

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 243

[Release Nos. 33-9146; 34-63003; IC-29448; File No. S7-23-10]

REMOVAL FROM REGULATION FD OF THE EXEMPTION FOR CREDIT RATING AGENCIES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: This amendment implements Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which requires that the Securities and Exchange Commission amend Regulation FD to remove the specific exemption from the rule for disclosures made to nationally recognized statistical rating organizations and credit rating agencies for the purpose of determining or monitoring credit ratings.

DATES: Effective Date: October 4, 2010

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is deleting Rule 100(b)(2)(iii)¹ under Regulation FD.²

I. Overview of the Amendment

Regulation FD provides that when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may trade on the basis of the

¹ 17 CFR 243.100(b)(2)(iii).

² 17 CFR 243.100 et seq.

information), it must make public disclosure of that information.³ Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) requires the Commission to “revise Regulation FD (17 CFR 243.100) to remove from such regulation the exemption for entities whose primary business is the issuance of credit ratings (17 CFR 243.100(b)(2)(iii))” within 90 days after the date of enactment.⁴ The effective date of the legislation is July 21, 2010 and our revised rule will be effective for disclosure made on or after October 4, 2010.

II. Discussion of the Amendment

As required by the Act, we are amending Regulation FD to remove the specific exemption provided to nationally recognized statistical rating organizations and credit rating agencies for disclosure made to them for the purpose of determining or monitoring a credit rating. To effectuate this change, we are removing Rule 100(b)(2)(iii) of Regulation FD. Due to the removal of Rule 100(b)(2)(iii), we are re-designating Rule 100(b)(2)(iv) as Rule 100(b)(2)(iii).

Regulation FD is designed to address 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.⁵ Under Regulation FD, the timing of the required public disclosure of material nonpublic information that is provided by an issuer, or persons acting on its behalf, to certain enumerated persons depends on whether the selective

³ 17 CFR 243.100(a). See Selective Disclosure and Insider Trading, Release No. 34-43154 (Aug. 15, 2000) [65 FR 51716] at 51716 (the “Regulation FD Adopting Release”).

⁴ Pub. L. No. 111-203 (July 21, 2010).

⁵ Regulation FD Adopting Release, supra note 3, at 51719.

disclosure was intentional. For an intentional selective disclosure, the issuer must make public disclosure simultaneously. In other circumstances, the issuer must make public disclosure promptly. Under the regulation, the required public disclosure may be made by filing or furnishing a Form 8-K,⁶ or by another method or combination of methods that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.⁷

Under Rule 100(b)(2)(iii) of Regulation FD, the issuer or person acting on the issuer's behalf need not make the public disclosure if the disclosure of material nonpublic information is made to a credit rating agency that makes its credit ratings publicly available, or is made pursuant to Rule 17g-5(a)(3)⁸ to a nationally recognized statistical rating organization. As required by Section 939B of the Act, we are removing the exemption specifically available to these entities under Regulation FD.⁹

III. Procedural and Other Matters

The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.¹⁰ This requirement does not apply, however, if the agency "for good cause finds . . . that notice and public procedure thereon are

⁶ 17 CFR 249.308.

⁷ 17 CFR 243.101(e).

⁸ 17 CFR 240.17g-5(a)(3).

⁹ Regulation FD also provides exemptions for communications made to 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 (17 CFR 243.100(b)(2)(i)), to any person who expressly agrees to maintain the information in confidence (17 CFR 243.100(b)(2)(ii)), and in connection with most offerings of securities registered under the Securities Act (17 CFR 243.100(b)(2)(iv)). These exemptions are unaffected by the Act.

