

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 63154/October 21, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-14096**

**In the Matter of**

**PATRICIA A. MCKAY, CPA**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Patricia A. McKay (“Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### **Summary**

1. Office Depot, Inc. ("Office Depot") violated Regulation FD in 2007 by selectively communicating to analysts that it would not meet analysts' quarterly earnings estimates for Office Depot. After a discussion between McKay and the company's Chief Executive Officer ("CEO"), Office Depot conducted one-on-one calls with the analysts late in the second quarter of 2007. The company did not directly tell the analysts that it would not meet their expectations; rather, this message was signaled through its references to recent public statements of comparable companies about the impact of the slowing economy on their earnings, and reminders of Office Depot's prior cautionary public statements. The analysts promptly lowered their estimates for the period. McKay assisted in preparing the talking points for the calls and she and the CEO were aware of the declining estimates while the company made the calls. The company also continued to make the calls despite McKay being notified of some analysts' concerns of, among other things, the lack of public disclosure. Six days after the calls began, Office Depot filed a Form 8-K announcing to the market, among other things, that its sales and earnings would be negatively impacted due to a continued soft economy. Prior to that Form 8-K, Office Depot's share price had significantly dropped on increased trading volume.

#### **Respondent**

2. McKay, a Florida licensed certified public accountant, age 52, served from September 2005 through February 2008 as executive vice president and Chief Financial Officer ("CFO") of Office Depot. McKay also served as a member of Office Depot's board of directors from May 2004 until assuming her role as CFO.

#### **Related Party**

3. Office Depot, a Delaware corporation based in Boca Raton, Florida, is an office products supplier. Office Depot's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded on the New York Stock Exchange.

#### **Background**

4. Office Depot, as a company policy, did not offer specific quarterly earnings guidance during the relevant time period. In late 2006 and early 2007, the CEO and McKay believed the significant earnings per share ("EPS") growth the company achieved in 2005 and early 2006 was not sustainable and set out to temper analysts' expectations. In February 2007, during a publicly broadcasted earnings conference call, the CEO and McKay described Office

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Depot's business model, which contemplated mid to upper teens EPS growth over the long-term. On another public conference call in late April 2007, the company warned investors that its largest business segments were facing a softening in demand that was continuing into the second quarter. Shortly following the analysts' publication of EPS estimates for Office Depot in late April (when most analysts lowered their estimates for Office Depot), the company reiterated at a publicly available investor conference in early May that its business model contemplated only mid to upper teens EPS growth over the long-term and that the company faced a softening demand environment.

5. On May 31, 2007, the CEO alerted Office Depot's board of directors and the executive committee that the company would not likely meet the analysts' consensus \$0.48 EPS estimate for the second quarter and that senior management was discussing a strategy for advance communication to avoid a complete surprise to the market.

6. Office Depot did not have written Regulation FD policies or procedures at the time. The company had also never conducted any formal Regulation FD training prior to June 2007, although its general counsel had occasionally distributed guidance and updates on Regulation FD.

#### **Office Depot's Selective Disclosures to Analysts**

7. In early June 2007, in response to the CEO's May 31, 2007 notice to the board of directors, McKay instructed the director of investor relations and his immediate supervisor to prepare a draft press release for her review previewing certain second quarter earnings information should the company later determine to issue one. By mid June 2007, certain of the company's preliminary internal estimates forecasted up to \$0.44 EPS for the quarter. McKay and the CEO were uncomfortable with issuing a press release because the company's internal estimates were incomplete at this point.

8. On June 20, 2007, ten days prior to the close of Office Depot's second quarter for 2007, the CEO and McKay, both of whom had investor relations experience, discussed how to encourage analysts to revisit their analysis of the company. The CEO, in an attempt to get analysts to lower their estimates, proposed to McKay that the company talk to the analysts and refer them to recent earnings announcements by two comparable companies that had recently publicly announced results which were impacted by the slowing economy. The CEO further suggested that Office Depot point out on the calls what the company had said to the market in April and May 2007. The CEO and McKay jointly decided to adopt this approach.

9. McKay, the director of investor relations, and the director's immediate supervisor drafted talking points, based on the CEO's suggestions, for use as a guide for the calls with analysts. The agreed upon talking points are set forth below.

- Haven't spoken in a while, just want to touch base.
- At beg. of Qtr we've talked about a number of head winds that we were facing this quarter including a softening economy, especially at small end.

- I think the earnings release we have seen from the likes of [Company A], [Company B], and [Company C] have been interesting.
  - On a sequential basis, [Company A] and [Company B] domestic comps were down substantially over prior quarters.
  - [Company C] mentioned economic conditions as a reason for their slowed growth.
- Some have pointed to better conditions in the second half of the year – however who knows?
- Remind you that economic model contemplates stable economic conditions – that is midteens growth

10. On Friday, June 22, 2007, and the following Monday, June 25, 2007, the director of investor relations spoke individually with all 18 analysts covering Office Depot and conveyed to them the information contained in the talking points. Office Depot did not regularly initiate calls of this type to all 18 analysts covering the company. Word of these calls quickly spread among analysts, some of whom believed that Office Depot was “talking down” analysts’ earnings estimates.

11. McKay and the CEO were in communication with the director of investor relations during and after the calls. On Saturday, June 23, 2007, McKay emailed the analysts’ revised estimates to the CEO and advised that the director of investor relations had spoken to most of the company’s analysts and that two had reduced their estimates. The CEO responded positively and encouraged the calls to continue so that additional analysts would lower their estimates. On Monday, June 25, 2007, McKay asked the director of investor relations’ immediate supervisor whether the director of investor relations had contacted a particular analyst whose EPS estimate was the highest and had not yet been revised. Also on Monday, the CEO requested and received an update, which showed that the analysts’ consensus estimate was still \$0.46. With McKay’s knowledge, the CEO then commented to the director of investor relations that they still needed conversations with a few more analysts.

