down to their clients — and last, to the public at large.” Christian Murray, *Leveling the Playing Field on The Street/ SEC Rule Seen as More Democratic, But Some Say It Causes Volatility*, NEWSDAY, June 16, 2001, at A16.

19. Exchange Act Release No. 43154 at 2. A possible conflict of interest could arise for an analyst in the temptation to publish favorable recommendations about issuers with which he has a close relationship, for the purpose of having sustained access to the selectively disclosed information; an objective and accurate analysis is therefore compromised. *Id.* at 3. Remarking positively about possible effects of the regulation, a law professor stated, “the principal benefit of this will be to enforce the independence and objectivity of the securities analyst.” Hakim, *supra* note 8. See *infra* notes 58-59 and accompanying text discussing Merrill Lynch & Co.

20. Exchange Act Release No. 43154 at 3. The extensive “information superhighway” has created the demand and expectation of enabling online investors to perform the same research that market professionals previously had done exclusively. *Id.*

21. See *supra* note 8.

22. See *id.* Investors now can credit their own research to be as current and accurate as that which any analyst will receive. See Jeff D. Opdyke, *The Big Chill: Street Feels Effect of ‘Fair Disclosure’ Rule*, WALL ST. J., Oct. 23, 2000, at C1 (discussing Regulation FD’s chilling effect on contacts between analysts and corporate managers). Indicatively, an analyst

lesser need for intermediaries indicates the belief that individual investors are savvy enough to analyze market information on their own,²³ perhaps the better contention is that the access to technology advanced the economic growth as evidenced in the capital markets, and in turn entitles individual, self-directed investors to the same quality and ease of information that analysts enjoy. Regardless, the effect of FD on issuers, so far, is mixed: some companies are abiding by the provisions of the regulation, and others choose to test the regulation's limits. And for the investing public? Regulation FD may not be the answer.

II. THE "DUMBING DOWN" OF WALL STREET

Now that Regulation FD requires issuers to cater their disclosures to both analysts and average investors, who may be unfamiliar with Wall Street jargon, companies have changed the way they disseminate information by "lay[ing] out a road map that analysts and investors can follow."²⁴ But the increased and now modified mode of corporate communication that FD requires evidences something more disturbing: the inferior view that many on Wall Street have of average American investors. Insiders complain that the regulation has "dumbed down" the level of corporate publicized communications because the general public has become privy to the same information, which requires the information to be presented in a way that the public can understand.²⁵ Some perceive a change in the issuers' manner of communication that tends to be "more superficial and less informative," when speaking to a general audience.²⁶ A more biting comment by Fidelity Investments snarled that Regulation FD "drags smart mutual-fund analysts *down to the level of the masses* because

grumbled that the regulation has made unattainable particular pieces of information which previously came from corporate executives directly, in that "[with] few places [he] can go to gather data on internal operations . . . his analysis now reflects 'more judgment calls . . .'" *Id.* However, a dichotomy will still exist between the reasonable investor, and a sophisticated investor or analyst, who with persistence, knowledge, and insight combined, can piece together particular information that may seem insignificant to the reasonable, or average investor, to reach a conclusion that the information is material. Tosetti, *supra* note 14, at 153.

23. See *infra* notes 76-81 and accompanying text reviewing the current state of investor financial literacy.

24. William C. Smith, *Tell-All Rules*, A.B.A. J., Apr. 2001, at 63 (quoting Daniel Kaufman, in-house counsel, Zany Brainy, Inc.).

25. *Id.* at 63-64.

26. *Id.* at 64.

they can no longer ask in private the thoughtful questions that give them an edge."²⁷ This defensive mentality was also displayed in a conversation between a market commentator and the hostess of CNBC's Squawk Box:

BARTIROMO (hostess): Give us again the impact that you think Reg. FD has had on investors.

CRAMER (TheStreet.com Markets Commentator): If you do a lot of homework . . . [i]n the old days, you . . . could go to the CFO of [a company]. You could call [him] up In the old days, the CFO would say, 'Well . . . I understand you did some homework and now let me give you the other side of the story Now the CFO says 'what . . . are you asking me this for? You know I'm not allowed to answer questions like that. No homework questions please.'

BARTIROMO: But that's for you. You are a market professional. You can call-pick up the phone and call the CFO.

CRAMER: *Oh, so we should all be stupid? We should all be dumb?*

BARTIROMO: But individual investors cannot.

CRAMER: *Where in the Constitution is the right to be stupid?*

BARTIROMO: It's not being stupid. Individual investors have the right to get the information at the same time that the Jim Cramers of the world have it.

CRAMER: [I]ndividual investors are like people who go to a ball game, OK? There are professionals who can hit and there are amateurs who are in the stands. And I accept that distinction. [W]here is the place where we all are able to hit the 400 ball? It's not the case. Right now, professionals are not able to do any homework and see any reward for it

BARTIROMO: They can still do their homework. They can go around the CFO. They can do their own checks . . . and then they can make their own decision about buying stock based on their homework²⁸

Despite any ignoble perception of small investors, analysts and institutional investors, as critics of Regulation FD, allege that issuers are releasing information of declining quality into the

27. Jeff D. Opdyke & Michael Schroeder, *Disclosure Rule Gets a Bad Rap*, WALL ST. J., June 5, 2001, at C1 (emphasis added).

