The SEC's New Regulation FD: A Critical Analysis

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INTRODUCTION

After much controversy and ongoing debate, the Securities and Exchange Commission ("SEC") formally adopted Regulation Fair Disclosure (FD)\(^1\) to prohibit the selective disclosure of material, nonpublic information to analysts and major institutional stockholders, among others, prior to releasing it to the public.\(^2\) This rule, which became effective on October 23, 2000, bars companies from revealing market-sensitive information to Wall Street analysts and large shareholders without a simultaneous release to the general public.\(^3\) Essentially, Regulation FD


\(^2\) See M. Ridgeway Barker et al., Policy Issue Alert: Regulation FD, POLY ISSUE ALERTS, Oct. 2000, at 16 (stating that under Regulation FD companies are required to disclose material nonpublic information to public soon after disclosure to stockholders); see also McGregor McCane, Company Moving Firms Here: World Investor Link Plans Webcast Center, RICHMOND TIMES-DISPATCH, Sept.11, 2001, at C-1 (discussing requirement of Regulation FD to release information to both analysts and public). See generally Tom Sweeney, In Focus: Securities/ M&A, NAT'L L.J., Feb.7, 2000, at B10 (commenting on Regulation FD prohibiting selective disclosure).

represents the SEC’s most recent attempt to “level the playing field” for investors of all sizes by promoting full and fair disclosure of material, nonpublic information.4

Although selective disclosure, if left unchecked, could lead some investors to question fairness and integrity in the marketplace, there are several that warrant more careful consideration.5 This note examines the SEC’s adoption of Regulation FD. Part I of this note discusses the regulation and its purpose. Part II examines judicial precedent and the SEC’s authority to adopt and enforce Regulation FD. Part III contrasts several potential negative impacts of the regulation, including a “chilling effect” on communications and the possibility of an “information overload” for investors. Finally, the note proposes that while Regulation FD’s premise is quite noble, the regulation became effective by creatively circumventing judicial precedent and giving only limited treatment to several policy implications.

I. REGULATION FD

A. BACKGROUND

The maintenance of fair and honest markets is a fundamental component of the federal securities laws.6 In an attempt to create

FD requires simultaneous disclosure by companies of nonpublic information).


5 See John J. Egan III, Full Disclosure Apt to Backfire, BOSTON GLOBE, Aug. 15, 2000, at C4 (explaining Regulation FD without direction could lead to lawsuits and decrease in analyst research); George R. Kramer, Unintended Ills of the SEC Plan, NATL L.J., Apr. 10, 2000, at A23 (discussing possible unintended result of Regulation FD is issuers making only bare minimum disclosure required by Regulation); see also John F. X. Peloso & Ben A. Indek, Recent SEC Rule Proposals Come Under Attack, N.Y.L.J., June 15, 2000, at 3 (commenting Regulation FD would result in less information being released).

a more efficient marketplace for securities, Congress established a system of mandatory disclosure in the Securities Exchange Act of 1934. In spite of this system's framework, the federal securities laws did not generally require that every important corporate development be made public as soon as they occur. In practice, issuers maintained control over the precise timing of many important corporate disclosures, as well as the audience and forum. Thus, at a time when no commission filing was immediately required, the issuer determined how and to whom to make the initial disclosure. As a result, issuers sometimes


11 See Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590 (proposed Dec. 20, 1999) (to be codified at 17 C.F.R. pts. 230, 240, 243, and 249) (proposing terms "prompt" and "simultaneously" as timing provisions, yet Regulation FD lacks definitions); see also Colesanti, supra note 10, at 22-23 (arguing Regulation FD's lack of clarity leaves
chose to disseminate information selectively before making broad public disclosures.12

Traditionally, companies operating within the pre-Regulation FD landscape met with major investment firms’ analysts to discuss information that could affect stock prices, such as sales fluctuations, the release or announcement of a new product, or imminent layoffs.13 With such advance warning, the firms and their clients would be at an advantage to trade stocks before the rest of the world learned of the information.14 For years the SEC compared this practice of selective disclosure to “tipping” and insider trading because it afforded an informational advantage to analysts and institutional investors that was not afforded to ordinary public investors.15 Regulation FD restricts corporations from selectively disclosing such material nonpublic information to analysts and large shareholders without also making a public disclosure.16 The regulation, therefore, appears to provide the

ambiguity with regards to whom and when disclosure must be made); Anthony T. Horgan, Comment, Regulation FD Provides Firm Footing on Selective Disclosure High Wire, 46 Vill. L. Rev. 645, 661 (2001) (explaining Regulation FD is “flexible” regarding public disclosure).


14 See Jennings, supra note 9, at 597 (explaining that prior to Regulation FD analysts could be forewarned of “adverse information” by companies); see also Colleen E. Medill, Stock Market Volatility and 401(K) Plans, 34 U. Mich. J.L. Ref. 469, 500 n.140 (2001) (noting prior to Regulation FD analysts enjoyed “informational advantage”). See generally Brenowitz, supra note 13, at 1D (stating analysts used undisclosed information to benefit clients).

15 See Paul B. Brountas, Jr., Note, Rule 10b-5 and Voluntary Corporate Disclosures to Securities Analysts, 92 Colum. L. Rev. 1517, 1520 (1992) (noting selective disclosure could be viewed as “tipping”); see also Clay Richards, Comment, Selective Disclosure: A Fencing Match Conducted on a Tightrope and Regulation FD — The SEC’s Latest Attempt to “Electrify the Tightrope”, 70 Miss. L.J. 417, 420 (explaining the SEC viewed selective disclosure similar to that of insider trading); See generally Barker et al., supra note 2, at 16 (comparing selective disclosure to “tipping”).

16 See Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,590 (noting Regulation FD restriction on selective disclosure); see also Barker et al., supra note 2, at
SEC with a powerful new enforcement tool for restricting the practice of selective disclosure.\textsuperscript{17}

\textbf{B. SEC CONCERNS: FAIRNESS, INVESTOR CONFIDENCE, AND POTENTIAL CONFLICTS OF INTEREST}

The SEC and proponents of Regulation FD are primarily concerned with fairness, investor confidence in the market, and the conflict of interest that may exist in both analyst and corporate official reporting.\textsuperscript{18} The SEC asserts that selective disclosure gives analysts, their investment firms, and the firms' clientele an unfair advantage in the marketplace because it enables them to make a profit, prevent a loss, or acquire a more precise understanding of a company's performance before the rest of the general public.\textsuperscript{19} Regulation FD was designed to level the playing field between professionals and ordinary public investors with respect such critical information about securities.\textsuperscript{20}

Additionally, Regulation FD addresses the concern that corporate officials may delay general public disclosure in order to

\textsuperscript{16} (commenting Regulation FD requires “prompt” disclosure of nonpublic information to public and “professionals”); Richards, \textit{supra} note 15, at 420-21 (stating need to prevent selective disclosure to analyst prior to public announcement).


\textsuperscript{19} See Barker et al., \textit{supra} note 2, at 16; Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (2000) (codified at 17 C.F.R. pts. 240, 243, 249) (calling selective disclosures “unrerable informational advantages”); see also id. at 51731 (“The inevitable effect of selective disclosure . . . is that individual investors lose confidence in the integrity of the markets because they perceive that certain market participants have an unfair advantage.”).

\textsuperscript{20} See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (2000) (codified at 17 C.F.R. pts. 240, 243, 249) (pointing out that investors rightly question whether playing field is level when insiders use selective disclosure); see also J Colesanti, \textit{supra} note 10, at 28 (noting Regulation FD’s goal was to completely level playing field for all investors, including public investors); T. Andrew Eckstein, \textit{The SEC’s New Regulation FD: A Return to the Parity Theory?}, 69 U. CIN. L. REV. 1289, 1291 (2001) (discussing intent of Regulation FD is to level the playing field).
gain favor or bolster credibility with particular analysts or institutional investors. As a result, selective disclosure could result in a potential conflict of interest because analysts may feel pressured to report favorably about a company, or slant their analysis in order to have continued access to such information. In promulgating Regulation FD, the SEC pointed to the market benefits of having analysts independently research and analyze information. In fact, the SEC cited reports indicating a trend toward less independent research and analysis as a basis for analyst advice, and a correspondingly greater dependence by analysts on access to corporate insiders to provide guidance for their earnings forecasts. Under Regulation FD, analysts will no longer be privy to company previews and will have to resort to other means of gathering and disseminating information.

Moreover, the growth in technology has made it much easier for issuers of securities to disseminate information more broadly. Where issuers once may have had to rely on analysts

21 See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (2000) (codified at 17 C.F.R. pts. 240, 243, 249) (acknowledging management might use "material information as a commodity to be used to gain or maintain favor with particular analysts or investors"); see also JAMES HAMILTON & TED TRAUTMANN, FAIR DISCLOSURE AND INSIDER TRADING REFORMS: REGULATION FD, RULE 10B5-1 AND 10B5-2 26 (2000); Eckstein, supra note 20, at 1292.

