

CLIENT UPDATE

REGULATION FD: RECENT CHARGES UNDERScore IMPORTANCE OF COMPLIANCE CULTURE

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The Securities and Exchange Commission (“SEC”) last week issued a press release announcing it has charged a former investor relations officer at First Solar, Inc. with violating Regulation Fair Disclosure (“Regulation FD”). An SEC investigation determined that the IR officer alerted certain analysts and investors in one-on-one conversations about a significant business development that had not yet been publicly disclosed. Importantly, and in keeping with past practice under analogous circumstances, the SEC indicated in the press release that it determined not to bring an enforcement action against First Solar in connection with the misconduct based on several factors relating to the strength of the company’s compliance policies and procedures.

While recent SEC Regulation FD enforcement actions have focused a spotlight on the use by issuers of social media and other non-traditional means of communication to publicly disseminate information, selective disclosure to analysts and other members of the investment community through one-on-one conversations still remains an area of high risk. Issuers should take time to review and, if necessary, update their Regulation FD policies, procedures and training for officers authorized to communicate with analysts and investors. While these measures may not stop a bad actor from intentionally or negligently violating the company’s policies and procedures, they may protect a company from civil and administrative SEC proceedings as well as the attendant reputational harm.

THE FIRST SOLAR CASE

In June 2011, First Solar received conditional commitments from the U.S. Department of Energy (the “DOE”) for three loan guarantees for an aggregate of \$4.5 billion. The guarantees, which would allow the company to obtain low-cost financing for key projects, were conditioned on the company’s meeting several requirements before the end of September. On September 13, 2011, First Solar’s then-CEO expressed confidence, publicly in connection with a conference that the company would receive the three loan guarantees. Two days later, the company’s executives, including its IR officer, learned the company would not receive the largest loan guarantee. A team including the IR officer and in-house lawyers discussed how and when First Solar should publicly disclose the loss of the DOE loan guarantee. The SEC investigation found that during these conversations, the in-house counsel specifically noted that, while the company was not required to immediately notify the public upon receipt of official notice from the DOE, they would be restricted by Regulation FD in answering any questions by analysts and investors until such time as the information was made public.

A September 20, 2011 Congressional line of inquiry caused concern within the solar industry about whether the DOE would move forward with its conditional commitments. The morning of September 21, 2011, First Solar’s stock dropped by 8% and analysts and investors began reaching out to First Solar’s IR officer. Despite knowing that the company did not intend to issue its press release regarding the DOE notice until the following morning, the IR officer proceeded to hold one-on-one conversations with over 20 analysts and institutional investors. The talking points indicated that there was a low probability of receiving one of the loan guarantees and reminded analysts and institutional investors of previously disclosed negative facts regarding the project. The IR officer went further and informed more than one contact that they should assume that the company would not receive one of the loan guarantees. First Solar management learned from news releases the evening of September 21 that the IR officer may have selectively disclosed the information. When First Solar issued its press release the following morning, First Solar’s stock dropped an additional 6%.

SEC EMPHASIZES ENVIRONMENT OF COMPLIANCE

In addition to First Solar’s “extraordinary cooperation” with the SEC’s investigation, the SEC press release highlighted the following factors in determining not to bring an enforcement action against First Solar in connection with the misconduct:

- Prior to the selective disclosure, First Solar had cultivated an environment of compliance, notably through the use of a disclosure committee that focused on compliance with Regulation FD;
- First Solar immediately discovered the selective disclosure and promptly issued a press release the following morning before market open;
- First Solar quickly self-reported the misconduct to the SEC; and
- Following the incident, First Solar undertook remedial measures to address the conduct, including by conducting additional Regulation FD training for employees responsible for public disclosure.

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Please do not hesitate to contact us with any questions.

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