



## Social Media and Regulation FD: SEC Uses Netflix Episode to Clarify Policy, Not Liberalize It

*April 23, 2013*

When the CEO of Netflix used his personal, publicly available Facebook account to disclose what the SEC thought was material information, the SEC threatened Netflix and its CEO with enforcement action. In a somewhat unusual move, the SEC has now reversed course and has instead provided guidance on how companies can use social media in compliance with [Regulation FD](#).

This [new guidance](#) is less a liberalization of Regulation FD than a logical application of prior SEC guidance. While the SEC guidance in this case provides some needed clarification, the principles of Regulation FD and the recommended approach to compliance in the age of social media remain essentially the same. Netflix and its CEO had facts in their favor that will not apply to all situations. Accordingly, companies that wish to use social media as an investor-relations tool should take steps to ensure that their social media accounts are recognized as channels for distribution of material information to the market, as discussed further below.

Regulation FD generally requires that public companies communicate material information to investors on a broad, non-exclusive basis. The primary intent was to address the corrosive effects of behind-the-scenes communications between companies and favored analysts or investors and to ensure “fair disclosure” to all investors.

Regulation FD was adopted in 2000 and accordingly focuses on more traditional methods of distributing information. A report on Form 8-K is the only method that categorically complies with Regulation FD; press releases do under most ordinary circumstances. [SEC guidance issued in 2008](#) advised that disclosure made on a corporate website could comply with Regulation FD, if the company first establishes its website as a “recognized channel of distribution” for material information. This status depends on factors such as whether appropriate notice is given to the market, whether material information is consistently posted to the website in a clear and conspicuous way and whether market participants actually look to the website to find material information.<sup>1</sup>

The 2008 guidance did not address social media, which was less significant at that time. Until now, there has been no specific SEC guidance on whether disclosure through social media channels can comply with Regulation FD.

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<sup>1</sup> See [the SEC's 2008 guidance](#) at page 45,867.

Against this background, in July 2012 Reed Hastings, CEO of Netflix, posted a message to his personal Facebook page congratulating company employees on exceeding 1 billion hours of streaming content in the prior month, the first month this threshold had been exceeded. Six months later, the SEC responded by sending a “Wells notice” to Netflix and Reed Hastings, indicating the SEC staff’s intent to recommend an enforcement action for violation of Regulation FD.

The Wells notice was somewhat surprising to many because it appeared to run contrary to prior guidance that the SEC would not second-guess reasonable, good faith attempts to comply with Regulation FD.<sup>2</sup> Four months later, the SEC declined to pursue the enforcement action; instead, the SEC provided [guidance](#) to all companies that the principles of the SEC’s 2008 guidance apply with equal force to disclosures made through social media.

Netflix was a special case in many ways, with favorable factors that will not apply to many other situations. For instance, it is not clear that the information in question was material, and the information in question arguably had already been made public.<sup>3</sup> In addition, Reed Hastings had over 200,000 Facebook followers, which included reporters for leading financial periodicals, so the content of his Facebook posting was broadly and quickly distributed.

Because of the somewhat special facts of the Netflix example, it is important to keep in mind that Regulation FD still prohibits disclosure of material, non-public information through a social media account, unless a company takes steps to make the account a recognized channel of distribution. Companies that wish to communicate material non-public information through social media should consider the following approach:

- ***Notify investors*** that you intend to use a particular social media channel to communicate material information to the market. The channel should be one where anyone who wishes to receive notifications can do so (such as a public Facebook page or a Twitter feed). The notice ideally would appear on the corporate investor-relations (IR) website and on an on-going basis in financial press releases and periodic SEC reports. The notice should also indicate the types of information that may be disclosed through this channel.<sup>4</sup>
- ***Do what you said you would do.*** That is, actually use the designated social media account to communicate information of the types you told investors would be disclosed through the account. The SEC said, [in the Regulation FD adopting release](#), that deviation

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<sup>2</sup> See, for example, “[Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?](#)”, January 30, 2013, by Joseph A. Grundfest, a Stanford Law School professor and former SEC commissioner.

<sup>3</sup> See discussion on pages 5–17 of [Professor Grundfest’s article](#).