28. *Squawk Box*, 8:00 am (CNBC television broadcast, Aug. 27, 2001) [hereinafter *Squawk Box*] (emphasis added).

market, thereby creating the potential for greater stock price volatility.²⁹ Interestingly enough, however, a recent study contends that the enhanced flow of information to investors, required by FD, has caused reactions to earnings news to be less volatile.³⁰ In fact, the study suggests that some improvement has resulted in the quality and quantity of financial information that companies have released prior to earnings announcements.³¹ So are analysts' worries justified?

III. ANALYSTS: DOWN AND OUT?

Analysts argue that the implementation of Regulation FD diminishes their importance in the market.³² However, analysts have the ability, unlike average market players, to piece together tidbits of information to arrive at a material conclusion.³³ Even though analysts' jobs have become more difficult as a result of Regulation FD,³⁴ most corporate executives in the industry believe

29. Phyllis Plitch, *Dire Effects of Disclosure Rule Doubted*, WALL ST. J., July 24, 2001, at C14. Contrary to critics' assertions, since Regulation FD's effective date of October 23, 2000, market volatility has apparently decreased. Editorials, *Don't Roll Back Fair Disclosure*, BUS. WK., Aug. 13, 2001, at 124.

30. Plitch, *supra* note 29, at C14.

31. *Regulation FD Does Not Harm Markets, Says USC Report*, BUS. WIRE, July 23, 2001. In a USC-Purdue study that sampled 1,595 companies, evidence revealed a minor decrease in return volatility (measuring the percent change in stock prices) around the time of earnings announcements since the implementation of Regulation FD. *Id.* Additionally, the fact that a company's stock price more quickly converges to its post-announcement level indicates that the quality of information that the market receives has improved. *Id.* Notably, the study found that the number of voluntary earnings disclosures by managers has doubled since FD became effective. *Id.*

32. *See supra* note 22. Lauren Rudd, *Do Your Homework And You Won't Need Analysts*, PITTSBURGH POST-GAZETTE, Apr. 14, 2002, at C4 (stating that the goal of the column was to aid readers in doing their own investment research to minimize dependence on analysts' reports, shown to be less credible due to the recent investment rating scandal at Merrill Lynch).

33. This practice is known as using the "mosaic" theory, where issuers selectively disclose to analysts nonpublic, immaterial information. Tosetti, *supra* note 14, at 153.

34. Gary McWilliams, *Sign of the Times*, WALL ST. J., Aug. 9, 2001, at C1. *See Reg FD Fools, More Reg FD Jokes*, WALL ST. J., Apr. 27, 2001, at C16 (noting that analysts can no longer rely on one-on-one meetings but have to trust the company's financial statements, and quoting a director of research at Morgan Stanley who said: "How do we train the next generation of analysts?"). (But can analysts trust a company's financial statements? *See infra* notes 88-91, 98-99 and accompanying text.) Analysts' loathe of the regulation is exposed in this recent conversation condemning the rule:

CRAMER (TheStreet.com Markets Commentator): [I] don't think that Reg FD is making anybody smarter. I think it's just making it more difficult. [E]xecutives are using this to hide behind and not be able to find facts

FABER (CNBC reporter): [Y]ou raised the case of an aggressive analyst and/or investor, but what about those who are completely lazy or simply relying on these

that the “best” analysts are digging deeper into the fundamental research, and spending less time on earnings forecasts.³⁵ To the layman, it seems that Regulation FD has compelled an important change via an unintended side effect. Not only does the rule provide everyone with the same access to corporate data, but it also (unintentionally?) requires analysts to refocus their research away from reliance on personal or professional relationships with corporate leaders to the basics of corporate structure and performance. Essentially, FD commands improved integrity on the part of market insiders.

IV. CORPORATE DEFIANCE IN NONCOMPLIANCE

Importantly, Regulation FD infiltrates the “old boys” network of trading favors and giving key information to select individuals.³⁶ Now, for instance, any inadvertent comments about earnings that a corporate executive, such as a CEO, makes during a golf game with a significant investor must be promptly disclosed.³⁷ The symbiotic relationship of handholding, via wink or nod,³⁸ between favored analysts and corporate executives has changed, and some companies have “clammed up,” becoming more conservative in their communications.³⁹ However, like analysts, not all issuers have yet adapted to, or, more likely approved of, the new rule. In the summer of 2001, Compaq Computer Corporation scheduled a closed-door meeting with analysts and institutional investors to

companies to offer them guidance and doing no homework whatsoever?

BARTIROMO: The individual is getting left behind because you are able to pick up the phone. You had dinner with the CFO last week. 'Let me call him right now and see, after that big dinner that we had last night together or that golf game we had. Let me call him right now.'

