

Client Alert

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WIGGIN AND DANA

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SEC Settlement Highlights the Importance of Avoiding Selective Disclosure

OFFICE DEPOT AND TWO EXECUTIVES TO PAY MORE THAN \$1 MILLION TO RESOLVE ACCUSATIONS

A recent Securities and Exchange Commission settlement highlights the significant consequences facing companies and their executives when they fail to adhere to the SEC's prohibition on selective disclosure of material information. To resolve accusations by the SEC that it violated Regulation FD, the SEC's rule prohibiting such selective disclosure, Office Depot recently agreed to pay a \$1 million fine without admitting or denying any wrongdoing. Office Depot CEO Stephen Odland and former CFO Patricia McKay each agreed to additional fines of \$50,000.

According to the SEC's complaint in the case, in June 2007 individuals in the investor relations office at Office Depot began contacting analysts and institutional investors by telephone at the direction of company executives with scripted information that hinted at an earnings shortfall due to the weak economy. While the scripted information contained no direct statement about Office Depot's earnings guidance, it did mention a number of other companies whose earnings had been adversely affected by the economic slowdown and referred to previous cautionary statements made by Office Depot. More than a week after it began making this presentation to analysts and institutional investors, the company filed an 8-K in which it warned investors that earnings would be "negatively impacted due to continued soft economic conditions." During the period between Office Depot's disclosure to analysts and institutional investors and the filing of the 8-K, its stock had dropped by almost 8%.

Regulation FD requires issuers to simultaneously (in the case of intentional disclosures) or promptly (in the case of unintentional disclosures) disclose to the public any material information communicated to analysts or investors. The SEC's vigorous pursuit of Office Depot and the amount of the ultimate settlement highlight the importance of compliance with Regulation FD. As this case illustrates, direct statements are not necessary – even implying material, nonpublic information is sufficient to draw SEC scrutiny. While companies can and do talk to their analysts and institutional investors, care must be taken to ensure that these conversations do not involve the dissemination, even implicitly, of any material information that is not yet public. Communications with analysts and institutional investors should be carefully planned, and investor relations personnel should be adequately trained, to avoid sharing anything of significance that has not also been shared with all investors.

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