

SEC Brings First Regulation FD Case in Nearly Two Years

On September 6, 2013, the Securities and Exchange Commission (“SEC”) charged the former head of investor relations (the “IR officer”) for First Solar Inc. (“First Solar” or the “Company”) with violating rules requiring fair disclosure of information promulgated under Regulation FD (“Regulation FD”) under the Securities Exchange Act of 1934 (“Exchange Act”).¹ The SEC based its action on telephone conversations the IR officer had with certain analysts and investors, prior to a public disclosure by the Company, that the Company was unlikely to receive a much-anticipated loan guarantee from the U.S. Department of Energy. The former IR officer was ordered to pay \$50,000 to settle the SEC’s charges. In connection with the settlement, the SEC determined not to bring any action against First Solar due to, among other factors, the Company’s “extraordinary cooperation.” This is the first Regulation FD case the SEC has brought since November 2011.

I. Regulation FD Background

Regulation FD addresses selective disclosure of material information by publicly traded companies. Regulation FD aims to promote full and fair disclosure by requiring material nonpublic information to be disclosed publicly in a broad manner, and not selectively. The regulation provides that when an issuer, or person acting on its behalf, discloses material nonpublic information relating to the issuer or its securities to certain enumerated persons, it must make public disclosure of that information.

In general, the enumerated persons include securities market professionals, brokers or dealers, investment advisors or managers, investment companies and holders of the issuer’s securities under circumstances in which it is reasonably foreseeable that such person will purchase or sell the issuer’s securities on the basis of the information.² The timing of the required public disclosure depends on whether the selective disclosure was intentional or non-intentional. For an intentional selective disclosure, the issuer must make public disclosure simultaneously; for a non-intentional disclosure, the issuer must make public disclosure promptly.³ Under the regulation, the required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is “reasonably designed to effect broad, non-exclusionary distribution of the information to the public.”⁴

II. First Solar Controversy

First Solar manufactures and sells solar modules, and designs, constructs, and sells solar power systems. The Company’s common stock trades on The NASDAQ Stock Market LLC.

According to the SEC’s Order, the IR officer attended an investor conference on September 13, 2011, with First Solar’s then-CEO, who publicly expressed confidence that the Company would receive three loan

¹ *Order Instituting Cease-And-Desist Proceedings Pursuant To Section 21C of the Securities Exchange Act of 1934, Making Findings, And Imposing Civil Penalties And A Cease-And-Desist Order*, Release No. 70337(September 6, 2013) relating to Administrative Proceeding File No. 3-15458, available at, <http://www.sec.gov/litigation/admin/2013/34-70337.pdf> (“Order”). See also *SEC Charges Former Vice President of Investor Relations With Violating Fair Disclosure Rules* (September 6, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539799034#.Ui33vcbD98F> (“Press Release”).

² 17 C.F.R. §§ 243.100(b)(1). Citations are to Sections of Regulation FD unless otherwise noted.

³ 17 C.F.R. §§ 243.100(a).

⁴ 17 C.F.R. §§ 243.101(e). See also *Selective Disclosure and Insider Trading*, Release Nos. 33-7881, 34-43154, IC-24599 (August 15, 2000), available at, <http://www.sec.gov/rules/final/33-7881.htm>.

guarantees totaling approximately \$4.5 billion for which the Company had received conditional commitments from the U.S. Department of Energy. The guarantees were conditioned on the Company's meeting several requirements before the end of September, and analysts speculated about whether the Company would be able to satisfy these requirements.

Two days later, on September 15, 2011, the IR officer and several other executives learned the Company would not be receiving at least one of the loan guarantees. A group of employees, including the IR officer and one of First Solar's in-house attorneys, discussed how and when the Company should publicly disclose the loss of the loan guarantee. The Company's in-house counsel specifically noted that when the Company received official notice from the U.S. Department of Energy, "we would not have to issue a press release or post something to our website the same day. We would, though, be restricted by Regulation FD in any [sic] answering questions asked by analysts, investors, etc. until such time that we do issue a press release or post to our website"⁵

On September 20, 2011, the U.S. House of Representatives' Committee on Energy and Commerce sent a letter (the "Congressional Inquiry") to the U.S. Department of Energy inquiring about its loan guarantee program and the status of conditional commitments, including the three involving First Solar, leading to an 8% drop in the Company's stock the next morning. The Congressional Inquiry caused concern within the solar industry about whether the U.S. Department of Energy would be able to move forward with its conditional commitments. Analysts began issuing research reports about the Congressional Inquiry, and numerous analysts and investors began calling the IR officer.

According to the Order, when the IR officer arrived at work on the morning of September 21, 2011 he knew a public press release had not yet been issued, and he learned that it would not be issued until the following morning. Nevertheless, the IR officer drafted talking points that emphasized the high probability of receiving two of the loan guarantees and the low probability of receiving the third, despite his knowing that Regulation FD prohibited him from selectively disclosing material nonpublic information to one party that was not publicly disclosed to all. The SEC investigation determined that the IR officer violated Regulation FD during one-on-one telephone conversations with approximately 30 sell-side analysts and institutional investors on September 21, 2011, during which the IR officer delivered his talking points and directed a subordinate to do the same. The IR officer also told at least one analyst and one institutional investor that if they wished to be conservative, they should assume that First Solar 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. That same day the Company's management learned from a news report that the IR officer had been conducting these discussions and when First Solar disclosed this material information in a press release the next day the Company's stock price declined 6%.

III. SEC Settlement

Under the terms of the Order, the IR officer will pay a civil money penalty of \$50,000 to the United States Treasury without admitting or denying the SEC's findings. In addition, he agreed to cease and desist from causing any future violations of Regulation FD and Section 13(a) of the Exchange Act.

Interestingly, the SEC determined not to bring an enforcement action against First Solar due to, among several other factors, the Company's "extraordinary cooperation" with the SEC's investigation. In its Press Release the SEC also noted specifically that prior to the IR officer's selective disclosure on September 21, 2011,

⁵ Id. See also the Press Release.

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“First Solar cultivated an environment of compliance through the use of a disclosure committee that focused on compliance with Regulation FD.”

In the same release, the SEC acknowledged the Company’s prompt response following the discovery of the IR officer’s selected disclosure and commended the Company’s remedial actions, saying: “The [C]ompany immediately discovered [the IR officer]’s selective disclosure and promptly issued a press release the next morning before the market opened. First Solar then quickly self-reported the misconduct to the SEC. Concurrent with the SEC’s investigation, First Solar undertook remedial measures to address the improper conduct. For example, the [C]ompany conducted additional Regulation FD training for employees responsible for public disclosure.”

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Margaux Knee at 212-701-3130 or mknee@cahill.com.

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