

PUBLICATION

Regulation FD and Social Media [Ober|Kaler]

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A periodic bulletin keeping small businesses informed about current developments in securities law and related matters.

As we discussed in our [February Bulletin](#), late last year Netflix and its CEO, Reed Hastings, each received a notice from the SEC Staff indicating that the Staff intended to recommend to the SEC that it institute proceedings against them related to Reed's posting on his company blog and on his Facebook page that Netflix members were viewing "nearly a billion hours per month." The company had not, such as through a press release or the filing of a Form 8-K, otherwise released this information, which the SEC deemed material. While Mr. Reed's position was that this information was public due to the large number of people (over 200,000) who subscribe to his Facebook page, and in any case was not material, he acknowledged that "we don't currently use Facebook and other social media to get material information to investors." Therefore, as we noted in our Bulletin, his blog and Facebook page would not have been a "recognized channel of distribution" and, if the posted information was material, the posting would have violated Regulation FD, which prohibits selective disclosure of material nonpublic information.

In April, the SEC released a [Report of Investigation \[PDF\]](#) with respect to the Netflix case. The Report confirms the SEC's position that companies can, in appropriate circumstances, use social media such as Facebook and Twitter to announce material, nonpublic information without violating Regulation FD. Consistent with its 2008 *Commission Guidance on the Use of Corporate Web Sites* (Release No. 34-58288), the SEC noted that in order to announce such information solely using such social media, the company must have previously alerted the market about which social media may be used to disseminate what types of information – in other words, the company must ensure that such social media is a "recognized channel of distribution" for communicating with [its] investors" in order for disclosure of material nonpublic information via such methods to comply with Regulation FD. While not stating that Netflix and Mr. Reed violated Regulation FD, the Report did, however, confirm 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." Apparently recognizing, however, perceived "market uncertainty about the application of Regulation FD to social media," the SEC declined to initiate an enforcement action against Netflix or Mr. Hastings.

Companies that intend to use social media to disseminate material nonpublic information should review with their counsel their communications policies and procedures to ensure that any such disclosures will be in compliance with Regulation FD.

In addition to the Report of Investigations, you can review the SEC's related press release [here](#).