

SEC CHARGES COMPANY AGAIN WITH REGULATION FD VIOLATIONS

Recently, the SEC brought charges in federal court against Siebel Systems, Inc for violating Regulation FD again, this time by disclosing favorable company information to select investors without also making the information public. Also charged was Siebel's CFO, who actually provided the information, and its former Investor Relations Officer, who was responsible for Siebel's Regulation FD compliance.

In its complaint, the SEC alleged that at two privately held events, the CFO made positive comments about the company's business activities that materially differed from negative public statements made in the preceding several weeks. Based on this information, an institutional investor who was in attendance at these events changed its stock position in the company resulting in a higher stock price and volume. (<http://www.sec.gov/litigation/litreleases/lr18766.htm>)

This is the second time that Siebel has been charged with violating Regulation FD. In November 2002, Siebel was among the first issuers to be charged under the "fair disclosure" regulation.

In addition, the SEC charged Siebel with violating the requirement under the Securities Exchange Act of 1934 to maintain adequate disclosure controls and procedures so that management receives information on a timely basis to make decisions about public disclosure. This is the first time the SEC has ever charged a company under this provision.

These charges highlight the SEC's continuing enforcement of Regulation FD and the extension of its review into the adequacy of a company's reporting system.

IN THIS ISSUE:

- **SEC Charges Company Again with Regulation FD Violations**
- **D&O Policy Covers Officers Even Though Sued in Shareholder Capacity**
- **Agencies Propose Rules On Disposal of Consumer Information**
- **Code of Ethics Now Required for Investment Advisers**

■ **D&O POLICY COVERS OFFICERS EVEN THOUGH SUED IN SHAREHOLDER CAPACITY**

A federal district court recently held that an insurance company must honor its director and officer insurance policies by reimbursing the former president, CEO and majority shareholder of TACC International Corp. (TACC), for defense and settlement fees paid in connection with claims that he misrepresented the value of TACC in a merger. (<http://pacer.mad.uscourts.gov/dc/opinions/saris/pdf/damelio.pdf>)

TACC had been sold to Illinois Tool Works Inc. (ITW) for \$130 million, with \$4 million of the purchase price held in escrow to cover any claims that ITW might have after the closing. Prior to the closing, TACC purchased a directors and officers (D&O) policy and a representations and warranties policy to cover the merger transaction. After the closing, ITW demanded the return of the \$4 million held in escrow because of TACC's alleged breach of its representations made in the merger agreement. The former TACC shareholders filed suit seeking to block ITW's claim for the escrow funds. ITW countersued, claiming that TACC and its shareholders

materially misrepresented certain information.

After the lawsuits were settled, the former president made a claim under the D&O policy for his \$12.2 million share of the settlement payout. The insurance company denied his claim because the former president had been sued in his capacity as a shareholder rather than as an officer and thus was not covered by the D&O policy.

The court ruled against the insurance company, holding that it did not matter in what capacity the former president was sued. Instead, the insurance company must consider whether the policy would cover the conduct being alleged. Because the settlement agreement was based on his wrongful conduct while serving as president, the court held that the president's claim should be allowed under the D&O policy.

Companies obtaining D&O insurance coverage for particular transactions should ensure that the policy's scope is properly crafted to include all actions that usually accompany that type of transaction.

■ AGENCIES PROPOSE RULES ON DISPOSAL OF CONSUMER INFORMATION

Recently, four banking regulators - the OCC, the OTS, the FDIC and the Fed - jointly issued proposed rules requiring financial institutions to adjust their information security programs to include certain types of consumer information not already protected. This proposed rule would implement section 216 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"). (<http://www.ots.treas.gov/docs/7/73219.pdf>)

The proposed rules would, among other things, protect information taken from credit reports obtained by a financial institution. Moreover, the proposed rule would add a provision requiring financial institutions to implement appropriate measures properly disposing of the "consumer information." The definition of "consumer information" includes any record about an individual that is, or is

derived from, a consumer report and that is maintained or possessed by, or on behalf of, the financial institution for business purposes.

These proposed rules would modify the Interagency Guidelines Establishing Standards for Safeguarding Customer Information, and non-compliance would be a violation of the safety and soundness standards.

■ CODE OF ETHICS NOW REQUIRED FOR INVESTMENT ADVISERS

Earlier this month, the SEC issued final rules, effective August 31, 2004, requiring registered investment advisers to adopt, maintain and enforce a code of ethics by January 7, 2005. Under the SEC rule, the code of ethics must, among other things, establish expected standards of conduct and address potential conflicts that may arise in the adviser's personal trading. Among other things, the code must require that advisers begin reporting their personal securities transactions, including transactions in mutual funds managed by the adviser, to their chief compliance officer or other designated person. Also, the investment adviser must provide the code to customers if requested. The text of the rule can be found at <http://www.sec.gov/rules/final/ia-2256.pdf>.

Kutak Rock LLP is a national law firm with 325 attorneys located in 16 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.

Paul D. Borja 202-828-2310
paul.borja@kutakrock.com

Stephen P. Candelmo 202-828-2413
stephen.candelmo@kutakrock.com

Jeremy T. Johnson 202-828-2463
jeremy.johnson@kutakrock.com

This newsletter is a publication of Kutak Rock LLP and is intended for general information only. It may be considered advertising under applicable court rules. It is not intended and should not be construed as legal advice. With regard to specific circumstances, each person should seek the advice of his or her attorney.

Copyright © 2004 Kutak Rock LLP. All rights reserved.