22 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,717 ("[A]nalyists have an incentive not to make negative statements about an issuer if they fear losing their access to selectively disclosed information."); see also HAMILTON & TRAUTMANN, supra note 21; Eckstein, supra note 20, at 1292 ("The fear is that analysts might feel compelled to give a favorable report on a company to continue their prized access to selectively disclosed information.").


24 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721 ("One common situation that raises special concerns about selective disclosure has been the practice of securities analysts seeking "guidance" from issuers regarding earnings forecasts"); see also HAMILTON & TRAUTMANN, supra note 21. See generally Bruce Machmeier, Fair Disclosure or Flawed Disclosure?: Regulation FD, the SEC'S Attempt to Promote Fair Disclosure of Corporate Information to All Investors Might Well Have the Opposite Effect, STAR TRIBUNE, at 3D (Oct. 23, 2000).

25 See Don Bauder, Fair Disclosure is Getting Its Chance to Sweep the Street, SAN DIEGO UNION-TRIBUNE, at H2 (Nov. 19, 2000) (arguing Regulation FD will actually force analysts to do real investigations by "visiting Web sites, interviewing customers and vendors and talking with retailers and dealers"); Machmeier, supra note 24, at 3D; see also Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51716 (codified at 17 C.F.R. pts. 240, 243, 249).

26 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,717 n.10 (explaining use of technology in security investments); see also Richards, supra note 15,
to serve as information intermediaries, issuers now can use a variety of methods to communicate directly with the marketplace. These methods include, among others, press releases distributed through a widely-circulated news or wire service, Internet web casting, and teleconferencing. In the SEC's opinion, technological limitations no longer afford issuers the excuse that smaller investors are difficult to reach without the use of intermediaries.

C. SCOPE OF REGULATION FD

The basic requirement of Regulation FD is that, "whenever a company or a person acting on its behalf discloses material nonpublic information to securities market professionals, or holders of the issuer's securities who may well trade on the basis of the information, the company must make public disclosure of that same information simultaneously for intentional disclosures and promptly for unintentional disclosures." In adopting this rule, the SEC enumerated several key provisions regarding the regulation, some of which are discussed below.

1. Scope of Communications, Issuers, and Issuer Personnel Covered

Regulation FD addresses the problem of selective disclosure made to those who would reasonably be expected to trade securities on the basis of the information, or provide others with
advice about securities trading. The rule applies to all issuers with securities registered under Section 12 of the Exchange Act and those issuers required to file reports under section 15(d) of the Exchange Act, including closed-end investment companies, but excluding other investment companies, foreign governments, or foreign private issuers. Accordingly, Rule 100(a) of Regulation FD enunciates that the rule against selective disclosure applies only to disclosures made to the category of persons enumerated in 100(b)(1). Further, Rule 100(b)(2) contains four exclusions from coverage. Additionally, the SEC sheds light on the categories of disclosures by a person acting on behalf of the issuer.

a. SECURITIES MARKET PROFESSIONALS & COMPANY SHAREHOLDERS

Absent a specified exclusion, Rule 100(b)(1) enumerates four categories of persons to whom selective disclosure may not be made. The first three categories include securities market professionals, specifically: brokers-dealers, investment advisers and certain institutional investment managers, and investment

33 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716; see also Eckstein, supra note 20, at 1295 (citing Rule 100(b)(1)); See generally Colesanti, supra note 10, at 4–6 (discussing requirements of Regulation FD).
34 See Regulation FD, 17 C.F.R. § 243.100(b)(2)(i)-(iv) (2000) (stating section shall not apply to disclosure made to person owing fiduciary duty of trust, to person who expressly agrees to keep disclosed information in confidence, to entity whose primary business is issuance of credit ratings or in connection with securities offering registered under Securities Act); see also Norwood P. Beveridge, Recent Developments In Corporate Law and Practice, 54 CONSUMER FIN. L. Q. REP. 240, 276 (2000) (stating Rule 100(b)(2) creates exclusion of four forms of communications); Horgan, supra note 11, at 658-59 (describing four exceptions to Regulation FD enumerated in Rule 100(b)(2)).
35 See 17 C.F.R. § 243.101(a) (describing selective disclosure of nonpublic information as intentional when person making disclosure knows, or is reckless in not knowing, such information is material and nonpublic); see also Fox, supra note 17, at 655 (stating Regulation FD requires issuer to simultaneously make information available to public when selective disclosure is intentional, and promptly make information available to public when selective disclosure is unintentional); Horgan, supra note 11, at 660 (explaining Regulation FD differentiates between intentional and unintentional disclosures).
36 See 17 C.F.R. § 243.101(a); see also Fox, supra note 17, at 655 (stating Regulation FD requires issuer to simultaneously disclose when selective disclosure is intentional, and promptly disclose to public when selective disclosure is unintentional); Horgan, supra note 11, at 660 (explaining Regulation FD differentiates between intentional and inadvertent disclosures).
companies, hedge funds, and affiliated persons. The fourth category includes any holder of the issuer’s securities, under circumstances in which it is reasonably foreseeable that such person would buy or sell securities on the basis of that information. As a whole, Rule 100(b)(1) covers “the types of persons most likely to be the recipients of improper selective disclosure, but should not cover persons who are engaged in ordinary-course business communications with the issuer, or interfere with disclosures to the media or communications to government agencies.”

b. EXEMPT COMMUNICATIONS

The first two of the four exclusions from coverage exempts communications made to either a person who owes the issuer a duty of trust or confidence (i.e. a temporary insider such as an attorney, investment banker, or accountant), or a person who expressly agrees to maintain information (orally or in writing) in confidence. However, the temporary insider and

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37 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719 (stating first three categories of persons to whom selective disclosure may not be made, absent specified exclusion, are securities market professionals); see also Jennings, supra note 9, at 570 (discussing securities markets professionals); Richards, supra note 15, at 428 (noting Regulation FD prohibits companies from selectively disclosing material information to analysts and institutional investors).

38 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719; see also Jennings, supra note 9, at 570 (stating investment analysts, brokers-dealers and investment companies are considered securities markets professionals). See generally Richards, supra note 15, at 428.

39 Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720; see also Colesanti, supra note 10, at 7 (explaining ordinary course of business communications were exempted in final version of Regulation FD at behest of commentators); Horgan, supra note 11, at 655 (arguing Regulation FD is “not intended to include communications made in the ordinary course of business”); Richards, supra note 15, at 432 (stating “regulation is designed to address the core problem of selective disclosures made to those people who will likely trade on such information”).

40 See 17 C.F.R. § 243.100(b)(2)(i) (2000) (stating public disclosure requirement does not apply to disclosure made to person who owes duty of trust or confidence to issuer, such as attorney, investment banker, or accountant); see also Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (describing attorneys, investments bankers, and accountants as “temporary insiders” owing issuer duty of trust or confidence); Richards, supra note 15, at 432 (stating Rule 100(b)(2) enumerates four exclusions from Regulation FD coverage, “including disclosure made to ‘temporary insiders’”).

41 See 17 C.F.R. § 243.100(b)(2)(ii) (2000) (stating public disclosure requirement does not apply to disclosure made to person who expressly agrees to maintain disclosed information in confidence); Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (stating second exclusion of Rule (b)(2) exempts communications made to person who has expressly agreed to maintain information in confidence); see also Beveridge, supra note 34, at 276 (discussing four exclusions from Regulation FD enumerated in Rule 100(b)(2)).
misappropriation theories of insider trading would still apply to those excluded persons who trade on such information. The third exclusion is for disclosure to an entity whose primary business is the issuance of credit ratings, provided that the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available. The fourth excludes communications made in connection with most offerings of securities registered under the Securities Act.

c. PERSONS ACTING ON ISSUER'S BEHALF

In order to clarify disclosures by a person acting on an issuer's behalf, the SEC defined the term "person acting on behalf of an issuer" as "any senior official of the issuer, or any other officer, employee, or agent of an issuer who regularly communicates with any of the persons described in rule 100(b)(1) or with the issuer's securities holders." This definition was designed to ensure that senior management, investor relations professionals and others who regularly interact with securities market professionals or securities holders were covered. Furthermore, the definition

42 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (explaining misuse of information disclosed to temporary insiders and persons expressly agreeing to maintain disclosed information in confidence would be covered under temporary insider or misappropriation theory of insider trading).

43 See 17 C.F.R. § 243.100(b)(2)(iii) (2000) (stating public disclosure requirement does not apply to disclosure made to entity whose primary business is issuance of credit ratings provided information is disclosed solely for developing credit rating and entity's credit ratings are available to public); see also Horgan, supra note 11, at 659 (describing information disclosed to rating agencies in course of securities rating as exempt from coverage of Regulation FD); Richards, supra note 15, at 432 (stating Rule 100(b)(2) excludes from coverage disclosures made to "credit ratings entities").


45 See 17 C.F.R. § 243.101(c) (2000) (defining "person acting on behalf of an insider" as "any senior official of the issuer . . . or any other officer, employee, or agent of an issuer who regularly communicates with any person described in §243.100(b)(i), (ii), or (iii) or with holders of the issuer's securities"); see also Horgan, supra note 11, at 655 (arguing rule addresses only employees whose responsibilities include interaction with securities professionals and securities holders); Jennings, supra note 9, at 568 (stating Regulation FD applies to persons permitted to communicate with financial community on behalf of company).

