Touro Law Review

Volume 30 | Number 3 Article 12

October 2014

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Recommended Citation

Wanser, Alyssa (2014) "The Facebook Status that Sparked an SEC Investigation: Regulation Fair Disclosure and the Growth of Social Media," *Touro Law Review*: Vol. 30: No. 3, Article 12.
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Cover Page Footnote
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THE FACEBOOK STATUS THAT SPARKED AN SEC INVESTIGATION: REGULATION FAIR DISCLOSURE AND THE GROWTH OF SOCIAL MEDIA

Alyssa Wanser[*]

I. INTRODUCTION

Within the last decade, social media has changed the world around us, not only in the way we interact with others, but also in the way we discover information. The average person spends roughly three hours a day on social media platforms, and it is expected to be a $1.3 trillion industry.[1] According to a recent study, 50% of people learn about breaking news through social media, and one out of every six job-seekers successfully attain a job using a social media platform.[2] Additionally, 65% of traditional media reporters use social media sites, such as Facebook and LinkedIn, for researching stories.[3]

The use of social media has become so prevalent that it has begun to capture the attention of major regulatory institutions. The Securities and Exchange Commission ("SEC" or "the Commission") recently had the opportunity to address the use of social media when Netflix CEO Reed Hastings posted information on his Facebook page that the SEC investigated for a potential securities violation.[4] The

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[1] Iris Vermeren, *How Social Media is Changing the World [infographic]*, BRANDWATCH (Aug. 20, 2013), http://www.brandwatch.com/2013/08/how-social-media-is-changing-our-world-infographic/.

[2] *Id.* (noting that "nearly 90 per cent of job recruiters hired employees through LinkedIn alone").

[3] *Id.*

[4] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 69279, at 4 (Apr. 7, 2013),

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Facebook post was a potential violation of the SEC's disclosure rule, Regulation Fair Disclosure ("Regulation FD"), which prevents issuers of securities from engaging in selective disclosure.[5] Selective disclosure occurs when issuers of securities release material, nonpublic information only to certain persons, who in turn trade securities based on this new knowledge.[6] Regulation FD requires an issuer of securities to make a public disclosure whenever that issuer releases any material, nonpublic information to certain individuals.[7] The goal in requiring disclosures is to prevent an unfair advantage in the market.[8]

A "public disclosure" can be made either by filing a Form 8-K, which is a report disclosing the nonpublic information,[9] or instead by "disseminat[ing] the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[10] This broad language regarding an alternate method of releasing information would appear to give issuers flexibility; but the SEC maintained the position that releasing material information sole-

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http://www.sec.gov/litigation/investreport/34-69279.pdf.

[5] Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (to be codified at 17 C.F.R. pt. 243).

[6] *Id.*

[7] 17 C.F.R. § 243.100(a) (2011):

> Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e):
>
> (1) Simultaneously, in the case of an intentional disclosure; and
>
> (2) Promptly, in the case of a non-intentional disclosure.

[8] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716.

[9] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (stating that information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally).

[10] 17 C.F.R. § 243.101(e) (2011):

> Public disclosure.
>
> (1) Except as provided in paragraph (e)(2) of this section, an issuer shall make the "public disclosure" of information required by § 243.100(a) by furnishing to or filing with the Commission a Form 8-K (17 CFR 249.308) disclosing that information.
>
> (2) An issuer shall be exempt from the requirement to furnish or file a Form 8-K if it instead disseminates the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

ly on a company's website would not be a sufficient disclosure to satisfy Regulation FD.[11] Yet, as technology has developed due to the increasing use of the Internet, businesses and agencies such as the SEC were forced to adapt to the growing demand for technology. In 2008, the SEC issued an interpretive release[12] to provide guidance regarding the use of company websites for public disclosures.[13] Within this release, the Commission proposed reinterpreting Regulation FD to permit posting on a company's website as a sufficient public disclosure to reflect the evolution of technology.[14]