CRAMER: [T]here was nothing the matter with the game the way it was played [B]ecause I think this FD's a joke Everybody in the business knows that FD's a joke.

Squawk Box, *supra* note 28 (emphasis added).

35. *Top Executives Say “Best” Analysts Focus More on Fundamentals Than Forecasts*, BUS. WIRE, Aug. 14, 2001.

36. Invitation-only conferences where exclusive, financial details of a company's performance were disclosed are no longer permitted. Editorials, *supra* note 29, at 124. Furthermore, the “whispering game,” in which companies leaked information to analysts, giving low expectations so that actual earnings would surpass the low numbers and cause their stock price to soar, has been quelled by the regulation. *Id.*

37. Smith, *supra* note 24, at 62. See also *Reg FD Fools*, *supra* note 34.

38. Some CFO's have admitted steering analysts in the “right direction” by using certain body language to convey information, because body language will not appear in a transcript. Geoffrey Colvin, *Just Say No to Guidance*, FORTUNE, Apr. 1, 2002, available at 2002 WL 2190477.

39. Opydke, *supra* note 22.

discuss a plan for its computer services business.⁴⁰ Although Compaq broadcast the meeting over the Internet to satisfy the simultaneous disclosure requirement of FD, the company released scant details about the logistics of the meeting.⁴¹ In fact, a Compaq spokesperson declared: "It's a meeting specifically designed for the analysts, and not something we're making public It's got a very narrow audience."⁴² In another instance of defiance, Raytheon Company provided detailed private briefings regarding its first quarter outlook to analysts after its annual investor conference had been carried via the Internet.⁴³ Afterwards, analysts' first quarter earnings estimates for Raytheon fell by approximately five cents, which change was attributed to conversations with the company's management.⁴⁴

Regardless of any SEC attempt to regulate corporate behavior to the benefit of the average investor, many companies will inevitably find a way to skirt the rule requirements and push the limits of the system.⁴⁵ For example, issuers play a new game of "preannouncing" low-balled earnings, so that when the actual earnings report is released, investors will be surprised by the extra few cents per share that the company actually earned.⁴⁶ Though Regulation FD obligates issuers to make these disclosures public, the rule does not prohibit disclosures that undoubtedly still attempt to keep the small investors a bit off track.

40. McWilliams, *supra* note 34.

41. *Id.*

42. *Id.*

43. Michael Schroeder, *Raytheon's Disclosure to Analysts is Investigated*, WALL ST. J., Mar. 15, 2001.

44. *Id.*

45. Hopefully, issuers will reconsider such a strategy because of the current increased public skepticism and SEC scrutiny of disclosure practices, prompted by the Enron fiasco.

46. Editorials, *supra* note 29.

V. THE DEMOCRATIZATION OF MARKET INFORMATION

Regulation FD was the brainchild of former SEC Chairman Arthur Levitt, who displayed his democratic suasion by attempting to help the individual investor access the information, in a timely manner, important to his investments. To some, Levitt was the “most pro-consumer head of the SEC in its history,” who encouraged regulations for the protection of ordinary investors.⁴⁷ Pedagogically, or rather, paternally, Levitt advised the public to avoid shaky investments by first becoming educated about the risk:

You have access to financial news, stock quotes and pricing information, to corporate filings and financial disclosure . . . [and can] sift through the facts in plain English [You] are now privy to the same information, at the same time, as analysts, investment bankers and every other professional on Wall Street.⁴⁸

Levitt’s philosophy behind Regulation FD, to level the playing field, is illustrated by his view that a “franchise” relationship exists between analysts and investment bankers.⁴⁹ Ideally, Levitt wanted the regulation to: (1) strip analysts of all incentives for talking up companies that their investment firm does business with (or whose securities it owns); and (2) curtail issuers and investment bankers from applying pressure to analysts for positive reports.⁵⁰ Before the

47. Smith, *supra* note 24 (quoting Jeffrey L. Kodroff, plaintiffs’ counsel, Spector, Roseman & Kodroff).

48. *Id.* (quoting Arthur Levitt, *The Future for America’s Investors: Their Rights and Obligations*, Address in Philadelphia (Jan. 16, 2001)). Levitt more specifically described his sentiment and rationale for Regulation FD:

In a democracy that prizes the initiative and promise of the individual, it’s not enough to talk about your rights, but also your obligations. As an investor, you certainly have the right to be treated fairly, to get straight answers to straight questions, to know what you are buying and what you are paying for it. But as an investor, you also have an obligation to ask questions — many questions — to seek out information, and contemplate your own tolerance for risk.

Id. See *infra* notes 76-81 and accompanying text (discussing investor education), and Rudd, *supra* note 32 (advising individuals to invest in companies they know).