46 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (stating definition of "person acting on behalf of insider" was revised to allow regulation to cover
states that a person who communicates material nonpublic information in breach of a duty to the issuer would not be considered to be acting on behalf of the issuer. Therefore, an issuer is not liable under FD for an employee's improper trading or tipping.

2. Materiality

Specifically, Regulation FD applies to disclosures of material, nonpublic information regarding the issuer or its securities. Rather than defining the terms "material" and "nonpublic," the regulation relies on existing definitions established in case law. For example, information is somewhat ambiguously deemed material if "there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision." This lack of clarity in a definition that is essential to the regulation's operation may result in several persons who interact with securities professionals or securities holders on regular basis; see also Jennings, supra note 9, at 569 (stating senior officials cannot circumvent Regulation FD by directing unauthorized persons to make selective disclosures on their behalf); Richards, supra note 15, at 431-32 (stating issuer is responsible only for disclosures of representative properly designated to speak to public, abating fear that issuer could be automatically liable whenever employee improperly trades on material nonpublic information).

See 17 C.F.R. § 243.101(c) (2000) (stating officer, employee, or agent of issuer who discloses material nonpublic information in breach of duty of trust is not considered to be acting on behalf of issuer); see also Colesanti, supra note 10, at 7 (noting person who communicates material nonpublic information in breach of duty to issuer is not acting on behalf of issuer); Jennings, supra note 9, at 569 (stating Regulation FD excludes disclosures by individuals "in breach of duty of trust" to company).


See 17 C.F.R. § 243.100(a) (2000) (stating whenever issuer, or person acting on behalf of issuer, discloses material nonpublic information regarding issuer or its securities, issuer shall make public disclosure of such information); see also Horgan, supra note 11, at 656 (stating obligations of Regulation FD apply only to disclosures of material nonpublic information about issuer or its securities); Jennings, supra note 9, at 571 (explaining Regulation FD applies only to "nonpublic information is 'material,' as defined by SEC").

See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721 (stating regulation relies on existing case law definitions of "material"); see also Jennings, supra note 9, at 571 (stating regulation does not expressly define materiality but definitions developed by case law control); Richards, supra note 15, at 429 (stating Regulation does not define "material" but relies on judicially developed definitions).

unintended and negative effects.52

3. Intentional and Unintentional: Timing of Required Public Disclosures

An integral aspect of Regulation FD is that the timing of required public disclosure depends entirely on whether the issuer has made an “intentional” or “unintentional” selective disclosure.53 An “intentional” selective disclosure requires the issuer to simultaneously disclose the same information to the public.54 “Intentional” selective disclosure takes place when an issuer (or person acting on its behalf) either knows or is reckless in not knowing that the information being communicated is both material and nonpublic.55

Under Rule 100(a)(2), an issuer who makes an “unintentional” disclosure of material, nonpublic information must promptly disclose that information.56 “Promptly” is defined to mean “as soon as reasonably practicable” (but no later than 24 hours, unless the following day the market is closed, in which case the

52 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721 (stating many believe unclear materiality standard will make issuer compliance difficult); see also Jennings, supra note 9, at 598 (arguing company officials will hesitate to discuss issues with analysts because materiality determination can only be made in hindsight); Richards, supra note 15, at 435 (noting many fear Regulation FD will have adverse impact on way public companies communicate with Wall Street analysts).

53 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722 (stating timing of required public disclosure is dependent upon whether issuer has made intentional or unintentional disclosure); see also Horgan, supra note 11, at 860 (noting Regulation FD differentiates between intentional and unintentional disclosures); Jennings, supra note 9, at 573 (stating Regulation FD distinguishes between intentional and unintentional disclosure of material, nonpublic information).

54 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722 (stating intentional disclosure requires simultaneous public disclosure); see also Colesanti, supra note 10, at 6 (noting “simultaneous” disclosure is not defined in Regulation FD); Steinberg, supra note 44, at 549 (stating selective intentional disclosure by issuer must be accompanied by simultaneous disclosure to public).

55 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722 (stating unintentional disclosure occurs when issuer making disclosure knows or is reckless in not knowing that information is material and nonpublic); see also Richards, supra note 15, at 433 (noting private conference call with analysts and investors used to disclose material nonpublic information may constitute intentional disclosure); Panel Discussion, supra note 44, at 276 (stating intentional disclosure includes both knowing and reckless disclosure).

56 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,722 (stating prompt public disclosure is required when issuer makes unintentional disclosure of material nonpublic information); see also Jennings, supra note 9, at 574 (noting unintentional disclosure constitutes negligence and often occurs during unscripted discussions with Wall Street analysts); Richards, supra note 15, at 433 (stating “inadvertent mistake” or “mistaken belief” information was public or immaterial would be characterized as unintentional disclosure).
outer limit for disclosure is before the next opening of the market) after a senior official of the issuer learns of the disclosure and knows (or is reckless in not knowing) that the information disclosed was both material and nonpublic.57

4. Public Disclosure

Regulation FD does not mandate the method of public disclosure necessary for compliance.58 Rather, it provides flexibility to issuers in determining the most appropriate means of disclosure.59 Rule 101(e) states that issuers can make public disclosure by filing or furnishing a form 8-K, or by disseminating information "through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."60 In general, acceptable methods of public disclosure include "press releases distributed through a widely-circulated news or wire service, or announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephone transmission, or by some other electronic transmission including the use of the Internet."61 Regardless of the method chosen, an

57 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723 (stating outer boundary of prompt public disclosure was modified to include later of twenty four hours or commencement of next day's trading on NYSE); see also Colesanti, supra note 10, at 6 (explaining prompt disclosure is defined as "as soon as reasonably practicable" but not longer than twenty-four hours); Jennings, supra note 9, at 574 (stating issuer who unintentionally discloses material nonpublic information must make public disclosure before later of twenty four hours or opening of next trading day).

58 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723 (stating Rule 101(e) defines types of "public disclosure" that will satisfy Regulation FD); see also Colesanti, supra note 10, at 6 (noting public disclosure requirement can be satisfied by several means); Richards, supra note 15, at 433 (stating Regulation FD requires issuer to make public disclosure through one of several alternative means).

59 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723 (stating SEC adopted modified definition of public disclosure to provide greatest amount of flexibility to issuers); see also Colesanti, supra note 10, at 6 (recognizing Final Release of Regulation FD loosened public disclosure requirement); Horgan, supra note 11, at 661 (stating regulation takes flexible approach to what constitutes proper public disclosure).

60 Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723; see also Colesanti, supra note 10, at 6-7 (noting method of public disclosure must be reasonably calculated to make broad public disclosure); Jennings, supra note 9, at 576 (noting SEC's emphasis on public disclosure being made in non-exclusionary manner).

61 Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723-24; see also HAMILTON & TRAUTMANN, supra note 21, at 26 (commenting that although posting of information on company's web site by itself is not sufficient means of public disclosure, SEC recognizes that issuer web sites can be major component of effective public disclosure.
issuer must provide the public with adequate notice of the conference or call, as well as the means for accessing it.\textsuperscript{62}

5. Liability Issues

Significantly, Regulation FD is not an antifraud rule and does not create new duties under either the antifraud provisions of the federal securities laws or in private rights of action.\textsuperscript{63} In fact, Rule 102 expressly provides that a failure to make a public disclosure required solely by Regulation FD shall not be deemed a violation of Rule 10(b)-5.\textsuperscript{64} Accordingly, private plaintiffs cannot rely on a Regulation FD violation as a basis for a private action alleging Rule 10(b)-5 violations by an issuer.\textsuperscript{65} Furthermore, Regulation FD does not affect any existing grounds for liability under rule 10(b)-5.\textsuperscript{66} For example, liability for "tipping" and insider trading under rule 10(b)-5 may still exist if a selective disclosure is made in circumstances that meet the

\textsuperscript{62} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723 (suggesting Internet and conference calls may be used to provide public with broad access to issuer disclosure events); see also Dennis J. Block & Jonathan M. Hoff, Regulation FD: New Rules for Selective Disclosure, N.Y.L.J., Nov. 6, 2000, at 5 (recommending press releases issued several days before conference call to inform investors of time, date and means of accessing conference call). But see Ellen L. Rosen, SEC's Fair Disclosure Rules Vex the Financial Community, N.Y.L.J., Aug. 23, 2000, at 1 (noting lawyers are concerned postings on corporate web sites will not satisfy Regulation FD requirements).

\textsuperscript{63} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726; see also Horgan, supra note 11, at 663 (stating Regulation FD does not create duties under antifraud provisions of federal securities laws or create private rights of action against issuers); Jennings, supra note 9, at 576 (stating SEC enforces Regulation FD through several forms of judicial action because regulation does not create private cause of action).

\textsuperscript{64} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 (stating Rule 102 is meant to exclude liability under Rule 10b-5 for cases based only on failure to make public disclosure required by regulation); see also HAMILTON & TRAUTMANN, supra note 21, at 31 (stating Rule 102 expressly provides failure to make public disclosure will not be considered violation of Rule 10b-5); Jennings, supra note 9, at 580 (noting violation of Regulation FD does not constitute per se violation of Rule 10b-5).

