

## SEC Explains How to Use Social Media for Regulation FD Compliance

April 4, 2013

Regulation FD, adopted by the SEC in 2000, prohibits “selective disclosure” by requiring public companies to disclose material information through broadly accessible channels. Thirteen years ago, this meant EDGAR filings, press releases and quarterly earnings calls.

This week the SEC issued a [report of investigation](#) under Section 21(a) of the Securities Exchange Act of 1934 regarding its inquiry into a post by Netflix’s CEO on his personal Facebook page. In the report, the SEC affirmed that a company may use social media to communicate with investors without violating Regulation FD – as long as the company had adequately informed the market that material information would be disclosed in this manner. The report states that whether a company’s social media disclosure satisfies Regulation FD will depend upon the principles outlined in the SEC’s 2008 guidance, [Commission Guidance on the Use of Company Web Sites](#), while recapping that guidance in a way that should make these principles more workable for companies that want to use websites, social media and other evolving communication methods to disclose important information to the market.

With the benefit of this Section 21(a) report, companies should be comfortable using evolving communication methods for corporate disclosure. Companies should continue to thoughtfully plan how to ensure that these methods alone can satisfy Regulation FD, and should remain alert to other possible federal securities law concerns that can arise when they or their executives use these methods to deliver corporate news. Below we offer a few insights into the report as well as some strategies to follow when making Regulation FD-sensitive corporate disclosures via non-traditional channels.

### Netflix

The Section 21(a) report grew out of the SEC’s inquiry into a post made last year by Netflix’s CEO on his personal Facebook page announcing a milestone in the company’s monthly usage numbers. Before the Facebook post, the CEO had publicly stated that the company did not use social media (Facebook or otherwise) to communicate material information to investors. Ultimately, the SEC declined to bring an enforcement action despite some suggestion that it did not consider this particular use of a Facebook post to comply with Regulation FD. The report does not explain why the SEC decided to avoid an enforcement action and instead proceed with a Section 21(a) report (a tool it uses sparingly).

### Using Social Media to Satisfy Regulation FD

Even though corporate use of social media has skyrocketed in recent years, before this week’s Section 21(a) report the SEC was officially silent on the use of social media to comply with Regulation FD. The report addresses this gap in guidance and makes it clear that the SEC does not “wish to inhibit the content, form, or forum” of corporate disclosures, but rather seeks to “encourage companies to seek out new forms of communication to better connect with shareholders.” Confirming the views of many practitioners, the report states that the principles outlined in the 2008 guidance, which discusses when information posted on a company website may be considered “public” for purposes of Regulation FD, also apply to disclosure made via social media and other “rapidly changing forms of communication.”

We think the Netflix Section 21(a) report is a noteworthy improvement on the 2008 guidance for two key reasons.

First, the report stresses that the key factor in determining whether social media disclosure satisfies Regulation FD is whether the company has adequately informed investors, the market and the media that it will communicate material information in this manner. This emphasis on sufficient *advance notice* should turn out to be quite helpful. The 2008 guidance was sometimes observed to have created a “chicken and egg” problem by focusing on whether a company’s website was *already* a “recognized channel of distribution” at the time the information in question was posted. Without a track record of using only its website to release material information, a company would have a hard time knowing whether its website met this standard. As a result, many companies adopted a belt-and-suspenders approach to Regulation FD compliance, in which a press release or Form 8-K is used to disclose information that is also disclosed via the company website, or an “advisory press release” is used to alert investors that material information will be posted at a certain time. If a company regularly releases all material information through a press release or Form 8-K, however, the concern persists that investors may not bother subscribing to RSS feeds, for example, because more traditional methods of disclosure remain in use – further inhibiting the development of the website as a recognized channel. By focusing on notice, rather than on whether a company’s disclosure channels have become “recognized” in the eyes of third parties, the Section 21(a) report provides a concrete step a company can take to establish a particular channel as a Regulation FD compliance tool.

Second, the report indicates that, as long as proper notice is given, the use of a subscription-based medium such as Facebook or Twitter can be suitable for Regulation FD purposes. This clears up a lingering concern that requiring an investor to subscribe, register or otherwise “opt in” to receive disclosures, even where no payment is required, might violate the Regulation FD imperative that disclosure be made on a “non-exclusionary” basis.

## Going Forward

Below are a few suggestions that companies can adopt to lay the groundwork for website and social media disclosure of Regulation FD-sensitive corporate information.

- **Decide which channels you want to use – and be specific.** We believe it makes sense to identify the precise location where material information will appear, such as the specific URL, Twitter handle or Facebook page, rather than a general home page or a general reference to a particular social media site. For some information, such as an upcoming earnings release, you may also be able to indicate to investors in advance when you expect to provide the information. The more specificity you provide investors about where and when to find future announcements the better. The SEC will expect you to make it easy for investors to find information. And although the SEC is comfortable with “opt in” channels, an investor should not have to pay money or agree to unusual license terms in order to access the channel.
- **Decide what type of information you want to disclose.** Although many companies will use websites and social media for some form of content, we expect that practice will continue to vary as to what types of information will be communicated through these channels. If a company decides, for example, that it will communicate key financial metrics through these channels, it would make sense to highlight that.
- **Craft a short paragraph explaining what you plan to disclose and where you plan to disclose it.** Once you have decided what channels you will use and what you will communicate through these channels, you need a concise statement explaining this.
- **Publish this paragraph regularly in your annual and quarterly reports, in your press release boilerplate, and on the home page of your corporate website.** This is the key to ensuring that the market has notice of your plans. If you intend to change your practices, make sure notice of the change is publicized well in advance.

- **Use available push technology.** When possible, you should provide a mechanism for investors to receive alerts that new information has been posted. This can be accomplished by giving investors the ability to subscribe to RSS or other social media feeds, and informing investors that these feeds are available and how to subscribe. Investors should have adequate time to subscribe before you begin to use the related disclosure channel.
- **Use it or lose it.** Once you have announced your intention to use a particular channel for a particular purpose, it's important that you use it as you have described. Sporadic or inconsistent use is less likely to produce the kind of market following that the SEC is clearly looking for.

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

|                                  |                     |  |
|----------------------------------|---------------------|--|
| <b>Alan F. Denenberg</b>         | <b>650 752 2004</b> | <a href="mailto:alan.denenberg@davispolk.com">alan.denenberg@davispolk.com</a>       |
| <b>Joseph A. Hall</b>            | <b>212 450 4565</b> | <a href="mailto:joseph.hall@davispolk.com">joseph.hall@davispolk.com</a>             |
| <b>Michael Kaplan</b>            | <b>212 450 4111</b> | <a href="mailto:michael.kaplan@davispolk.com">michael.kaplan@davispolk.com</a>       |
| <b>William M. Kelly</b>          | <b>650 752 2003</b> | <a href="mailto:william.kelly@davispolk.com">william.kelly@davispolk.com</a>         |
| <b>Richard J. Sandler</b>        | <b>212 450 4224</b> | <a href="mailto:richard.sandler@davispolk.com">richard.sandler@davispolk.com</a>     |
| <b>Linda Chatman Thomsen</b>     | <b>202 962 7125</b> | <a href="mailto:linda.thomsen@davispolk.com">linda.thomsen@davispolk.com</a>         |
| <b>Richard D. Truesdell, Jr.</b> | <b>212 450 4674</b> | <a href="mailto:richard.truesdell@davispolk.com">richard.truesdell@davispolk.com</a> |
| <b>Janice Brunner</b>            | <b>212 450 4211</b> | <a href="mailto:janice.brunner@davispolk.com">janice.brunner@davispolk.com</a>       |

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