49. Karen Talley, *Levitt Expects Wall Street to Fall Short*, WALL ST. J., July 24, 2001, at C13 (commenting that the ethical wall between analysts who follow stocks, and the investment bankers who hold those stocks and court the issuers of the stocks, is weak, and that a separation between analysts and investment bankers should exist). See also Dan Fost, *Stung by Enron, Business Journalists Increase Their Vigilance*, THE SAN FRANCISCO CHRONICLE, March 3, 2002, available at 2002 WL 4014449 (explaining that a conflict of interest exists for analysts because their employers have a banking relationship with the companies they cover).

50. Talley, *supra* note 49.

rule's implementation, it was not uncommon for promises of positive coverage to be traded for new business.⁵¹ Unfortunately, Levitt is not hopeful (and may ultimately be proven correct⁵²) that Regulation FD will prevent the investment bankers from holding the stocks they praise.⁵³ Compromised analyst objectivity spurred the adoption of this rule to allow the ordinary investor to judge for himself the impact of any disclosed information. The purpose of FD is evident in issuers' grumbles, to which Levitt has responded: "We have heard from corporate executives who lament being unable to do certain things because of Fair Disclosure They never should have been doing those things [anyway]."⁵⁴

At least pre-Enron, the implementation of Regulation FD had actually provided individual investors with at least the perception of greater fairness in our capital markets.⁵⁵ However, insofar as "professional investors on Wall Street have increasingly tried to create private markets of information to benefit themselves and their firms,"⁵⁶ unfortunately, it seems that such efforts have succeeded.⁵⁷ The New York State Attorney General discovered the analysts of Merrill Lynch & Co. to have biasedly rated Internet stocks to win new business, instead of protecting their investor clients.⁵⁸ Merrill Lynch analysts are accused of giving the highest investment ratings to Internet stocks, labeled internally at the firm as "falling apart" or "piece[s] of crap."⁵⁹ Remarkably, this is the kind of behavior that Levitt sought to prevent.⁶⁰

VI. THE LIABILITY DETERRENCE

Concerns have arisen that Regulation FD will be frequently

51. *Id.*

52. *See infra* notes 58-59 and accompanying text (discussing Merrill Lynch's recent troubles with compromised analyst objectivity and disclosure practices).

53. *Id.*

54. Floyd Norris, *Levitt to Leave SEC Early; Bush to Pick 4*, N.Y. TIMES, Dec. 21, 2000, at C1.

55. Hansard, *supra* note 8 (remarking about a Securities Industry Association study).

56. *Id.* (quoting Tom Gardner, founder of Motley Fool, Inc.).

57. *See supra* notes 1-5 and accompanying text and *infra* notes 58-59, 98-99 and accompanying text (mentioning the recent disclosure scandals).

58. Charles Gasparino, *Merrill Lynch Told Analysts to Change Ways*, WALL ST. J., Apr. 9, 2002, at C1.

59. Rudd, *supra* note 32, at C4. As New York Attorney General Eliot Spitzer, investigating the matter, declared, "there was a general notion that everyone know what was going on, except the small investors." Charles Gasparino, *Wall Street Has an Unlikely New Cop: Spitzer*, WALL ST. J., Apr. 25, 2002, at C1, C3.

60. *See supra* notes 49-51 and accompanying text.

enforced against issuers, in turn subjecting them to immense liability to shareholders. Though Regulation FD gives no private cause of action and can only be enforced by the SEC,⁶¹ issuers have become more careful in wording their disclosures, so as not to be proven inaccurate in the future, and to prevent any liability from misleading the public as a consequence of the disclosure.⁶² As an attorney for an issuer stated, “[w]hen you know that the plaintiff’s bar [may be] on the phone, and people who may sue you, it makes you more cautious in giving guidance.”⁶³ On the other hand, as proponents of the regulation contend, “[w]hat happened before consumers and lawyers were listening in on conference calls?”⁶⁴ Wary plaintiffs’ lawyers have doubted whether only government enforcement of the rule, without the added threat of private shareholder lawsuits, will be enough to impede any leaks by issuers to analysts of material information.⁶⁵ Nevertheless, a consensus exists among companies that no issuer would like to be the guinea pig for the SEC’s enforcement of the rule.⁶⁶ However, the SEC’s first violation inquiry under the regulation was necessitated by Raytheon’s private briefings to analysts regarding its first quarter earnings.⁶⁷ Additionally, Motorola Corporation’s revenue and earnings guidance to analysts is also subject to possible SEC enforcement action.⁶⁸ As an example of a proper way to conform to FD’s requirements, though Campbell Soup Company

61. In its Adopting Release, the SEC discusses liability under Regulation FD:

It is not an anti-fraud rule, and it is not designed to create new duties under the antifraud provisions of the federal securities laws or in private rights of action

The provision makes clear that Regulation FD does not create a new duty for purposes of 10b-5 liability. Accordingly, private plaintiffs cannot rely on an issuer’s violation of Regulation FD as a basis for a private action alleging 10b-5 violations.

Exchange Act Release No. 43154 at 20.