\textsuperscript{65} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 (explaining private plaintiffs cannot rely on issuer's violation of Regulation FD as basis for private action alleging Rule 10b-5 violations); see also HAMILTON & TRAUTMANN, supra note 21, at 31 (stating private plaintiffs cannot rely on violation of Regulation FD as basis for Rule 10b-5 action because Regulation FD does not create new duty for purposes of Rule 10b-5 liability); Richards, supra note 15, at 434 (stating because Regulation FD is issuer disclosure rule, no private liability arises from issuer's failure to make proper disclosure).

\textsuperscript{66} See SEC, Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 (clarifying Rule 102 is designed to exclude Rule 10b-5 liability for cases based on failure to make Regulation FD public disclosure); see also HAMILTON & TRAUTMANN, supra note 21, at 32 (2000) (recognizing Rule 102 does not provide protection from Rule 10b-5 liability); Richards, supra note 15, at 434 (noting Regulation FD does not purport to change or undermine traditional bases for Rule 10b-5 liability).
Dirks v. SEC\textsuperscript{67} "personal benefit" test.\textsuperscript{68} In addition, if an issuer's report or public disclosure made under Regulation FD contains either false or misleading information, or omitted material information, Rule 102 will not provide protection from rule 10(b)-5 liability.\textsuperscript{69}

Consequently, if an issuer fails to comply with Regulation FD, that issuer would be subject only to an SEC enforcement action alleging violations of section 13(a) or 15(b) of the Exchange Act and Regulation FD.\textsuperscript{70} Further, the SEC can bring an administrative action seeking a cease-and-desist order, or a civil action for an injunction and/or money penalties.\textsuperscript{71} In appropriate cases, the SEC could also bring an enforcement action against the disclosing individual responsible for a violation either as a "cause of" the violation in a cease-and-desist proceeding, or as an aider and abettor of the violation in an injunctive action.\textsuperscript{72}

II. EXAMINING JUDICIAL PRECEDENT AND THE SEC'S AUTHORITY TO ENACT REGULATION FD

Prior to Regulation FD's promulgation, the SEC had sought to

\textsuperscript{67} 463 U.S. 646 (1983).

\textsuperscript{68} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 (recognizing liability for tipping exists under personal benefit test); see also Dirks, 463 U.S. at 663 (stating inquiry into "whether the insider receives a direct or personal benefit from the disclosure" helps courts determine breach of duty); HAMILTON & TRAUTMANN, supra note 21, at 12 (2000) (noting "personal benefit test" supplies court with objective criteria in determining whether there has been breach of duty by insider).

\textsuperscript{69} See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,726 (recognizing Rule 102 does not protect from Rule 10b-5 liability if false or misleading information is contained in issuers report); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1975) (explaining it is well established that private cause of action under Rule 10b-5 exists despite lack of express private remedy); HAMILTON & TRAUTMANN, supra note 21, at 32 (2000) (indicating instances where Rule 10b-5 liability cannot be avoided).


combat selective disclosure by analogizing the practice to the “tipping” liability found in insider trading law. These early attempts to curtail selective disclosure relied on both Rule 10(b) liability and the “parity of information” theory. However, as discussed below, the Supreme Court clearly rejected the parity of information theory of liability, thus making it more difficult for the SEC to successfully combat selective disclosure. In an apparent attempt to avoid language found in several Supreme Court decisions, the SEC creatively adopted Regulation FD under the provisions of sections 13(a) and 15(d) of the 1934 Exchange Act.

A. Judicial Treatment of the “Parity of Information” Theory

1. High-Water Mark for the “Parity of Information” Theory

Under early insider trading case law, selective disclosure of material information to securities analysts could lead to liability because courts adhered to the principle that traders should have equal access to corporate information. In Cady, Roberts & Co., the SEC extended liability for insider trading on a theory of “parity of information,” which is based on the notion that all investors should enjoy equal access to information. In SEC v.

73 See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 852 (2d Cir. 1968) (finding that defendant employees violated Rule 10(b)-5(3) and Section 10(b) by divulging undisclosed information); see also In re Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961) (holding individuals other than corporate insiders could be obligated to either disclose material nonpublic information before trading or abstain from trading altogether); Richards, supra note 15, at 420 (discussing briefly SEC’s evaluation of selective disclosure prior to Regulation FD).

74 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727; see also Glen Banks, The SEC Puts the Weight on the Other Side, N.Y.L.J., Sept. 29, 2000, at 1 (discussing cases dealing with insider trading that were decided prior to Regulation FD); Roberta S. Karmel, Avoiding Precedents By Adopting Insider Trading Rules, N.Y.L.J., Dec. 21, 2000, at 3 (discussing prior case law reliance on parity of information theory).

75 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727 (discussing early insider trading case law liability); see also Banks, supra note 74, at 1 (recognizing principle of equal access to corporate information); Karmel, supra note 74, at 3 (stating all investors should enjoy equal access to information, however, recognizing theory is too broad).


77 See Malcolm A. Tripp, Access, Efficiency, and Fairness in Dirks v. SEC, 60 IND. L.J. 535, 539 (1984) (providing more detailed analysis of In re Cady, Roberts); see also Banks, supra note 74, at 1 (citing Texas Gulf for proposition that “all investors trading on impersonal exchanges [should] have equal access to material information”); Karmel, supra note 74, at 3 (discussing Cady, Roberts & Co).
Texas Gulf Sulpher Co.,\textsuperscript{78} the Court of Appeals for the Second Circuit adopted the rationale of Cady Roberts and ruled that Rule 10(b)-5 "is based in policy on [the] justifiable expectation of the securities market place that all investors trading on impersonal exchanges have relatively equal access to material information."\textsuperscript{79} The court held that a person possessing material, nonpublic information may not trade on it if they know that it is unavailable to others.\textsuperscript{80} This prohibition applied to any person, not just insiders,\textsuperscript{81} and courts consistently reiterated this point over the next decade.\textsuperscript{82} The holding in Texas Gulf represents the high-water mark for the prohibition of insider trading because it utilized both an inherent fairness argument,\textsuperscript{83} as well as the Cady, Roberts formulation of "disclose or abstain."\textsuperscript{74}

\textsuperscript{78} 401 F.2d 833 (1968).
\textsuperscript{79} Texas Gulf, 401 F.2d at 848 (extending liability to corporate officers and employees who traded on undisclosed information regarding successful result of mining operations); see also Banks, supra note 74, at 1 (discussing implications of Texas Gulf); Michael H. Dessent, Joe Six-Pack, United States v. O'Hagan, and Private Securities Litigation: A Line Must Be Drawn, 40 ARIZ. L. REV. 1137, 1161 (1998) (citing Texas Gulf for proposition that all investors trading on impersonal exchanges should have equal access to information).
\textsuperscript{80} See Texas Gulf, 401 F.2d at 848 (applying "disclose or refrain" rule by which corporate insider must either disclose all material information to public or refrain from trading until information becomes public); see also Banks, supra note 74, at 1 (announcing holding in Texas Gulf; Dessent, supra note 79, at 1160 (discussing holding in Texas Gulf).
\textsuperscript{81} See Texas Gulf, 401 F.2d at 848 (noting Rule 10b-5 "is also applicable to one possessing information who may not be strictly termed an 'insider' within the meaning of Sec. 16(b) of the Act"); see also Cady, Roberts & Co., 40 S.E.C. at 912 (recognizing insiders are not only class of persons who cannot disclose nonpublic information); Banks, supra note 74, at 1 (noting "[a]nyone - corporate insider or not - who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose.").
\textsuperscript{82} See Banks, supra note 74, at 1, n.11 (recognizing courts have applied Texas Gulf holding consistently); see also, Dessent, supra note 79, at 1160 (recognizing Texas Gulf was starting point for modern evolution of insider trading laws); Tripp, supra note 77, at 548 (discussing relationship between fiduciary duty and access to information).
\textsuperscript{83} See Texas Gulf, 401 F.2d at 847-48 (stating 10b-5 was designed "to insure fairness in securities transactions" through disclosure by "anyone possessing inside information and not just corporate managers); see also Kimberly D. Krawiec, Fiduciaries, Misappropriators and the Murky Outlines of the Den of Thieves: A Conceptual Continuum for Analyzing United States v. O'Hagan, 33 TULSA L.J. 163, 169 (1997) (asserting Texas Gulf Sulpher Co. was decided based on "parity of information" theory); Lynn L. White, Recent Development: Securities Regulations - The Disclose or Abstain Rule - Tippee Liability, 51 TENN. L. REV. 359, 365 (1984) (asserting Texas Gulf Sulpher Co. was decided based on "perceived" policy of level playing field).
\textsuperscript{84} Texas Gulf, 401 F.2d at 848 (concluding from Cady, Roberts & Co., "[a]nyone in possession of material inside information must either disclose it to the investing public . . . or [if] he chooses not to do so, must abstain from trading in . . . the securities concerned while such inside information remains undisclosed."); see also Cady, Roberts & Co., 40 S.E.C. at 911 (explaining that to avoid liability where disclosure is not possible simply "keep out of the market"); Edmund W. Kitch, The Theory and Practice of
a broad reading of insider trading laws, the practice of selective disclosure was effectively prohibited. However, the Supreme Court had not yet ruled on this issue.

