

Penalty for Head of Investor Relations – \$50,000, Penalty for Company – \$0, Regulation Fair Disclosure Compliance Program – Priceless

Article By:

Drinker Biddle & Reath LLP

The latest Regulation FD enforcement case brought by the **Securities and Exchange Commission** demonstrates the value to a public company of maintaining a rigorous Regulation FD compliance program. Regulation FD was adopted by the SEC in August 2000 to address concerns about the selective disclosure of information by public companies. The SEC has summarized Regulation FD as follows: when an issuer discloses material nonpublic information to certain individuals or entities — generally, securities market professionals, such as stock analysts, or holders of the issuer's securities who may well trade on the basis of the information — the issuer must make full public disclosure of that information.

The SEC issued an order on September 6, 2013, in its administrative proceeding against Lawrence D. Polizzotto, who had been the head of investor relations for First Solar, Inc., a company traded on NASDAQ. The order stated that Mr. Polizzotto made selective disclosures in one-on-one conversations with stock analysts regarding the fact that it appeared unlikely that First Solar would receive a previously anticipated government loan guarantee. These disclosures were material to investors, as the company had previously made public statements about management's high level of confidence that the loan guarantee would be received.

What is particularly notable about the order in the Polizzotto matter is the fact that the Commission fined Mr. Polizzotto \$50,000 personally, and issued a cease and desist order against him, but did not sanction First Solar. In the order and related press release, the SEC highlighted the following facts:

- Mr. Polizzotto had been advised in an e-mail from First Solar's inside counsel that he would be restricted by Regulation FD from making statements about the status of the loan guarantee to individual analysts and investors until the company issued a press release about the matter.
- Knowing that the press release had not yet been issued, Mr. Polizzotto drafted talking points for discussions with individual analysts and investors about the loan guarantee status.
- When other members of the company's management learned through a news article that Mr. Polizzotto may have selectively disclosed material information about the status of the loan

guarantee, the company finalized and issued its press release on the matter.

- Prior to the selective disclosure, First Solar had cultivated an environment of compliance through the use of a disclosure committee that focused on compliance with Regulation FD.
- First Solar promptly self-reported the selective disclosure to the SEC and cooperated with the SEC's investigation.
- The company took remedial measures to address the selective disclosure, including additional training on Regulation FD.

The moral of this story for public companies is that a company may not ultimately be able to prevent a rogue employee from violating Regulation FD, but the company can reduce its exposure to penalties for the violation by maintaining a strong culture of compliance and taking swift and thorough steps to remediate the violation when the company discovers it.

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