Furthermore, when the SEC does pursue an issuer for violations of the rule, it can bring an administrative action seeking a cease-and-desist order, or a civil action seeking an injunction and/or monetary penalties. *Id.* at 20. Also, the SEC can bring an enforcement action against an individual (who was a representative of the issuer) who violated the rule, either as “a cause of” violation in a cease-and-desist action, or in an injunction action as an aider/abettor of the violation. *Id.*

62. Murray, *supra* note 18. Presently, this point is ever so crucial, again, thanks to Enron.

63. Smith, *supra* note 24, at 64 (quoting Steve Poss, Chair of Corporate Governance and Securities Litigation, Goodwin Procter).

64. *Id.* (quoting Jeffrey L. Kodroff, plaintiffs’ counsel, Spector, Roseman & Kodroff).

65. *Id.*

66. Jeff D. Opdyke, *Wall Street, SEC Discuss ‘Reg FD’ at Roundtable*, WALL ST. J., Apr. 25, 2001.

67. See *supra* notes 43-44 and accompanying text.

68. Schroeder, *supra* note 43.

continues holding one-on-one analyst meetings, the company provides only long-term guidance and will not answer privately asked questions designed to elicit specific, short-term numbers.⁶⁹ Corporate anxiety can yield to paranoia; therefore, issuers are acting cautiously and taking a “wait-and-see” approach to gauge the severity of the enforcement action against the first offender of the regulation.⁷⁰

VII. REGULATION FD: A GOOD IDEA WITH A FLAWED RESULT

Regulation FD theoretically provides the individual investor with the ability to access material information contemporaneously with analysts and other insiders. The democratization of capital market information energized the economy as well as the layman’s enthusiasm in investing in the stock market, that is, until Enron Corporation collapsed. Thus, the initial criticism of the regulation by market analysts and corporate executives was not proven true. The number of corporate communications augmented rather than decreased,⁷¹ and the quality of information released by corporate executives to the public improved, instead of corporations “clamming up” and releasing scant details.⁷² For example, the CEO’s of USA Networks and Gillette Company followed a “more data, less guidance” theory and abandoned selective disclosure to analysts; nothing happened to their stocks — analysts didn’t talk the stock down, and investors didn’t sell.⁷³ Moreover, the rule still fulfills an important function of “leveling the playing field.” The new economy, represented by the Internet’s online trading and discount brokers, self-directed pension plans, exchange-traded funds, and lower fee-based businesses, would have been unable to thrive in a market favoring the selective disclosure to analysts.⁷⁴ As a result of the online innovations, the market has become more efficient. Therefore, “it’s ludicrous to believe that insiders should be allowed to continue to get first crack at materially important information

69. Opdyke & Schroeder, *supra* note 27.

70. *Id.* The SEC is expected to decide very soon which company, previously under investigation, against which it will pursue an enforcement action for violating FD. Recently, PeopleSoft, Inc., and Northrup Grumman were accused of violating the rule by holding private information sessions with analysts; both companies deny providing the analysts with any material information. John Labate, *SEC Takes Action on Disclosure Violations*, FIN. TIMES, April 8, 2002, at 30, available at 2002 WL 16946737.

71. See *supra* note 31 and accompanying text.

72. *Id.*

73. Colvin, *supra* note 38.

74. *Id.*

. . . . You'd think the industry would want a level playing field to protect the integrity of the game."⁷⁵ However, ironically, the regulation has not fulfilled one of its secondary goals — to increase the transparency of the American capital market, because the effect of the rule still allows for information to be kept from investors and analysts alike.

Improving the integrity of our capital markets is only a part of the larger vision that Regulation FD represents. Propelled by a broadening of general public access to the stock markets, the rule embodies a democratic archetype permeating business institutions. Traditionally a game for the wealthy, modern technology has transformed the means of business and commerce, and therefore the economy. Consequently, changes to the selective disclosure system of the American stock market were apt to follow. Regulation FD is a fundamental alteration to the market information disclosure process, and illustrates a general shift towards a general policy to protect the average investor. Regulation FD was overdue, but its effects may be dampened as a result of the travesty of the Enron collapse: Enron has propelled a slew of disclosure reforms, and FD is not enough.

VIII. ENRON: PUTTING INVESTORS ON THE RUN

The monumental downfall of Enron has redirected the focus of protecting the individual investor to Americans' financial literacy. If the American public does not know nor understand the basics of personal finance, no Fair Disclosure regulation, nor any other for that matter, can protect them from another Enron. A recent survey conducted revealed "Americans scored an average of 42 percent on a 14-question test of basic knowledge of personal finances. For instance, two-thirds falsely believe there is 'an organization that insures you against losing money in the stock market or as a result of investment fraud.'"⁷⁶ More shockingly, 45 percent of Americans incorrectly believe diversification to guarantee that investments will perform well even if the stock market does not, and 63 percent of those surveyed do not understand the basic concept of inflation.⁷⁷ These grim statistics patently illustrate how easily information disseminated into the market, as a result of FD, for example, can

75. *Id.*

76. Besty Stark, *ABC News: Economic Illiteracy? Americans Flunk Basics of Finance* (ABC television broadcast, Feb. 6, 2002) available at <http://www.abcnews.com>.