<sup>4</sup> See [the SEC’s Netflix report](#) at page 7.

from a company's usual practices for making public disclosure can factor into a Regulation FD violation.<sup>5</sup>

- ***Comply with technical disclosure requirements.*** In certain contexts, SEC rules require specific disclosures that may not be practical to include in “tweets” or other abbreviated formats. For instance, non-GAAP financial measures (such as EBITDA) must be accompanied by a reconciliation to a GAAP measure, and forward-looking statements must be accompanied by cautionary language to satisfy a statutory safe harbor.
  - As a result of these requirements, we expect that, without further guidance from the SEC, relatively few companies will announce material information to investors exclusively through social media. One way to integrate social media into investor relations, however, would be to use social media to direct followers to more detailed disclosure—for instance, by posting a tweet that simply announces the release of earnings or other material information and embeds a hyperlink to a press release or 8-K that contains all the required disclosures.
  - Depending on the context, it may be feasible to include some substantive disclosure in a tweet or other abbreviated communication, and add a hyperlink to reconciliations or other required disclosures. However, there is no specific guidance on this topic, and the particular circumstances matter. Generally speaking, as more information of a substantive nature is included in the main posting, the more challenging it can be to omit required or other important disclosures and simply hyperlink to them.
- ***Use a dedicated account.*** The safest course is to communicate material information through a dedicated investor relations account, which may be distinct from the account used to broadcast marketing, product or other business developments. This will avoid the risk that information material to investors gets lost among communications for other purposes.
  - The line between “investor” information and marketing and other information is not always a clear one. Some product and other information could be material to investors, as the Netflix example illustrates. This overlap applies to a company's public communications more generally and can be addressed by ensuring that non-IR functions are aware of what metrics or topics are potentially material to investors and, when appropriate, obtain pre-approval from legal personnel. In terms of complying with Regulation FD, one approach is to notify investors that the company's general social media account (as opposed to its dedicated IR account) includes important information on, say, product launches, promotions and other notable events that investors may consider material.

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<sup>5</sup> See the SEC's Regulation FD [adopting release](#) at page 51,724.

- **Consider revising corporate policies** to address the use of social media by company personnel. Many companies are enhancing policies to address compliance with Regulation FD as well as reputational and other risks of inappropriate use of social media.
  - It would be unusual for a company to establish an executive’s personal social media account as a designated channel for communicating material information to investors. Nevertheless, executive officers are presumed to speak for the company for Regulation FD purposes,<sup>6</sup> so executives’ personal social media accounts should generally be subject to the policies that apply to corporate accounts. This is particularly the case if the CEO or other leaders regularly post company information on their personal accounts or if such accounts are followed by the financial press and investors.
  
- **Consider how soon a company can start** using the designated social media account to communicate material non-public information. This is a facts-and-circumstances question, and there is no uniform answer.<sup>7</sup> Helpful factors include making the notices described above conspicuous and giving the market some reasonable period of time to react to those notices.
  - Many social media channels also let a company see who has chosen to “follow” messages from the company. It is helpful if financial journalists and other members of the investment community follow your designated social media account.
  - It is also helpful if your social media communications are quickly and broadly disseminated to the market at large, either through follow-on social media communications (such as “re-tweets”) or more traditional news stories.
  - Until the designated social media account is adequately recognized as a channel of distribution, it is important to supplement social media communications of material information with a Form 8-K or press release, in order to ensure compliance with Regulation FD.
  - Social media channels change their privacy policies and default settings from time to time. It is essential for individuals posting through such channels—and the compliance personnel who provide oversight—to understand the various privacy settings of the social media channels being used, so that information is communicated to its intended audience.
  
- **Consider other implications** of using social media for corporate communications. As social media become a more recognized channel of communications, it will be important that compliance policies address the range of securities law issues they raise. And while

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<sup>6</sup> See [the SEC’s Netflix report](#) at page 7.

<sup>7</sup> See [the SEC’s 2008 guidance](#) at page 45,868.

company communications personnel may understand the need to pre-clear various postings, it may be worthwhile to train executives in this area as well. Some non-Regulation FD compliance points:

- **Proxy rules.** Apart from Regulation FD, SEC proxy rules require the proxy soliciting materials must be filed with the SEC. The SEC has a broad view of what constitutes soliciting materials. If a company becomes involved in a transaction where proxies are being solicited, the company must be careful that social media communications by the company and its executives do not include soliciting material that has not been filed as required. [Zipcar](#) recently filed a Twitter post as soliciting material pursuant to these rules.
- **Securities offerings.** When a company is contemplating or conducting a securities offering, social media communications by the company and its executives should be subject to the same policies and oversight as other corporate communications during an offering. As with company press releases, a social media communication that is viewed as offering securities or conditioning the market for the offering would (unless a safe harbor is available) be problematic.
- **Stock exchange rules.** Rules of the [New York Stock Exchange](#) and [Nasdaq](#) require listed companies to notify the exchange shortly in advance of the publication of material information, and material information must be released by means that comply with Regulation FD. These requirements apply to disclosures through a social media channel just as they do to traditional press releases.
- **Balance and accuracy.** Keep in mind that, while tweets and other social media communications may be limited in length for technical reasons, the need for brevity does not excuse a material omission. Accuracy and balance are just as important in social media communications as they are in more formal securities disclosures.

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