

## **When is information public and what constitutes a public disclosure for purposes of Regulation FD?**

[Regulation FD](#) was designed to put an end to the practice of companies [selectively disclosing material nonpublic information](#) to certain market participants who could reasonably be expected to trade on the basis of that information or to provide others with advice about trading. Once material information becomes public, however, a subsequent selective disclosure will no longer trigger Regulation FD. For this reason, one of the most important aspects of Reg. FD compliance is in determining when information is public.

The standard for evaluating when information is public was articulated by the Securities and Exchange Commission in *In re Faberge, Inc.*, a 1973 administrative proceeding brought before the Commission by the [Division of Enforcement](#). In its decision the Commission found that for information to be public it “must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information ... what constitutes a reasonable waiting period must be dictated by such surrounding circumstances as the form of dissemination and the complexity of information, *i.e.*, whether it is ‘readily translatable into investment action’.”

In 2008, to address a number of concerns related to how the federal securities laws might apply to information posted on a company’s website, the Commission released [interpretive guidance](#) on the use of company websites, including guidance on when information is public and what constitutes a public disclosure for purposes of Regulation FD. Although the guidance only speaks to websites and blogs which are maintained by or on behalf of a company, much of what is laid out can be applied to other mediums of communication on the web.

## **When is information posted on a company’s website public for purposes of Regulation FD?**

Information that is posted on a company’s website is public if it satisfies the standard articulated in *In re Faberge, Inc.*, namely once it has been disseminated in a manner calculated to reach investors in general through recognized channels of distribution and investors have been afforded a reasonable waiting period to react to the information. The Commission offers guidance on each of the major elements of this standard in its 2008 release:

### **When is a company’s website a recognized channel of distribution?**

Whether or not a website, or any other medium, comes within the category of a recognized channel of distribution will depend on two things: what a company has done to make it a recognized channel of distribution and whether or not the marketplace uses it as one. Steps that a company can take to make a website a recognized channel of distribution include:

- issuing an [advisory release](#) alerting the marketplace to the website’s location and of the company’s intent to regularly post material information there;
- including disclosure regarding the website’s location and of the company’s intent to regularly post material information there in the periodic reports that the company files with the Commission;
- establishing a pattern of regularly posting material information to the website; and
- [monitoring the website’s usage](#) to make sure that material information posted is being accessed.

### **When is information disseminated in a manner calculated to reach the marketplace in general?**

Once a company's website is a recognized channel of distribution whether or not material information has been disseminated will depend on the manner in which it is posted and its accessibility to the marketplace. Factors to consider in evaluating whether information is posted and accessible include:

- whether the website is appropriately designed so that any material information posted will be prominently displayed in a readily accessible format that can be easily retrieved;
- whether the website can accommodate the volume of traffic that might accompany disclosure of a major development;
- whether information posted on the website is regularly picked up by the media and marketplace, as compared to whether the company has to affirmatively advise the media and marketplace about information posted on the website;
- the extent to which the company is well-known and well-followed in the marketplace;
- measures taken to make the information accessible, including the use of push technologies, like RSS and email alerts, or advisory releases disseminated through other channels of distribution; and
- the extent to which the company uses other channels of distribution, in addition to the website, to disseminate information, and whether and to what extent those other channels are the primary means of distribution.

#### **What is a reasonable waiting period?**

Whether there has been a reasonable waiting period for the marketplace to react to material information posted on a company's website will depend on the facts and circumstances surrounding the dissemination, including:

- whether the company is well-known and well-followed in the marketplace;
- the extent to which information from the website is regularly accessed;
- measures taken to alert the marketplace to the website's location and of the company's intent to regularly post material information there;
- measures taken to affirmatively advise the media and marketplace about the information or its availability, including through other channels of distribution; and
- the nature and complexity of the information posted.

As the Commission notes in its release, what may be considered a reasonable waiting period for one company or one type of information may not necessarily be so for another company or different type of information.

#### **What constitutes a public disclosure for purposes of Regulation FD?**

Regulation FD requires that whenever a company discloses material nonpublic information to certain market participants it also discloses that information publicly—simultaneously, in the case of an intentional disclosure, and promptly, in the case of an unintentional disclosure. A public disclosure is defined by Regulation FD and the Commission's related [Compliance and Disclosure Interpretations](#) as a disclosure that has either been: filed or furnished through the Commission's EDGAR database and is available on the [EDGAR website](#) or, alternatively, disseminated by a method or combination of methods reasonably designed to provide broad, non-exclusionary distribution.

In its 2008 release the Commission very briefly (in less than 2 pages) addresses when material information posted solely on a company's website might constitute a broad, non-exclusionary distribution for purposes of Regulation FD. Essentially, as when evaluating whether information is public, a company needs to determine whether its website is a recognized channel of distribution and whether the information is posted and accessible, and therefore has been disseminated. However, rather than evaluate whether there has been a

reasonable waiting period, a company needs consider whether Regulation FD's public disclosure timing requirements—simultaneous in the case of an intentional disclosure, and prompt in the case of an unintentional disclosure—can be satisfied solely by posting the material information on its website.

In practice, a company intending to make a simultaneous disclosure of material information solely by posting the information on its website should take additional steps to alert the marketplace of its intent in advance. Whereas a company making a prompt disclosure of material information, following an unintentional disclosure, should evaluate, based on the nature and complexity of the information, whether it is advisable to use additional means of dissemination, beyond posting the information on its website, to achieve broad, non-exclusory distribution of the information.

It's easy to get overwhelmed by the details when evaluating the public nature of information, but remember Regulation FD is about the selective disclosure of material nonpublic information to certain covered market participants. Posting material information on a company website in a prominent location and in a format that is readily accessible to the general public is not a selective disclosure. It's only if the posted material information is not public and a subsequent disclosure is made to a covered market participant that Regulation FD comes into play.

In other words, if a company takes steps to establish its website as a recognized channel of distribution, prominently posts material information in a manner that is readily accessible to the general public and does nothing else Regulation FD is not triggered, even if the information is not considered immediately public. On the other hand, if as soon as the material information is posted to the website the company's CFO gets on a call with a group of analysts or institutional investors and discloses that same information then Regulation FD will come into play, and if the post was not a public disclosure and the material information is not public when the CFO makes the subsequent disclosure then company will have a Reg. FD violation on its hands.