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SEC's Latest Regulation FD Enforcement Action Highlights the Benefits of a Strong Compliance Program

The SEC recently filed a civil action against the former chief financial officer of American Commercial Lines, Inc. ("ACL"), a marine transportation and manufacturing company based in Indiana. In its complaint, the SEC alleged that, while acting in his capacity as the company's designated investor relations contact and without informing anyone at ACL, the CFO selectively disclosed material, nonpublic information regarding ACL's second quarter 2007 earnings forecast to a limited number of analysts without simultaneously making that information available to the public.

Since the adoption of Regulation FD in 2000, the SEC has brought various enforcement actions against companies and officers alleged to have been responsible for selective disclosure in violation of Regulation FD, but this action involving ACL represents the first instance in which the SEC did not include the reporting company as a party to the action.

The Enforcement Action

According to the SEC's complaint:

- On Monday, June 11, 2007, ACL issued a press release projecting second quarter earnings in line with ACL's first quarter earnings of approximately \$.20 per share.
- Following the issuance of the press release, the CEO and CFO met with various analysts that covered ACL. Following these meetings, the CFO suggested to the CEO that he would send an e-mail to analysts summarizing the information discussed in the meetings. The e-mail was to have been sent out on June 15th, and according to the CEO, the CFO was to have provided a draft of the e-mail to external counsel prior to sending it.
- The CFO was unable to finalize the e-mail on the 15th, but before leaving work on the 15th, he received an updated internal analysis indicating that ACL's earnings per share for the second quarter would be significantly below the projection.
- On Saturday, June 16, the CFO sent an e-mail from his home to the eight sell-side analysts who covered ACL stating that the company's earnings per share for the second quarter "will likely be in the neighborhood of about a dime below that of the first quarter," effectively cutting in half ACL's second quarter earnings guidance.
- On Monday, June 18, the first trading day after the CFO's e-mail to analysts, ACL's stock price dropped 9.7% on unusually heavy volume.

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- Also on that Monday, the CEO learned of the CFO's e-mail and ACL publicly disclosed the content of the e-mail on a Form 8-K.

Without admitting or denying the allegations in the complaint, the CFO consented to the entry of a final judgment requiring him to pay a \$25,000 penalty.

Company Excluded

In announcing the action against the CFO, the SEC identified the following factors as relevant to its determination not to bring an enforcement action against ACL:

- Prior to the June 16, 2007 disclosure by the CFO, ACL cultivated an environment of compliance by providing training regarding the requirements of Regulation FD and by adopting policies that implemented controls to prevent violations.
- The SEC determined that the CFO alone was responsible for the violation and he acted outside the control systems established by ACL to prevent improper disclosures.
- Once the illegal disclosure was discovered by ACL, it promptly and publicly disclosed the information by filing a Form 8-K on the same day.
- ACL self-reported the conduct to the SEC's staff the day after it was discovered and the company cooperated with the staff's investigation.
- ACL took remedial measures to address the improper conduct, including the adoption of additional controls to prevent such conduct in the future.

Useful Reminders

The SEC's enforcement action highlights several compliance measures that public companies should remain mindful of. The first is the weight that the SEC gave to the fact that ACL had cultivated an "environment of compliance" through training and policies meant to prevent violations. The second is the importance of ACL's reaction to the discovery of the violation: it put the selectively disclosed information out immediately on a Form 8-K, self reported the violation to the SEC and cooperated with the SEC's investigation.

Public companies should consider the SEC's action in this case as a reminder to ensure that compliance programs are in place, that personnel receive regularly training and refreshers and that they are prepared to monitor and react to selective disclosures should they occur. Regulation FD is but one of a number of examples (the Foreign Corrupt Practices Act being another) of potentially high risk areas that warrant internal vigilance. Having a compliance program is critical, but so is ensuring that those most likely to be exposed to compliance issues are reminded regularly of the specific compliance policies and procedures, and given sufficient training so that they also understand the reasons for such policies and procedures.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman (44-20-7367-1601) or Raphael M. Russo (212-373-3309).