

# Capital Markets and Securities

## Recent SEC Enforcement Action Highlights Importance of Sound Regulation FD Policies and Procedures

The importance of a carefully crafted and disciplined Regulation FD compliance program was highlighted by a recent SEC enforcement action. Regulation FD prohibits selective disclosure of material nonpublic information to certain market participants. Since the SEC adopted Regulation FD in 2000, it has sanctioned seven companies for violations.

### *Recent SEC Enforcement Action*

On September 24, 2009, the SEC settled a civil enforcement action against the former CFO of American Commercial Lines, Inc., a Nasdaq-traded company, for selectively disclosing in violation of Regulation FD material nonpublic information regarding the company's second quarter 2007 earnings forecast. The CFO consented to the entry of a final judgment requiring him to pay a \$25,000 penalty. A copy of the SEC's complaint in the matter can be found at: <http://www.sec.gov/litigation/complaints/2009/comp21222.pdf>.

According to the SEC's complaint, on June 11, 2007, American Commercial issued a press release stating that its 2007 second quarter EPS would "look similar to the first quarter," which was \$0.20. Less than a week later, on June 16, 2007, the CFO sent an e-mail from his home to eight sell-side analysts covering the company. In the e-mail, the CFO revised the second quarter guidance, advising that the EPS was now expected to be "about a dime below that of the first quarter"—half its \$0.20 EPS estimate published less than a week earlier. The CFO never provided his June 16, 2007 e-mail to anyone else at the company, or to counsel, prior to sending it to the analysts.

On June 18, 2007, the first trading day after the CFO's selective disclosure, the company's stock price dropped 9.7 percent on volume of

approximately 300 percent above the stock's recent average daily trading volume. The company publicly disclosed the content of the CFO's e-mail in a Form 8-K filing at the end of that trading day after the CEO of the company became aware of the selective disclosure.

### *Company Successfully Avoids Sanction*

Although the Regulation FD violation was caused by its CFO, American Commercial successfully avoided sanctions for the violation. In determining not to bring an enforcement action against the company, the SEC highlighted several factors, including that: (i) the company cultivated an environment of compliance by providing training regarding Regulation FD and by adopting policies that implemented controls to prevent violations; (ii) the CFO alone was responsible for the violation and he acted outside the control systems established by the company to prevent improper disclosures; (iii) once the selective disclosure was discovered by the company, it promptly and publicly disclosed the information by filing a Form 8-K with the SEC the same day; (iv) the company self-reported the conduct to the Staff of the SEC the day after it was discovered and the company provided extraordinary cooperation with the Staff's investigation; and (v) the company took remedial measures to address the improper conduct, including the adoption of additional controls to prevent such conduct in the future.

### *Key Considerations for Public Companies*

American Commercial's controls, as well as the prompt remedial actions undertaken upon discovery that material nonpublic information had been selectively disclosed, mitigated further damages.

This enforcement action underscores the importance of well-documented policies and ongoing training programs for Regulation FD compliance for public company executives, boards of directors and investor relations departments.

Companies without comprehensive Regulation FD compliance programs and policies in place should consider adopting them in light of this enforcement action, and companies with existing

policies and programs should revisit them to ensure that they demonstrate the intent to observe the regulations and cultivate an environment of compliance to help protect the company in the event Regulation FD violations arise.

Please direct any questions regarding this SEC enforcement action and other aspects of federal securities law compliance to any members of the Capital Markets Group listed below.

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