77. *Id.*

quickly become *misinformation* to certain investors. For instance:

[I]n the past [analysts' conflict of interest issues as indicated in buy/sell recommendations] didn't cause as many problems because the community consuming that information was the institutional-investor community They understood that a buy recommendation does not necessarily mean it is a good buy for them. *That understanding has slipped because of the expansion of individual-investor participation. So a big part of the problem and the solution goes back to investor education.* The industry and the regulators can do more to help investors⁷⁸

The growing number of equity analytical tools and trading systems on the internet has impacted the market as shown by greater trading and more available information.⁷⁹ However, the availability of such resources does not necessarily mean that individual investors are equipped to engage in the markets on their own.⁸⁰ Such facts beg the question: "Is it smart for the average investor to make decisions about the market, which is influenced by many other factors that [he] might not understand?"⁸¹

Thus, speculation exists that Regulation FD falls short of its desired goals. "People need, first of all, accurate figures. They need to know what they're investing in; they need information on the companies they're investing in. And they need to learn how to invest their money in a wise way and diversify their portfolios."⁸² The current fair disclosure regulation requires companies to disclose accurate financial information to analysts and investors alike, but only when the company decides to disclose any information at all. Moreover, if a company of Enron's size, along with its accountants and lawyers, could conclude that the securities laws allow what had occurred, the current laws are inadequate.⁸³

78. *Rolling Out a New Regulatory Environment: Industry, Government Lawyers Discuss the Latest Trends*, Corporate Legal Times Roundtable (Feb. 2002) (citing Nora Mead Brownell, Commissioner of the Federal Energy Regulatory Commission), available at 2/02 CORP. LEGAL TIMES 62, col. 1 (emphasis added).

79. *Personal Finance: Martini Chat*, TheStreet.com, Dec. 23, 2001 (citing Lisa Meyer, Personal Finance Editor at TheStreet.com), available at 2001 WL 32973677.

80. *Id.* See *supra* notes 76-77 and accompanying text.

81. *Id.*

82. *CNNfn Before Hours: In Light of Enron, Need for Financial Literacy Among Americans Comes to Forefront*, Feb. 6, 2002 (quoting Don Blandin, President of American Savings Education Council), available at 2002 WL 4333655.

83. Hendriques, *supra* note 3 (quoting Richard C. Breen, former SEC Chairman).

The events of the Enron disaster violated “the spirit and intent of securities laws and the whole concept of full and fair disclosure.”⁸⁴ SEC Chairman Harvey Pitt, appointed by President Bush, asserts that Regulation FD fails its intended effect because the regulation does not demand disclosure.⁸⁵ In essence, companies can “tell everything to everybody, or nothing to anybody.”⁸⁶ Furthermore, he indicated, assuring investors, that his priority is to enforce the securities laws in a manner so that the events of Enron cannot recur.⁸⁷ Therefore, upon its review of Regulation FD’s performance in its first year of effectiveness, the SEC, in its report, made three recommendations: (1) more definitively declare to issuers the information that must be made public by providing additional guidelines on “materiality;” (2) provide companies with incentives for relaying information to the public by allowing more technology to be used in the information dissemination process; and (3) closely examine post Regulation FD market information and filings for a clearer understanding of how the regulation has affected the depth and quality of information that companies have been providing.⁸⁸

Nevertheless, the question remains: Did Regulation FD fail to prevent the Enron collapse? In other words, would the rule have provided investors with the information necessary to foresee Enron’s downfall, and get out before so much was lost? The answer is probably not. The scandalous cover-up practices occurring at Enron were accounting frauds and book-cooking. The information that was released to the public by the company’s management was inaccurate and false. Moreover, because of Regulation FD, market analysts were not receiving guidance from the company;⁸⁹ thus, both analysts and investors were receiving the same inaccurate information from Enron, and both analysts and investors were misled as to the financial health of the company. Also, for

84. *Id.*

85. *The SEC Recommends Improvements to Regulation FD*, *supra* note 2.

86. *Pitt the Gamekeeper*, THE ECONOMIST, February 16, 2002, available at 2002 WL 7245193.

87. James Toedtman, *Pitt Against All Odds*, NEWSDAY, Feb. 12, 2002, available at 2002 WL 2727647. However, Regulation FD only ensures that analysts will not have an edge over investors in receiving material information from corporate executives. Credit-rating agencies were exempt from the regulation, and still have access to such information. Nguyen, *supra* note 1. Notably, Enron collapsed because of the massive debt hidden in several partnerships. Thus, investors and analysts alike are more closely observing the credit ratings of issuers. *Id.*

88. *The SEC Recommends Improvements to Regulation FD*, *supra* note 2.

