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June 1, 2005

Update: SEC Enforcement Actions Involving Selective Disclosure

Since the adoption of the Fair Disclosure rule ("Regulation FD") in August 2000, the SEC has brought seven separate enforcement actions and issued one Report of Investigation. These include:

- the November 2002, actions against the Secure Computing Corporation ("Secure"), Siebel Systems, Inc. ("Siebel") and the Raytheon Company ("Raytheon") as well as the CFOs of Secure and Raytheon
- the November 2002 Report of Investigation in respect of Motorola.
- the September 9, 2003 enforcement action against Schering-Plough ("Schering") and its Chairman/CEO
- the June 29, 2004, enforcement action charging Siebel and two of its senior executives with violations of a cease-and-desist order issued in 2002.
- the March 24, 2005, the SEC enforcement actions against Flowserve Corporation ("Flowserve"), its CEO and Director of Investor Relations.

Three of the actions involved selective disclosure to a few institutional investors, two involved selective disclosure at an investor conference and five involved selective disclosure to sell-side analysts.

In this Update, we remind registrants of certain consideration in respect of selective disclosure. In an annex, we summarize each of the relevant enforcement actions and related actions. .

Background

Regulation FD prohibits domestic reporting companies or persons acting on their behalf from disclosing material non-public information to securities analysts, broker-dealers, investment advisers, institutional investors, other investors in the company's securities and certain other enumerated persons before disclosing the same information to the public.

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The timing of the required public disclosure depends on whether the selective disclosure was intentional or non-intentional. In the case of intentional selective disclosure, the issuer must make public disclosure simultaneously (in effect, prohibiting such selective disclosure). In the case of non-intentional disclosure, the issuer must make public disclosure “as soon as reasonably practicable” but no later than the later of 24 hours after the selective disclosure and the commencement of the next day’s trading on the New York Stock Exchange.

Under the regulation, the required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public.

Reminders

- The SEC is serious about monitoring compliance with and enforcing Regulation FD.
- Individuals risk becoming subject to enforcement actions where they play an active role in the violation.
- Non-intentional selective disclosure must be remedied right away and there should be no further disclosure other than a press release (or other FD compliant disclosure).
- Senior officials of issuers should be particularly cautious during private conversations with analysts.
- After-the-fact private communications of material, non-public information to securities professionals are not a proper way to supplement a prior public disclosure that the issuer determines to have been misunderstood or misinterpreted.
- When communicating with securities industry professionals, issuers may not use “code” words to selectively disclose information that they could not selectively disclose expressly.
- Reliance on counsel will not necessarily provide a successful defense in all future cases.
- Senior investor relations officers (investor relations directors as well as key spokespersons such as CFOs and CEOs) must be proactive and vigilant in monitoring public disclosure and acting on Regulation FD violations.
- Having a company policy on proper disclosure will not help if it is not followed. A member of management (most likely the Director of Investor Relations or the

General Counsel) that is responsible for monitoring compliance with Regulation FD needs to present at any session where selective disclosure issues may arise and needs to guide the company spokesperson and preempt or explain problematic statements.

- Selective disclosure problems can arise out of a failure to disclose "good news," as well as a failure to disclose negative news, in contrast to insider trading situations where the positive or negative impact of the non-public information may be relevant.

- The SEC's cautionary advice regarding the particular dangers of providing guidance about earnings estimates to research analysts should be heeded; while one-on-one conversations with analysts are not prohibited, they can certainly create a high degree of risk under Regulation FD.

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This memorandum provides only a general overview of the matters described. It is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group. In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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Annex I

The Enforcement Actions

In the Matter of Flowserve Corporation, C. Scott Greer and Michael Conley

The SEC filed and settled two enforcement proceedings in which Flowserve and its Chairman and Chief Executive Officer, C. Scott Greer, agreed to pay civil penalties of $350,000 and $50,000, respectively. Flowserve, Greer and the Director of Investor Relations, Michael Conley, also consented to the SEC's issuance of a cease-and-desist order.

The SEC found that Flowserve violated Regulation FD and Section 13(a) of the Securities Exchange Act of 1934 by intentionally disclosing material nonpublic information during a meeting with analysts near the end of a reporting period in which it reaffirmed its previously publicly disclosed earnings guidance. This was the first Regulation FD case brought by the SEC involving a reaffirmation of earnings by a company and the first settled enforcement action against a Director of Investor Relations.