2. Supreme Court's Express Rejection of the "Parity of Information" Theory

The Supreme Court decisions in *Chiarella v. U.S.* and *Dirks v. SEC* significantly narrowed the landscape of 10(b)-5 liability. In *Chiarella*, the Court explicitly rejected the parity of information approach holding that there must be a breach of a fiduciary duty or other special relationship of trust and confidence before the law imposes a duty to disclose or abstain from trading. Further, the Court stated that the adoption of such a broad formulation for liability "should not be undertaken absent some explicit evidence of congressional intent."


85 See Colesanti, *supra* note 10, 8-9 (stating few selective disclosure cases have been brought after *Dirks*, thus implying that under old *Texas Gulf* standard more cases would be prosecuted); Richards, *supra* note 15, at 420 (stating selective disclosure was insider trading under traditional case law).


89 See *Chiarella*, 445 U.S. at 233 (stating violation of 10b-5 arises from duties owed between parties and not from parity-of-information rule); see also *Dirks* 463 U.S. at 654-55 (discussing rejection in *Chiarella* of liability based on parity of information and instead adopting liability based on special relationships giving rise to duty to disclose); Richard J. Hunter, Jr. & Anthony L. Lovisek, *Insider Trading Since Carpenter: The Misappropriation Theory and Beyond, 41* *How. L.J.* 79, 82 (1997) (noting Supreme Court requires fiduciary duty for 10b-5 liability); Ronald F. Kidd, *Insider Trading: The Misappropriation Theory Versus an "Access to Information Perspective, 18 Del. J. Corp. L.* 101, 112 (1993) (stating "[S]upreme Court held that the duty to disclose 'does not arise from the mere possession of nonpublic information.' Rather, there must be a relationship of trust.")

90 See *Chiarella*, 445 U.S. at 233 (1980) ("Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties... should not be undertaken absent some explicit evidence of congressional intent."); *Dirks*, 463 U.S. at 656 (finding *Chiarella* Court rejected parity of information theory as inconsistent with congressional intent); see also Karmel, *supra* note 18, at 107 (stating common law breach of duty is required for 10b-5 liability to stand); J. Dormer Stephen III, *United States v. O'Hagan: The
Again, the rejection of this theory is evidenced in *Dirks*. In *Dirks*, the Court addressed the disclosure or "tipping" of material, nonpublic information by an insider to an analyst and expressly rejected the parity of information approach. In reaffirming the holding in *Chiarolla*, the Court emphasized that "a duty to disclose arises from the relationship between parties and not merely from one's ability to acquire information because of his position in the market." The Court discarded the idea that a person is prohibited from trading whenever he or she knowingly receives material, nonpublic information from an insider. Instead, the Court stated that a recipient of insider information is prohibited from trading when the information has been "improperly" made available to him or her as the result of a breach of the insider's fiduciary duty to shareholders. Under this formula, courts should use "objective criteria" (e.g. whether the insider receives a direct or indirect personal benefit from the disclosure) to determine if there has been a breach of duty. This

*Misappropriation Theory Under Section 10(b) and Rule 10b-5 - Can the Judicial Oak Grow Any Higher?*, 102 DICK. L. REV. 277, 318 (1998) (asserting *Chiarolla* did not expand 10b-5 liability to those with no fiduciary relationship because no showing of congressional intent to expand such liability exists).  

91 See *Dirks*, 463 U.S. at 654-59 (discussing rejection of parity of information as basis for liability); see also Dessent, *supra* note 79, at 1173 (commenting that after *Dirks* parity of information theory was "tabbed" by the Supreme Court); Hunter & Loviscek, *supra* note 89, at 110 (finding inability to reach defendant in *Dirks* was rejection of parity theory); Kidd, *supra* note 89, at 106 (noting Supreme Court rejected parity theory in *Dirks*).  

92 *Dirks*, 463 U.S. at 654-59 (requiring breach of fiduciary duty as basis for liability). See Dessent, *supra* note 79, at 1173 (discussing parity of information theory after the *Dirks* decision); see also Hunter & Loviscek, *supra* note 89, at 110 (analyzing Supreme Court rejection of parity theory); Kidd, *supra* note 89, at 106 (discussing *Dirks* decision).  

93 *Dirks*, 463 U.S. 657; Dessent, *supra* note 79, at 1172 (commenting liability based on fiduciary relationship arose after *Dirks*); see also Hunter & Loviscek, *supra* note 89, at 85 (finding *Dirks* is support for liability based on fiduciary relationship); Kidd, *supra* note 89, at 112-14 (noting Supreme Court supports liability based on fiduciary relations).  

94 See *Dirks*, 463 U.S. at 658-59 (asserting duty to disclose or abstain does not automatically arise from possession of inside information); see also Dessent, *supra* note 79, at 1172 (discussing liability based on fiduciary relationship); Hunter & Loviscek, *supra* note 89, at 85 (opining *Dirks* supports liability based on fiduciary relationship).  

95 See *Dirks*, 463 U.S. at 659-61 (explaining it would open way for "devious" dealings if outsider recipient receives information improperly obtained from insiders); see also Dessent, *supra* note 79, at 1171 (noting tippee must receive information through tipper's breach of duty and tippee must know duty was breached in order for liability to arise); Hunter & Loviscek, *supra* note 89, at 84-85 (noting "tippee of an insider owes a fiduciary duty that derives from the duty owed by the insider").  

96 See *Dirks*, 463 U.S. at 659-61 (holding fiduciary duty is owed to shareholders of corporation by tippee "not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should have known that there has been a breach."); see also Dessent, *supra* note 79, at 1171; Hunter & Loviscek, *supra* note 89, at 84-85.  

holding virtually eliminated the SEC's ability to combat selective disclosure via the 10(b)-5 antifraud provision.\textsuperscript{98} As a result, many have viewed this decision as affording considerable protection to insiders who make selective disclosures to analysts, and to the analysts (and their clients) who receive such information.\textsuperscript{99}

Since \textit{Dirks}, there have been very few insider trading cases involving selective disclosure.\textsuperscript{100} While the Supreme Court made its rejection of the parity of information theory quite clear in both \textit{Chiarella} and \textit{Dirks}, it could have done so without great elaboration. However, the Court chose to question the prudence of future SEC regulations and warned against adoption of the parity of information theory absent specific congressional intent. "It was this halting by the Supreme Court of the SEC's liberal application of the parity of information theory that contributed most to the development of the "misappropriation" theory under 10(b)-5."\textsuperscript{101}

at 51,716, (2000) (to be codified 17 CFR pts. 240, 243, and 249) (discussing how Regulation FD will address issue of whether analysts who receive inside information are actually in some way personally benefiting from such information in violation of \textit{Dirks}).

\textsuperscript{98} \textit{See} Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 (2000) (noting \textit{Dirks} left status of "issuer selective disclosure" unclear); \textit{see also} Banks, supra note 74, at 1 (discussing Regulation FD will address weakness in insider trading laws created by \textit{Dirks}); Colesanti, \textit{supra} note 10, at 14-16 (asserting \textit{Dirks} was change from SEC's broad power to enforce 10b-5); Fox, \textit{supra} note 17, at 663 (positing selective disclosure was considered legal and normal part of business before enactment of Regulation FD); Karmel, \textit{supra} note 74, at 3 ("The SEC was unhappy with its inability to combat selective disclose after \textit{Dirks}"); Richards, \textit{supra} note 15, at 420 (stating \textit{Dirks} provided analyst special treatment under the law).

\textsuperscript{99} \textit{See} Colesanti, \textit{supra} note 10, at 16 ("Commentators would agree that, post-Dirks, the S.E.C. has demonstrably cooled its jets in terms of charging analysts."); \textit{see also} Fox, \textit{supra} note 17, at 663 (commenting selective disclosure was considered legal and normal part of business before enactment of Regulation FD); Richards, \textit{supra} note 15, at 420.

\textsuperscript{100} \textit{See} Selective Disclosure and Insider Trading, 65 Fed. Reg. 72,590, 72,593 (proposed December 28, 1999) (codified at 17 CFR Parts 240, 243, and 249) ("After \textit{Dirks}, there have been very few insider trading cases based on disclosure to, or trading by, securities analysts."); \textit{see also} Banks, \textit{supra} note 74, at 1 ("Since \textit{Dirks}, the SEC has brought only two proceedings arising from a corporate insider's selective disclosure of material nonpublic information to a market professional."); Karmel, \textit{supra} note 74, at 3 (noting SEC's non-ability to prosecute selective disclosure).