89. That is exactly what Regulation Fair Disclosure sought to prevent. See *supra* notes 17-19 and accompanying text.

analysts, because Enron's debt was placed in special purpose entities' books instead of the company's books, "it was becoming increasingly difficult to understand how Enron was achieving revenue growth and profitability."⁹⁰ FD removed from analysts their tools for making transparent the financials of a very opaque company; yet, analysts could not cease covering Enron in the market altogether, despite not understanding it, because Enron was an industry giant.⁹¹ However, Regulation FD probably did not prevent analysts from discovering any information via private guidance from the company, which would have enabled the market to anticipate Enron's failure; the outright lies, fraud, and deception of the management would have been told to everyone. Therefore, Regulation FD could not have protected the public in such a situation.

In the wake of Enron, industry leaders have spoken out for changes in many facets of the industry — from the disclosure of accounting practices to analysts' conflicts of interests.⁹² Warren Buffet, the famed billionaire investor, views the solution as something a bit simpler, lying within the companies themselves. He stated, "I would suggest that the CEO regard himself as the chief disclosure officer of the company In the end it's the CEO who determines the qualitative aspect of disclosure, and that's

90. Claire Mencke, *Post-Enron Reforms Will Focus on Fuller and Faster Disclosure*, INVESTOR'S BUS. DAILY, Feb. 20, 2002, at A1 (quoting Chuck Hill, research director of Thompson/First Call).

91. *Id.* One article discusses the implications of negative reporting about an issuer: analysts were prevented from asking questions when participating in a conference call. Stuart Weinburg, *Pivotal Has Cut Me Off Since I Said "Sell,"* NAT'L POST, May 1, 2002 available at 2002 WL 19615780. But after the Enron and Merrill Lynch scandals, some analysts may be more willing to say what they think.

92. Some problems and possible remedies:

[O]ur system of financial and related disclosure is old, it's outdated, it neither provides timely or current information, nor does it provide clear and understandable financial disclosure [T]he three target goals of improvements in our financial reporting process [are] the timeliness of information to the marketplace, the transparency of that information being presented to that marketplace, and the transformation of the process by which that information is created and communicated.

James Cheek, Partner at Bass, Berry & Sims, Roundtable Discussion on Financial Disclosure and Auditor Oversight (Mar. 6, 2002) available at www.sec.gov/spotlight/roundtables/accountround030602.htm (last visited Apr. 22, 2002). See Scott Bernard Nelson, *SEC Rolls Out Reforms — Timetable Unveiled for Rules to Speed Disclosure of Corporate Information*, THE BOSTON GLOBE, Apr. 13, 2002, at C1. The SEC worries that extended involvement in securities reform, for example, the New York State Attorney General's probe into analysts' conflicts of interests, will "set a dangerous precedent and lead to a Balkanization of the securities laws, as each state weighs in with its own mandates" Gasparino, *supra* note 59, at C1.

all-important.”⁹³ Furthermore, corporate executives must be willing to respond to investor interest, and accept responsibility for their company’s disclosure practices.⁹⁴ Heightened investor interest in a company’s disclosure practices is a new challenge for issuers, because investors will no longer accept at face value the management’s portrayal of the company’s financial health.⁹⁵ The individual investor is now more willing to dissect and interpret a company’s financial statements.⁹⁶ Such a change is important because in the end, companies must answer to their investors.

More corporations, such as Krispy Kreme Doughnuts and General Electric, are feeling the heat of scrutiny for their own accounting practices because of Enron.⁹⁷ Additionally, more disclosure scandals are coming to light. For example, Global Crossing Ltd., a giant in the telecommunications industry, sought bankruptcy protection in January 2002 after its accounting treatments for swaps falsely inflated the company’s revenue.⁹⁸ Also, Adelphia Communications Corporation recently revealed that it borrowed \$2.3 billion that was kept off its books, and the company’s shares fell in response.⁹⁹ As a result, this could be “the year of the

93. *Buffett Spotlight CEOs*, available at http://money.cnn.com/2002/03/04/ceos/wires/buffett_re/index.htm

94. Discussing American companies’ response to cries for disclosure due to Enron, Former SEC Commissioner Laura Unger replied:

I think right now companies are trying to make sense of what it is investors want and what the SEC wants in terms of additional disclosure. The focus has traditionally been on earnings. Have companies met their earnings? What were the expectations? Managing those expectations isn’t so easy anymore — post Regulation FD So I think companies are trying to assess what texture they need to give. What’s meaningful to investors?

Business Center, 5:00 p.m. (CNBC television broadcast, Apr. 23, 2002).

95. Gretchen Morgenson, *Wait a Second: What Devils Lurk in the Details?*, N.Y. TIMES, Apr. 14, 2002, at section 3-1, 11.

96. *Id.* Hopefully, the ordinary investor will be able to understand such documents. See *infra* notes 76-81 and accompanying text.

97. Dan Fost, *Stung by Enron, Business Journalists Increase Their Vigilance*, THE SAN FRANCISCO CHRONICLE, March 3, 2002, available at 2002 WL 4014449.

