Image is Everything: SEC Brings Second Regulation FD Action in Six Months

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Continuing its focus on Regulation FD, the SEC filed an action in early March against Presstek, Inc., a manufacturer and distributor of high-technology digital imaging equipment, and its former CEO, Edward J. Marino.

According to the SEC's complaint, two days before the end of the third quarter, Mr. Marino accepted a telephone call from the managing partner of an investment advisor to investment funds holding a significant stake in the company. By then, Presstek was aware that its third quarter financial results would be lower than expected due to a weak August performance in both North America and Europe. When asked about Presstek's performance in Europe during the summer, Mr. Marino described the summer as "not as vibrant as [they] expected in North America and Europe" and a "mixed picture" overall. The call lasted only ten minutes, but the image of Presstek was clear. While still on the call, the investment manager sent a text to a colleague, "sounds like a disaster," and within minutes the firm began selling off substantially all the shares held by the investment funds. Presstek disclosed the updated financial information just after midnight the following day, leading to a 20% drop in its stock price. The SEC agreed to a settlement with Presstek for a $400,000 civil penalty, but the action against Mr. Marino continues.

Along with the Regulation FD action taken by the SEC last fall against the CEO of American Commercial Lines (see our October 5, 2009 update), this most recent enforcement action suggests renewed focus on Regulation FD after a period of relative inactivity. Here are some simple lessons to take from this current SEC action:

- **Use Extreme Caution in Private Conversations With Investment Professionals.** Be particularly cautious when the discussions relate to financial results and earnings guidance. In this case, Presstek planned to issue a preliminary announcement in October to report its poor performance. If your company needs to provide advance warning of earnings results or otherwise update its financial disclosures, do it first in a press release or with a Form 8-K.

- **Provide FD Training and Follow That Script!** Regulation FD missteps can happen in a flash—for Mr. Marino, it only took ten minutes. Keep Regulation FD "top of mind" with your executives by implementing a training plan for spokespersons and Investor Relations professionals that includes periodic refresher sessions. Then, follow the script. Talking points and a script can help you confine commentary to identified publicly disclosed information.

- **It's What You Convey, Not Just What You Say.** Though Mr. Marino's comments were limited to general observations about the Presstek's third quarter performance, the message was clearly communicated. As the SEC made clear in its Schering-Plough action, companies cannot evade the requirements of Regulation FD by using code words or phrases to convey material nonpublic information. Be careful that your words don't communicate more than you intend.

- **Remedial Measures and Prompt Cooperation Are Key.** In this case, the SEC pointed out that Presstek had taken extensive remedial measures, including revision of its corporation communications policy, replacement of its management team, and appointment of new independent board members. These actions played a role in the willingness of the SEC to settle the action with Presstek.

Additional Information

For more information on Regulation FD and enforcement actions by the SEC, please see our Updates dated October 5, 2009, September 13, 2005, April 11, 2005, September 16, 2003 and December 11, 2002.

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