Recently, the SEC further expanded the acceptable methods by which issuers can appropriately release information as a result of the Netflix investigation.[15] Hastings's post,[16] which stated the number of hours of television and movies watched by Netflix customers, was under investigation because it was not accompanied by a simultaneous release to the public.[17] After an investigation, the SEC ultimately concluded that, so long as investors were provided adequate notice, issuers may be authorized to release material, nonpublic information by means of social media in compliance with Regulation FD.[18]

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[11] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,724 (stating, "an issuer's posting of new information on its own website would not by itself be considered a sufficient method of public disclosure. . . . [Yet], in some circumstances an issuer may be able to demonstrate that disclosure made on its website could be part of a combination of methods, 'reasonably designed to provide broad, non-exclusionary distribution' of information to the public.").

[12] *SEC Interpretive Release*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/interp.shtml (last visited May 2, 2014) (providing that the SEC issues the releases to publish its views and interpret the federal securities laws and SEC regulations to provide guidance on topics of general interest to the business community).

[13] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862 (Aug. 7, 2008).

[14] *Id.* at 45,868 (stating "we now believe that technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting of the information on the company's web site, in and of itself, may be a sufficient method of public disclosure under 17 C.F.R. § 243.101(e) of Regulation FD.").

[15] Report of Investigation, *supra* note 4, at 7.

[16] *Id.* at 4 (providing that Hastings posted a Facebook status update that stated "Congrats to Ted Sarados, and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June.").

[17] *Id.*

[18] *Id.* at 7-8 (stating "the steps taken to alert the market about which forms of communication a company intends to use for the dissemination of material, nonpublic information, including the social media channels that may be used and the types of information that may be disclosed through these channels, are critical to the fair and efficient disclosure of information.").

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Although this new interpretation reflects the evolution of technology, it does raise concerns over whether it could hurt investors.[19] Many investors may be more comfortable with the traditional means of releasing information and find the use of social media to be a burden and perhaps, even a mistake.[20] Consequently, it is not certain that the SEC's interpretation of Regulation FD regarding social media serves the broader policy goals of the Regulation. The use of social media websites can also have many downsides, such as unwanted postings and privacy concerns, since users will be required to register by providing their personal information.[21] Finally, the language employed by the SEC is vague, creating uncertainty surrounding which social media websites are appropriate platforms and how companies will go about informing the public of their intended use of social media.

This Comment will examine the evolution of Regulation FD: Section II will start with an analysis of the reasons for the promulgation of Regulation FD, and then it will discuss subsequent interpretations due to changing technology and the investigation surrounding Netflix. Next, Section III will explore any controversy surrounding the SEC's decision to reinterpret Regulation FD, including any negative impacts on investors and potential disadvantages to using social media websites. Section IV will propose possible solutions for both the SEC in its implementation of Regulation FD and for companies on how to comply. Finally, Section V will provide relevant conclusions.

II. EVOLUTION OF REGULATION FAIR DISCLOSURE

In 2000, the SEC adopted a new rule, Regulation FD, to address the issue of selective disclosure, a process in which issuers of material, nonpublic information released that information only to certain persons, who, in turn, traded securities based on their new knowledge.[22] The purpose of Regulation FD was to prevent selective disclosure in order to enhance the fairness and efficiency of capital

[19] Anthony Palazzo, *Netflix CEO Hastings Uses Facebook to Announce Viewership*, BLOOMBERG TECHNOLOGY (Apr. 12, 2013, 2:27 PM), http://www.bloomberg.com/news/2013-04-11/netflix-ceo-hastings-uses-facebook-to-announce-viewership.html.

