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Regulation FD Policies: Best Practices

Client Bulletins

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In October, 2010, the SEC announced charges against and a settlement with Office Depot, Inc. for violations of Regulation FD. Implemented in 2000, Regulation FD prohibits companies from selectively disclosing material non-public information. Office Depot was charged with intentionally disclosing material non-public information without simultaneously disclosing that same information to the public. This recent uptick in Regulation FD enforcement together with the need for increased conversation with investors as a result of Say on Pay and other Dodd-Frank Act initiatives make this a good time to revisit and update Regulation FD policies.

If you have not yet implemented a formal Regulation FD policy, it is time to do so. In a 2009 enforcement proceeding for Regulation FD violations, the SEC decided not to institute an action against a company whose employee was charged with violating Regulation FD. One of the mitigating factors supporting the SEC's decision was that the company had adopted a Regulation FD policy to prevent violations. The SEC's consideration in that enforcement proceeding underscores the importance of having a Regulation FD policy in place.

There are several best practices for complying with Regulation FD. In general, a Regulation FD policy should contain the following:

- An outline of the procedures and practices regarding disclosure of information to the public, including a formal designation of authorized person(s) permitted to communicate with analysts and investors on behalf of the company.
- A restatement of the company's policy on confidentiality of information.
- A step-by-step guide to disclosing material information. This may include details on timing for release of material information; procedures for earnings calls, one-on-one analyst or investor meetings, and investor conferences; preparation and review of press releases by the investor relations, accounting, and legal departments; and record-keeping policies.

Controlling the Flow of Information

A Regulation FD policy is intended to control the dissemination of information inside and outside of the company to ensure that material non-public information is not selectively disclosed to market professionals or investors. Limiting the number of company representatives that are authorized to speak publicly on behalf of the company is an effective way to control dissemination of information. The policy should make clear that no other officers, directors, or employees should have any communication with any market professionals or investors. For example, the policy may limit the authorized persons to the CEO, CFO, the company's general counsel, one or more members of the board of directors, and the person(s) involved in investor relations and public relations. The authorized persons should be well-versed in Regulation FD and familiar with the company's public disclosures.

The dissemination of information can be further controlled by appointing an officer of the company to serve as the compliance officer for purposes of the Regulation FD policy. The compliance officer is responsible for administering and directing compliance with Regulation FD and the company's policy. Any questions relating to compliance with Regulation FD are directed to the compliance officer, and the compliance officer or his or her designee approves all public disclosures. The compliance officer designates other officers or senior-level employees in each department or operating group to be responsible for ensuring that the compliance officer is aware of developments within that department that may be material. When the compliance officer is not within a company's legal department, the policy should provide that determinations as to materiality and disclosure should be made by the compliance officer in consultation with the company's internal and external legal counsel.

One practice implemented by some companies is establishment of a Regulation FD disclosure committee. A disclosure committee may help implement the policy and address disclosure issues that arise from time to time. A disclosure committee may also assist the compliance officer with materiality determinations.

The Role of Directors

With the recent enactment of the Dodd-Frank Act and Say on Pay, Directors may find that they need to have direct communications with significant shareholders to address shareholder concerns. If directors are authorized to speak on behalf of a company and those directors plan to speak privately with investors, the SEC Staff recommends that the company implement policies and procedures that are intended to avoid potential Regulation FD violations. Best practices applicable to director discussions include pre-clearance of the discussion topics with a shareholder, require company counsel to participate in the meeting, and obtaining a confidentiality agreement with the shareholder(s).

Presentations to Analysts & Investors

Presentations to analysts or investors, regardless of the forum, and the content of the presentations should be approved by the compliance officer and in the absence of a designated compliance officer, by the company's legal counsel. Review and approval of presentations may also be necessary for presentations other than typical analyst presentations, such as presentations to customers, vendors, or distributors. Groups of customers, vendors, or distributors may include individuals who are investors in the company, and there is potential for Regulation FD violations to occur in these presentations. The compliance officer should inform legal counsel of all upcoming presentations so that the prospect for a potential Regulation FD situation can be evaluated.

Companies should post all presentations on their website on the morning that the presentation will be made.

Communications with Analysts

The policy should specify that earnings guidance is not to be provided to analysts, unless the guidance is provided strictly in accordance with the Regulation FD policy. The policy should also state that the company will not review draft analyst reports.

The policy should emphasize that any updates to previously disclosed material non-public information be done only through the procedures stated in the Regulation FD policy. Consider whether a strict "no comment" policy should be adopted with respect to requests to update or affirm guidance. If a strict "no comment" policy is adopted, it is helpful for that policy to be posted on the company's web site to give analysts and the public notice that the company does not update or affirm guidance. If the company does not adopt a strict "no comment" policy, the company and its legal counsel should carefully consider how such updates are to occur and what specifically will be communicated in the update.

Investor Meetings

The policy should set forth certain procedures for investor meetings and earnings calls or webcasts. The company should consider adopting the following procedures in the Regulation FD policy:

- Limit any one-on-one discussions with analysts and stockholders to those experienced in dealing with investors. Some companies stipulate that one-on-one analyst meetings use a delayed-use agreement, where the analyst agrees not to use any of the information for 24 hours. This allows the company to determine whether any information was accidentally disclosed, so the company can cure the erroneous disclosure before the analyst further disseminates or uses the information.
- Always have someone from Investor Relations present.
- If the company has a disclosure committee, consider having one or more members of the committee attend.
- Prepare and review past disclosures to ensure consistency.
- Use handouts that previously were released.
- Keep the commentary to what was discussed in the most recent earnings conference call script and investor relations presentation.
- Anticipate potential investor questions and draft a list of responses.
- Brief everyone in advance about details/issues that may arise that may be material and non-public and will not be discussed.
- Rehearse the script before the meeting.
- Maintain a binder or folder of pertinent information and bring it to meeting. Include in the binder or folder previously disclosed, public information, potential Q&A list, and the most recent earnings release and guidance.

Meeting procedures should include:

- Reminder about the safe harbor disclosure for forward-looking information prior to commencing the meeting.
- Earnings guidance discussions should only reflect the company's most recent public statements.
- Designate a person to take notes during the meeting.
- If anything material is disclosed at the meeting, consult with legal counsel and/or the disclosure committee and promptly issue a press release.

After the meeting, the company participants should debrief to confirm that no material, non-public information was disclosed.

Market Rumors

The Regulation FD policy should include the Company's position that it will not comment on market rumors.

Compliance Monitoring

The Regulation FD policy should include procedures for the company to monitor unusual trading activity in the company's securities, analyst and investor communications, and market rumors to determine if any corrective disclosure is required. If a Regulation FD violation is identified, the compliance officer, legal counsel, and senior management should together determine what actions need to be taken, including the release of information, corrective disclosure and potential self-reporting to the SEC.

Conclusion

An effective Regulation FD policy requires continued review, education and enforcement. Officers, directors, and employees must understand the importance of the policy and the consequences of noncompliance. Periodic training should be provided to officers, directors, and employees so that they understand the policy and will recognize when to report concerns to the compliance officer or legal counsel. An effective and well implemented Regulation FD policy will minimize the risk of material non-public information being selectively disclosed, and if such information is disclosed, will ensure that appropriate corrective action is taken.

For assistance in developing or reviewing your Regulation FD policy, please contact Megan, Carrie or any of our securities attorneys.

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