Flowserve began 2002 by forecasting annual earnings per share in the range of $1.90 to $2.30. This forecast was lowered in July 2002 and again in September 2002 to $1.45 to $1.55 per share. This lowered forecast, which represented more than a 30% decline in earnings per share estimates since the beginning of the year, was reaffirmed by Flowserve in a press release issued on October 22, 2003.

Greer and Conley met privately with analysts from four investment and brokerage firms on November 19, 2002, forty-two days before the end of Flowserve's fiscal year. Prior to the meeting, Conley did not caution the analysts as to what topics were off limits for purposes of their discussions with Greer. During the meetings, Greer was asked about the company's earnings guidance for the year. Greer reaffirmed the guidance provided in the October press release, despite company policy requiring a response stating that earnings guidance was effective at the date given and would not be updated until the company publicly announced updated guidance. Conley did not caution Greer before Greer answered the analyst's question. Moreover, following the exchange between Greer and the analyst, Conley did not explain Greer's statement nor did he reiterate the company policy as to earnings guidance.

An analyst attending the meeting issued a report that highlighted Flowserve's reaffirmation of its earnings guidance and distributed it to Thomson Financial subscribers of First Call. The next day, the trading volume of Flowserve's stock increased by 75% and the closing stock price was approximately 6% higher than the closing price the day before. Flowserve furnished a Form 8-K to the SEC following the close of the market acknowledging that it had "reaffirmed its full year 2002 estimated earnings per share."

The SEC Litigation Release noted that in addition to the underlying conduct, the SEC considered the respondents' lack of cooperation with the SEC staff; specifically denying that a reaffirmation occurred at the private meeting with analysts, which was inconsistent with the Form 8-K furnished by Flowserve.

In the Matter of Secure Computing Corporation and John McNulty

The SEC brought cease-and-desist proceedings against this Silicon Valley software company and its CFO, John McNulty, based on its finding of non-intentional selective disclosure to an institutional investor and analyst, followed by intentional selective disclosure to four additional institutional investors.

The SEC found that Secure had entered into an agreement in early 2002 with a computer networking company, under which the networking company would bundle Secure's software with its products. The agreement between Secure and the networking company contemplated that a public announcement regarding the transaction would be made after certain customers tested the bundled software and provided testimonials.

After the networking company posted an electronic manual for the bundled software on its website, Secure's executives became concerned that the news of the agreement would leak. On March 6, 2002, Secure posted a page on its own website containing technical information regarding the bundled product. Secure's main web page did not, however, mention the agreement or provide a link to the page with the technical information.

On the same day, McNulty and Secure's Director of Investor Relations conducted a conference call with an institutional investor and a salesman from a brokerage firm that followed Secure. During the call, McNulty was asked questions concerning the bundled product. McNulty asked the IR Director whether he could discuss something that had been posted on Secure's and its new partner's website; at that point, McNulty did not identify the networking company by name. The IR Director, who participated on the call from a separate location, was unaware that McNulty was referring to the deal with the networking company, and confirmed that he could.

McNulty then stated on the call that Secure had entered into a deal with the networking company to sell the bundled product and identified the company by name. McNulty also said that there was information on both Secure's and the partner's websites and provided the Secure web page address describing the product. As McNulty spoke, the IR Director realized that the agreement had not been publicly announced and that McNulty should not be discussing the subject, but she did not interrupt McNulty.

As soon as the call ended, the IR Director attempted to reach McNulty and left him a voicemail message informing him that he had disclosed non-public information during the conference call. However, before he listened to the IR Director's voicemail message, McNulty received an e-mail message from a managing partner of the brokerage firm asking about the deal. McNulty sent an e-mail response providing Secure's web page address for the product integration. McNulty further wrote, "There won't be a[n] announcement/press release until [the networking company] has some customer references - bottom line though it ain't bad." McNulty then heard the voicemail message. Despite recognizing that disclosure of material non-public information had occurred, Secure made no general public announcement of the software agreement on March 6.

The following morning, Secure's management (including McNulty) determined it would have to issue a press release announcing the agreement as soon as possible and sought consent of the computer networking company, but the computer networking company refused. In the meantime, McNulty conducted conference calls with four additional institutional investors, during which he confirmed the existence of the contract.

