

A Biweekly
Newsletter of
Federal Securities,
Corporate &
Banking Law
Developments

UNDOING AN INSIDER TRADE POSSIBLE?

What should you do to remedy a stock transaction that could be considered "insider trading?" After Martha Stewart's sales of ImClone Systems, Inc. stock, this question has taken on more importance. Here is what one company is doing, although whether it will be successful is not yet known.

According to press releases and SEC filings made by Swift Transportation Co., Inc., a publicly traded company, its CEO purchased 187,000 shares of his company's common stock two days before it announced an increase in earnings and a renewal of its stock repurchase program. The value of the shares increased by over \$600,000 the day after the announcements. The CEO attempted to rescind the purchase transaction but was unsuccessful.

The CEO and the company then took actions to mitigate the threat of adverse publicity or regulatory action, including:

- Putting the gain in a trust administered by the company's independent directors;
- Disclosing the transaction and the proposed remedies in a Securities and Exchange Commission filing; and
- Hiring independent counsel to review the transaction and implementing a pre-clearance policy.

It remains to be seen whether the actions of the CEO and of the company will protect them from SEC enforcement action or shareholder lawsuits.

This situation highlights the importance to every public company of a detailed and well-circulated insider trading policy, including monitoring and enforcement of properly-defined "blackout periods."

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If you would like more information on these topics or have any questions, please e-mail us at CorporateNotes@KutakRock.com.

■ PROSECUTORS DEMANDING THAT COMPANIES COOPERATE IN INVESTIGATIONS

Alan Strasser of our Washington, DC office writes:

In light of the recent \$25 million fine against Lucent for not cooperating with SEC investigators, companies should be aware that federal criminal prosecutors are applying similar standards now in demanding that companies cooperate to a greater degree than required in current or proposed federal sentencing guidelines. These steps have included only indemnifying employees for legal expenses if they cooperate with investigators, waiving the attorney-client privilege for employee discussions with company lawyers and automatically providing investigators with documents requested by defense lawyers.

The U.S. Sentencing Commission had earlier proposed revisions to the federal sentencing guidelines that, unless vetoed by Congress, take effect on November 1, 2004. The revisions set forth seven requirements for an effective compliance and ethics program, which may potentially mitigate any punishment.

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These criteria include establishing standards and procedures to prevent and detect criminal conduct.

With the potential for significant penalties, companies should act now to establish compliance programs that satisfy the criteria in the proposed sentencing guidelines.

■ SEC EXPANDS BROKER EXEMPTIONS FOR BANKS

On June 2, the SEC proposed expanding the securities-related activities in which banks, thrifts and credit unions may engage without having to register as brokers with the SEC. The Gramm-Leach-Bliley Act initially exempted 11 activities, and this new proposal supplements the SEC's earlier interim rules adopted in 2001. Among the new proposals include clarifying the third party brokerage networking exemption that permits banks to partner with brokers to offer financial services to customers and share their compensation.

The public comment period for these proposed rules ends on August 1, 2004.

These proposed rules provide banks with new revenue opportunities without the related costs of SEC registration and regulation.

■ DISCLOSURE GUIDANCE ISSUED ON BANK OVERDRAFT FEES

Federal bank regulators have proposed disclosure obligations and "best practices" for banks that operate "overdraft protection" programs. These programs usually accompany a checking account and permit a bank, at its discretion, to cover a customer's bounced checks or debit card overdrafts.

Under the proposal, fees charged for overdraft protection services would need to be disclosed via the Truth in Savings Act rather than under more detailed and costly Truth in Lending Act. Some bankers had

complained that the cost of the TILA disclosures would make overdraft protection an unprofitable service that would have to be discontinued.

Banks are also encouraged to follow "best practices" to minimize bank risk and to enhance customer understanding of these programs, including:

- Clearly disclosing the amounts and coverage;
- Clearly explaining that overdraft protection is solely at the discretion of the bank and therefore is not guaranteed;
- Obtaining express customer consent to the protection, or allowing customers to "opt out" of automatic protection;
- Advising customers of alternatives to this protection; and
- Avoiding discussion of both overdraft protection and "free" accounts in the same ad.

Bank regulators also cautioned banks to have counsel review their overdraft programs to ensure that they comply with applicable federal and state laws.

Kutak Rock LLP is a national law firm with 325 attorneys located in 15 offices throughout the United States. Our practice includes corporate, banking and federal securities law, mergers and acquisitions, bankruptcy and creditors' rights, executive compensation, and complex commercial litigation.

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