

# CORPORATE AND SECURITIES LAW

## *Alert*

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

### Recent Developments Demonstrate the Importance of Regulation FD Compliance

October 12, 2009

In connection with a recently settled enforcement action for a violation of Regulation FD, the SEC has provided certain factors it will consider when determining whether to bring charges against a company for a violation of Regulation FD by an executive officer of the company. Additionally, the SEC has updated its Compliance and Disclosure Interpretations regarding Regulation FD. These developments provide new insight on how public companies should prepare and implement their Regulation FD compliance programs, and present an excellent opportunity for companies to review their current Regulation FD practices.

Regulation FD generally prohibits the selective disclosure by a public company, or persons acting on its behalf, of material non-public information regarding the company, or its securities, to certain investors or investment advisors.

#### ***Regulation FD Enforcement Proceeding***

In late September the SEC settled an action alleging violations of Regulation FD and Section 13(a) of the Securities Exchange Act of 1934 against the former CFO of a public company, and at the same time declined to bring enforcement action against the company. The action alleged that the former CFO sent emails to certain analysts without company authorization, or review by the company's general counsel or any other executive officer, while serving as the company's designated investor relations contact. The emails reported that the company's quarterly earnings would be significantly less than the company had previously announced in a press release just five days earlier. The former CFO agreed to pay a \$25,000 fine in settlement of the action.

In determining not to bring an enforcement action against the company, the SEC cited the following factors:

- Prior to the selective disclosure the company had cultivated an "environment of compliance" by providing Regulation FD training and implementing controls to prevent Regulation FD violations;
- The former CFO's actions were taken without authorization, outside of the control systems of the company;

- The company took prompt action to publicly disclose the information by filing a Form 8-K the same day it discovered the violation;
- The company self-reported the violation to the SEC and provided “extraordinary cooperation” in the SEC’s investigation; and
- The company took remedial measures, including the adoption of additional controls, to prevent future violations.

These factors indicate the importance of having an effective Regulation FD compliance program, as well as the need to act quickly should a potential violation of Regulation FD occur.

### ***Updated Regulation FD Guidance***

In August the SEC released new Regulation FD Compliance and Disclosure Interpretations. The following is a summary of the new guidance:

- Selective disclosure of material information may be made once the issuer confirms that the information to be disclosed has been accepted for filing and is publicly available on EDGAR.
- Meetings which are open to the public or attended by members of the press do not satisfy Regulation FD’s public disclosure requirement unless other steps are taken to provide the kind of broad, non-exclusionary distribution of the information to the public required by Regulation FD, such as electronically broadcasting the meeting with adequate advance notice.
- The SEC reminded companies of its previous guidance in Release No. 34-58288 (August 1, 2008) that set forth the considerations for determining whether information posted to a company web site satisfied Regulation FD’s public disclosure requirement. Principally, the web site must be a “recognized channel of distribution” and the information must be posted in a manner calculated to reach investors. In practice, however, few companies have modified their Regulation FD compliance practices to take advantage of this interpretation due to the lack of certainty over whether a company web site satisfies the SEC’s criteria for public disclosure.

In addition to the updated guidance, the Regulation FD Compliance & Disclosure Interpretations carried over without change several interpretations from the Manual of Publicly Available Telephone Interpretations, confirming that these previously issued interpretations continue to reflect the SEC’s views.

### ***What should public companies be doing now?***

Public companies should review their Regulation FD compliance programs to make sure they are up to date with the latest developments, including the SEC’s recent guidance discussed above, and that their compliance programs are being implemented through both training and control systems. Public companies should also have in place an emergency plan for responding to potential violations of Regulation FD that establishes responsibilities and procedures for determining the proper corrective action, including outside counsel as necessary. A commitment to Regulation FD compliance not only helps prevent violations from occurring but also cultivates the “environment of compliance” that the SEC deems significant when deciding whether to bring enforcement action against the company.

Bass, Berry & Sims PLC’s Periodic and Current Reporting Subgroup monitors and advises on developments in SEC reporting, including quarterly, annual and current SEC reports and proxy statement

disclosures as well as XBRL compliance. If you have any questions regarding the issues addressed in this Corporate and Securities Law Advisory or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroup listed below.

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