Over these two days, prior to the issuance of the press release, Secure's stock price rose 15% on unusually large trading volume. At the end of the second day, Secure issued a press release announcing the agreement.

The SEC found that the March 6 disclosure was non-intentional, but that once the non-intentional disclosure was made, the company had a duty to make prompt public disclosure of the information. McNulty compounded the problem the next day by again selectively disclosing information prior to the issuance of the press release. The March 7 selective disclosure was found to be intentional and violated Regulation FD because Secure and McNulty were on notice of the non-intentional disclosure of the preceding day and failed to make simultaneous public disclosure of the information to the public when McNulty spoke to the additional investors.

In the Matter of Siebel Systems, Inc.

The SEC filed and settled a civil action against Siebel in which Siebel agreed to pay a $250,000 civil penalty and entered a cease-and-desist order against Siebel based on its finding that Siebel's CEO intentionally disclosed material non-public information to attendees of an invitation-only investor conference.

At the conference, the CEO made comments that the company was "pretty optimistic" because it was witnessing "a return to normal behavior in IT buying patterns" and that "the linearty of this Q4 will be about what we saw in Q4 of the previous two years." These comments were in contrast to remarks he had made three weeks earlier in a public conference call in which he had stated that there was "an exceptionally soft market for information technology," "spending for tech products and services continues to slide" and that the company expected "things will be tough through the remainder of the year." Following a pre-conference briefing with an analyst who organized the conference, that analyst put out a report in which the analyst stated that "after speaking with management, we think there is a good chance that [the Company's CEO] sets a positive tone at our software conference."

A list of questions that would be asked of the CEO at the conference (including one regarding the fourth quarter outlook) were provided in advance. A list of attendees at the conference was also provided. Siebel's IR Director knew that the conference would not be simultaneously broadcast to the public, but did not advise the CEO of this before he made his statements. The IR Director provided the CEO with talking points containing only information that was already public.

On the day of the conference, Siebel's stock price closed approximately 20% higher than the prior day's close and the trading volume was more than twice the normal daily volume.

The SEC found that Siebel's CEO was aware that his positive comments at the conference were based on material non-public information, namely internal information concerning what the company was observing in its sales pipeline and reflecting a positive trend in the transactions that the company was completing and expected to complete. The company was also aware that the conference would be attended by persons covered by Regulation FD.

The IR Director also knew that the conference was not being disseminated to the public (even though she failed to advise the CEO of that fact). The SEC concluded that under these circumstances Siebel knew or was reckless in not knowing that it made intentional selective disclosure of material non-public information in violation of Regulation FD.

In the Matter of Raytheon Company and Franklyn A. Caine

The SEC issued a cease-and-desist order against Raytheon Company and its CFO, Franklyn A. Caine, in a case where it found that Caine selectively provided earnings guidance to research analysts in order to generate consensus estimates that the company could then take credit for beating.

The SEC alleged that following a February 7, 2001 investor public conference call in which Raytheon's CFO reiterated guidance on Raytheon's 2001 annual earnings per share (EPS) but made no disclosures covering Raytheon's first quarter EPS or its 2001 quarterly or semi-annual earnings distribution, Caine and his staff contacted each sell-side analyst whose estimates were included in Thomson Corporation's First Call Service and requested copies of their quarterly Raytheon financial models. They then conducted one-on-one calls with eleven of the thirteen analysts who followed Raytheon's stock.

During most of these one-on-one calls, Caine disclosed that in 2001 Raytheon expected its earnings distribution to follow the same seasonal pattern as in 2000 (i.e., that Raytheon would generate one-third of its earnings in the first half of 2001 and the remaining two-thirds in the second half of 2001). Previously, however, each analyst had estimated that Raytheon's quarterly earnings distribution would be less seasonal in 2001 than had been reported in 2000 (i.e., that Raytheon would generate more than one-third of its 2001 earnings in the first half of the year). Caine also communicated specific guidance by commenting on analysts' 2001 first quarter EPS estimates. His remarks included statements that their estimates were “aggressive,” “very aggressive,” “too high” and that business would be “back-end loaded.”

In one instance where an analyst was out of town, Caine made the selective disclosure to the analyst’s assistant who, a week later, still had not lowered the firm’s first quarter estimate. Caine sent the analyst an e-mail that repeated the earnings guidance: “When we spoke about your model, I think we said that you should expect our earnings profile to be about the same as it was in 2000 - that is, we generated about one-third of our EPS in the first half of the year. I notice that you’re WAY above that.”

