

SEC Brings Rare Charges in Alleged Regulation Fair Disclosure Violation

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What happened

The SEC recently brought charges against AT&T and three mid-level executives for selectively providing information to Wall Street analysts in alleged violation of Regulation Fair Disclosure (Reg FD). According to the [complaint filed in the Southern District of New York](#), AT&T learned in March 2016 that a “steeper-than-expected” decline in its first quarter smartphone sales would lead the company to fall an estimated \$1 billion short of analysts’ quarterly earnings estimates.

According to the SEC’s allegations, AT&T decided to make a public disclosure “to manage market expectations.” At a scheduled investor conference on March 9, 2016, AT&T’s CFO noted that its previous earnings release had included comments about the company’s decline in wireless equipment revenue and stated that he “would not be surprised” if that trend continued.

Per the SEC’s complaint, the CFO then instructed an investor relations executive to make sure that his team was “working the analysts that still have equipment revenue too high” to get them to lower estimates in light of the decline. Three mid-level investor relations executives allegedly disclosed that data selectively, during private one-on-one calls, to approximately 20 analysts. The SEC alleges that these mid-level executives *knew* that the sales data was “material” to investors and therefore should have been widely disseminated.

Rather than settling the case as is typical in these matters, [AT&T has pledged to fight](#) the lawsuit and has characterized the SEC’s complaint as “a significant departure from the SEC’s own long-standing Regulation FD enforcement policy and ... inconsistent with the testimony of all who participated in these conversations.” According to AT&T, the SEC did not “cite to a single witness involved in any of the analyst calls who believes that the investor relations executives conveyed material nonpublic information.” AT&T also contends that the conversations “concerned the widely reported, industry-wide phase-out of subsidy programs for new smartphone purchases and the impact of this trend on smartphone upgrade rates and equipment revenue,” which had already been discussed publicly. AT&T’s statement standing by its employees and attacking the SEC’s evidence and the basis for its action as “meritless” constitutes a remarkable public challenge to the SEC.

The case is notable for a few reasons. While the rule was promulgated more than 20 years ago, Reg FD enforcement cases are quite uncommon. Indeed, this is only the second time in the last five years that the SEC has brought Reg FD charges. Litigated Reg FD cases, particularly ones where individuals are charged, are even more uncommon; only a few such cases have been filed since Reg FD’s adoption in 2000. It is even more unusual given AT&T’s stature.

Typically, public companies, particularly those of AT&T’s size, would opt to settle – even when they believe the charges are not warranted – rather than take on the cost, exposure, and potential reputational harm that can attend litigation against the SEC. Clearly AT&T must have believed that the SEC was demanding too much in settlement. By the same token, the SEC’s willingness to litigate the case (including its claims against the employees) rather than settle the matter may suggest that the SEC’s current leadership is taking an even more aggressive view of public company enforcement, if not individual liability. The litigation will offer a rare chance for a court to clarify the parameters of this important rule governing selective disclosure.

Why it matters

The SEC’s charges signify that, although Reg FD enforcement actions have been rare, the SEC remains committed to pursuing Reg FD violations where it believes such action is warranted. Accordingly, public company legal, finance, and investor relations teams should pay close attention to the AT&T case. One-on-one

meetings with analysts are nothing new, but public companies should tread lightly. Such have long been viewed as a vehicle for disproportionate disclosure, and this case may indicate a more active SEC focus on potential Reg FD violations. Public companies can mitigate this risk by:

- Adopting and enforcing a compliance policy, an earnings guidance policy and comprehensive disclosure controls designed to promote Reg FD compliance and to detect violations
- Ensuring that at least two company representatives are present for any discussion with analysts
- Providing regular Reg FD compliance training
- Maintaining all public statements in one repository (SEC filings, press releases, transcripts of conference calls, etc.)
- Establishing a protocol for unintentional selective disclosures (public companies must publicly disclose material nonpublic information following an unintentional selective disclosure before the later of 24 hours or the beginning of the next day's trading on the New York Stock Exchange)
- Designating a corporate officer to be responsible for deciding whether information is material, determining whether it already has been disclosed to the public and answering questions regarding Reg FD compliance
- Identifying a team responsible for working with that corporate officer on any Reg FD disclosures. That team should include representatives from legal, investor relations and finance

For questions about mitigating Reg FD enforcement risks or more information on SEC enforcement matters generally, please contact a member of Cooley's white collar defense and investigations and securities litigation groups. For more information and content on corporate disclosures and the public securities arena generally, please visit [Cooley's PubCo blog](#).

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