

SONFIELD & SONFIELD

Since 1898



Washington, D.C., April 2013 - The Securities and Exchange Commission today issued a report that makes clear that companies can use social media outlets like Facebook and Twitter to announce key information in compliance with Regulation Fair Disclosure (Regulation FD) so long as investors have been alerted about which social media will be used to disseminate such information.

[The SEC's report of investigation](#) confirms that Regulation FD applies to social media and other emerging means of communication used by public companies the same way it applies to company websites. The SEC issued guidance in 2008 clarifying that websites can serve as an effective means for disseminating information to investors if they've been made aware that's where to look for it. Today's report clarifies that company communications made through social media channels could constitute selective disclosures and, therefore, require careful Regulation FD analysis.

"One set of shareholders should not be able to get a jump on other shareholders just because the company is selectively disclosing important information," said George Canellos, Acting Director of the SEC's Division of Enforcement. "Most social media are perfectly suitable methods for communicating with investors, but not if the access is restricted or if investors don't know that's where they need to turn to get the latest news."

Regulation FD requires companies to distribute material information in a manner reasonably designed to get that information out to the general public broadly and non-exclusively. It is intended to ensure that all investors have the ability to gain access to material information at the same time.

Lona Nallengara, Acting Director of the SEC's Division of Corporation Finance, added, "Companies should review the Commission's existing guidance - it is flexible enough to address questions that arise for companies that choose to communicate through social media, and the guidance does so in a straightforward manner."

The SEC's report of investigation stems from an inquiry the Division of Enforcement launched into a post by Netflix CEO Reed Hastings on his personal Facebook page stating that Netflix's monthly online viewing had exceeded one billion hours for the first time. Netflix did not report this information to investors through a press release or Form 8-K filing, and a subsequent company press release later that day did not include this information. Neither Hastings nor Netflix had previously used his Facebook page to announce company metrics, and they had never before taken steps to alert investors that Hastings' personal Facebook page might be used as a medium for communicating information about Netflix. Netflix's stock price had begun rising before the posting, and increased from \$70.45 at the time of the Facebook post to \$81.72 at the close of the following trading day.

The SEC did not initiate an enforcement action or allege wrongdoing by Hastings or Netflix. Recognizing that there has been market uncertainty about the application of Regulation FD to social media, the SEC issued the report of investigation pursuant to Section 21(a) of the Securities Exchange Act of 1934.

The report of investigation explains that although every case must be evaluated on its own facts, 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 an acceptable method of disclosure under the securities laws. Personal social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information.

The SEC's inquiry was conducted by Cameron P. Hoffman, Michael E. Liftik, and Assistant Regional Director Cary S. Robnett in the San Francisco Regional Office.

Michael Fugler, NIBA Advisory Committee Chairman

Emily Foshee, NIBA Executive Director

NIBA New York Conference
Marriott Hotel Downtown, New York, NY
REGISTER NOW