The SEC alleged that after their one-on-one conversations with Raytheon management, each analyst lowered his or her first and second quarter EPS estimates, and increased EPS in the second half of the year. Those analysts that had published their estimates on First Call prior to their one-on-one call submitted revised estimates to First Call. Those analysts who had not yet published estimates on First Call introduced quarterly EPS estimates on First Call containing the EPS numbers from their revised Raytheon model. Generally, analysts published First Call notes discussing or containing their revised Raytheon EPS estimates. On February 14, 2001, one analyst indicated in a First Call report that the analyst had revised the analyst’s 2001 quarterly earnings profile based on a discussion with Raytheon management. In addition, in at least two instances, analysts communicated directly with their firm’s sales force to discuss their revised Raytheon EPS estimates.

By March 12, 2001, the Street’s 2001 first quarter EPS consensus estimate had dropped from $0.31 to $0.27, a penny below Raytheon’s internal forecast. The Street’s $0.27 first quarter EPS consensus remained unchanged until Raytheon reported first quarter EPS of $0.28 in April 2001. In a publicly available conference call moderated by Caine discussing Raytheon’s first quarter results, Raytheon stated that it was “pleased to report another quarter of progress toward our goal of restoring your confidence in our company. This quarter represents the fifth straight quarter we have met or exceeded our commitments to you.”

Unlike the analysts who received selective disclosures from Raytheon during the first quarter, the two sell-side analysts who did not have private conversations with Raytheon maintained the same quarterly EPS estimate throughout the quarter.

The SEC found that Raytheon’s one-on-one conversations constituted intentional selective disclosure and that Raytheon was required to make simultaneous public disclosure. The SEC concluded that the disclosures were material on the basis of a combination of factors, including the subject matter (i.e., earnings guidance), Caines's conduct in reaching out to the analysts, the consistent reaction of the analysts in lowering their first quarter estimates, the decision of two analysts to announce to their sales forces the lowering of first quarter estimates and e-mails sent by one sales force. The disclosures were non-public as the company had not publicly disclosed guidance on first quarter EPS or on quarterly earnings distribution, and the company had never publicly given guidance on anticipated first quarter earnings or revenues for particular business units. Thus communications to analysts that their revenue projections for business units were high, aggressive or very aggressive revealed non-public information.

In the Matter of Schering-Plough Corporation and Richard J. Kogan

The SEC imposed a cease-and-desist order against Schering and a $50,000 fine against its then Chairman and CEO Richard J. Kogan for several private meetings during which the CEO is alleged to have intentionally communicated information that was negative, material and non-public “through a combination of spoken language, tone, emphasis and demeanor.” During the period in question, Schering’s internal forecast predicted an EPS of $1.03 in 2003, far below Wall Street’s consensus of $1.42. At the same time, Schering’s internal estimates for 3Q2002 and FY2002 were, respectively, $0.07 and $0.06 below Wall Street’s consensus.

The first set of the selective disclosure meetings took place during the week of September 20, 2002 in Boston with analysts and portfolio managers from four institutional investors, three of which were among Schering’s largest shareholders. An additional meeting took place on October 3, 2002 at Schering’s New Jersey headquarters, with approximately 25 analysts and portfolio managers in attendance. On the evening of October 3, 2003, Schering issued a press release which publicized much if not all of what had been disclosed at the private meetings.

Schering had publicly predicted a poor annual performance as early as August 13, 2002 when it filed a From 10-Q disclosing an adverse ruling in patent litigation related to its biggest selling drug (28% of sales and a higher percentage of earnings). The Form 10-Q stated that while Schering was appealing the decision, generic forms of the drug could become available as soon as December 2002 and that the resulting competition “would likely have a rapid, sharp and material adverse effect on the Company’s results of operations." Schering also disclosed that it expected U.S. wholesalers to deplete their inventories by the end of the year and that this would have an approximately $250 million negative impact on pre-tax profits.

