

SEC Charges TherapeuticsMD with Regulation FD Violations

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Last week, the SEC issued a reminder that Regulation FD remains a vital element of the federal securities regulations. In the first enforcement action regarding Regulation FD since 2013, the SEC charged TherapeuticsMD Inc., a pharmaceutical company, with violations of Regulation FD based on its sharing of material, nonpublic information with sell-side research analysts without also disclosing the same information to the public.

The SEC's order found that on two separate occasions in 2017, TherapeuticsMD selectively shared material information with analysts about the company's interactions with the U.S. Food and Drug Administration (FDA). One day after a publicly-announced meeting with the FDA about a new drug approval, TherapeuticsMD sent private messages to sell-side analysts describing the meeting as "very positive and productive." TherapeuticsMD's stock price closed up 19.4 percent on heavy trading volume the next day. At that time, the company had not issued a press release or made any other market-wide disclosure about the meeting. On the morning of July 17, 2017, TherapeuticsMD issued a press release announcing that it had submitted additional information to the FDA, but did not yet have a timeline for its new drug approval. TherapeuticsMD's stock price declined approximately 16 percent in pre-market trading following the issuance of the press release. TherapeuticsMD held a call with and emailed sell-side analysts after the press release was issued and selectively shared previously undisclosed details about the June FDA meeting. All of the analysts published research notes containing these details, and the stock rebounded to close down only 6.6 percent for the day. The SEC order found that TherapeuticsMD, at the time of the violations, did not have policies or procedures relating to compliance with Regulation FD.

Regulation FD prohibits public companies, or persons acting on their behalf, from selectively disclosing material, nonpublic information to certain persons outside the company, including institutional investors, securities analysts, and other securities professionals. Whenever a public company discloses material, nonpublic information to any such person, Regulation FD requires that the company also disclose the information to the public simultaneously.

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TherapeuticsMD consented to the SEC's order without admitting or denying the findings and was ordered to cease and desist from future violations of Regulation FD and Section 13(a) of the Securities Exchange Act of 1934. The company agreed to pay a \$200,000 penalty. In addition, TherapeuticsMD implemented policies and procedures which, among other things, (a) require public disclosure of material, nonpublic information in connection with Regulation FD, (b) provide examples of types of material, nonpublic information that may arise in light of TherapeuticsMD's business model, and (c) establish specific review protocols for all external communications, including earnings calls, analyst meetings, and press releases. TherapeuticsMD also now requires Regulation FD training for employees.

The TherapeuticsMD order is a good reminder that public companies should establish and follow guidelines for complying with Regulation FD when interacting with market participants, including stockholders, institutional investors, securities analysts, and other securities professionals.