\textsuperscript{101} \textit{See} Colesanti, \textit{supra} note 10, at 15 (discussing Supreme Court's express rejection of notion that mere possession of material nonpublic information, absent a duty to shareholders, could create obligation to disclose or abstain); Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,593 (asserting "[i]n \textit{Chiarella}, the Court rejected the 'parity of information' approach"); \textit{see also} Dessent, \textit{supra} note 79, at 1173 (commenting that after \textit{Dirks} parity of information theory was "tabbed" by Supreme Court); Hunter & Loviseck, \textit{supra} note 89, at 110 (finding inability to reach defendant in \textit{Dirks} was rejection of parity theory); Kidd, \textit{supra} note 89, at 106 (noting Supreme Court rejected parity theory in \textit{Dirks}).
3. Discussion of the “Misappropriation” Theory

In response to the Supreme Court’s decision in Chiarella, the SEC enacted Rule 14(e)-3 to address the misuse of information in connection with tender offers.102 This rule places a “disclose” or “abstain” prohibition upon any person, other than a bidder or a prospective bidder in possession of material information regarding a tender offer.103 In U.S. v. O'Hagan,104 the Supreme Court endorsed this strategy and the misappropriation theory, which focuses on a deceptive manner of obtaining nonpublic information rather than any uniqueness of position. The facts of the particular case involved an attorney who traded securities of a target company even though the attorney’s law firm represented the bidder.105 According to the Court’s holding, the breach of a duty of loyalty or confidentiality by a fiduciary, which deprives a principal of the exclusive use of confidential information, coupled with the self-serving use of that information, constituted a violation of Rule 10(b)-5.106 Although the defendant in O'Hagan was held to have violated both Rules 14(e)-3 and 10(b)-5,107 it is unclear whether this holding endorsed the SEC’s view that neither scienter nor a breach of fiduciary duty is required for a 14(e)-3 violation.108 In any event, in its recent release adopting Rules 10(b)-5-1109 and 10(b)-5-2,110 the SEC acknowledged that courts have definitely rejected the parity of information theory in insider trading cases that are brought under 10(b)-5.111 Nevertheless, Regulation FD appears to contradict this conclusion and represents “a return to the parity

102 See Taylor supra note 88, 1333 (asserting Rule 14e-3 is designed to prevent fraud in connection with tender offers); see also Dessent, supra note 79, at 1167 (noting “[i]n apparent retaliation against Chiarella, four months later the SEC adopted Rule 14e-3”); Karmel, supra note 74, at 3 (positing 14e-3 was adopted after Chiarella “for dealing with the misuse of information in the tender offer arena”).
103 See Karmel, supra note 74, at 3; see also 17 CFR §240.14e-3 (2001).
105 See id. at 648.
107 See O'Hagan at 666-67; Bayne, supra note 106, at 436-37 (noting Court merely affirmed “Commission did not exceed its rulemaking authority in enacting Rule 14e-3(a)”).
108 See Karmel, supra note 74, at 3.
111 Karmel, supra note 74, at 3.
of information theory.”

**B. SEC'S AUTHORITY TO ADOPT REGULATION FD UNDER THE EXCHANGE ACT**

The SEC enacted Regulation FD under sections 13(a) and 15(d) of the Exchange Act. Since the language of 13(a) provides the SEC with broad discretion to proscribe rules and regulations “necessary or appropriate for the proper protection of investors and to ensure fair dealing,” a plain reading of the section indicates that the SEC acted within the authority expressly granted to it by Congress when it promulgated Regulation FD. The broad language of section 15(d) of the Exchange Act also gives the SEC wide latitude to enact this regulation. Specifically, “the Commission may prescribe as necessary or appropriate in the public interest or the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 . . . .” Since the SEC expressly states that the purpose of the new regulation is to protect investors and ensure fair dealing in the market, it is clear that the Commission acted within its authority to enact Regulation FD under this section.

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112 Id.
113 See HAMILTON & TRAUTMANN, supra note 21, (noting Regulation FD is designed similarly to existing SEC rules under Sections 13(a) and 15(d)).
115 See 15 U.S.C. § 78o (c)(4) (2001). See generally Horgan, supra note 11, at 654 (noting issuer must either have securities registered under Section 12 of Exchange Act or must be required to file reports under Section 15 (d) of Exchange Act to be subject to Regulation FD.); Jennings, supra note 9, at 580 (stating Regulation FD creates duties only under Section 13 (a) and Section 15 (d) of Exchange Act).
117 See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249) (noting selective disclosure of material information by issuers leads to loss of investor confidence in integrity of capital markets.); see also Fox, supra note 17, at 684 (stating SEC claims primary purpose of Regulation FD is to provide “fundamental fairness to all investors.”); Jennings, supra note 9, at 547 (2001) (noting Regulation FD is intended to level playing field between those parties privy to material nonpublic information before its public dissemination and those who are not).
III. POLICY CONSIDERATIONS: POTENTIAL NEGATIVE IMPACTS

A. "CHILLING EFFECT"

Although Regulation FD's stated purpose is to improve the flow of information into the marketplace, the new rule may actually increase market volatility and reduce the quantity and quality of information reaching the marketplace. One major concern with the new regulation is that there is no specific mandate for company disclosures. Rather, Regulation FD simply states that if an issuer chooses to disclose material, nonpublic information to someone it must simultaneously release that information to the public. Determining such materiality is often difficult and risky, potentially making corporate officials less inclined to discuss important information at all. This scenario highlights

118 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,717-18 (explaining need for Regulation FD); see also Jennings, supra note 9, at 567 (discussing Regulation FD's stated purpose evidences SEC's desire to combat selective disclosure of material nonpublic information by company officials to securities market professionals). See generally Richards, supra note 15, at 420 (stating SEC proposed Regulation FD to eliminate seemingly special treatment afforded to analysts by Dirks decision).

119 See Kramer, supra note 5, at A23 (arguing three unintended but likely results of Regulation FD include less information in the markets, more stock price volatility, and increased need for high-priced legal advice); see also Analysts, Portfolio Managers Say Volume, Quality of Information Have Fallen Under Regulation FD, AIMR Member Survey Shows, BUSINESS WIRE, Mar. 26, 2001 (discussing survey concluding volume of substantive information released by public companies has decreased since Regulation FD took effect). See generally Charles Davidson, Putting Shoe Leather to Asphalt, NATIONAL REAL ESTATE INVESTOR, Sept. 2001 (analyzing view Regulation FD is causing companies to clam up and disclose less information).


121 See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 (discussing basic rules of Regulation FD); see also Horgan, supra note 11, at 660 (clarifying issuer must make simultaneous public disclosure when disclosure is intentional). See generally Colesanti, supra note 10, at 6 (2000) (explaining requirements of Regulation FD).

122 See Norm Alster, Tight lips sink stock tips; Has Regulation FD had a chilling effect on the flow of information from public companies?, ELECTRONIC BUSINESS, July 1, 2001 at 56 (arguing companies fearful of SEC prosecution will starting blocking news); see also Jennings, supra note 9, at 596 (stating when question arises whether company
the potential danger of creating a "chilling effect" on corporate communications by slowing the information flow if issuers decide not to disclose anything at all, rather than make a mistake and subject themselves to liability.  

As previously discussed, the SEC failed to offer a bright-line test to assist issuers in determining materiality. As a result, it is often unclear to issuers what type of information would be considered material. Without such standards, an issuer will be at risk of violating Regulation FD when speaking in a nonpublic forum, regardless of their earlier materiality assessments. By inhibiting contacts with analysts, Regulation FD could result in less, rather than more disclosure to the securities markets. In fact, there seems to be some early evidence that companies may selectively disclose information, company will likely err on side of caution and keep information confidential. See generally Egan, supra note 5, at C4 (arguing most well-counseled companies are careful not to discuss material information).

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123 See Daniel L. Goelzer, SEC "Fair Disclosure" Proposal Can Chill Market Communications, LEGAL OPINION LETTER, Mar. 17, 2000 at Vol. 10 No. 6 (arguing proposed Regulation FD makes selective disclosure strict liability offense resulting in less disclosure to securities markets); see also Jennings, supra note 9, at 596 (discussing view Regulation FD will have chilling effect on corporate disclosures resulting from fear company will run afoul of Regulation FD); Peloso & Indek, supra note 5, at 3 (noting major criticism of Proposed Regulation FD; it would have effect exactly opposite of Commission's intent, i.e., to increase public disclosure of material information about issuer).

124 See Jennings, supra note 9, at 598 (stating SEC failed to provide “bright line” test as to what information qualifies as material under Regulation FD); see also Alster, supra note 122, at 56 (discussing confusion over definition of material information under Regulation FD). See generally Bowmen & Zeikel, supra note 120 (discussing materiality under Regulation FD).

125 See Colesanti, supra note 10, at 22-23 (“Regulation FD suffers from its undefined terms including ‘materiality,’ ‘nonpublic,’ and ‘broad, non-exclusionary’ public disclosure”); Egan, supra note 5, at C4 (discussing new rule does not offer any guidance on what constitutes “material information”). But see Horgan, supra note 11, at 656-57 (“[t]he Commission rejected the suggestion of including a bright line standard, but, in response to requests for more interpretive guidance, set forth a list of the types of information it believes are especially likely to be considered material”).

