

SEC Settles Regulation FD Case Against CFO

On September 24, 2009, the Securities and Exchange Commission (“SEC” or “Commission”) filed a settled Regulation FD violation charge against the former chief financial officer of American Commercial Lines, Inc. (“ACL”).¹ Regulation FD² generally prohibits issuers from selectively disclosing material, non-public information without a contemporaneous public communication of the same information. As discussed below, the SEC chose not to bring an enforcement action against ACL because of the company’s “environment of compliance” and “extraordinary cooperation” with the SEC’s investigation.

I. Regulation FD

On August 10, 2000, the SEC adopted Regulation FD (Fair Disclosure) in an attempt to address the perceived practice of issuers providing material information to selected analysts and investors before making disclosure to the general investing public.

Regulation FD provides that:

- whenever an issuer, or person acting on its behalf,
- discloses material nonpublic information,
- to certain enumerated persons (generally, securities market professionals and holders of the issuer’s securities who may trade on the basis of the information),
- the issuer must make disclosure of that information to the public:
 - simultaneously, for intentional disclosure, or
 - promptly, for inadvertent disclosure.

II. Alleged Regulation FD Violation³

Christopher A. Black (“Black”) was ACL’s CFO from February 2005 until April 2008. On Monday, June 11, 2007, at the direction of Black and ACL’s CEO, the company issued a release revising year-end earnings guidance and projecting second quarter results. The company predicted second quarter earnings “similar to the first quarter.” From June 12 through June 14, Black and ACL’s CEO met with analysts to discuss this release. ACL agreed that Black would follow these meetings with an email to the analysts summarizing the information discussed during the week. Black was instructed to clear the email with outside counsel before its dissemination.

Prior to sending the summary email, Black received updated internal analysis suggesting the second quarter could be worse than projected in the press release and attendant analyst meetings. On Saturday, June 16, 2007, without company or counsel approval, Black sent an email to eight select sell-side analysts stating, based upon the updated information, “EPS for the second quarter will likely be in the neighborhood of about a dime

¹ U.S. Securities and Exchange Commission, Litigation Release No. 21222, September 24, 2009.

² 17 C.F.R. Section 243.100 et seq.

³ This account of the violation is based on allegations in the SEC’s complaint against Christopher A. Black, which he neither admitted nor denied. *United States Securities and Exchange Commission v. Black*, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009).

below that of the first quarter” This email was not publicly disclosed, nor was it otherwise disseminated to anyone inside or outside the company. The SEC would later claim that the email contained information which was a “significant departure from ACL’s second quarter guidance in its June 11, 2007 press release, when the company stated that the second quarter would ‘look similar to the first quarter.’”

On Monday, June 18, ACL’s common stock price dropped 9.7 percent on a 300 percent increase in trading volume over its daily average.

III. ACL’s Reaction and the SEC’s Charge

ACL’s CEO learned of Black’s email on Monday, June 18, 2007. By the close of trading that same day, the company filed a Form 8-K to publicly disclose the updated forecast. The following day, the company contacted the SEC and detailed the events. Ultimately, the SEC filed a settled charge against Black, which included a \$25,000 final judgment and cease and desist order without admission or denial of the allegations.

Significantly, the SEC decided not to bring an enforcement action against the company. In its Litigation Release⁴, the Commission enumerated five reasons for its decision not to hold ACL responsible for the Regulation FD violation:

- Prior to the June 16, 2007 disclosure by Black, 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;
- Black 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 with the Commission the same day;
- ACL self-reported Black’s conduct to the SEC the day after it was discovered and the company provided extraordinary cooperation with the SEC’s investigation; and
- ACL took remedial measures to address Black’s improper conduct, including the adoption of additional controls to prevent such conduct in the future.

IV. Conclusion

The factors enumerated by the SEC as supporting its decision not to pursue ACL provide useful guidance as to how strong controls, cooperative behavior, and reactive enhancement of preventative measures can protect an issuer from regulatory sanctions in the event of a Regulation FD violation triggered by an unauthorized selective disclosure.

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⁴ Litigation Release No. 21222, *supra*.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Andrew Roop at 212.701.3113 or aroop@cahill.com.

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