

# Securities Reform Act Litigation Reporter

A Monthly Reporter Featuring Expert Analysis and Prompt Publication of Oral and Written Decisions

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## Regulation FD Compliance Requires Continued Vigilance

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The SEC recently instituted cease-and-desist proceedings and imposed civil penalties against the former head of investor relations of a public company for violating Section 13(a) of the Exchange Act and Regulation FD (Fair Disclosure), which prohibits selective disclosure of material non-public information about an issuer. SEC Release No. 34-70337, Order Instituting Cease-and-Desist Proceedings: In the matter of Lawrence D. Polizzotto (Sept. 6, 2013). The public company itself avoided an enforcement action by cooperating with the SEC, among other factors. This SEC action confirms that Regulation FD enforcement remains a priority for the SEC but that companies can minimize the impact of a violation through robust compliance programs and prompt corrective action.

According to the SEC's order, at an investor conference the company's CEO expressed confidence that the U.S. Department of Energy ("DOE") would grant the company three important loan guarantees relating to three separate projects. After learning from the DOE that one of the guarantees (related to the largest project) would not be granted, in-house counsel advised company executives (including the head of investor relations) that the adverse development could not be selectively disclosed until the information was publicly disseminated. Nevertheless, the investor relations head and a subordinate, using talking points, contacted more than 30 analysts and investors and conveyed a "low probability" that the refused guarantee would be granted and a "high probability" of receiving the other guarantees. The head of investor relations also told at least one analyst and one institutional investor to assume, if they wanted to be conservative, that the "low probability" guarantee would not be granted. In the SEC's view, this messaging effectively signaled, contrary to the CEO's prior public statements, that the company no longer believed it would receive all three loan guarantees. The head of investor relations also selectively confirmed a rumor that the company was negotiating a transaction to reduce the negative impact of not receiving the guarantee.

The head of investor relations consented to the entry of a cease-and-desist order and agreed to pay a \$50,000 fine, although the company itself was not penalized. The SEC's press release emphasized several factors as contributing to the decision not to charge the company:

- Cultivating, prior to the improper disclosure, an environment of compliance through the use of a disclosure committee focused on Regulation FD compliance;

- Discovering the violation quickly after it occurred and then promptly issuing a press release disseminating the material information the very next morning before market open;
- Quick self-reporting of the violation to the SEC;
- Exhibiting “extraordinary cooperation” with the SEC’s investigation; and
- Undertaking remedial measures, including providing additional Regulation FD training for employees responsible for public disclosure.

Robust compliance programs and internal controls, coupled with prompt action in the event systems are circumvented, can enable a company to avoid an SEC enforcement action. Public companies are well advised to review their Regulation FD compliance and control systems and training programs regularly to ensure they are state-of-the-art and up to date for various circumstances, including investor conferences and one-on-one meetings as well as social media and corporate websites.

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