Testimony of
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on behalf of
The Association of Publicly Traded Companies

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Good morning Chairman Baker, Ranking Member Kanjorski and members of the Subcommittee. Thank you for the opportunity to testify today on behalf of the hundreds of mid cap and small cap public companies that make up the Association of Publicly Traded Companies ("APTC").

I am Daniel Hann, Senior Vice President and General Counsel of Biomet, Inc. Biomet is in the business of manufacturing and marketing products used primarily by orthopedic surgeons and is headquartered in the industrial heartland of northern Indiana. We have operations in over 40 locations worldwide and distribute products in more than 100 countries. Our best known product lines are total hip and total knee replacements for patients affected by osteoarthritis and osteoporosis.

Biomet has been a member of the APTC for many years and our President and CEO, Dr. Dane Miller, serves on the board of the APTC. With a market capitalization of approximately $7.8 billion and annual sales in excess of $1 billion we are no longer a small company, but we are still very much a growing company. We are proud of our reputation for creating and maintaining shareholder value. Dr. Miller was recently recognized by *Business Week* and *Forbes* magazines as among the top five CEOs in the country for delivering shareholder value relative to his compensation.

Biomet has been a public company since 1982. Our shareholders include some of the country's largest institutional investors as well as tens of thousands of individual investors. With regard to shareholder relations and corporate governance, we focus on long-term investors, many of whom are individuals. In addition, due to the success of our broad-based stock option plan, our shareholders include many of our own Biomet team members.

For all these reasons, Biomet and the APTC support the goal of promoting investor confidence through fair and efficient capital markets. The APTC's position on the specific issues before the Subcommittee is guided by a belief that issuers, investors and all market participants benefit from governmental policies that are designed to maximize the flow of quality information to the equities markets. Last month I had the opportunity to participate in the Regulation FD Roundtable held by the U.S. Securities and Exchange Commission (the "Commission") in New York City. Although we continue to believe there is room for improvement, the APTC applauds the efforts of Acting Chairman Unger and the other Commissioners to understand the full impact of Regulation FD and their willingness to provide guidance to market participants.

As a general matter, the APTC views Regulation FD as reflecting two policy choices. First, the decision not to create a new private right of action was a crucial and essential policy choice for Regulation FD and we commend the Commission for this wise decision. Second, the Commission decided that the benefits of a more level playing field for information outweighed the possible costs of restricting selective disclosure as it can be argued that any restrictions on the quantity or quality of information could negatively impact the efficiency of the stock markets. Insofar as Regulation FD has some positive aspects for issuers that may offset the additional burden of

compliance, we, as issuers, are relatively neutral toward it. For investors, however, -- especially long-term, buy-and-hold investors -- Regulation FD appears to be a mixed bag. Investors may feel that they are treated more fairly because it is unlawful for an issuer to provide material non-public information to someone who can trade ahead of them. However, unless individuals are attempting to beat professional traders in the day-by-day moves of the market, they would probably be better served by polices that promote more efficient markets, rather than focusing on an illusive level playing field.

Responses to the Subcommittee's Specific Questions

What impact has Regulation FD had on the quality and quantity of information being provided to the capital markets about issuer companies?

The overall quantity of information has not changed according to the two surveys of which we are aware, namely, the National Investors Relations Institute and the PricewaterhouseCoopers surveys. We believe that this is true because companies are issuing more press releases as a shield against the risk that a non-public disclosure could prove in hindsight to have been material. However, we believe that the quality of information has been adversely affected by the requirement for public disclosure of all material information. Such a requirement encourages issuers to limit disclosures to more general information that is less likely to become the basis of a private securities class action lawsuit if the company stock hits a downdraft. While we are unaware of any effort to measure it, we suspect that the quality of information going to the markets has suffered. I will offer a suggestion later as to how that impact might be mitigated.

Has Regulation FD impacted volatility in the marketplace?

It is difficult to say whether Regulation FD has caused more volatility in the equities markets. It is clear, however, that the long-term investors who sell stock when they need liquidity rather than when they think they have maximized their return would benefit from improved market efficiency and less volatility. If the net effect of Regulation FD is indeed "fairer" but more volatile markets, it could be a bad bargain for individual investors. However, to be frank, the net effect of Regulation FD will be evident only after the passage of more time.

