

SEC Charges IR Professional with Regulation FD Violation

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A former investor relations professional at First Solar agreed to pay \$50,000 to settle the SEC's charges that he violated Regulation FD. According to the SEC [order](#), the IR officer attended an investor conference on September 13, 2011 with the company's then-CEO. At that time, the CEO indicated publicly that the company would receive three loan guarantees of \$4.5 billion from the U.S. Department of Energy, which would allow the company to obtain low-cost financing for key projects. The guarantees were conditioned on the company's meeting several requirements before the end of September, and analysts had been speculating about whether the company would be able to satisfy these requirements. In particular, the project with the largest guarantee, nearly \$2 billion, had the most regulatory hurdles to overcome.

Two days later, on September 15, several executives at the company learned that they would not receive at least one of the guarantees. In discussing the timing and content of public disclosure of this information, a company lawyer specifically advised that, while they would not need to issue a press release once they received official notice from the Energy Department, the company would be restricted under Regulation FD from answering questions from analysts until the information was made public. The company worked on drafting a press release.

On September 20, a Congressional committee asked the Energy Department about its loan guarantee program and the status of conditional commitments, including those involving First Solar, leading to an 8% stock drop for the company the next morning and causing numerous analysts and investors to contact the IR officer. While the IR officer was aware that the company would not issue a public press release until the next day, he held more than 30 one-on-one conversations with sell-side analysts and institutional investors during which he informed them that there was a high probability of receiving two of the loan guarantee and a low probability of receiving the third. He also reminded analysts and institutional investors of previously-disclosed facts that shed a negative light on the project, such as permitting obstacles, pending litigation, and a need to secure financing, as well as referring to a rumor that had not been confirmed by the company that there might be a buyer for the project. He went so far as to inform at least one analyst and another investor that they should assume that the company would not receive one of the loan guarantees.

Some analysts e-mailed their sales teams immediately after speaking with the IR officer with the message that they expected First Solar to receive two out of the three loan guarantees. Company management learned from news reports that the IR officer had been conducting these discussions, and the company issued a press release the next day. Its stock price dropped 6 percent.

Importantly, the SEC decided not to bring any action against First Solar because of the company's "extraordinary cooperation." The SEC determined that, prior to this violation, the company "cultivated an environment of compliance through the use of a disclosure committee that focused on compliance with Regulation FD." The SEC press release noted that the company immediately discovered the IR officer's selective disclosure and promptly issued a press release the next morning, and reported the misconduct to the SEC. The company also undertook remedial actions, including conducting additional Regulation FD training.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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