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## [SEC Enforcement Action Under Regulation FD For Implicit Communications To Selected Analysts](#)

On October 21, 2010, the Securities and Exchange Commission announced enforcement actions against Office Depot, Inc. and two executive officers for violating Regulation FD by selectively conveying to analysts and institutional investors that Office Depot would not meet analysts' earnings estimates.

### *The Violation*

According to the SEC complaint, Office Depot's CEO and then-CFO were concerned that analyst estimates for the then current quarter were too high. They considered issuing a press release to provide the company's lower internal guidance, but were concerned because internal estimates were incomplete at that point. Instead, they directed employees to conduct one-on-one calls with analysts designed to cause analysts to revise their estimates downward by referring to recent public statements of comparable companies that cautioned of the slowing economy's impact on earnings. The CFO assisted in preparing the following talking points for the calls:

- Haven't spoken in a while, just want to touch base.
- At beginning of quarter we've talked about a number of head winds that we were facing this quarter including a softening economy, especially at small end.
- I think the earnings release we have seen from the likes of [Company A], [Company B], and [Company C] have been interesting.
  - On a sequential basis, [Company A] and [Company B] domestic comps were down substantially over prior quarters.
  - [Company C] mentioned economic conditions as a reason for their slowed growth.
- Some have pointed to better conditions in the second half of the year - however who knows?
- Remind you that economic model contemplates stable economic conditions - that is midteens growth

Office Depot's director of investor relations notified the CFO that an analyst expressed concern over the lack of a press release and indicated that several of his clients were also surprised. Nonetheless, the CFO instructed the director of investor relations to call Office Depot's top twenty institutional investors and relay the prepared talking points to them, which he did.

Six days after the calls to analysts began, Office Depot filed a Form 8-K publicly disclosing, among other things, that its earnings would be "negatively impacted due to continued soft economic conditions."

### *The Market Reaction*

Between the first day Office Depot began calling analysts to the last market close before Office Depot filed its 8-K, Office

Depot's stock dropped 7.7%.

### *SEC Civil Charges and Settlements*

The SEC brought and settled on the same day enforcement actions on the Regulation FD violation and an unrelated financial restatement. Office Depot agreed to settle the SEC's charges without admitting or denying the findings and allegations, and agreed to pay a \$1 million penalty. The CEO and CFO also agreed to settle the Regulation FD charges against them without admitting or denying the findings, and each agreed to pay a \$50,000 penalty.

### *Noteworthy Implications*

This enforcement action is noteworthy because Office Depot and its CEO and CFO were charged not with *explicit* communication of material, non-public information, but with *implicit* communications designed to lead analysts to a conclusion that matched material, non-public information.

This is the first Regulation FD action involving indirect communications since a U.S. District Court dismissed the SEC's complaint against Siebel Systems, Inc. in 2005. In the Siebel Systems case, the SEC alleged that the CEO of Siebel Systems selectively disclosed material, non-public information at private meetings with analysts when he made statements such as "business activity levels were 'good' or 'better' and that its sales pipeline was 'building.'" Such statements were similar to prior public statements made by the CEO, but had somewhat different wording and context, which the SEC alleged were understood by the listeners to convey material, non-public information. The District Court took issue with the SEC's scrutinizing of the particular words, verb tenses, and syntax of the CEO's statements. The District Court also stated that Regulation FD does not prohibit persons speaking on behalf of an issuer from providing "mere positive or negative characterizations, or their optimistic or pessimistic subjective general impressions, based upon or drawn from the material information available to the public."

This enforcement action signals that the SEC remains committed to applying Regulation FD to implicit as well as explicit statements. A significant difference between the Office Depot action and the Siebel Systems action is the evidence that Office Depot's executives intended for the selective conversations to communicate material, non-public information. No such evidence appears in the SEC's complaint in the Siebel Systems action.

### *What should you do now?*

The Office Depot is the third Regulation FD enforcement action brought since September 2009. The action is a reminder that companies need to be vigilant about Regulation FD compliance. We advise public companies to adopt written Regulation FD compliance policies, to update such policies and procedures regularly and to conduct periodic Regulation FD training for executives and company spokespersons.

Regulation FD issues and related questions about updates to prior public disclosures can be complex and often require significant legal and business judgment. Executives and company spokespersons should consult with legal counsel whenever non-public information is proposed to be communicated privately to analysts, brokers or investors and whenever private conversations might occur with analysts, brokers or investors while the speaker is aware of material, non-public information.

*What if you have questions?*

For any questions or more information on these or any related matters, please contact one of our [Securities and Corporate Finance Partners](#).

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