

# SEC Sues AT&T and Three Executives for Selective Disclosures to Analysts

March 9, 2021

On March 5, 2021, the U.S. Securities and Exchange Commission (“SEC”) filed suit against AT&T and three executives, alleging that the defendants selectively disclosed AT&T’s actual and projected financial results in private calls to research analysts in 2016. The SEC’s complaint, filed in the U.S. District Court for the Southern District of New York, claims that AT&T violated Regulation Fair Disclosure (“Regulation FD”) and the reporting provisions of the Securities Exchange Act of 1934 (“Exchange Act”), and that the Investment Relations executives who made the calls aided and abetted those violations.<sup>1</sup>

**Alleged selective disclosures.** According to the SEC’s complaint, AT&T learned in March of 2016 that its quarterly revenue was expected to fall short of analysts’ estimates due to record low sales of new smartphones to AT&T customers. This decline left AT&T on track to fall \$1 billion short of analysts’ consensus revenue estimate.

The complaint notes that AT&T considered, but ultimately did not file, a Form-8-K that would directly and publicly address the downward trend in its revenue. Although AT&T’s Chief Financial Officer (“CFO”) addressed the issue at an investor conference that was webcast, he declined to provide quantitative information. Instead, he referred back to his comments from AT&T’s prior quarter earnings release regarding the decline in wireless equipment revenue and stated that he “would not be surprised” to see that trend continue. These statements, however, did not cause analysts to significantly reduce their revenue estimates for AT&T.

The SEC alleges that the CFO, hoping to avoid a third consecutive quarter of missing consensus, instructed the company’s Investor Relations Director to “work the analysts who still have [revenue from smartphone sales] too high.” The Director then asked his team to “walk the analysts down” from their initial estimates. During the six weeks before AT&T announced its quarterly results, the three Investor Relations executives named in the complaint made private phone calls to twenty equity stock analysts over

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<sup>1</sup> Complaint, *Secs. & Exch. Comm’n v. AT&T et al.*, No. 1 :21-cv-01951 (S.D.N.Y. Mar. 5, 2021), available at <https://www.sec.gov/litigation/complaints/2021/comp-pr2021-43.pdf>.

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the course of six weeks. In those calls, the executives purportedly disclosed material nonpublic information (“MNPI”) including AT&T’s projected and actual smartphone sale rates and its projected and actual revenue from wireless equipment. In some calls, the executives allegedly misrepresented AT&T’s internal results as publicly available consensus estimates, conduct which the SEC pointed to as evidence that they understood the disclosures were prohibited. The SEC’s complaint also noted that AT&T’s Regulation FD training, as provided to the Investor Relations Department, labelled both revenue information and smartphone sales data as being material information to investors.

As a result of those calls, the complaint alleges, each of the twenty analysts revised their initial revenue forecasts downward, many of them citing record low smartphone sales and related declines in revenue. Many of the analysts reduced their estimates to the level that AT&T had internally forecast or planned to report. The revised research reports decreased the overall consensus revenue estimate for AT&T, enabling the company’s first-quarter earnings, announced at the end of April, to beat the final consensus revenue estimate by less than \$100 million.

The SEC claims the alleged conduct constitutes a violation of Section 13(a) of the Exchange Act and of Regulation FD by AT&T, and that the individual executives’ conduct aided and abetted AT&T’s violations. The SEC seeks a permanent injunction and civil monetary penalties as to all defendants.

**AT&T’s defense of its disclosures.** In response to the SEC’s filing, AT&T issued a press release branding the suit as “a significant departure from the SEC’s own long-standing Regulation FD enforcement policy.”<sup>2</sup> AT&T disputed that the information provided to analysts qualified as MNPI, noting that AT&T had publicly disclosed trends of declining phone sales and that the decline had not significantly impacted AT&T’s earnings, which are primarily generated by wireless service plans. AT&T also expressed a broader concern that the lawsuit would “chill productive communications between companies and analysts, something the SEC was worried about when it adopted Regulation FD some 20 years ago.”

**The SEC’s increasing focus on selective disclosures.** The AT&T matter continues a recent trend by the SEC to focus on selective disclosures. In 2018, the SEC disseminated interpretive guidance on cybersecurity disclosure obligations, indicating that companies should implement Regulation FD-compliant policies for handling MNPI arising from

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<sup>2</sup> Press Release, *AT&T Disputes SEC Allegations*, AT&T Inc. (Mar. 5, 2021), <https://www.prnewswire.com/news-releases/att-disputes-sec-allegations-301241737.html>. The SEC has previously sued to enforce Regulation FD on the basis of similar factual allegations. See, e.g., *Complaint, Secs. & Exch. Comm’n v. Office Depot*, No. 9:10-cv-81239 (S.D. Fla. Oct. 21, 2010) (alleging that Office Depot and two of its executives selectively disclosed to analysts and institutional investors that the company would fall short of earnings estimates).

cybersecurity risks and incidents.<sup>3</sup> In mid-2019, the SEC settled a rare standalone Regulation FD action concerning leaks to analysts of confidential meetings with the Food and Drug Administration regarding a potential drug approval.<sup>4</sup> In a press release regarding its recent AT&T filing, the SEC emphasized that it “remains committed to assuring an even playing field by taking appropriate action, including litigation when necessary, against public companies and their executives who selectively disclose material nonpublic information.”<sup>5</sup> This litigation reinforces the need for companies to implement and maintain robust policies and procedures governing the misuse of MNPI and ensure appropriate tone at the top concerning the misuse of MNPI.

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Please do not hesitate to contact us with any questions.



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<sup>3</sup> *Commission Statement and Guidance of Public Company Cybersecurity Disclosures*, 17 C.F.R. Parts 229 and 249, Release No. 33-10459 (Feb. 21, 2019), <https://www.sec.gov/rules/interp/2018/33-10459.pdf>.

<sup>4</sup> For our prior coverage, see Debevoise & Plimpton, *SEC Charges Pharmaceutical Company for Violation of Regulation FD, Reinforcing Need to Establish Policies for Handling Material Non-Public Information* (Aug. 23, 2019), <https://www.debevoise.com/insights/publications/2019/08/sec-charges-pharmaceutical-company-for-violation>.

<sup>5</sup> Press Release, *SEC Charges AT&T and Three Executives with Selectively Providing Information to Wall Street Analysts, Secs. & Exch. Comm'n* (Mar. 5, 2021), <https://www.sec.gov/news/press-release/2021-43>.