

## SEC REGULATION FD ACTION EMPHASIZES IMPORTANCE OF SIMULTANEOUS DISCLOSURE

**March 12, 2010**

In an apparent renewed effort to highlight disclosure requirements relating to investor communications, earlier this week the SEC settled a Regulation FD enforcement action – its second FD settlement in the past six months.<sup>1</sup> In the action settled this week, the SEC alleged that Presstek, Inc. had violated Regulation FD and Section 13(a) of the Securities Exchange Act of 1934, as amended, and that Edward J. Marino, its former chief executive officer, had aided and abetted such violations.

The SEC's recent action once again emphasizes the importance of reviewing and updating disclosure controls and procedures to ensure that an intentional selective disclosure of material nonpublic information is simultaneously disclosed to the public. Additionally, the Presstek matter reiterates the importance of Regulation FD education for any person acting on behalf of an issuer, particularly with respect to interactions with the investment community, and “re-education” on the ramifications of Regulation FD violations. The remainder of this client alert summarizes the SEC's actions in the Presstek matter.

Regulation FD prohibits issuers from selectively disclosing material nonpublic information to securities professionals without simultaneously (or, with respect to non-intentional disclosures, promptly) disclosing the same information to the public. In the Presstek matter, the SEC alleged that Mr. Marino, while acting on behalf of Presstek, selectively and intentionally disclosed material nonpublic information regarding Presstek's financial performance during the third quarter of 2006 to a managing partner of a registered investment adviser that held almost half a million Presstek shares. The sequence of key events in September 2006 was as follows:

- On September 10, Mr. Marino received an e-mail from Presstek's controller indicating that the company's weak August performance in North America and Europe had negatively impacted the company's margin and operating income relative to plan. Presstek planned to issue a preliminary announcement in early October 2006 to report its anticipated poor financial performance for the quarter ended September 30, 2006.
- However, on the morning of September 28, Mr. Marino received a call from the managing partner of a registered investment adviser, and based on notes from that conversation, Mr. Marino stated that “[s]ummer [was] not as vibrant as [they] expected in North America and Europe” and while “Europe [had] gotten better since [the summer]” it was “overall a mixed picture [for Presstek's performance

---

<sup>1</sup> The SEC complaint is available at: <http://www.sec.gov/litigation/complaints/2010/comp21443.pdf> (March 9, 2010). The SEC litigation release is available at: <http://www.sec.gov/litigation/litreleases/2010/lr21443.htm> (March 9, 2010). In September 2009, the SEC settled a civil action brought against Christopher A. Black, the former senior vice president and CFO of American Commercial Lines, Inc. (“ACL”), in which the SEC alleged that Mr. Black aided and abetted ACL's violation of Regulation FD and Section 13(a) of the 1934 Act. Our client alert describing the ACL matter, the first Regulation FD action brought by the SEC since 2007, is available at: <http://www.wcsr.com/resources/pdfs/cs093009.pdf> (September 30, 2009).

that quarter].” Over the course of the day, the investment adviser sold substantially all of its holdings of Presstek shares, and the company’s stock price dropped 19%.

- On September 29, Presstek issued a preliminary announcement reporting that its financial performance was below its prior estimates for the quarter ended September 30, 2006.

Although Presstek made a public announcement at or about 12:01 a.m. on the day following Mr. Marino’s selective disclosure of material nonpublic information in an apparent attempt to comply with Regulation FD, the SEC’s enforcement action sends a clear message that such efforts will not cure intentional disclosures made over 12 hours earlier. Rather, to comply with Regulation FD, Presstek should have simultaneously disclosed to the public the information provided to the investment adviser during the telephone call on the morning of September 28.

Although the SEC is still seeking injunctive relief and civil penalties in the ongoing action against Mr. Marino, Presstek agreed to settle the SEC’s charges by consenting to an order that enjoins the company from further similar violations and directs it to pay a \$400,000 civil penalty. The Presstek matter also highlights the SEC’s favorable consideration of Presstek’s subsequent remedial measures – revising its corporate communications policies and corporate governance principles, replacing its management team, appointing new independent board members and creating a whistleblower’s hotline – in reaching the settlement.

### **Contact Information**

If you have any questions regarding the recent SEC action, please contact Sudhir N. Shenoy (<http://www.wcsr.com/SudhirShenoy>), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/corporateandsecurities>.

**Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.**

**IRS CIRCULAR 230 NOTICE:** To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).