What particular benefits or problems is your industry group experiencing as a result of Regulation FD?

The real benefit of Regulation FD inures to people like me, namely, lawyers. We now have a rule to reference when we caution others to avoid certain means of communication and disclosing certain types of information. We, the lawyers, are now more important and more necessary in publicly traded companies. I am certain the Subcommittee members – at least those who are lawyers -- applaud this result.

Seriously, the primary problem is uncertainty. No company wants to serve as the enforcement test case for Regulation FD. While we appreciate the statements from the Commissioners and the Commission's senior enforcement staff that they will not prosecute good faith mistakes, the vagueness of the materiality standard calls for caution. This is especially true for the large majority of publicly traded companies that lack a large staff of legal and communications personnel. There is a natural inclination to err on the side of caution pending some clarification as to where the Commission will draw the line on "materiality."

There is also a disproportionate impact on small and relatively new public companies. These companies often struggle to establish and maintain coverage by securities analysts. The new rule's prohibitions against "non-intentional" disclosures and one-on-one conversations with analysts will disproportionately burden smaller public companies. It is a simple function of human nature that an analyst with only marginal interest in a company will react negatively to being told, "Let me get back to you on that question after I talk to my lawyer."

Are there any specific ways that Regulation FD can be improved?

Yes. We offer two suggestions. One suggestion focuses on improving Regulation FD itself, while the other is based on a more practical way to overcome some of the unintended consequences of Regulation FD.

Our first proposal focuses on the problem that the legal definition of materiality is vague and fact-specific. When the Commission proposed Regulation FD, it offered no guidance as to how the Commission would define "material" for the purpose of this new rule. Nor did the proposing release ask for comment on whether there should be better guidance with regard to defining "material."

Because the materiality standard is the basis for enforcement, companies are generally responding by providing less information in non-public communications and providing more information of a general nature in a more structured format. The decline in more specific information probably harms the overall quality of information in the market. There is a solution to this problem, which could cure the principal defect in Regulation FD. The flow of information to the markets might well continue unabated, despite the new risk of enforcement action, if the rule were made clear and the risks were more well-defined. A bright line around the information the

Commission views as critical to the investing public in the context of Regulation FD will better serve the purpose of the rule than a purposefully vague materiality standard.

Since only the Commission will enforce this rule, the Commission should be able to state the types of information that are sufficiently material to prompt an investigation. We suspect that the Commission had determined the kinds of important information that were being disclosed selectively when it proposed the rule. A clear description of this information and similarly important types of information would serve clear notice on issuers and information recipients alike, and would justify vigorous enforcement of the new rule by the Commission.

Our second proposal is for more emphasis on another important area where the Commission can use other tools to promote the goal of Regulation FD – more and better information for all investors. Specifically, the Commission can promote a freer flow of information by supporting the statutory safe harbor for forward-looking statements or by promulgating a broader and deeper safe harbor under authority granted in the Private Securities Litigation Reform Act of 1995.

As I noted earlier, companies are now very cautious about making the types of specific forward-looking statements that will be most useful for individual investors. I offer the following example to explain how this works:

> **Aware of the potential exposure to liability if a statement proves false and is arguably not forward-looking, a retail company's spokesman says: "The ongoing economic downturn is not likely to have a significant impact on our sales revenue." This is a fairly general and definitely forward-looking statement. It might not mean much to the average**

investor; however, an analyst who really understands the company's business might suspect that this means that "the company has surprisingly strong same-store sales so far and any imaginable drop would not keep the company from meeting its projections." If the company were comfortable, from an exposure perspective, with actually saying what the sophisticated analyst heard, all investors would benefit from clearer, more specific information. However, the company would not say this because the statement is partially comprised of "current" facts and may not be covered by the safe harbor.

