

# CORPORATE AND SECURITIES LAW

## ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### **SEC Brings Regulation FD Action for “Signaling” Analysts**

October 28, 2010

On October 21, 2010, the Securities and Exchange Commission (“SEC”) announced that it had settled enforcement actions against Office Depot and its CEO and former CFO for selectively signaling to analysts and institutional investors that the company would not meet analysts' earnings estimates for the second quarter of 2007. The Office Depot settlement is noteworthy because Office Depot did not explicitly state that the company would not meet estimates, but rather signaled this message by reference to recent comparable companies' earning results and pointing out statements made by Office Depot in prior public conference calls.

According to the SEC's order, toward the end of Office Depot's second quarter of 2007, the company's CEO and then CFO discussed contacting analysts in an effort to get them to lower their earnings estimates for the company, which exceeded the company's internal projections. The CFO, the director of investor relations and the director of investor relations' immediate supervisor prepared talking points for use as a guide for the calls with analysts. The talking points were based in part on the CEO's suggestion that Office Depot refer analysts to recent disappointing earnings announcements by two comparable companies and remind the analysts of cautionary statements Office Depot had made in prior public conference calls regarding potential negative impacts to Office Depot's results of operations.

On June 22, 2007, and June 25, 2007, the director of investor relations spoke individually with all 18 analysts covering Office Depot and conveyed to them the information contained in the talking points. As a result of these calls, 15 of the 18 analysts covering Office Depot lowered their estimates. On June 28, 2007, six days after the calls began, Office Depot filed a Form 8-K announcing that, among other things, its earnings would be negatively impacted due to continued soft economic conditions. From June 22, 2007, the day the calls to analysts began, to June 28, 2007, the day of the 8-K filing, Office Depot's stock dropped 7.7 percent on increased trading volume.

The SEC charged that although Office Depot did not directly state to analysts it would not meet their expectations, it signaled this message by referring to the recent public statements of two comparable companies and reminding analysts of Office Depot's prior cautionary statements. The SEC also referenced the timing of the selective disclosure, noting that a reasonable investor may infer that a confirmation of expected earnings made late in a quarter might convey actual information about the issuer's performance and thus carry more weight than information conveyed in the original forecast early in the quarter.

The Office Depot case demonstrates that the SEC will view indirect or implicit guidance as direct disclosures that can result in violations of Regulation FD. Companies should also bear in mind that private communications with analysts and other market professionals carry a high degree of risk under

Regulation FD, particularly when conducted late in a reporting period. The case also further confirms that the SEC views market reaction as indicative of the materiality of selectively disclosed information.

A press release issued by the SEC announcing settlement of the enforcement action may be found on the SEC's Web site [here](#).

Bass, Berry & Sims PLC's Investor Relations/Earning Releases Subgroup monitors and advises on developments and best practices in the areas of earnings releases, non-GAAP financial measures, earnings guidance, Regulation FD and investor relations. If you have any questions regarding the issues addressed in this *Corporate and Securities Law Alert*, please feel free to communicate with your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroup responsible for this alert listed below.

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### Bass, Berry & Sims PLC Corporate and Securities Group

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