At the Boston meetings with the Wellington Management Company, the Massachusetts Financial Services Company, Fidelity Management & Research Company and Putnam Investments, Kogan is alleged to have spoken of Schering's problems in *definite* terms, as opposed to the *contingent* phrasing that had been used in earlier public statements. He also told the institutional investors that Schering did not favor repurchasing its own shares, that there were no significant cost-cutting measures planned for 2003 and that gross margins would be negatively impacted by product launches, none of which was public knowledge. As a result of these meetings, Fidelity and Putnam downgraded Schering's stock and all four institutions sold heavily. Between October 1 and October 3, 2002, Schering's stock price fell 17% on four times the stock's normal daily trading volume. Selling by Fidelity and Putnam amounted to more than 30% of the overall market volume for the period.

On October 3, 2002, Schering hosted approximately 25 analysts and fund managers at its New Jersey headquarters and again selectively disclosed its anticipated large negative performance. Schering did issue a press release on the night of October 3 containing much if not all of what it had been selectively disclosing, but only in response to media inquiries asking if Kogan had explicitly used the word "terrible" to describe the company's performance during the meeting.

While the SEC found that the CEO's purpose may not have been to suggest that institutional investors sell Schering stock, his conduct nonetheless violated Regulation FD by "providing guidance that included material, non-public information about Schering's earnings prospects during private meetings with institutional investors and analysts, and by failing to make a public disclosure of the information as required by Regulation FD. … Kogan's statements, demeanor and general expression of concern for Schering's prospects during private meetings amounted to selective disclosure and prompted a significant sell-off in Schering stock."

Pending Litigation

On June 29, 2004, the SEC filed a civil action against Siebel, Siebel's CFO, Kenneth A. Goldman, and Siebel's current senior office and former IR Director, Mark D. Hanson. Siebel is charged with violating the 2002 cease-and-desist order and the officers with aiding and abetting the violation.

The SEC's complaint alleges that, six months after the cease-and-desist order was issued, the CFO disclosed material non-public information during two private events he attended with the IR Director in New York on April 30, 2003, a "one-on-one" meeting with an institutional investor and an invitation-only dinner hosted by Morgan Stanley. The SEC charges that, at both the meeting and the dinner, Goldman made positive comments about the company's business activity levels and transaction pipeline that materially contrasted with negative public statements Siebel made about its business in the preceding several weeks.

According to the complaint, based on Goldman's comments during the April 30 meeting, an institutional investor converted its 108,200 share short position in Siebel stock into a 114,200 share long position-a net change of 222,400 shares. On May 1, 2003, the day following the private meetings, the company's stock price closed approximately 8% higher than the prior day's close, and the trading volume was nearly twice the average daily volume for the preceding year.

The SEC further alleges that Hanson, who had been put in charge of Siebel's Regulation FD compliance, failed to prevent the selective disclosures, and that both Hanson and Goldman failed to cause Siebel to make a public disclosure the next day. Finally, the complaint alleges that Siebel failed to maintain disclosure controls and procedures designed to ensure the proper handling of information that is required to be disclosed in reports filed or submitted under the Exchange Act and to ensure that management has the information it needs to make timely disclosure decisions.

This matter is pending.

Report of Investigation

The SEC conducted an investigation of Motorola in which it found that the company made selective disclosure to analysts based on clarifications of earnings guidance. Because the disclosure had been cleared by in-house counsel, the SEC issued a report of investigation instead of seeking a cease-and-desist order or other enforcement action.

In a February 23, 2001 press release and a public conference call, Motorola had said that sales and orders were experiencing “significant weakness” and that Motorola was likely to miss its earnings estimates for the quarter. According to the SEC’s Report, following the announcement, the company's IR Director monitored the analysts’ models and research notes and concluded that the analysts had not understood from the public call just how disappointing the results for the quarter would be. Despite this, Motorola specifically decided not to issue a new press release or otherwise make a timely public disclosure of this additional clarifying information.

Motorola decided to telephone the analysts and tell them that “significant,” as used on the public call, actually meant a “25% or more” decline. During the period of the IR Director’s telephone calls, there were significant increases in the trading volume of

Motorola stock at most of the firms where analysts were contacted, and the per share price of Motorola stock fell more than 15%.

Prior to making the phone calls to analysts, the IR Director sought and obtained the advice of Motorola's in-house legal counsel responsible for SEC reporting and disclosure issues, who advised him that he could contact selected analysts, reiterate the information that had been disclosed on the public call, and provide quantitative definitions for certain qualitative terms that had been used. Counsel based that advice on the conclusion that providing a quantitative definition for the term "significant" was not material and that Motorola's particular definition of the word "significant" was public for Regulation FD purposes.

