

## SEC Clarifies Company Use of Social Media Under Regulation FD

On April 2, 2013, the SEC issued a [Report of Investigation](#) (Report) announcing that it had concluded its investigation regarding potential Regulation FD violations related to the use by Mr. Reed Hastings, the CEO of Netflix, of his personal Facebook page to announce that Netflix had streamed over one billion hours of content in one month for the first time. Neither Netflix nor Mr. Hastings had previously used Hastings's personal Facebook page to announce company metrics, and Netflix had not previously informed shareholders that Mr. Hastings's Facebook page would be used to disclose information about Netflix. The post was not accompanied by a press release, a post on Netflix's own website or Facebook page, or a Current Report on Form 8-K. Details of the underlying facts and the SEC's response are set forth in our [SEC Enforcement Alert](#) dated December 12, 2012.

Recognizing that there is uncertainty concerning how Regulation FD and the SEC's 2008 Guidance on the Use of Company Web Sites (2008 Guidance) apply to disclosures made through social media channels, the SEC issued the Report to provide guidance as to the application of Regulation FD to disclosures through social media. The Report also discloses that the Commission had decided not to pursue enforcement action against Netflix or Mr. Hastings, although the analysis in this Report suggests that Mr. Hastings' disclosure through Facebook raised serious issues as to compliance with Regulation FD.

Regulation FD is intended to ensure that individual investors have equal access to material information by prohibiting selective disclosure. It provides that when an issuer, or a person acting on its behalf, discloses material, nonpublic information to enumerated persons, including brokers, dealers, investment advisers (i.e. analysts) or shareholders under circumstances in which it is reasonably foreseeable that they will trade on the basis of the information, it must distribute that information in a manner reasonably designed to achieve effective broad and non-exclusionary distribution to the public. As a result, all disclosures to any enumerated persons, or any broader group that includes any enumerated persons, should be analyzed for compliance with Regulation FD. This analysis has two components: whether the information was material and non-public and whether it was disseminated in a manner "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."

In August 2008, in response to the wide-spread use of websites to disseminate information electronically to investors and the market, the SEC issued its 2008 Guidance. The guidance was not limited to the use of websites, however, as it also contemplated other "push" technology forms of communication such as email alerts, RSS feeds, and blogs. The Report notes that as a result, the 2008 Guidance provides a relevant framework for applying Regulation FD to evolving social media channels of distribution, as "the ways in which companies may use social media channels are not fundamentally different from the ways in which the web sites, blogs, and RSS feeds addressed by the 2008 Guidance are used".

As noted in the Report, the 2008 Guidance explains that the determination of whether a company's website is an acceptable distribution channel will depend on steps taken by the company to alert the market to its website and its disclosure practices, as well as investor use thereof. The guidance includes a non-exclusive list of factors to be considered, which focus on whether the company has made investors, the market, and the media aware of the channels of distribution it expects to use, and what they need to do in order to receive relevant information. The Report states that issuer communications through social

media channels require careful Regulation FD analysis comparable to communications through more traditional channels. The Report also emphasizes that the principles outlined in the 2008 Guidance, specifically the concept that the investing public should be alerted to the channels through which a company disseminates material information, apply to corporate disclosures made through social media channels.

As stated in the Report, the 2008 Guidance encourages issuers to consider including in periodic reports and press releases the corporate website address and disclosures that the company routinely posts important information on that website. The Report notes that, similarly, disclosures on corporate websites identifying the specific social media channels a company intends to use to disseminate material non-public information would give investors and the markets the opportunity to take the steps necessary to be in a position to receive important disclosures, e.g., subscribing, joining, registering, or reviewing that particular channel. The SEC characterized these as “some, but certainly not all” of the methods a company could use “with minimal burden, to enable evolving social media channels of corporate disclosure to be used as recognized channels of distribution in compliance with Regulation FD and the 2008 Guidance.”

As a cautionary note (although the SEC declined to pursue an enforcement action against Netflix or Mr. Hastings), the Report states that disclosure of material, nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose, is unlikely to qualify as a method “reasonably designed to provide broad, non-exclusionary distribution of the information to the public” within the meaning of Regulation FD, even if the individual in question has a large number of subscribers, friends, or other social media contacts. Thus, while the SEC exercised restraint here, in the future, it appears that the use of social media to communicate material nonpublic information, without prior and appropriate notice to the public, may run afoul of Regulation FD.

For more information, please contact [Sara Adler](#), [Jonathan Green](#), [Joel Greenberg](#) or [Lindsay Moilanen](#).

---

**Chicago Office**  
+1.312.583.2300

**Frankfurt Office**  
+49.69.25494.0

**London Office**  
+44.20.7105.0500

**Los Angeles Office**  
+1.310.788.1000

**New York Office**  
+1.212.836.8000

**Palo Alto Office**  
+1.650.319.4500

**Shanghai Office**  
+86.21.2208.3600

**Washington, DC Office**  
+1.202.682.3500

**West Palm Beach Office**  
+1.561.802.3230

---

Copyright ©2013 by Kaye Scholer LLP, 425 Park Avenue, New York, NY 10022-3598. All rights reserved. This publication is intended as a general guide only. It does not contain a general legal analysis or constitute an opinion of Kaye Scholer LLP or any member of the firm on the legal issues described. It is recommended that readers not rely on this general guide but that professional advice be sought in connection with individual matters. Attorney Advertising: Prior results do not guarantee future outcomes.