

SEC ENFORCEMENT ACTION AGAINST SCHERING-PLOUGH AND ITS FORMER CEO UNDER REGULATION FD

SIMPSON THACHER & BARTLETT LLP

SEPTEMBER 12, 2003

On September 9, 2003, the Securities and Exchange Commission issued a cease-and-desist order against Schering-Plough Corporation and Schering-Plough's former chairman of the board and chief executive officer, Richard J. Kogan. The order found Schering-Plough and Kogan had violated the disclosure requirements of Regulation FD and Section 13(a) of the Securities Exchange Act of 1934 and ordered Schering-Plough and Kogan to cease and desist from committing or causing violations of these provisions.¹ Schering-Plough and Kogan agreed, without admitting or denying the SEC's findings, to settlements that require Schering-Plough and Kogan to pay civil penalties of \$1,000,000 and \$50,000, respectively. The penalty imposed upon Kogan represents the first occasion on which the SEC has imposed a monetary penalty on a corporate officer for a violation of Regulation FD.

Regulation FD

Regulation FD generally requires that, whenever an issuer, or person acting on its behalf, discloses material nonpublic information to a securities market professional or a holder of the issuer's securities who may trade on the basis of that information, the issuer must make simultaneous public disclosure of that information, in the case of an intentional disclosure, or make prompt public disclosure of such information, in the case of an unintentional disclosure.²

Summary of Facts

During late September 2002, Kogan and Schering-Plough's senior vice president of investor relations met in Boston with analysts and portfolio managers of four institutional investors, three of which were among Schering-Plough's largest investors. According to the

¹ See *In the Matter of Schering-Plough-Plough Corporation and Richard J. Kogan, Administrative Proceedings*, File No. 3-11249 and Securities and Exchange Act of 1934 Release No. 34-48461.

² For more information concerning Regulation FD, see our memorandum dated August 24, 2000 entitled "*New SEC Rules on Selective Disclosure and Insider Trading*," which is available upon request or at our website: www.simpsonthacher.com.

order, at the meetings, through “a combination of spoken language, tone, emphasis and demeanor” Kogan disclosed material nonpublic information regarding Schering-Plough. Statements purportedly made by Kogan in violation of the selective disclosure rules included the following:

- Schering-Plough was going to take a “hard hit” to earnings in 2003. The SEC viewed this statement as materially different from the company’s earlier public disclosure that its earnings could suffer depending on the outcome of various contingencies because it conveyed a definitive as opposed to a contingent statement not previously disclosed.
- Kogan was not in favor of Schering-Plough repurchasing its own shares. The company had previously publicly stated no decision had been made on whether to buy back its shares.
- Schering-Plough’s manufacturing costs would increase in 2003 and no significant cost cuts were planned. The SEC viewed this statement as extending materially beyond the company’s prior public disclosure that the company’s costs had increased during the second quarter of 2002 “primarily due to a shift in sales towards royalty-bearing products and costs associated with manufacturing issues.”
- 2003 would be a “very, very difficult” year, and that “the Street” had not sufficiently lowered earnings estimates for the third quarter of Schering-Plough’s 2002 fiscal year to reflect the impact from certain previously disclosed events. Several months earlier Schering-Plough had publicly warned that it expected third-quarter earnings to be “significantly lower than the comparable period in 2001,” but the company had never publicly commented on Wall Street analysts’ earnings estimates.

According to the order, immediately after the meetings, analysts at two of the firms downgraded their ratings of Schering-Plough, and portfolio managers at three of the firms sold significant amounts of Schering-Plough stock. The price of Schering-Plough’s stock declined over the next several days by more than 17% as shares representing approximately four times normal trading volume changed hands.

On October 3, 2002, Kogan held a previously scheduled meeting with approximately 25 analysts and portfolio managers. The meeting was neither webcast nor otherwise accessible to the general public. At the meeting Kogan said, among other things, that Schering-Plough’s 2003 earnings would be “terrible”. That evening, Schering-Plough issued a press release providing earnings guidance for 2002 and 2003 that was materially below analysts’ consensus estimates and the company’s own prior earnings guidance.

Analysis

The Schering-Plough action is the latest in a series of Regulation FD enforcement actions brought by the SEC. In this action, the SEC imposed the most severe sanctions to date in relation to Regulation FD violations. The SEC's early guidance with respect to Regulation FD was that enforcement action would only be instituted in cases of clear violations and that "issuers will not be second-guessed on close materiality judgments." Earnings information and stock repurchase plans, two topics discussed by Kogan in his investor meetings, are subject matters that the SEC had specifically highlighted in the adopting release for Regulation FD as areas to be reviewed carefully by issuers prior to being selectively disclosed.

Schering-Plough serves as a timely reminder that is essential for senior management and investor relations personnel to be thoroughly briefed with respect to the requirements of Regulation FD and that companies adopt procedures to promote compliance with the Regulation. The Schering-Plough action demonstrates that the SEC intends to enforce vigorously the requirements of Regulation FD, particularly now that the Regulation has been in effect for several years.

*

*

*

This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

SIMPSON THACHER & BARTLETT LLP