

American Electronics Association
Futures Industry Association
Institute of International Bankers
Securities Industry Association
The Bond Market Association

April 28, 2000

Jonathan G. Katz
Secretary, Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549

Re: Proposed Regulation FD, File No. S7-31-99

Dear Mr. Katz:

We are writing to comment on the Commission's proposed regulation on selective disclosure. We applaud the Commission's ongoing efforts to encourage more open communication of corporate information to investors. Chairman Levitt's longstanding campaign of moral persuasion for broader dissemination has paid impressive dividends. For example, recent data collected by the National Investor Relations Institute shows a dramatic trend toward opening up quarterly conference calls to the public.¹ Clearly this is an area where there is an ongoing sea-change towards greater transparency and openness. This trend is likely to continue, thanks to investor demand for real-time access to information and the proliferation of technology to provide that information instantly and inexpensively.

However, this trend also raises the question of whether regulatory action is necessary or appropriate at this time, especially since the proposed regulation could have unintended adverse consequences on corporate communications. Proposed Regulation FD, while well-intentioned, could prove to be a setback for the free flow of corporate information to the markets. By requiring companies to make rapid-fire legal judgments

¹ According to a recently released study by the National Investor Relations Institute, 82 per cent of the companies that conduct quarterly conference calls currently open those calls to all investors, compared to 29 per cent as of June 1998. The NIRI survey also shows that 74 per cent of those companies open their calls to the media, compared to 14 per cent in June 1998. Of particular significance, 48 per cent of these firms offer live open webcasts, a phenomenon that did not exist at all a year ago, and 49 per cent of the companies that offer quarterly webcasts either webcast other analyst meetings or are considering doing so. See NIRI Executive Alert of February 29, 2000. See also "Open Conference Call Trend Wins the Day," Neal Lipschutz, Dow Jones Newswires, January 24, 2000; "Companies Hear Investors Say, 'Call Me!'", David Henry, USA Today, July 1, 1999; "Web Site Logs CEO Calls With Analysts," Gail Marks Jarvis, Knight Ridder, April 6, 1999.

about whether any given communication is “material,” thereby triggering regulatory obligations, the rule may be more likely to deter companies from transmitting information to the markets than to foster more information.

Companies in the high technology market sectors, which tend to see greater stock price volatility on new information, are likely to find these day-to-day materiality judgments especially daunting. This may be all the more troubling for many such companies because they tend to be smaller and newer businesses that are especially concerned about spreading investor awareness of their prospects.

We are also concerned that Regulation FD could undermine the clear Congressional policy preference expressed for encouraging voluntary disclosure of forward-looking information. In 1995, acting on concerns that spurious private lawsuits were discouraging issuers from divulging information about their economic prospects, Congress added Section 21E of the Securities Exchange Act of 1934 to create a safe harbor from private liability for forward-looking statements. While Regulation FD does not purport to reopen issuers to private liability, it does expose issuers to possible investigation and prosecution by the Commission if the issuer’s judgment about the materiality of any given statement is susceptible to hindsight questioning.

Moreover, the liability threshold of Regulation FD is in marked contrast to the private liability thresholds that Congress placed on forward-looking issuer statements. Section 21E protects an issuer statement from private liability so long as it is accompanied by specified cautionary language, and even if not accompanied by such language, protects it if it is immaterial, or if the statement was not made with actual knowledge of its falsity. In contrast, Regulation FD exposes an issuer to civil prosecution if the issuer “either knew prior to the disclosure, or was reckless in not knowing, that he or she would be communicating information that was material and nonpublic.”

We also note that foreign companies, which heretofore have not been subject to any substantive reporting requirements under the U.S. securities laws, and which may face obstacles in tracking communications made abroad and simultaneously translating them into English, may also have especially difficult problems with Regulation FD. To this extent Regulation FD would be an impediment to foreign issuers considering whether to list their securities on U.S. markets.

As an alternative to new regulations, we encourage the Commission to continue on the path that has been working effectively, and continue to encourage market participants to foster greater openness. Toward this end, we think that this is an area where a Commission-sanctioned blue ribbon panel to examine current practices and trends, and make appropriate recommendations for change, could be valuable. Such a dialogue among investors, issuers, information processors and both buy-side and sell-side

analysts would give a further push to opening up issuer communications to the investing public. We recommend this course as a wiser alternative than proposed Regulation FD.

Sincerely,

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Cc: The Honorable Arthur Levitt, Chairman;
The Honorable Norman S. Johnson, Commissioner;
The Honorable Isaac C. Hunt, Jr., Commissioner;
The Honorable Paul R. Carey, Commissioner;
The Honorable Laura S. Unger, Commissioner;
David Becker, General Counsel;
Meyer Eisenberg, Deputy General Counsel;
Richard Levine, Assistant General Counsel;
Sharon Zamore, Senior Counsel;
Elizabeth Nowicki, Attorney;
David Martin, Director, Division of Corporation Finance;
Harvey J. Goldschmid, Special Adviser to the Chairman;
Gregg W. Corso, Counsel to the Chairman.