



JONES DAY
COMMENTARY

SEC RENEWS FOCUS ON REGULATION FD

After five years of almost no formal actions, the SEC has filed two complaints in the last six months alleging violations of Regulation FD (“Reg FD”). The most recent case is *SEC v. Presstek*, which the SEC filed on March 9, 2010.¹

REGULATION FD

Reg FD prohibits issuers from selectively disclosing material nonpublic information to, among others, securities professionals or investors without simultaneously (or in certain instances, promptly) disclosing the same information to the public. The regulation covers officers, employees, or agents of the company who “regularly communicate” with brokers, investment advisers, investment companies, or the company’s securities holders.

SEC v. PRESSTEK

In early September 2006, Presstek’s controller notified Edward Marino, Presstek’s President and CEO, that Presstek’s margin and operating income would be significantly lower than company forecasts. The company planned to issue a preliminary announcement of the revised forecast in early October. However, information about Presstek’s poor third quarter performance remained nonpublic.

On September 28, 2006, Michael Barone, managing partner of Sidus Investments, called Marino to inquire about Presstek’s performance. During the course of the one-on-one conversation, Marino indicated that “the summer was not as vibrant as they expected in North America and Europe.” Marino further stated that while Europe’s performance had increased since the summer, the company’s overall performance was a “mixed picture.”

¹ The SEC’s litigation release and complaint can be found at <http://sec.gov/litigation/litreleases/2010/lr21443.htm>. The other recent case is *SEC v. Black*, Case No. 09-CV-0128 (S.D. Ind. Sept. 24, 2009), and can be found at <http://sec.gov/litigation/litreleases/2009/lr21222.htm>.

Evidence obtained by the SEC indicated that during the conversation, Barone sent text messages reconveying the information obtained from Marino, and only two minutes after the end of the conversation, Barone had signaled Sidus's trader to sell its entire investment in Presstek. Marino did not disclose the negative information to any other analyst or investor. After Presstek publicly announced its revised forecast two days later, the company's stock dropped nearly 30 percent.

In its complaint against Presstek and Marino, the SEC alleges violation of Reg FD. The SEC Staff simultaneously filed a consent decree with the company. The company agreed to a cease-and-desist order and a \$400,000 fine. In the complaint, the SEC took the unusual step of noting the company's extensive remedial measures, which the SEC took into account in agreeing to the settlement. These measures included taking appropriate personnel actions and strengthening compliance controls.

IMPORTANCE TO PUBLIC COMPANIES

Reg FD was enacted to ensure the full and fair disclosure to all investors of material company information. Reg FD is intended to ensure that earnings forecasts or guidance is provided only by means of public disclosure. Liability may attach to even inadvertent disclosures. To avoid liability in the event of inadvertent selective disclosure, the company must "promptly" make public disclosure of the information at issue.

Prior to 2006, the SEC Staff was active in Reg FD enforcement. Between 2002 and 2005 alone, the SEC brought seven high-profile enforcement actions. For example, the SEC brought a Reg FD action against Schering Plough that resulted in a \$1 million fine for the company, a \$50,000 fine against the CEO, and a cease-and-desist order against both.

Reg FD violations can occur in a number of situations. Anytime a company official engages in a private conversation with an analyst, the official takes on some degree of risk under Reg FD. Communicating selectively to an analyst or investor that earnings are expected to be higher than, lower than, or even the same as what has been publicly forecast can violate Reg FD. Public companies should re-educate themselves and their employees on the practical considerations surrounding Reg FD and the importance of avoiding selective disclosures.

WHAT TO DO NOW

Now that the SEC has shown a renewed focus on Reg FD, there are several steps a company can take to prepare for the potential increased scrutiny:

- Adopt and maintain appropriate compliance programs in areas involving corporate communications, where there is a higher risk of Reg FD violations. Any compliance program should include distribution of company policies regarding company communications. Conduct regular training sessions to ensure executives understand their obligations regarding Reg FD.
- Avoid or limit one-on-one discussions with analysts and investors. If executives engage in these discussions, essential preparations include a complete understanding of the company's recent public disclosures in order to limit commentary to previously disclosed information, identifying topics that are "off-limits," preparing answers to expected questions, and establishing procedures to address inadvertent selective disclosures. Additionally, having counsel review communications prior to issuance, or having more than one company representative attend live meetings, will reduce the risk of selective disclosure.

- If a Reg FD violation occurs, discuss with counsel the appropriate remedial actions. The Presstek Board took extensive remedial measures, and the SEC expressly cited those measures as a reason for agreeing to a favorable settlement.

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