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SEC BRINGS FIRST STANDALONE REGULATION FD CHARGES SINCE 2013

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On August 20, 2019, the Securities and Exchange Commission (the “SEC”) announced charges against TherapeuticsMD, Inc. (“TherapeuticsMD”) for violating Regulation FD, promulgated under Section 13(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). This is the first time that the SEC has brought charges based solely on Regulation FD violations since 2013, when it brought charges against an officer of First Solar, Inc., and demonstrates the SEC’s continued focus on Regulation FD.

Regulation FD

Regulation FD requires the simultaneous public disclosure of material non-public information when it is intentionally disclosed by a company to certain select individuals or entities outside of the company.

The goal of Regulation FD is to promote full and fair disclosure of material information to all investors by prohibiting publicly traded companies from disclosing material non-public information to a limited number of people. To satisfy the disclosure requirements of Regulation FD, a public company must disseminate material information through a means of public disclosure including, but not limited to, press releases, conference calls or webcasts, issuer website publications, and SEC reports under Section 13(a) of the Exchange Act.

The TherapeuticsMD Charges

The SEC charged TherapeuticsMD with two counts of selective disclosure of material non-public information in violation of Regulation FD, each alleged to have occurred in the summer of 2017. The SEC alleged that, on two occasions, executives of TherapeuticsMD communicated to sell-side research analysts details of an ongoing Food and Drug Administration (“FDA”) approval process related to one of the company’s drug candidates, which resulted in significant movement in TherapeuticsMD’s stock price. According to the SEC, TherapeuticsMD made no broad, public disclosure of the FDA approval process until several weeks later during an earnings call.

Without admitting or denying any of the SEC’s allegations, TherapeuticsMD settled the charges for a \$200,000 penalty and is subject to an order to cease and desist from future Regulation FD violations.

The SEC’s order, which can be found at [this link](#), noted that TherapeuticsMD did not have any internal policies or procedures relating to Regulation FD compliance at the time of the alleged violations, but did consider the company’s cooperation and subsequent remediation efforts in accepting TherapeuticsMD’s settlement offer.

Next Steps for All Public Companies

Companies should be aware of SEC enforcement of Regulation FD violations and the need to maintain effective internal Regulation FD policies and procedures. Companies should review their current Regulation FD compliance policies and procedures, or should establish such policies and procedures if they do not currently have

them, to ensure that all material non-public information is properly handled and disclosed in compliance with Regulation FD.

If you would like more information on Regulation FD compliance and best practices, please contact a member of Harter Secrest & Emery LLP's Securities and Capital Markets group at 716.853.1616, 585.232.6500, or visit www.hselaw.com.

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