[20] *Id.*

[21] *Id.*

[22] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716.

markets, essentially expanding on the legislation enacted by Congress in the 1930s.[23] The Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively "the Acts") focus on the importance of fair dealing and the need to regulate the markets.[24] The creation of Regulation FD extends from the federal securities laws with the objective of ensuring full and fair disclosure to the investing public.[25]

To further Regulation FD's predominant principles of fairness and efficiency, the SEC has released reports to the investing public that establish guidelines for determining the boundaries of Regulation FD.[26] To ensure compliance, in 2008, the SEC issued a press release concerning the ways in which companies could abide by Regulation FD through the use of company websites.[27] More recently, in April of 2013, the SEC reported that companies are now authorized to utilize social media websites in the same fashion, deeming them an appropriate means for disseminating information.[28] Overall, the federal securities laws influenced the SEC to create Regulation FD in order to expand upon the objectives the Acts addressed years ago. However, due to frequently changing technology, the SEC has been forced to reevaluate the overall purpose of Regulation FD and to ensure that the new interpretations of the rule achieve the goals of the Securities Acts.

A. The Securities Act of 1933 and The Securities Exchange Act of 1934

Congress enacted the Securities Act of 1933 ("Securities Act") to mandate that investors receive certain financial information

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[23] *Id.* at 51,719.

[24] *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml (last visited May 2, 2014); *see also* 15 U.S.C. §§ 77a—bbbb; 15 U.S.C. §§ 78a—lll.

[25] Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,591 (Dec. 28, 1999) (to be codified at 17 C.F.R. pt. 243).

[26] Report of Investigation, *supra* note 4, at 1.

[27] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,868 (stating, "technology has evolved and the use of the Internet has grown such that . . . posting of the information on the company's Web site . . . may be a sufficient method of public disclosure under 17 C.F.R. § 243.101(e) of Regulation FD.").

[28] Report of Investigation, *supra* note 4, at 6-8 (deciding that social media websites now apply in the same way as corporate websites, according to the 2008 guidance). "We appreciate the value and prevalence of social media channels in contemporary market communications, and the Commission supports companies seeking new ways to communicate and engage with shareholders and the market." *Id.*

regarding securities being offered for public sale and to prohibit fraud during the sale of securities.[29] To accomplish these goals, Congress enacted a system that required the registration of securities to provide potential investors with relevant financial information.[30] Thus, the primary purpose of enacting the Securities Act was to ensure fair dealing and honest conduct within the securities market.[31] Because the Securities Act was designed to control only the initial issuance of securities, Congress adopted the Securities Exchange Act ("Exchange Act") the following year to govern dealings subsequent to the initial issuance.[32] The motivation for creating this subsequent act was to govern secondary market transactions and related practices.[33]

One of the primary purposes behind both of the Acts was to protect the investing public from fraud by ensuring that issuers of securities provide full disclosure.[34] The Securities Act compelled issuers to provide "full disclosure of material information concerning

[29] *Securities Industry*, *supra* note 24 (stating that the two basic objectives of the Securities Act was to "require that investors receive financial and other significant information concerning securities being offered for public sale; and [to] prohibit deceit, misrepresentations, and other fraud in the sale of securities.").

[30] *Id.* (requiring the information to be accurate, so that investors can make informed decisions when deciding whether or not to purchase securities).

[31] Res. Corp. Int'l v. SEC, 103 F.2d 929, 932 (D.C. Cir. 1939) (holding that "the [Securities] Act is designed, through the imposition of penalties, to insure fair dealing and good conduct . . . in the sale of securities to the public.").

[32] Peoples Sec. Co. v. SEC, 289 F.2d 268, 271 (5th Cir. 1961) (finding that "[t]he Exchange Act differs from the Securities Act primarily in that it applies to post-distribution trading.").

[33] 15 U.S.C. § 78b (2010):

> Necessity for regulation.
>
> For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.

Id.

