Presentation to the

National Investor Relations Institute



2011 Regulation FD Update

"Nudge, nudge, wink, wink. Know what I mean?"

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Agenda

- Regulation FD Refresher
- Summary of Recent SEC Settlements and Takeaways
  - *Black*
  - *Presstek*
  - *Office Depot*
- Practical Considerations

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Regulation FD

- Whenever an issuer or person acting on its behalf discloses (intentionally/recklessly or non-intentionally) material nonpublic information to certain securities professionals or security holders, then the issuer must publicly disclose that same information
  - simultaneously with respect to intentional disclosures, and
  - promptly (e.g., generally within 24 hours) with respect to non-intentional disclosures

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Communications Covered By Regulation FD

- Communications by
  - senior officers of issuer
  - any person who regularly communicates to securities market professionals and security holders on behalf of the issuer
  - any person directed by senior management to make selective disclosure
- Communications to
  - broker-dealers and their associated persons
  - investment advisors, institutional investment managers and their associated persons
  - investment companies, hedge funds and their affiliated persons
  - security holders of the issuer under circumstances in which it is foreseeable that such holders would trade on the information disclosed

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Communications Covered By Regulation FD (cont'd)

- Communications of material and nonpublic information, including
  - earnings or financial guidance
  - mergers & acquisitions information
  - business development (product, R&D, customer, supplier, or operations data)
  - changes in control or in management
  - information regarding issuer's securities
  - Information or other events that would be important to trading decisions by security holders

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Communications Not Covered By Regulation FD

- Exempted communications
  - Communications with persons who owe duty of trust or confidence (e.g., lawyers, investment bankers, accountants)
  - Communications with persons who agree to maintain confidence
  - Communications in connection with most registered public offerings
- Certain communications not covered
  - Communications in violation of duty
  - Ordinary business communications
  - Communications with governmental agencies

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Black
(September 2009 SEC Settlement)

- Allegations
  - The CFO of American Commercial Lines sent eight emails from his home computer on a Saturday to sell-side analysts stating that “EPS for the second quarter will likely be in the neighborhood of about a dime below that of the first quarter”
  - On the next business day the stock dropped 9.7% and traded at three times higher than the average trading volume
- American’s Remedial Actions
  - On the following Monday, the CEO became aware of the CFO’s weekend activities and caused American to:
    - Disclose the email’s contents on a Form 8-K
    - Self-report the violation to the SEC
    - Cooperate with the SEC Staff during the investigation
    - Note: American already had a written Regulation FD policy in place
- Penalties in the SEC settlement
  - CFO paid $25,000 in fines

Presstek
(March 2010 SEC Settlement)

PRESSTEK
A SMARTER WAY TO PRINT

- Allegations
  - September 28, 2006: During the last week of a quarter the managing partner of a registered investment advisor spoke to the CEO at 10:40 a.m. regarding quarterly performance in Europe
    - The CEO told the managing partner that the summer had not been "as vibrant as expected in North America and Europe … While Europe [had] gotten better since [the summer], it was overall a mixed picture."
    - The managing partner sold approximately 500,000 shares held by it and Presstek's shares dropped 19%
  - On September 29, 2006, Presstek issued a press release at 12:01 a.m. reporting that its quarterly financial performance was below its prior estimates and its shares opened down another 20%

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Presstek
(March 2010 SEC Settlement) (cont'd)

- Presstek's remedial measures
  - Revised its corporate communications policies and corporate governance principles
  - Replaced management team (including CEO and CFO)
  - Appointed new independent board members
  - Created a whistleblower hotline
  - But did not self-report to the SEC
- Penalties in the SEC settlement
  - Although Presstek issued a press release about 13 hours later, they agreed to pay a $400,000 civil money penalty

Takeaways

- Information must be disclosed to the public as soon as possible after a Regulation FD violation is discovered
- A Company's quick remedial measures and cooperation with the SEC may be helpful

Office Depot
(October 2010 SEC Settlement)

- Allegations
  - June 2007: CEO and CFO discussed how to encourage analysts to revisit their earnings per share estimates
    - The CEO suggested they talk to analysts, refer them to recent earnings announcements by comparable companies who announced earnings were impacted by the economy and highlight OD's prior cautionary public statements
  - The CFO and Director of IR developed the following talking points:
    - Haven't spoken in awhile, just wanted to touch base
    - At beginning of quarter we've talked about a number of headwinds that we were facing this quarter including a softening economy, especially at small end
    - Some have pointed to better conditions in the second half of the year – however who knows?
    - 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], [Company B] and [Company C] domestic comps were down substantially over prior quarters.
      - [Company C] mentioned economic conditions as a reason for their slowed growth
    - Remind you that economic model contemplates stable economic conditions that are midteens growth

Office Depot
(October 2010 SEC Settlement) (cont'd)

- Allegations (cont'd)
  - June 22-25, 2007: The Director of IR made calls to 18 analysts and presented the talking points
    - The CEO and CFO were not present during the calls but were aware of the analysts' declining estimates while the Director of IR made the calls
    - By the second day, 15 analysts lowered their estimates, bringing the consensus earnings per share estimate down to $0.45 from $0.48
    - Even after two analysts expressed surprise that Office Depot had not issued a press release, the CFO instructed the Director of IR to call their top 20 institutional investors
  - June 22-27, 2007: Office Depot's shares dropped 7.7%
  - June 28, 2007: Office Depot filed a Form 8-K after the market closed indicating its earnings would be "negatively impacted due to continued soft economic conditions"
  - Office Depot did not have either a written Regulation FD policy or a formal training program



"Talking Wall Street down from its earnings projections whether done expressly or through signals is prohibited."

- Eric I. Bustillo,
  Director of the SEC's Miami Regional Office

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- Penalties in the SEC settlement
  - Without admitting or denying the findings or allegations:
    - Office Depot paid $1 million fine
    - The CEO and CFO each paid a $50,000 fine
  - CEO resigned four days after the SEC's announcement of the settlement of action (the CFO previously resigned)

Takeaways

- The SEC has recently become more active in prosecuting Regulation FD violations
- Implied disclosure, indirect guidance, coded speech and signals can violate Regulation FD
- Individuals can violate Regulation FD even if they do not personally convey the messages
- A company's lack of a written Regulation FD policy and/or training program is not helpful in SEC investigations
- A Company's quick remedial measures and cooperation with the SEC may be helpful

Practical Considerations

- Remain vigilant in complying with Regulation FD
- Have in place (and update periodically) a written Regulation FD policy
- Provide ongoing mandatory Regulation FD training for all “covered persons” and update training to:
  - address the importance of tone, nonverbal communication, inferences and subtexts
  - emphasize that covered persons may be charged and fined by the SEC even if they did not personally convey the messages
  - highlight the fact that unplanned disclosures might not qualify as unintentional disclosures under Regulation FD
  - include directors in training program
- When possible, have two-on-one meetings
  - Be extra careful with informal meetings

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Practical Considerations (cont'd)

- Tread carefully in communications near a quarter's end
  - Private communications with analysts and investors about earnings have a "high degree of risk" of violating Regulation FD
  - Consider prohibiting one-on-one calls during quiet periods
  - Do not make non-routine (e.g., unscheduled) calls
  - A confirmation of expected quarterly earnings made near the end of a quarter might convey information about actual performance
- Review effectiveness of your disclosure team with respect to
  - procedures for monitoring private discussions (including logs, debriefings and changes in share price after any such discussion)
  - determining whether a Regulation FD issue exists
  - timeliness regarding implementing remedial and/or corrective actions

Questions or Comments?

