Too Fine a Point? Court Dismisses SEC Regulation FD Enforcement

A judge in the U.S. District Court for the Southern District of New York recently dismissed the SEC's first Regulation FD enforcement action to be tested in federal courts. In dismissing the action against Siebel Systems and two of its officers, the Court took the SEC to task for its overly aggressive enforcement of Regulation FD.

This Update highlights the key issues raised by this case and offers practical guidance.

Court Rejected SEC's Allegations

SEC Alleged Material, Nonpublic Information Selectively Disclosed. The SEC based its case on statements by Siebel's chief financial officer at two private meetings with institutional investors. The SEC alleged that the chief financial officer disclosed material, nonpublic information about the company because his statements were "significantly more positive and upbeat" than public statements on the same subject made by Siebel's chief executive officer during the preceding month.

Prior Public Statements Adequately Disclosed Information. The Court closely examined the public and private statements cited by the SEC and found that the public statements adequately disclosed the substance of the private statements, even if the chief executive officer's tone in his public statements was somewhat more downbeat than the chief financial officer's appeared to be in the private conversations. The Court rejected the SEC's attempts to parse the statements for fine discrepancies, holding that "Regulation FD was never intended to be utilized in the manner attempted by the SEC under these circumstances." The Court cited the SEC's own statements as support, including assurances made by the SEC when it adopted Regulation FD that it was "not going to second-guess close calls regarding the materiality of a potential disclosure" and that "enforcement of the regulation will be focused on clear violations."

Regulation FD Requires Only Fair Accuracy. The Court concluded that the SEC's approach in the Siebel case would impose too great a burden on corporate officers and would discourage the disclosure of information to investors:

Regulation FD does not require that corporate officials only utter verbatim statements that were previously publicly made. . . . "[N]it-picking should not become the name of the game. . . . There is no requirement that a material fact be expressed in certain words or in a certain form of language. Fair accuracy, not perfection, is the appropriate standard."

Court Also Rejected Alleged Failure to Maintain Adequate Disclosure Controls and Procedures. The Court dismissed the SEC's claims against Siebel and the two officers for violating or aiding and abetting violations of Regulation FD. The Court also dismissed the SEC's claim against Siebel for violating the disclosure control provisions of Section 13(a) of the Exchange Act, which require companies to maintain adequate disclosure controls and procedures for the proper and timely handling of information, because the complaint had not cited sufficient facts aside from the claimed violation of Regulation FD to support this cause of action and "cannot survive solely on the basis of these conclusory allegations."
Practical Tips

Any Private Statements Should Conform to the Substance of Prior Public Disclosures. Private statements that conform to the substance of prior public disclosures should not be actionable under Regulation FD — provided that the court of appeals upholds this decision. The SEC is not going to stop enforcing Regulation FD, and it will continue to scrutinize statements that officers make in private settings, especially those minefields of Regulation FD: private meetings with analysts and investors. In those situations especially, an investor relations officer or other corporate officer should take care to align private comments with the substance of prior public statements.

Regulation FD Violation Implicates Effectiveness of Disclosure Controls and Procedures. In actions for violations of Regulation FD, the SEC may assert claims against the company for failing to comply with Rule 13a-15 requirements for disclosure controls and procedures, and it may seek sanctions against investor relations officers, compliance officers and others whose job it is to supervise compliance with Regulation FD. Companies can address this risk by

- establishing, periodically updating and following a Regulation FD policy and

- periodically training its officers on Regulation FD compliance — and documenting the training.

These steps will not eliminate the risks that company representatives will violate Regulation FD; those risks will be around as long as public company spokespeople are human. But they should reduce the risk that a violation will merit an SEC enforcement action.

Additional Information


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