126 See Bowmen & Zeikel, supra note 120 (stating broad definition of “materiality” will have a negative impact on non-public corporate communications); see also Colesanti, supra note 10, at 22-23 (discussing the vague language used in Regulation FD). But see Jennings, supra note 9, at 568 (2001) (“Regulation FD imposes an affirmative duty to disclose material nonpublic information that is intended to be communicated to designated market professionals.”).

127 See Bowmen & Zeikel, supra note 120 (stating “[i]n fact, we are very concerned that the proposed regulations, rather than increase the information flow to investors, will curtail that flow because issuers will take the line of least resistance and disclose less”); Goelzer, supra note 123, at Vol. 10 No. 6 (noting regulations on market information to analysts can have adverse effect on all information disclosed by companies). But see John Hackett, Facing Up to Broad Disclosure, U.S. BANKER, Dec. 2000, at 51 (commenting banks are changing way corporate information is released by using internet and conference calls to let anyone listen in on discussions with analysts).
intend to reduce the amount of information they release to the marketplace. Further, companies are hesitant to be the first to test the breadth of the materiality term.

An increase in market volatility is a real and tangible result of this lack of information. In a survey conducted by Thomson Financial, 100 percent of the companies said they expected the volatility of their stock to increase because of Regulation FD. This volatility can be attributed to a company being less able to guide analysts’ estimates. Perhaps the clearest evidence of this increased potential for volatility can be found in Intel’s release of information in compliance with Regulation FD even before the new rule had become effective. In an attempt to comply with the rule, Intel issued a news release rather than simply informing influential analysts when it realized that its third quarter revenues would fall short of the expected figures.

128 See Beth Piskora, New SEC Rule Unnerves Market, N.Y. POST, Oct. 23, 2000, at 52 (commenting Regulation RD might decrease amount of information released by companies); see also Colesanti, supra note 10, at 16 (stating in mid-1990’s concern over abusive litigation by SEC and Congress had chilled disclosure by corporations); Richards, supra note 15, at 437-439 (discussing potential caution in communicating with analysts because of liability for releasing information).
130 See Piskora, supra note 128, at 52 (stating Wall Street analysts believe the new SEC Regulation will result in less company information released to both analysts and investors alike); Bowmen & Zeikel, supra note 120 (expressing concern Regulation FD will result in decreased information flow to investors). But see Hackett, supra note 127, at 51 (discussing new methods by which banks are releasing corporate information).
131 See Piskora, supra note 128, at 52 (discussing results of survey conducted by Thomson Financial).
132 See Piskora, supra note 128, at 52 (attributing increased volatility of market to companies’ decreased role in guiding analyst’s estimates). See generally Jennings, supra note 9, at 551 (discussing how company is protecting its best interest by contributing to accuracy of analysts’ reports); Get Ready for the Regulation FD Shakedown Cruise, PR NEWS, Sept. 11, 2000, available at 2000 WL 4139083 (explaining how companies will often review drafts of analyst reports in order to make sure of their accuracy).
133 See Daniel Gross, A Little Democracy on Wall Street, NY TIMES, Oct. 23, 2000, at A25 (discussing Intel’s news release of its third-quarters revenue falling short of estimate, and repercussions that followed); Hackett, supra note 127, at 51 (discussing how critics’ predictions of Regulation FD’s affect on increased volatility of stock prices came true when Intel issued its press release of third-quarter revenues falling short of expectations); Joseph Nocera, No Whispering Allowed; Why the SEC’s Crackdown on Selective Disclosure is Good News, MONEY, Dec. 2000, at 71 (noting Seth Tobias’ statement of how Intel’s pre-announcement last September is example of “how much worse a Regulation FD world will be”).
134 See Gross, supra note 133, at A25 (discussing Intel’s news release, as opposed to disclosing to only a few influential analysts); Hackett, supra note 127, at 51 (stating “Intel’s press release announcing that earnings estimates would fall short of expectations” was for early compliance with Regulation FD). But see Nocera, supra note 133, at 71 (stating Intel has traditionally released market-sensitive information to all investors at
the following day, investors of all sizes rushed to dump their shares; Intel fell 22 percent and suffered an $80 million loss as a record 300 million shares traded hands.\(^\text{135}\) Similarly, when Dell, Apple, Hasbro, United Airlines and Xerox issued public warnings about lower than expected earnings, the stock of these market-leading "Blue Chip" companies also plummeted.\(^\text{136}\) Surely, such volatility can lead to decreased public confidence in the securities markets.

B. "INFORMATION OVERLOAD"

Ironically, another potential negative impact of the new regulation is the opposite scenario, where the proposal results in significantly greater information being made available to the public in an "information overload."\(^\text{137}\) Such information overload is likely caused by the same lack of clarity in the materiality definition\(^\text{138}\) that was previously discussed. Even though Regulation FD simply calls for the disclosure of material information,\(^\text{139}\) some issuers may decide to err on the side of same time).

\(^\text{135}\) See Gross, supra note 133, at A25 (discussing negative results such disclosure had on firm's stock price and trade volume); Hackett, supra note 127, at 51 (stating because of such disclosure "[t]he next day the stock lost 20% of its value"); Nocera, supra note 133, at 71 (noting "[i]mmediately after the pre-announcement, the stock dropped a stomach-churning 22%").

\(^\text{136}\) See Gross, supra note 133, at A25 (showing similar results to other publicly traded companies that also disclosed public warnings); see also Thomas G. Donlan, Phony Fairness: Regulation FD Will Hurt Markets and Investors, BARRON'S, Oct. 23, 2000, at 78 (discussing how markets have already seen companies complying with Regulation FD and are getting hit with 10% and 20% price declines in single day); Adam Puch, Regulation FD Good for the Market, UPSIDE TODAY, Dec. 19, 2000, available at 2000 WL 4725628 (stating "[c]ompanies that have disseminated information directly to the public have seen their stock price plummet after the release").

\(^\text{137}\) See Laura S. Unger, Rethinking Disclosure in the Information Age: Can There be too Much of a Good Thing, Address before the Internet Securities Regulation American Conference Institute, (June 26, 2000), available at http://www.sec.gov/news/speech/spch387.htm (discussing adverse effects that too much information may have on market). But see Horgan, supra note 11, at 664-65 (stating market is fully efficient when price of security embodies all information whether such information is publicly available or not); Jennings, supra note 9, at 549 (stating full disclosure of all information represents one of guiding principles of federal securities regulation).

\(^\text{138}\) See Colesanti, supra note 10, at 22-23 (stating "Regulation FD suffers from its undefined terms including 'materiality,' 'nonpublic,' and 'broad, non-exclusionary' public disclosure"); Egan, supra note 5, at C4 (discussing how new rule does not offer any guidance on what constitutes "material information"). But see Horgan, supra note 11, at 656-57 (stating "[t]he Commission rejected the suggestion of including a bright line standard, but, in response to requests for more interpretive guidance, set forth a list of the types of information it believes are especially likely to be considered material").

caution by disclosing both material and nonmaterial information. Although too much information may be preferable to not having enough, Regulation FD could produce an overwhelming flow of information if companies address the materiality issue by releasing information concerning everything and anything.

Prior to Regulation FD’s adoption, the job of the analyst was to “ferret out” the important information and present it to the public. Under an information overload scenario, where average public investors are inundated with information without the benefit of professional assistance, the inability to properly analyze the information may result in trading on false expectations. Information can only empower investors if they can understand and effectively apply it. Further, access to information can never be a substitute for knowing how to codified at 17 C.F.R. pts. 240, 243, and 249).

See Unger, supra note 137. See generally Machmeier, supra note 24, 3D (discussing adverse effects of disclosing all information to the public); Reg. FD Could Swamp Investors, SEC’s Unger Says, INVESTORS RELATIONS BUSINESS, Aug. 14, 2000, available at 2000 WL 8692594 (discussing SEC Commissioner Laura Unger’s statements about effects of disclosing too much information to public).

See Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716; Machmeier, supra note 24, at 3D (discussing how flow of too much information to average investor can have an opposite effect than regulation intends); see also Reg. FD Could Swamp Investors, SEC’s Unger Says, INVESTORS RELATIONS BUSINESS, Aug. 14, 2000, available at 2000 WL 8692594 (discussing SEC Commissioner Laura Unger’s statement that “an equally likely problem could be that investors become swamped with too much information”).

See Dirks, 463 U.S. at 646 (stating common role for analyst was to search out information by meeting with and questioning corporate officers and other insiders); see also Gross, supra note 133, at A25 (describing analysts as “well-dressed but passive conduits”); Jennings, supra note 9, at 550 (stating corporate disclosure often results in unintelligible public information even to experienced investors and as a result securities analyst acts as intermediary between markets and potential investors).


interpret it.\textsuperscript{145} As more information gets directly into the hands of investors, it seems more appropriate than ever that analysts and other professionals should continue to play an important role in giving meaning to the facts.\textsuperscript{146}

C. "PARITY OF INFORMATION" AS AN UNREALISTIC GOAL

At the end of the day, equal access to all material information is likely an unattainable goal.\textsuperscript{147} "Even if there is an absolute, theoretical compliance with a Regulation FD, some [investors] will inevitably get the information and act on it sooner than others."\textsuperscript{148} For example, the investor who is watching the first screen on which the information appears will always have an advantage over those who do get their information from another source.\textsuperscript{149} Investors following their stocks at the office will have an advantage, including the ability to trade immediately, over those who wait until they get home from work.\textsuperscript{150} Similarly,

\textsuperscript{145} See Dirks, 463 U.S. at 658 (stating one role of analysts is to "ferret out and analyze information"); see also Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,717 (stating information will still need to be interpreted by analysts); Unger, supra note 137 (noting market professionals will still fill important role for investors) at http://www.sec.gov/news/speech/spch387.htm.

