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SEC sues AT&T over alleged Regulation FD violations

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On March 5, 2021, the U.S. Securities and Exchange Commission (SEC) filed a complaint against AT&T Inc. (AT&T), alleging repeated violations of Regulation FD, and three of its investor relations (IR) executives alleging aiding and abetting such violations.

Regulation FD, adopted in 2000, reflects the view that all investors should have equal access to a company's material disclosures at the same time. It bars issuers and certain others acting on their behalf from disclosing material non-public information to analysts, investors, and others reasonably likely to trade on the information. In fact, one of the primary purposes of Regulation FD is to prohibit issuers from selectively providing non-public guidance to securities analysts regarding earnings forecasts. Though Regulation FD does not define materiality, the adopting release provides that information is material if there is a "substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision or if the facts "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

According to allegations in the SEC complaint, filed in the U.S. District Court for the Southern District of New York, AT&T disclosed internal smartphone sales data by making "private, one-on-one phone calls to analysts at approximately 20 separate firms" between March 9, 2016, and April 21, 2016, five days before AT&T publicly reported its first quarter results, despite knowing that such information was considered "material" to investors and, therefore, should not be selectively disclosed. The SEC alleges that the phone calls were part of a plan to induce enough analysts to lower their estimates so that the consensus revenue estimate would fall to the level that AT&T expected to report. Specifically, the SEC alleges that the three IR executives disclosed "AT&T's internal upgrade rate and wireless equipment revenue data for the first quarter on these calls" and communicated that "the analysts' revenue estimates were above what AT&T was expecting to report and, therefore, needed to be reduced." Shortly after the call, each of the 20 analysts issued revised research reports, reducing the revenue estimates for AT&T, almost all of them citing "a record low upgrade rate and reduced wireless equipment revenue as the primary reasons." Consequently, the analysts' consensus revenue estimate was lowered and AT&T subsequently reported first quarter revenue that was slightly above the revised consensus revenue estimate.

AT&T has contested the SEC's claims, stating in its public statement that the conversations the three IR employees had with the analysts "concerned the widely reported, industry-wide phase-out subsidy programs for new smartphone purchases and the impact of this trend, and that AT&T disclosed this trend "on multiple occasions before the analyst calls in question."

The SEC is seeking permanent injunctive relief and civil monetary penalties against AT&T and its three IR executives.

With respect to Regulation FD, the SEC has taken only infrequent enforcement actions in recent years. The enforcement action against AT&T demonstrates a potentially developing focus on public companies and their executives who selectively disclose material non-public information, and that the SEC is willing to take action, including litigation when necessary, against such conduct. As stated by Richard R. Best, Director of the SEC's New York Regional Office, AT&T's alleged selective disclosure of material information in private phone calls with analysts "is precisely the type of conduct Regulation FD was designed to prevent."

While taking note of the AT&T proceeding as the litigation unfolds, public companies and their IR teams, in consultation with internal counsel, should review and develop, if necessary, systems to manage selective disclosure risks in their investor relations programs to address communication policies with securities analysts. These risks can arise from communications with analysts, especially during or near quiet periods—in situations where the issuer's internal estimates materially vary from analysts' estimates—and attempts to reconcile public disclosure of trends with private disclosures of more specific or quantified information.

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