The SEC noted that counsel's advice was erroneous in both respects because Motorola's use of "significant" had apparently not conveyed the particular quantitative meaning (i.e., 25% or more) that Motorola had intended and, the fact that its IR Director believed it necessary to call analysts to guide them to a "25% or more" conclusion demonstrated that Motorola considered it quite important to communicate that specific figure, at that level of detail, and, therefore, the information was material.

In reaching its conclusions, the SEC made the following observations:

The information selectively disclosed by Motorola clearly was material. Although the SEC stated when it adopted Regulation FD that "issuers will not be second-guessed on close materiality judgments," the information conveyed in the IR Director's telephone calls to analysts clearly was material in the eyes of the SEC. In its view, there is a substantial likelihood that a reasonable investor would consider it important that Motorola's sales and orders were down by 25% or more for the quarter even though the company already had explained that sales and orders were experiencing "significant weakness." Counsel erred in concluding that the IR Director would not be communicating material non-public information by providing a quantitative definition for the term "significant." Counsel failed to take into account the relevant circumstances of this situation, particularly the context of what the IR Director was planning to do, or why he was planning to do it. The fact that the IR Director believed it necessary to call analysts to guide them to a "25% or more" conclusion demonstrates that, regardless of what Motorola originally intended to communicate by the term "significant weakness," the IR Director subsequently discovered that it had not been understood to mean "25% or more." Similarly, the IR Director's plan to call analysts seriatim demonstrated that he considered it quite important to communicate this specific quantitative figure, at this level of detail, to those analysts. As such, these circumstances demonstrate - and should have demonstrated to counsel - that the specific quantitative figure was important information that had not previously been made public.

Senior officials of issuers should be particularly cautious during private conversations with analysts. Although Regulation FD does not prohibit private discussions between investor relations officers and analysts, it does prohibit the communication of material, non-public information during those discussions. In the Release adopting Regulation FD, the SEC underscored that selective disclosure of corporate earnings, particularly during private conversations, will likely violate Regulation FD.

After-the-fact private communications of material, non-public information to securities professionals are not a proper way to supplement a prior public disclosure that the issuer determines to have been misunderstood or misinterpreted. Regulation FD was adopted out of concern that issuers were disclosing important non-public information, such as advance warnings of earnings results, to securities analysts or selected institutional investors or both, before making full disclosure of the same information to the general public. If an issuer becomes aware, as Motorola did, that information it is trying to convey to the public has not in fact been conveyed, and the issuer determines that further disclosure is necessary, the proper course of action under Regulation FD is to make additional public disclosure. The SEC was particularly troubled that in Motorola's case, after it knew that even securities professionals had failed to understand the message it purportedly was trying to convey, the company chose to contact selected analysts only, rather than make broad public disclosure.

When communicating with securities industry professionals, issuers may not use "code" words to selectively disclose information that they could not selectively disclose expressly. Issuers may not evade the public disclosure requirements of Regulation FD by using code words or winks and nods to convey material non-public information during private conversations. The SEC was particularly troubled in the Motorola case by the fact that Motorola communicated to the public using general terms such as "significant," and then engaged in private discussions with analysts to provide a more detailed quantitative definition of the code word "significant."

Reliance on counsel will not necessarily provide a successful defense in all future cases. In issuing a report rather than commencing a formal enforcement action, the SEC credited Motorola's reliance on counsel in the context of this case concerning Regulation FD issues because it understood that legal advice, although erroneous, was sought and given in good faith.

In cases where relevant facts are concealed from counsel, or where counsel's advice was not faithfully given and followed, reliance on counsel will not help. In addition, in a case where the officer knows that the information to be selectively disclosed would be important to the reasonable investor, he or she cannot seek out and rely on counsel's consent as a shield against liability. In many cases, an issuer's chief financial officer or investor relations officer may have a keener awareness than company counsel of the significance of information to investors. Consultation with counsel will not relieve the officer from responsibility for disclosure of information that he or she personally knows, or is reckless in not knowing, is material and non-public.

The SEC noted that, having now issued the Motorola report, it would be less likely in future cases to credit reliance on counsel for the advice rendered in Motorola's case.