

2016 Edition

# Informal Corporate Disclosure Under Federal Securities Law

Press Releases, Analyst Calls and  
Other Communications

Anne Sherry, J.D.  
Doreen Zanutelli, J.D.



Wolters Kluwer

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## Editorial Staff

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## FOREWORD

*Informal Corporate Disclosure under Federal Securities Law* discusses the regulatory requirements that govern press releases, analyst conference calls, roadshows, webcasts, and other corporate communications. These “informal” disclosures—as distinguished from formal disclosures in documents filed with the Securities and Exchange Commission—consist of relatively unstructured communications disseminated to investors and analysts through a broad range of channels: the news wire services, face-to-face meetings, telephone, television, the Internet and social media, etc. Companies rely on these disclosures to communicate important, current information about themselves to investors, thus supplementing the disclosures in their periodic reports filed with the SEC.

Unlike periodic reports and other formal disclosures, which are subject to a labyrinth of SEC rules, informal disclosures are largely subject only to the vague standards of the Commission’s antifraud provisions and certain other broad requirements (e.g., Regulation FD). Not only are these requirements difficult to apply, but they may trigger severe penalties and liability when violated. Thus, companies must navigate the applicable standards with great care.

This work examines those standards at length. In addition to covering relevant federal securities laws and regulations, the work discusses self-regulatory organization rules governing informal disclosures by listed companies, as well as disclosure guidelines under the National Investor Relations Institute (NIRI) *Standards of Practice for Investor Relations*.

The 2016 edition incorporates recent court decisions and SEC enforcement actions relating to the duty to disclose, materiality of statements, analysts’ obligations under Regulation AC, and the statutory safe harbor for forward-looking statements.



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## CHAPTER 1

## INTRODUCTION

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## ¶ 101 Overview and Scope

Corporate disclosures may be divided into two categories: (1) formal, highly-structured disclosures such as those filed with the Securities and Exchange Commission; and (2) informal disclosures such as those found in press releases, speeches, analyst conference calls, advertisements, and investor roadshows. Formal disclosures are subject to a broad spectrum of SEC rules that regulate all aspects of the disclosure—its scope, content, format, timing, signatories, etc. Even on the more subjective aspects of formal disclosures, such as the Management's Discussion and Analysis section in various periodic reports, the SEC has issued extensive interpretative guidance to help companies craft their disclosures.

Informal disclosures, by contrast, are largely subject only to the general antifraud provisions, Regulation FD, and a few other broad regulatory requirements that apply to all disclosures (see Chapter 2). Public companies generally do not file informal disclosures with the SEC, nor does the Commission ordinarily review them. Regulation of these communications effectively occurs after the fact, through SEC enforcement actions and private securities fraud litigation. Thus, although informal disclosures are fraught with litigation risks similar to those that accompany formal disclosures, companies do not benefit from the specific content and procedural requirements that instruct them in preparing their formal SEC filings. In short, the requirements for informal disclosure are vague; the consequences of their violation, costly.

This work discusses and explains the various requirements governing informal disclosure. Those requirements include primarily, but not exclusively, the federal securities provisions mentioned above. They also include listed company rules of the major self-regulatory organizations: the New York Stock Exchange, NASDAQ, and NYSE Amex. In addition, the discussion covers standards of practice for investor relations officers issued by the National Investor Relations Institute.

**"Informal Disclosure" Defined**

For purposes of this work, the term "informal disclosure" generally refers to unstructured corporate disclosures to investors and securities analysts disseminated through a variety of channels (the news wire services, face-to-face meetings, telephone, Internet, etc.), as distinguished from formal disclosures in documents filed with the SEC. Examples include earnings press releases, merger announcements, speeches about the company's business, discussions with analysts, and investor roadshows. The term also includes advertising and other communications that, although not primarily targeted to investors, can reasonably be expected to reach investors and the trading markets. See *Release No. 34-20560* (SEC 1984), 29 SEC DOCKET 792.