

Regulation FD Decision in *SEC v. Siebel Systems, et al.*

The United States District Court for the Southern District of New York today dismissed in full a complaint filed by the Securities and Exchange Commission against Siebel Systems, Inc. and two of its senior officers, alleging claims for violation of Regulation FD, or "Fair Disclosure." This decision is the first to interpret the scope and effect of Regulation FD, which was promulgated by the SEC in 2000 for the purpose of mandating equal disclosure of material, nonpublic information to investors. Cooley Godward served as lead counsel for Siebel and its officers.

In a 27-page decision, the Honorable George B. Daniels ruled that the SEC had failed to allege that statements made by Siebel's CFO in two private meetings with institutional investors and analysts on April 30, 2003, disclosed material non-public information. The Court found that the substance of each of the statements challenged by the SEC had already been disclosed to the public in prior comments made by Siebel's CEO. The Court took issue with the SEC's scrutinizing, at an "extremely heightened level," the particular words, verb tenses, and syntax of the April 30 statements in order to prove up its case:

No support for such an approach can be found in Regulation FD itself, or in the Proposing and Adopting Releases. Such an approach places an unreasonable burden on a company's management and spokespersons to become linguistic experts, or otherwise live in fear of violating Regulation FD should

the words they use later be interpreted by the SEC as connoting even the slightest variance from the company's public statements ... Regulation FD does not require that corporate officials only utter verbatim statements that were previously publicly made.

Nor was the Court swayed by the fact that various analysts allegedly purchased stock following the April 30 meetings:

The actions taken by those in attendance at [the CFO's] speaking engagements, although a relevant consideration, do not change the nature or content of [his] statements. Regulation FD deals exclusively with the disclosure of material information. The regulation does not prohibit persons speaking on behalf of an issuer, from providing mere positive or negative characterizations, or their optimistic or pessimistic subjective general impressions, based upon or drawn from the material information available to the public. The mere fact that analysts might have considered [the CFO's] private statements significant is not, standing alone, a basis to infer that Regulation FD was violated.

Finally, although the Court declined to reach Siebel's arguments that Regulation FD was promulgated without statutory authority and in violation of the Due Process Clause and the First Amendment to the Constitution, the Court warned the SEC of

the negative impact that overly aggressive enforcement of Regulation FD might have:

Applying Regulation FD in an overly aggressive manner cannot effectively encourage full and complete public disclosure of facts reasonably deemed relevant to investment decisionmaking. It provides no clear guidance for companies to conform their conduct in compliance with Regulation FD. Instead, the enforcement of Regulation FD by excessively scrutinizing vague general comments has a potential chilling effect which can discourage, rather than, encourage public disclosure of material information.

In such case, "the very purpose of the regulation, i.e., to provide the public with a broad flow of relevant investment information, would be thwarted."

In sum, the Court found that Regulation FD "was never intended to be utilized in the manner attempted by the SEC" in this case. Accordingly, the Court held that the deficiencies in the complaint could not be cured, granted Siebel's motion to dismiss

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under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and dismissed the action in its entirety.

Cooley Godward is extremely pleased with this tremendous result. The team was led by John C. Dwyer with valuable contributions from partners Neal Stevens and Jeff Karr and associates Angela Dunning and Richard North. Co-counsel included Kathleen Sullivan, former Dean of Stanford Law School, and Steven Schatz of Wilson, Sonsini, Goodrich & Rosati.

The complete text of the decision can be accessed at www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/491/RegFD_Siebel_Decision.PDF. ■