

## Recent Regulation FD Enforcement and Guidance

The US Securities and Exchange Commission recently brought a Regulation FD enforcement proceeding against Christopher A. Black, the former chief financial officer, and designated investor relations contact, of American Commercial Lines, Inc. (ACL), alleging that Mr. Black violated the SEC's rules prohibiting selective disclosure. In settlement of the proceeding, Mr. Black, without admitting or denying the SEC's allegations, agreed to pay a \$25,000 penalty and consented to an order directing him to cease and desist from violating Regulation FD and Section 13(a) of the Securities Exchange Act of 1934. See the SEC's order 34-60715 (the "Order"), dated September 24, 2009, available at <http://www.sec.gov/litigation/admin/2009/34-60715.pdf>.

This case is notable in two respects. First, it demonstrates that the SEC does monitor compliance with Regulation FD, notwithstanding that the SEC has not initiated many Regulation FD actions recently. Second, and perhaps more significantly, the SEC did not commence enforcement proceedings against ACL; rather the SEC brought the action only against the corporate officer that the SEC believed had violated Regulation FD.

The SEC complaint alleged that on Monday, June 11, 2007, ACL issued a press release revising its prior annual earnings guidance for 2007, projecting annual earnings per share in the range of \$1.45-1.65. The press release also included general earnings guidance for the second quarter of 2007, stating that the company expected the "2007 second quarter results to look similar to the first quarter." ACL's first quarter 2007 earnings per share were \$0.20.

On Tuesday, June 12, 2007, through Thursday, June 14, 2007, Mr. Black and ACL's CEO traveled together to meet with analysts who covered the company. Upon their return, Mr. Black proposed to send an email to all of the analysts, summarizing the information that

had been discussed in their meetings. ACL's CEO agreed, and asked for the email to be sent by the close of business on Friday, June 15, 2007. According to ACL's CEO, the CEO directed Mr. Black to provide a draft of the email to outside counsel before sending it.

Mr. Black was unable to finalize the email on Friday. Instead he sent it from his home on Saturday to just the eight sell-side analysts who covered the company. Mr. Black did not have counsel review the email and he did not notify anyone else at ACL that he was sending it. In the email, Mr. Black stated that he wanted to provide "some additional color" regarding the June 2007 earnings guidance and that the company expected "EPS for the second quarter will likely be in the neighborhood of about a dime below that of the first quarter ...."

On Monday, June 18, 2007, the first trading day after Mr. Black's email, ACL's stock price dropped 9.7 percent on usually heaving trading volume. ACL's CEO learned of the email on that Monday morning. ACL filed a Form 8-K to disclose the content of Mr. Black's email at the end of the trading day on that Monday afternoon. For further information about the facts in this case, see the Order referenced above and the SEC's complaint, available at <http://www.sec.gov/litigation/complaints/2009/comp21222.pdf>.

The SEC issued Litigation Release No. 21222 on September 24, 2009, available at <http://www.sec.gov/litigation/litreleases/2009/lr21222.htm>, in which it explained several factors that made it decide not to commence enforcement proceedings against ACL:

- Before the date that Mr. Black sent the email in question, ACL had "cultivated an environment of compliance" in which it provided training on Regulation FD requirements and adopted policies implemented controls to prevent violations;

- In this matter, Mr. Black was responsible for the violation and he did so outside of the systems of control that ACL had adopted to prevent improper disclosures;
- On the day that ACL discovered that Mr. Black sent the email to certain analysts, it filed a Form 8-K to publicly disclose the information;
- ACL self-reported the selective disclosure to the staff of the SEC on the day after it discovered that the email had been sent;
- ACL provided “extraordinary cooperation” with the SEC staff’s investigation; and
- ACL took remedial measures to address the improper conduct, which included the adoption of additional controls aimed at preventing future Regulation FD violations.

There are a number of important lessons that public companies can learn from this enforcement case. First, companies should implement controls to prevent selective disclosure, and should revise and update those controls as necessary to be sure that they work as intended. As the ACL situation emphasizes, a strong on-going compliance program can be an extremely effective tool in deterring government action against a company in the event an employee violates both company policy and Regulation FD.

Second, it is important to train employees on the compliance requirements of Regulation FD, to periodically refresh that training and to document that such training occurred. Pointing out the personal penalties that Mr. Black incurred may serve as a graphic reminder to employees of the importance of refraining from selective disclosure of material nonpublic information about the company.

Finally, this case provides a roadmap of meaningful steps that can be taken to head off government prosecution of the company should an employee violate Regulation FD. These steps include promptly filing a Form 8-K, as required by Regulation FD; self-reporting the violation to the SEC; cooperating with any SEC investigation; and reviewing and improving internal controls in an effort to improve future compliance.

When considering how to implement Regulation FD compliance, public companies should note that the SEC published Compliance and Disclosure Interpretations

(CDIs) for Regulation FD on August 14, 2009. See <http://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm>. Many of these CDIs reflect the SEC’s prior telephone interpretations, but there have been some revisions and clarifications. For example, Question 102.01 specifies that the adequate advance notice under Regulation FD must specify the subject matter, as well as the date, time and call-in information for a conference call. Question 102.05 provides that a shareholder meeting that is open to the public but is not otherwise webcast or broadcast by electronic means is not a method of disclosure “reasonably designed to provide broad, non-exclusionary distribution of information to the public.” And, Question 102.06 states that the mere presence of the press at an otherwise non-public meeting attended by persons outside of the issuer does not render the meeting public for the purposes of Regulation FD. Question 102.07 has been added to reference Exchange Act Release No. 58288, (available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>), which discusses the circumstances under which information posted on a company website is considered public for the purposes of Regulation FD. For a further description of that interpretive release, see our Securities Update, titled “SEC Issues Updated Guidance on Company Web Sites,” available at <http://www.mayerbrown.com/securities/article.asp?id=5413&nid=10707>.

The CDIs on Regulation FD, taken together with the SEC’s interpretative release mentioned in the CDIs, serve as important reference tools that public companies should consult as questions about Regulation FD compliance arise.

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