\textsuperscript{146} See Dirks, 463 U.S. at 657-58 (rejecting idea of equality of information); see also Peloso & Indek, supra note 5, at 3 (suggesting Regulation FD would necessitate disclosure far beyond what is currently required); Lee B. Spencer, Jr. & George A. Schieren, Letter to the Jonathan G. Katz, Re: Proposed Regulation FD – File No. S7-31-99, Securities Industry Association 8, (Apr. 6, 2000) (stating required access to all information would be departure from current securities law) at http://www.sia.com/2000_comment_letters/pdf/sec_regulation_fd_4-6.pdf.

\textsuperscript{147} See Dirks, 463 U.S. at 657-58 (rejecting idea of equality of information); see also Peloso & Indek, supra note 5, at 3 (suggesting Regulation FD would necessitate disclosure far beyond what is currently required); Spencer & Schieren, supra note 146, at 8.

\textsuperscript{148} See Spencer, & Schieren, supra note 146, at 8; see also Jason Michael Craft, Note, What's All the Commotion?: An Examination of the Securities and Exchange Commission's Regulation FD, 14 DEPAUL BUS. L.J. 119, 121 (2001) (noting selective disclosure results in information being released to analysts before general public); T. Andrew Eckstein, supra note 20, at 1291 (discussing SEC's concern that analysts may receive information before small investors and reap benefits from it at others' expense); Hayday, supra note 23, at 844 (noting small investors' access to information may lag behind analysts' access by a few days).

\textsuperscript{149} See Kramer, supra note 5, at A23 (commenting Regulation FD might actually restrict disclosure); Spencer & Schieren, supra note 146, at 4 (noting limited number of infractions). But see Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,591-92 (proposed Dec. 28, 2000) (noting numerous recent examples of selective disclosure practices).

\textsuperscript{150} See Fox, supra note 17, at 663 (commenting most evidence of selective disclosure occurs in press reports); Peloso & Indek, supra note 5, at 3 (noting many commentators feel Regulation FD is unnecessary). But see Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,717 (rejecting view Regulation FD is unnecessary due to scarce evidence of selective disclosure).
“investors monitoring electronic communications will have an advantage over those who get the news over radio and TV.”¹¹¹ The methods for disclosure under Regulation FD fall prey to similar problems.

For example, conference calls appear to be a less than adequate means for insuring that all investors have realistic access to disclosed information.¹¹² Consequently, those who participate in a conference call will essentially be in a similar position as those who were the beneficiaries of selective disclosure prior to the enactment of Regulation FD.¹¹³ Internet web casting introduces the same problems because each person who is able to log in and access the disclosed information will enjoy an informational advantage over those who cannot.¹¹⁴ Thus, although SEC through Regulation FD attempts to level the playing field for all investors, it may well be grasping at an unachievable goal.¹¹⁵


¹¹² See Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,592 (proposed Dec. 20, 1999) (to be codified at 17 C.F.R. pts. 230, 240, 243, and 249) (noting problems when conference calls are opened only to insiders and exclude investing public); see also Richards, supra note 15, at 418-19 (noting selective disclosure can occur in conference calls from which small investors are excluded); Randall Smith, Conference Calls to Big Investors Often Leave Little Guys Hung Up, WALL ST. J., June 21, 1995, at C1 (noting conference calls are more advantageous to large investors than small investors).


¹¹⁴ See Eckstein, supra note 20, at 1297 (noting SEC’s requirement that webcasts are preceded by adequate public notice and means to access webcast); Hayday, supra note 23, at 858 (noting lack of internet access will prohibit some investors from accessing webcasts); see also Peter H. Ehrenberg & Peter S. Friedman, To Speak or Not to Speak: Selective Disclosure and Regulation FD, 203 N.J. LAW. 23, 26 (June 2000) (stating not all investors have computer access).

¹¹⁵ See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,716 (August 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249) (noting individual investors’ concern over selective disclosure and advantage it gives to analysts); see also Spencer & Schieren, supra note 146, at 10 (characterizing parity of information as “illusory”), Unger, supra note 137 (discussing one goal of Regulation FD is to achieve balance between interests of individual investors and corporations regarding disclosure).
D. INDUSTRY TREND MAY RENDER RULE UNNECESSARY

Some commentators have argued that Regulation FD is simply a hastily-drafted response to a perceived problem, which actually exists in very few real-world situations. In fact, the SEC's assertion of the existence of a problem associated with selective disclosure appears to be based primarily upon anecdotal evidence, since there is an absence of any study evaluating the consequences of Regulation FD. To the contrary, recent data compiled by the National Investor Relations Institute already showed a dramatic trend toward opening up quarterly conference calls to the public well before the SEC enacted Regulation FD. Clearly, this is just one area where there was an ongoing change towards greater transparency and openness. The Internet also continues to create a "powerful, investor-driven pressure toward more open discussions of forward-looking information." It can be argued that this trend would have likely continued even in the absence of a new rule, thanks to investor demand for real time access to information, and the proliferation of technology to provide that information instantly and inexpensively.

156 See Kramer, supra note 5, at A23 (commenting Regulation FD might actually restrict disclosure); Spencer & Schieren, supra note 146, at 4 (noting limited number of infractions). But see Selective Disclosure and Insider Trading, Fed. Reg. at 72,591-92 (noting numerous recent examples of selective disclosure practices).

157 See Fox, supra note 17, at 663 (noting most evidence of selective disclosure occurs in press reports); Pelosi & Indek, supra note 5, at 3 (discussing the feeling among many commentators that Regulation FD is unnecessary). But see Selective Disclosure and Insider Trading, supra note 1, at 51,717 (rejecting view that Regulation FD is unnecessary).


159 See Kramer, supra note 5, at A23 (noting many companies make their conference calls available publicly); Spencer & Schieren, supra note 146, at 3-4 (noting NIRI survey indicates trend of allowing greater open access for investors); see also Regulation FD: Has the SEC Cut the Tightrope?, BUSINESS LINE (Dec. 3, 2000) (noting 61% of issuers currently webcast and 22% plan to do so), available at 2000 WL 30107443.

160 See Spencer & Schieren, supra note 146, at 3 (noting general increase in information being made available.

161 See Kramer, supra note 5, at A23.

162 See Spencer & Schieren, supra note 146, at 4 (noting companies were already moving towards open disclosure prior to Regulation FD enactment); Louis M. Thompson, Executive Alert, Guidance For Compliance with Regulation FD, National Investor Relations Institute, (Sept. 10, 2001) (discussing September 2001 NIRI survey that found 92% of members webcasting conference calls), at http://www.niri.org/publications/alerts/EA091001.cfm; Unger, supra note 137 (discussing impact of technology on investors in future).
Ironically, the new regulation may be responsible for placing a halt on this trend, thus leaving the SEC further from its goal than when it began.163

IV. CONCLUSION

Admittedly, unregulated selective disclosure, could eventually lead some investors to question fairness and integrity in the marketplace. However we have crafted this note in an attempt to explore several concerns about Regulation FD’s enactment and its potential impact on the securities markets. Specifically, the new regulation became effective with limited treatment of recent Supreme Court decisions and the intent of Congress in adopting the Exchange Act of 1934. As mentioned, although the Supreme Court expressly rejected the parity of information theory in Chiarella and Dirks, it appears that the SEC adopted Regulation FD under the provisions of 13(a) and 15(d) of the 1934 Exchange Act in order to avoid potential conflicting with Supreme Court language. Further, the court said in Chiarella and repeated in Dirks, that the SEC should not undertake “formulation of an absolute equal information rule... ‘absent some explicit evidence of congressional intent.’”164 While Congress has never expressly rejected the parity of information theory in quite the same way, it is impossible to ignore the protection that Congress has afforded market analysts throughout the 1934 Exchange Act. This protection suggests that the SEC’s authority is not so clearly defined in this area and perhaps a more careful consideration should have been undertaken before enacting Regulation FD. Finally, even if clear authority existed for the SEC to enact Regulation FD, the existence of potentially adverse policy implications such as a chilling effect on communications and,

163 See Colesanti, supra note 10, at 30-31 (concluding Regulation FD brings uncertainty to disclosure rules); Spencer & Schieren, supra note 146, at 44 (concluding Regulation FD will lead to less disclosure). But see Thompson, supra note 162 (finding most members of National Investor Relations Institute are releasing same amount or more information than before Regulation FD took effect).

conversely, an information overload for investors perhaps make it clear that a more careful study should have been undertaken before the adoption of the regulation.