98. Susan Pulliam and Dennis Berman, *SEC Examines Andersen Work for Telecoms*, WALL ST. J., Mar. 22, 2002, at A3. Notably, both Enron and Global Crossing used the same accounting firm, Arthur Andersen LLP. *Id.* Furthermore, as previously discussed, analysts at Merrill Lynch promoted struggling technology stocks, including Global Crossing, which they did not believe in. Caroline E. Mayer and Robert O’Harrow, Jr., *Rein in Analysts, Dealers Agree*; N.Y., *Merrill Lynch in Talks on Reform*, THE WASHINGTON POST, Apr. 13, 2002, available at 2002 WL 19153541. See *supra* notes 58-59 and accompanying text. SEC disclosure reforms regarding analyst independence are currently underway. Pulliam and Berman, *supra* note 98.

99. Geraldine Fabrikant, *A Family Affair at Adelphia Rocks Investors*, N.Y. TIMES, Apr. 4, 2002, available at www.nytimes.com (last visited April 10, 2002).

footnote;” examining the fine print of a company’s financial statements could reveal possible poisons to the company’s financial health.¹⁰⁰ In this respect, Regulation FD has already prompted positive change after Enron’s failure:

What’s changed is that analysts are now making disclosures. That’s all you can ask. Before you had a banking relationship or something that was a . . . nudge thing that the investor assumed or knew and the individual was unaware of. Now this kind of stuff is in the fine print, but it’s there. Investors can find it if they’re looking for it and can make a decision with that knowledge, which is all we’re really looking for.¹⁰¹

Though individual investors still need to educate themselves about the market, Regulation FD has assisted in making the desired information more available.¹⁰²

IX. CONCLUSION

Regulation FD may not survive the aftermath of Enron’s collapse because of public outcry for changes across the market. Regulation FD bandages only a small problem in the disclosure system by requiring material information to be conveyed to analysts and the public at the same time. The slight progress that Regulation FD has made can be invalidated because the rule could become obsolete due to “real-time” disclosure. SEC Chairman Pitt has proposed to supplement the current periodic (say, quarterly) disclosure system with one of “continuing disclosure.”¹⁰³ In other words, Pitt advises a “pro-disclosure requirement,” imposing an affirmative obligation on companies to disclose “undeniably significant information

100. *Id.* (quoting Rik Kirkland, managing editor of Fortune). Other regulatory changes in the industry are bound to occur, including new accounting rules for special purpose vehicles, whose financial statements are kept separate from the company’s books. Andrew Hill, *Wall Street Opens Its Books*, FIN. TIMES, Apr. 18, 2002, available at 2002 WL 16946622.

101. *Personal Finance: Martini Chat*, *supra* note 79 (quoting Aaron Task, Senior writer at TheStreet.com).

102. Hill, *supra* note 100 (stating that investors could be overwhelmed by corporate America’s new openness, and shareholders may learn more than they ever hoped or feared to know).

103. *Rolling Out a New Regulatory Environment*, *supra* note 78 (quoting Sarah A. Miller, Director of the Center for Securities, Trust and Investments at the American Bankers Association). Pitt stated: “Even before the Enron situation, we were working to improve and modernize our disclosure system — to make disclosures more meaningful, and intelligible, to average investors.” Harvey L. Pitt, *How to Prevent Future Enrons*, Dec. 11, 2001, available at www.sec.gov/news/speech/spch530.htm (last visited Apr. 22, 2002).

immediately.”¹⁰⁴ Information issued periodically quickly becomes stale, old information; continued disclosure could make Regulation FD moot¹⁰⁵ because the simultaneous disclosure would no longer be necessary if the public had access to a constant stream of information.

However, Chairman Pitt disagrees with that assessment, because selective disclosures to analysts and other market professionals would still be prohibited.¹⁰⁶ Regardless, loopholes still exist in the system, and Regulation FD may be just the first of many patches.

Enron has prompted a more serious look into the effectiveness of securities regulations. However unfortunate the investor losses in Enron, some good may result from the travesty: large corporations will start to release more detailed information about themselves in an effort to become more transparent to investors.¹⁰⁷ Such bold behavior will probably make issuers better off in the long run. The well-intentioned Regulation FD and any other disclosure regulation like it would not have softened the blow of Enron's fraudulent, deceitful conduct, nor prompted further modifications to the securities disclosure system or investigation in to the individual investors' understanding of the financial markets. Unfortunately, only a grave disaster like Enron is powerful enough to compel a comprehensive reexamination of the securities system in search of change.

Marissa P. Viccaro

104. Neal Lipschutz, *Fast Disclosures by Corporations Sought by SEC*, WALL ST. J., Dec. 17, 2001.

105. *Rolling out a New Regulatory Environment*, *supra* note 78. See Lipschutz, *supra* note 104 (quoting SEC Commissioner Laura Unger in a report stating “eventually, Regulation FD may become obsolete”).

106. Lipschutz, *supra* note 104.

107. See *supra* note 73 and accompanying text.