Currently, companies that wish to communicate their expectations about the company's future must do so under the watchful eyes of their securities lawyers. Despite reform legislation, private securities class action lawsuits are still quite common if a company's stock experiences a significant drop. In addition, the safe harbor for forward-looking statements is still a work in progress in the federal courts. The Commission could be a positive force for improving the quality of forward-looking disclosures if it supported a more expansive interpretation of the safe harbor as *amicus curiae.* The Eleventh Circuit case, *Harris v. Ivax,* shows the way the safe harbor can provide real protection to issuers who offer meaningful information to investors in a public forum. Incidentally, in 1999, the Commission filed an *amicus* brief in that case that was not helpful to the broader interpretation of the safe harbor.

The Commission also could use its rulemaking authority to create a safe harbor that is clear enough that both issuers and investors can make good use of the information. Before the statutory safe harbor was enacted, the Commission engaged in an extensive rulemaking, during which it received many thoughtful comments and proposals. The Commission did not act

on those comments and proposals, but could revive that rulemaking to explore ways to encourage the disclosure of better quality forward-looking information.

It is certain that Regulation FD has changed the way many companies communicate with the markets. A better safe harbor also could change company communications for the better.

Was there a need for Regulation FD prior to its promulgation?

Regulation FD did not arise overnight. Selective disclosure has concerned the Commission for at least a decade. Even before Regulation FD was proposed, significant progress had been made in the simultaneous availability of important information to all investors. The availability of cost-efficient conference call technology and Internet webcasting had already begun a process whereby more and more public companies were opening their quarterly conference calls to all investors. In the years before the Commission proposed Regulation FD, Chairman Levitt and Commissioner Unger had a particular impact in raising the awareness of abusive practices that can result from selective disclosure. In fact, Regulation FD does not change the underlying law and, therefore, there is a reasonable question whether Regulation FD was a solution in search of a problem.

As the APTC's board discussed its reaction to Regulation FD over a period of weeks, it decided to support the Commission's overall effort toward involving issuing companies in efforts to eliminate the abuses of selective disclosure. The APTC board supported Regulation FD in concept when it was proposed by the Commission. As always, we will support vigorous enforcement against those who violate the Commission's rules in ways that harm investors and impugn the integrity of the public equities markets.

However, we thought then, and now, that more study and more opportunity for the free market to address the issue was advisable.

How are those affected by Regulation FD adjusting to the Regulation FD regime in terms of policies, practices and trends?

Regulation FD has significantly changed the way issuers deal with the investment community. It has not only had a significant impact on how companies communicate with analysts, it also has had an impact on how companies communicate with all market participants including, but not limited to, shareholders, employees and customers. In my experience, issuers have made a bona fide attempt to be good corporate stewards and comply with the new rule. In recent months, issuers have worked very hard to implement new policies and procedures to comply with Regulation FD and have taken steps to educate directors, officers and employees as to their respective duties and responsibilities under the rule. One consequence of the new rule is that issuer press releases tend to be longer and more detailed, oftentimes making it difficult for the average investor to separate the wheat from the chaff.

As a general rule, companies are now webcasting their conference calls and opening them up to the public rather than limiting these calls to analysts. During these calls, issuers are providing more detailed information, but far less original information as compared to what was

reported in the related press release. Accordingly, issuers are participating in fewer one-on-one meetings and telephone calls with analysts and shareholders and are unwilling to privately reaffirm an analyst's prior earnings guidance or, for that matter, even the company's prior guidance. The net result is that the rule seems to have had a chilling effect on investor relations as a whole.

Was the Commission responsive to commentary regarding the rule?

The Commission, both commissioners and senior staff, were very open to meetings and discussion about the rule. They met with APTC board members on a number of occasions to discuss the rule. The final rule attempted to respond to our concerns about the materiality standard without accepting our view. It also included a specific rule regarding earnings guidance, which provides a relatively bright line in one area. Therefore, the Commission attempted to respond to particular comments.

The Commission also received very persuasive comments urging the wisdom of more study and a more incremental approach. In this respect, the Commission was less responsive and today we are left with a controversial rule. Nevertheless, with the continued efforts of the Commission to be open to change and the adoption of the APTC's proposed solutions, I believe there is an opportunity to substantially improve Regulation FD.

In closing, once again I would like to thank you for the opportunity to appear before this Subcommittee and share the views of the APTC on Regulation FD.