

## Small Business Securities Bulletin

*A periodic bulletin keeping small businesses informed about current developments in securities law and related matters*

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Penny Somer-Greif

410.347.7341

[psomergreif@ober.com](mailto:psomergreif@ober.com)

### Regulation FD – Recent Case Serves as a Reminder to Ensure your Regulation FD Compliance Programs are Current

As is not uncommon, December has been a slow month in the securities law compliance world. While the SEC has continued to propose new rules, particularly in response to mandates under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, these proposals will not be relevant to most small SEC reporting and private companies. Therefore, I wanted to use this month's bulletin to discuss a recent SEC Regulation FD case and remind companies to ensure that their corporate communications/Regulation FD policies are current and being consistently followed in practice, including employee training on the company's communication policies and procedures as needed.

Regulation FD, for "Fair Disclosure," prohibits selective disclosure of material nonpublic information to certain parties, including brokers, dealers, investment advisers, investment companies and stockholders. In October 2010, the SEC brought its second Regulation FD case this year (and its third within 14 months); we discussed the previous case in [our first June 2010 Bulletin](#). This most recent case emphasizes that Regulation FD applies to all communication including implied communication, not just explicit written and verbal statements.

The SEC announced enforcement actions in October against Office Depot, Inc. and its Chief Executive and Chief Financial Officers “for violating or causing violations of fair disclosure regulations when selectively conveying to analysts and institutional investors that the company would not meet analysts’ earnings estimates.” According to the SEC complaint (available at [www.sec.gov/litigation/complaints/2010/comp21703.pdf](http://www.sec.gov/litigation/complaints/2010/comp21703.pdf)), in June 2007 Office Depot’s CEO and CFO, realizing its significant earnings per share (EPS) growth during 2005 and 2006 was not sustainable, discussed how to encourage analysts to revisit their current forecasts and ultimately lower their estimates. Apparently attempting to comply with the “letter” (as opposed to the “spirit”) of Regulation FD by avoiding explicit statements to that effect, the CEO and CFO together crafted an approach whereby Office Depot’s director of investor relations contacted analysts to “touch base.” During these calls the director of investment relations directed analysts to recent earnings announcements by similar companies that had recently announced that their results had been impacted by the slowing economy and reminded the analysts of recent cautionary company statements, including that the company’s economic model contemplated stable economic conditions. Office Depot did not regularly make analyst call of this nature. The analysts shortly thereafter started lowering their estimates for Office Depot for the period ending June 30, 2007, followed soon after by a decrease in Office Depot’s stock price. The calls continued at the direction of the CFO and CEO even after the CFO was told about two analysts’ concerns about the lack of a press release. Six days after these calls began, Office Depot filed a Form 8-K that announcing that its earnings would be negatively impacted by the continuing soft economy.

Boiled down, the moral of this story is that with respect to Regulation FD, as with most securities laws, you cannot do indirectly (in this case, selectively imply to analysts that your company will not make the analysts’ forecasts) what you cannot do directly. Implied messages are prohibited under Regulation FD in the same manner that explicit ones are.

This case also serves as another reminder that certain actions, in particular one-on-one discussions with persons covered by the Regulation FD selective disclosure prohibition is particularly risky under Regulation FD. While some smaller companies may not have analyst coverage that was the subject of the Office Depot action, the same prohibition on communication of material nonpublic information by “winks and nods” would apply to any selective disclosure of such information, including to existing stockholders.

As with the June 2010 enforcement action, this case emphasizes that despite the low volume of Regulation FD cases, Regulation FD continues to be on the SEC’s radar screen, and that its enforcement actions in this regard are not limited to explicit statements that are blatant violations of the rules. Therefore, companies should ensure that their corporate communications policies are current and being implemented effectively and consistently.

The SEC's press release discussing the Office Depot enforcement action is available at [www.sec.gov/news/press/2010/2010-202.htm](http://www.sec.gov/news/press/2010/2010-202.htm).

## Happy Holidays, and a Busy 2011 Expected

I wanted to take this opportunity to wish everyone a happy holiday season, including a very happy new year! 2011 is sure to be a busy year in the securities compliance arena, with the SEC set to propose and adopt a number of rules pursuant to its mandate under Dodd-Frank. As always, we will monitor these developments and keep you up-to-date!

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### About Me

I am a former SEC attorney who also has prior “big firm” experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at [www.ober.com/attorneys/penny-somer-greif](http://www.ober.com/attorneys/penny-somer-greif).

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