

A Biweekly  
Newsletter of  
Federal Securities,  
Corporate &  
Banking Law  
Developments

## Record Penalty Imposed for Violation of Regulation FD

The pharmaceutical company Schering-Plough recently agreed to pay a \$1 million fine for violating the SEC's Regulation FD (Fair Disclosure), which requires companies to make information available to all investors at the same time. (<http://www.sec.gov/news/press/2003-109.htm>) Richard Kogan, Schering-Plough's former CEO, also agreed to pay a \$50,000 fine, and is the first individual to be penalized for a Regulation FD violation. Regulation FD was adopted in 2000 to prevent selective disclosure of material nonpublic information.

The SEC contended that Mr. Kogan held several private meetings with institutional investors during the week of September 30, 2002 at which he disclosed negative information regarding Schering-Plough's earnings prospects.

Under insider trading laws, it is illegal to buy or sell stock based on material information about a company that has not yet been made public. It is unclear whether the institutional investors who benefited from the insider knowledge will also face charges. However, no such charges have been filed because the SEC would have to prove that the investors knew the information was confidential when received and not about to be disclosed. **Company executives should be aware that violations of Regulation FD could include individual fines as well as significant penalties imposed on the company.**

### ■ NASDAQ ISSUES SUMMARY OF CORPORATE GOVERNANCE PROPOSALS

On September 10, 2003, the Nasdaq issued a summary of its corporate governance proposals.

([http://www.nasdaq.com/about/Corp\\_Gov\\_Summary.pdf](http://www.nasdaq.com/about/Corp_Gov_Summary.pdf)) The summary highlights the changes that have taken place since the last set of proposals issued in February 2003. In particular, the noted changes include the following:

- The now-effective requirement, as of June 30, 2003, for shareholder approval of stock option plans and other equity compensation;
- The proposal that directors can only be considered independent if members of their immediate family also meet the independence standards;
- The proposal that heightened eligibility standards for audit committee members be imposed; and
- The proposal that independent directors of a "controlled company" be required to meet in executive sessions.

In addition to the aforementioned changes, the summary provides a comprehensive overview of the existing proposals covering areas such as stock options, board independence, audit committees and codes of conduct. These proposed rules will take effect with a company's first annual meeting occurring after January 15, 2004, but not later than October 31, 2004.

**Companies listed, or contemplating listing, on Nasdaq should consider taking Board action now to prepare for these rules.**

### ■ SEC ANSWERS QUESTIONS REGARDING AUDITOR INDEPENDENCE RULES

The SEC has provided answers to 35 frequently asked questions about the application of the recently adopted auditor independence rules.

ATLANTA  
CHICAGO  
DENVER  
DES MOINES  
FAYETTEVILLE  
IRVINE  
KANSAS CITY  
LINCOLN  
LITTLE ROCK  
NEW YORK  
OKLAHOMA CITY  
OMAHA  
PASADENA  
RICHMOND  
SCOTTSDALE  
WASHINGTON

The questions and responses address such issues as partner rotation and transition, other matters regarding audit partners, nonaudit services, audit committee pre-approval and communications, fee disclosures, "cooling off" periods and broker-dealer and investment advisors.

The answers clarify that the audit committee of a parent company may also function as the audit committee for a wholly-owned subsidiary that is also an issuer. They also prohibit audit committees from establishing broad, categorical approvals for nonaudit work and require the approval policies to be detailed and specific to each service that may be rendered. The full list of questions and answers can be reviewed at the website [www.sec.gov/info/accountants/ocafaqaudind080703.htm](http://www.sec.gov/info/accountants/ocafaqaudind080703.htm).

**Audit committees of public companies should consult with SEC counsel to ensure their audit policies and procedures comply with these SEC policy positions. Also, audit committees should ensure that their auditors' practices comply with these rules.**

## ■ MUTUAL FUND PROBE LAUNCHED BY NEW YORK ATTORNEY GENERAL

You may have heard about recent actions by the New York State Attorney General and the SEC against mutual fund traders. ([http://www.oag.state.ny.us/press/2003/sep/sep16a\\_03.html](http://www.oag.state.ny.us/press/2003/sep/sep16a_03.html)) The charges consist of two practices allowed by mutual funds that are illegal or improper:

- "Late trading"—the illegal practice of purchasing mutual funds after 4 pm at that day's price. Since mutual funds are only priced once a day at 4 pm, investors who purchase a mutual fund after that time are supposed to receive the next day's price.

- "Market timing"—the improper practice of taking advantage of prices that are already outdated when the fund's value is set. This is most often done using international funds, because market-timers realize that changes in the U.S. market are often mimicked by changes in international markets. Market-timing is not illegal but is improper and often prohibited by individual mutual funds.

These actions are being taken by the New York Attorney General and the SEC because mutual funds gave special treatment to some of their investors at the expense of the rest.

**If you or your company engage in investments, beware of opportunities that seem to give you an advantage over your fellow investors in the same fund or company.**

Kutak Rock LLP is a national law firm with more than 325 attorneys located in 16 offices throughout the United States practicing in the areas of corporate, banking and securities law, public and corporate finance and complex commercial litigation matters.

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