

Regulation FD: A Case Study on Enforcement

On September 6, 2013, the Securities and Exchange Commission issued a cease-and-desist order settling charges that Lawrence Polizzotto, the former head of investor relations at First Solar, Inc., a solar energy company, violated Regulation FD. Regulation FD generally requires that whenever an issuer discloses material nonpublic information, it must do so in a broad, non-exclusionary manner. The SEC charged Mr. Polizzotto of violating Regulation FD during phone conversations with certain analysts and investors by disclosing that the company was unlikely to receive a much-anticipated loan guarantee from the U.S. Department of Energy. Mr. Polizzotto agreed to settle the charges for \$50,000. The details are discussed in the short cease-and-desist order, which can be found [here](#).

This settlement is a good reminder that companies should evaluate, review and reinforce their Regulation FD compliance programs. According to the SEC, the selective disclosure occurred even though the company had cultivated an environment of compliance focused on Regulation FD. The SEC determined not to bring an enforcement action against the company due to the company's "extraordinary cooperation" with the investigation and several other factors, including the company's ongoing compliance program, its quick response after discovering the problematic disclosures and the fact that it self-reported the potential violation to the SEC.

This case is also an example of the SEC's renewed focus on enforcement actions generally, including potential violations that might be considered relatively minor. For example, the SEC recently created a new [Financial Reporting and Audit Task Force](#) focused on detecting securities-law violations related to the preparation of financial statements, issuer reporting and disclosure, and audit failures. In addition, in June 2013, [the SEC charged PACCAR Inc.](#), a commercial truck manufacturer, with accounting deficiencies when PACCAR failed to report its aftermarket parts business separately from its truck sales business in violation of segment reporting rules. PACCAR settled the charge for \$225,000.

Key Takeaways

- Review the company's Regulation FD compliance program to ensure that all employees responsible for public disclosure understand their responsibilities and potential personal liability. "Self policing," or the existence of a robust compliance environment, a key factor the SEC enforcement staff considers when exercising discretion on whether to charge a company with a securities law violation, cannot be addressed after an issue arises.
- Consider releasing material nonpublic information promptly to reduce the risk of inadvertent disclosure.
- Emphasize that Regulation FD applies to all material nonpublic information and remind employees at the time they receive such information that it is restricted.
- Vet all external talking points with the in-house or outside counsel whenever possible.

For more information on how to improve Regulation FD compliance programs or recent enforcement trends, please contact your usual Ropes & Gray advisor.