¹⁰ See 5 U.S.C. 553(b).

impracticable, unnecessary, or contrary to the public interest."¹¹ The revision to Regulation FD that the Commission is adopting is required by Section 939B of the Act by the legislatively required date. Unless the rule and form amendments become effective by that date, issuers may be confused regarding their disclosure and reporting obligations. The Commission is required by statute to remove the specific exemption for disclosure provided to nationally recognized statistical rating organizations and credit rating agencies. Because this revision is required by Congress, it does not involve the exercise of Commission discretion or policy judgments. For these reasons, the Commission finds that good cause exists to dispense with a public notice and comment period for these amendments because notice and comment would be unnecessary, impracticable and contrary to the public interest.¹²

The Commission is taking this action to implement the Act. Thus, any costs and benefits to the economy resulting from the amendments are mandated by the Act. Section 23(a)(2)¹³ of the Securities Exchange Act of 1934 ("Exchange Act")¹⁴ requires us, when adopting rules under the Exchange Act, to consider the anti-competitive effect of any rules we adopt. Further, Section 3(f) of the Exchange Act¹⁵ and Section 2(c) of the Investment

¹¹ 5 U.S.C. 553(b).

¹² The Regulatory Flexibility Act requires agencies to prepare analyses for rulemaking only when the APA requires general notice of proposed rulemaking. 5 U.S.C. §603(a). The Regulatory Flexibility Act does not apply to the rules we adopt today because, as noted above, the Commission is not required to solicit public comment when using the expedited rulemaking procedures under Section 553(b) of the APA.

¹³ 15 U.S.C. 78w(a)(2).

¹⁴ 15 U.S.C. 78a et seq.

¹⁵ 15 U.S.C. 78c(f).

Company Act of 1940¹⁶ require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. While the amendments may affect efficiency, competition and capital formation, the action we are taking today is required by the Act and imposes no burden on efficiency, competition and capital formation that is not consistent with implementation of the Act.

IV. Paperwork Reduction Act

Certain provisions of Regulation FD contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.¹⁷ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the disclosure requirements is mandatory. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

The titles for the collections are (1) Form 8-K, and (2) Reg FD-Other Disclosure Materials. OMB approved the regulation's information collection requirements. Form 8-K (OMB Control No. 3235-0060) was adopted pursuant to Sections 13,¹⁸ 15,¹⁹ and 23²⁰ of the

¹⁶ 15 U.S.C. 80a-2(c).

¹⁷ 44 U.S.C. 3501 et seq.

¹⁸ 15 U.S.C. 78m.

¹⁹ 15 U.S.C. 78o.

²⁰ 15 U.S.C. 78w.

Exchange Act, and Regulation FD-Other Disclosure Materials (OMB Control No. 3235-0536) was adopted pursuant to Sections 13, 15, 23, and 36²¹ of the Exchange Act.

As discussed in the Regulation FD proposing²² and adopting releases,²³ in many cases, information disclosed under Regulation FD would be information that an issuer ultimately was going to disclose to the public. Under Regulation FD, that issuer likely will not make any more public disclosure than it otherwise would, but it may make the disclosure sooner and it is required to file or disseminate that information in a manner reasonably designed to provide broad, non-exclusionary distribution of the information to the public. Following the amendments adopted today, reporting persons will remain obligated to disclose the same information that they were previously required to report on these forms. We therefore believe that the overall information collection burden will remain approximately the same because the same transactions will remain reportable.

V. Statutory Authority and Text of the Amendment

The amendments described in this release are being adopted under the authority set forth in Sections 10, 19(a), and 28 of the Securities Act of 1933, Sections 3, 9, 10, 13, 15, 23, and 36 of the Securities Exchange Act of 1934, Section 30 of the Investment Company Act of 1940, and Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

²¹ 15 U.S.C. 78mm.

²² See Selective Disclosure and Insider Trading, Release No. 34-42259 (Dec. 20, 1999) [64 FR 72590].

²³ See Regulation FD Adopting Release, supra note 3.

List of Subjects

17 CFR Part 243

Reporting and recordkeeping requirements, Securities.

Text of Amendments

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 243 -- REGULATION FD

1. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

* * * * *

2. Section 243.100 is amended by removing paragraph (b)(2)(iii) and redesignating paragraph (b)(2)(iv) as (b)(2)(iii).

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: September 29, 2010