SECURITIES

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SEC Alleges Another "Fair Disclosure" Violation Against Siebel Systems, Along with Lack of Disclosure Controls

Also Charges Company Officials with Aiding and Abetting

On June 29, 2004, the SEC filed a civil action in federal district court alleging that Siebel Systems, Inc. violated Regulation FD by selectively disclosing material nonpublic information. The complaint also alleges that Siebel failed to maintain adequate disclosure controls and procedures in violation of new SEC Rule 13a-15, the first time the SEC has brought charges under this new rule. And, the SEC charges Siebel's CFO and its former Senior Vice President for Corporate Development and Investor Relations with aiding and abetting Siebel's alleged Regulation FD violations.

These charges follow Siebel's entry into a settlement with the SEC in November 2002 concerning a prior violation of Regulation FD in which Siebel paid a $250,000 fine and consented to cease and desist from committing further violations of Regulation FD. Accordingly, Siebel and the two named officers also has been charged with violating the cease and desist order. For its part, Seibel maintains that it has meritorious defenses to the lawsuit and is prepared to pursue resolution of the matter through the normal course of civil litigation.

According to the SEC, at two private meetings on April 30, 2003 -- a one-on-one meeting with an institutional investor and an "invitation-only" dinner hosted by Morgan Stanley -- attended by the CFO and SVP-IR, the CFO made positive comments about Siebel's business activity levels and transaction pipeline that were materially different from negative statements that the company had made in prior weeks. The complaint further alleges that within "roughly four trading hours" after the meeting, the institutional investor converted a short position in Siebel stock to a long position -- a net change of 222,400 shares. The morning after the dinner, Morgan Stanley began publicizing the positive statements to its institutional clients. Siebel's stock price rose over 8% the next day on trading volume that was nearly twice the average daily trading volume over the preceding year.

This case is notable for a number of reasons:

- First, it demonstrates that the SEC continues to be vigilant in identifying and prosecuting instances of selective disclosure in violation of Regulation FD. Historically, large spikes in price and trading volume have triggered insider trading inquiries. Unusual trading activity should now be expected to prompt inquiry also into possible Regulation FD violations.

- Second, the complaint marks the first time the SEC has alleged a violation of Rule 13a-15 under the Securities Exchange Act of 1934. The complaint broadly characterizes Rule 13a-15 as requiring the maintenance of controls and procedures designed to ensure "the proper and timely handling of information" required to be disclosed by an issuer in its 1934 Act reports. It remains to be seen whether the SEC intends routinely to charge a violation of Rule 13a-15 in all Regulation FD cases or whether it was motivated to cite the additional charge in this case based on the allegation in the complaint that "[f]ollowing the entry of the cease-and-desist order, [Siebel] did little to prevent future violation of Regulation FD."

- Third, this is the first Regulation FD case to our knowledge in which aiding and abetting liability has been alleged. In the case of the CFO, the SEC says he knowingly rendered substantial assistance to Siebel's primary violation of Regulation FD and the cease and desist order by making statements that he knew, or was reckless in not knowing, constituted material nonpublic information. The SVP--IR, who was responsible for the company's Regulation FD compliance, was charged with aiding and abetting the violations of Regulation FD and the cease and desist order for failing to take precautions to ensure that the CFO did not disclose material nonpublic information under circumstances where he knew the disclosures would not be simultaneously made public. The SEC complaint raises the stakes for company officials who, although they do not make the prohibited disclosures, are responsible for the company's Regulation FD compliance.

The SEC litigation release and the complaint can be found at http://www.sec.gov /litigation/litreleases/lr18766.htm. For additional information concerning compliance with Regulation FD, see our November 2002 advisory, *Regulation FD's Bounty*.

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