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SEC Enforces Regulation FD Violation Against CFO – But Not the Company

On September 24, 2009, the Securities and Exchange Commission filed a Regulation FD enforcement action against Christopher A. Black, the former chief financial officer of American Commercial Lines, Inc., a Delaware marine transportation and manufacturing company, for aiding and abetting the company's violation of Regulation FD and Section 13(a) of the Securities Exchange Act of 1934. Significantly, the SEC decided not to bring an enforcement action against the company for the violation, citing a number of compliance measures and remedial steps taken by the company with respect to Regulation FD. Regulation FD prohibits issuers from selectively disclosing material, non-public information without simultaneously making public disclosure of the same information. In settling the action, Black consented to the entry of a final judgment requiring the payment of \$25,000 in civil penalties.

The complaint alleged that Black, while acting in his capacity as the company's designated investor relations contact and without informing anyone else at the company, selectively disclosed material, non-public information regarding the company's second quarter 2007 earnings forecast to a limited number of analysts in violation of Regulation FD. The company had issued a press release projecting second quarter earnings in line with the company's first quarter earnings of approximately \$.20 per share. Less than a week later, Black sent an e-mail from his home to the eight sell-side analysts who covered the company, 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 the company's second quarter earnings guidance to \$.10 per share. The complaint also alleged that Black's selective disclosure and resulting analysts' reports triggered a significant drop in the company's stock price, resulting in a 9.7% drop on unusually heavy volume on the first trading day after Black's e-mail to analysts.

Without admitting or denying the allegations in the complaint, Black consented to the entry of a final judgment requiring him to pay a \$25,000 penalty. Black also consented to the entry of an order in a follow-on administrative proceeding directing him to cease and desist from violating Regulation FD and Section 13(a) of the Exchange Act.

In the SEC's litigation release on the matter, the SEC detailed the factors that it considered in determining not to bring an enforcement action against the company for the Regulation FD violation. The SEC listed the following factors:

- Prior to the selective disclosure by Black, the company 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 the company to prevent improper disclosures.

- Once the illegal disclosure was discovered by the company, it promptly and publicly disclosed the information by filing a Form 8-K with the SEC on the same day.
- The company self-reported the conduct to the SEC staff the day after it was discovered and provided extraordinary cooperation with the staff's investigation.
- The company took remedial measures to address the improper conduct, including the adoption of additional controls to prevent such conduct in the future.

Conclusion

The case is noteworthy for the SEC's decision not to pursue an enforcement action against the company, emphasizing the importance for companies to have Regulation FD compliance policies in place and to take prompt remedial measures to address any improper conduct.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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