May 19, 2010

SEC's Recent FD Enforcement Action Serves as a Useful Reminder

On March 9, 2010, the Securities and Exchange Commission filed a civil injunctive action against Presstek, Inc., a designer, manufacturer, seller and servicer of high-technology digital imaging equipment, based in Greenwich, CT, and individually against its former chief executive officer, Edward J. Marino. In its complaint, the SEC alleged that Mr. Marino aided and abetted Presstek's violation of Section 13(a) of the Securities Exchange Act of 1934 and Regulation FD by selectively disclosing negative material non-public information regarding Presstek's financial performance to a registered investment advisor without simultaneously disclosing such information to the public.

Relevant Facts Alleged in the SEC's Complaint

After having served on Presstek's board of directors and as chairman of Presstek's Audit Committee, Mr. Marino became the president and CEO of Presstek in April 2002. Mr. Marino was one of three persons authorized to speak on Presstek's behalf to investors, analysts and other securities professionals. Presstek maintained an internal policy of "corporate silence" beginning on the 15th day of the last month of any given quarter.

In September 2006, Mr. Marino was informed that Presstek's forecast for the quarter would be lower than expected and that a preliminary announcement would be made in early October 2006 to report such performance.

On the morning of September 28, 2006, Mr. Marino spoke with the managing partner of a registered investment advisor regarding Presstek's lower-than-expected financial performance for the third quarter.

Specifically, Mr. Marino stated that "[s]ummer [was] not as vibrant as [they] expected in North America and Europe" and that although "Europe [had] gotten better since [the summer]" it was "overall a mixed picture [for Presstek's performance that quarter]."

Promptly after the telephone conversation, the registered investment advisor sold substantially all of its Presstek holdings. Presstek's stock price dropped approximately 19 percent that day from the prior day's closing price.

At or about 12:01 a.m. on September 29, 2006, Presstek issued its preliminary announcement for the third quarter 2006, stating that its performance was below its earlier publicly disclosed estimates. That day, Presstek's opening stock price was 20 percent lower than the prior day's closing price, and its closing price was 10 percent lower than the prior day's closing price.

According to Litigation Release No. 21443 (March 9, 2010), Presstek agreed to settle the SEC's charges brought by consenting to an order that enjoins Presstek from further violations of Regulation FD and Section 13(a) of the Exchange Act and directs it to pay a $400,000 civil penalty. In addition, Presstek initiated remedial measures that included (i) revising corporate communications policies and corporate governance principles, (ii) replacing its management team and appointing new independent board members, and (iii) creating a whistleblower's hotline.

There is an ongoing civil action against Mr. Marino.

Useful Reminder

The SEC's enforcement action against Presstek serves as a useful reminder to public companies of the importance of reviewing and updating their compliance programs to prevent the selective disclosure of material non-public information to certain limited investors without simultaneous disclosure to all investors.

Additionally, compliance programs and communications policies should be continually explained and discussed with officers and other representatives who are in contact with investors, analysts and other securities professionals in the market.

Finally, this enforcement action again points out the need for public companies to be ever vigilant in their discussions with investors, analysts and shareholders who often call to get information and are generally well known to company officers. When guards are let down, such as in circumstances as these, bad consequences can result.