

Amicus Submission to SEC Questions Regulation FD Case Against Netflix

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Professor Joseph Grundfest at Stanford Law School and The Rock Center for Corporate Governance suggests that the SEC should not initiate enforcement action against Netflix in his [article](#), "Regulation FD in the Age of Facebook and Twitter," which was sent to the SEC as an Amicus Wells Submission. At issue is whether Netflix violated Regulation FD because of a posting made by the CEO to his Facebook page that claimed monthly viewing exceeded 1 billion hours for the first time.

The article contends that the posting contained no material information as the market was already aware at the time that the company was delivering close to a billion hours for the month as evidenced by several press reports. The viewing metric was not linked to any compensation scheme and did not affect the company's valuation. In addition, the message was written in the form of a congratulatory note to certain employees and not designed to influence investors.

Central to the dispute is the use of social media to communicate corporate information. The article claims that the Netflix CEO posting was reasonably designed to provide "broad non-exclusionary distribution" and did not constitute selective disclosure. The CEO's Facebook page had 205,000 followers, as proven by the rapid and wide dissemination of his message through Twitter feeds and also traditional media. Unlike the 13 prior Regulation FD cases, the message was broadly accessible by the general public instead of targeting the investment industry insiders central to the objectives of Regulation FD. In previous precedents where companies were found to have violated Regulation FD, the companies controlled the recipients, with the largest group numbering 200, whereas Netflix made no efforts to limit who saw the posting.

The article argues that Netflix's actions are not inconsistent with prior Staff guidance regarding the use of company websites and Regulation FD. While the SEC's 2008 guidance favored advanced notification that material information may be communicated through company websites, that guidance also indicated that use by investors and the market of the company website can substitute for the company actions to alert the market to information being available.

Professor Grundfest raises an interesting question of whether Regulation FD would survive a constitutional challenge as a restraint on truthful speech, particularly as applied to this case. The debate may focus on whether the SEC's explicit preference for using press releases, Form 8-Ks and static webpages violate the First Amendment as discriminating against social media, in the absence of any showing that social media is less effective in achieving the regulation's objectives. It may be possible to characterize Regulation FD as a prohibited content-based regulation which limits truthful, material speech when expressed by certain persons (the issuer) to certain recipients (investors), that cannot be made through any communication means other than those explicitly endorsed (Form 8-Ks).

Bringing forth a case against Netflix may also be futile, since the investigation has already obtained the remedy it seeks and chilled the use of social media without making a contemporaneous 8-K filing. The article references numerous law firm memos advising companies to exercise extreme caution in using social media to disclose information.

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

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