12. Office Depot’s calls influenced many analysts to revise and lower their second quarter 2007 forecasts. By the end of the second day of the calls, fifteen of the eighteen analysts lowered their estimates, bringing the consensus estimate down from \$0.48 to \$0.45.

### **Analyst and Investor Reaction to Calls and Calls to Institutional Investors**

13. During a call on Friday, June 22, 2007, one analyst expressed concern to the director of investor relations about the lack of a press release. That same day, the director of investor relations conveyed to McKay this concern and that one other analyst was informing his customers that he expected Office Depot’s earnings to be down based on his call.

14. On Monday, June 25, 2007, the director of investor relations notified McKay that another analyst told him that he was surprised at the lack of a press release and indicated that several of his clients were also surprised. Also, late Monday evening, McKay instructed the

director of investor relations to call the company's top twenty institutional investors and relay the same talking points to them, which he did the following day.

### **Office Depot Files an 8-K**

15. After the close of the market on Thursday, June 28, 2007, six days after the calls to analysts began, Office Depot filed a Form 8-K publicly disclosing, among other things, that its earnings would be “negatively impacted due to continued soft economic conditions.”

### **Market Reaction**

16. Between Friday, June 22, 2007 (the day Office Depot began calling analysts) and June 28, 2007 (the last market close before Office Depot filed its 8-K), the company's stock dropped 7.7%. On the first day of the calls, Office Depot's stock closed at \$33.49 per share. This was a decrease of 2.8% from the previous close, on trading volume of almost 7.5 million shares, which was two and half times the average volume for the remainder of that week. On the second day of calls, the stock dropped another 3.5% to \$32.32 per share on trading volume of 7 million shares.

### **Violations**

17. Regulation FD prohibits issuers or persons acting on their behalf from disclosing material nonpublic information to securities analysts, institutional investors, or other enumerated persons without disclosing that information to the public. See generally Regulation FD, Rule 100; Final Rule: Selective Disclosure and Insider Trading, Exchange Act Rel. No. 43154, 65 Fed. Reg. 51,716 (Aug. 15, 2000) (“Adopting Release”). Where a selective disclosure of material nonpublic information is “intentional,” issuers must make a public disclosure simultaneously with the selective disclosure. Regulation FD, Rule 100(a)(1). Intentional means “when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.” Regulation FD, Rule 101(a). Where the selective disclosure is “non-intentional,” Regulation FD requires issuers to make a public disclosure of the information promptly after a senior official of the issuer learns of the non-intentional disclosure. Rules 100(a)(2) & 101(d). Regulation FD defines “promptly” to mean “as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange).” Rule 101(d).

18. An issuer's failure to make a required public disclosure pursuant to Regulation FD constitutes a violation of both Regulation FD and Section 13(a) of the Exchange Act. See Adopting Release, 65 Fed. Reg. at 51,726.

19. The Commission adopted Regulation FD out of concern that issuers were “disclosing important nonpublic 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.” Id. at 51,716. The Commission explained in the Adopting Release:

When an issuer official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the issuer official communicates selectively to the analyst nonpublic information that the company's anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the issuer likely will have violated Regulation FD. This is true whether the information about earnings is communicated expressly or through indirect "guidance," the meaning of which is apparent though implied.

Id. at 51,721.

20. Furthermore, the Division of Corporation Finance has stated in its interpretations of Regulation FD that "a confirmation of expected quarterly earnings made near the end of a quarter might convey information about how the issuer actually performed. In that respect, the inference a reasonable investor may draw from such a confirmation may differ significantly from the inference he or she may have drawn from the original forecast early in the quarter." Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Regulation FD, Item 1 (4th supp., May 2001) ("Telephone Interpretations"). (On August 14, 2009, the Telephone Interpretations regarding Regulation FD were migrated over to the Compliance & Disclosure Interpretation format.)

21. As a result of the conduct described above, McKay was a cause of Office Depot's violations of Regulation FD and Section 13(a) of the Exchange Act.

#### IV.

#### Undertaking

Respondent has agreed to the following undertaking:

McKay shall, within 10 days of the entry of this Order, make a payment in the nature of a penalty in the amount of \$50,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies McKay as a Respondent in these proceedings, and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Glenn S. Gordon, Division of Enforcement, Securities and Exchange Commission, 801 Brickell Avenue, Suite 1800, Miami, Florida 33131.

Respondent agrees that she shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source including, but not limited to, payment made pursuant to any

insurance policy, with regard to any amounts that Respondent shall pay pursuant to this Order, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors. Respondent further agrees that she shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state or local tax for any amounts that Respondent shall pay pursuant to this Order, regardless of whether such amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

In determining whether to accept the Offer, the Commission has considered the Respondent's undertaking. Respondent agrees that if the Division of Enforcement believes that Respondent has not satisfied this undertaking, it may petition the Commission to reopen the matter to determine whether additional sanctions are appropriate.

V.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, IT IS HEREBY ORDERED that pursuant to Section 21C of the Exchange Act, Respondent McKay cease and desist from causing any violations and any future violations of Section 13(a) of the Exchange Act and Regulation FD.

By the Commission.

Elizabeth M. Murphy  
Secretary

Service List

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), on the Respondent and her legal agent.

The attached Order has been sent to the following parties and other persons entitled to notice:

Honorable Brenda P. Murray  
Chief Administrative Law Judge  
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