[34] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."[35] Subsequently, the Exchange Act sought to protect investors against the manipulation of stock prices by establishing a system of regulating transactions upon security exchanges and to require reporting by companies listed on those exchanges.[36] To accomplish an efficient system of regulation, Congress created the SEC, conferring upon it a wide array of powers.[37] One such power is the authority to promulgate rules and regulations necessary to execute the functions of the Commission or to implement the provisions of the Exchange Act.[38] As per its enumerated power, the SEC thus promulgated Regulation FD to carry out the provisions of the Securities Acts, which ensured full and fair disclosure and a level playing field for all investors.[39]

B. Formation of Regulation FD

In 2000, the SEC proposed Regulation FD to address the problem of issuers making disclosures of material, nonpublic information to select persons, such as analysts and institutional investors, and not to the general public.[40] The proposition suggested that there be simultaneous access of material information to all potential investors, thereby eliminating any potential biases towards larger, more established investors, and serving an essential objective of the Securities Acts.[41] Prior to the proposal, there was no requirement for

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[35] *Id.* (citing H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933)).

[36] *Id.* (citing S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934)).

[37] 15 U.S.C. § 78d(a) (2010).

[38] 15 U.S.C. § 78w(a)(1) (2010):

> Power to make rules and regulations; considerations; public disclosure.
>
> (1) The Commission . . . shall [] have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof.

Id.

[39] *See generally* 17 C.F.R. § 243.100.

[40] Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,591.

[41] *Id.* (stating "[f]ull and fair disclosure of information by issuers of securities to the investing public is a cornerstone of the federal securities laws. In enacting the mandatory dis-

issuers of securities to disclose important corporate developments to the public as they occur, giving issuers the liberty to decide when to release disclosures and to whom.[42] At times, this led to issuers selectively releasing information that had the potential to have a significant impact on the market price of the issuer's securities, thereby providing an unfair advantage.[43] Essentially, selective disclosure posed a threat to the fairness of the securities markets by allowing the informed investors to immediately use the confidential information to make a profit before the information became public knowledge.[44]

1. Creation and Importance

After releasing the proposal, the SEC received comments from the public[45] and, ultimately, decided that it was an essential rule to secure fairness in the securities markets.[46] A vast majority of the comments were from individual investors, urging the SEC to enact Regulation FD, as many of them had been negatively affected by selective disclosure and felt they were at a disadvantage in the market.[47] Further, the Commission considered the commenters' trepidation surrounding Regulation FD, due to the possibility of excessive liability

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closure system of the Exchange Act, Congress sought to . . . facilitate the operation of fair and efficient markets.").

[42] *Id.* (emphasizing that "the federal securities laws do not generally require an issuer to make public disclosure of all important corporate developments when they occur . . . . [I]ssuers also retain control over the audience and forum for some important disclosures. If a disclosure is made at a time when no Commission filing is immediately required, the issuer determines how and to whom to make its initial disclosure. As a result, issuers sometimes choose to disclose information selectively").

[43] *Id.* at 72,591-92 (stating that "selective disclosures have been made in conference calls or meetings that are open only to analysts and/or institutional investors, and exclude other investors, members of the public, and the media . . . . [T]hese situations involve advance notice of the issuer's upcoming quarterly earnings or sales figures—figures which, when announced, have a predictable and significant impact on the market price of the issuer's securities.").

[44] *Id.* at 72,592 (finding that "a recent academic study indicated [that] selective disclosure has the immediate effect of enabling those privy to the information to make a quick profit (or quickly minimize losses) by trading before the information is disseminated to the public.").

[45] *See generally Comments on Proposed Rule: Selective Disclosure and Insider Trading*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/proposed/s73199.shtml (last visited May 2, 2014) (providing the files of electronically received public comments responding to the proposed rule).

[46] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716.

[47] *Id.* at 51,717 (finding that "[m]any felt that selective disclosure was indistinguishable from insider trading in its effect on the market and investors, and expressed surprise that existing law did not already prohibit this practice.").

for companies, and decided to narrow its scope.[48] The final version of the rule provides that when an issuer of securities, or a person acting on its behalf, discloses material, nonpublic information to select enumerated persons, it must also disclose the information through a public medium.[49] The amount of time that the issuer has to make a public disclosure depends on whether the selective disclosure was intentional or non-intentional.[50] A disclosure is "intentional" when the issuer either knows, or is reckless in not knowing, that the information he is communicating is material and nonpublic, in which case, the issuer must make its public disclosure simultaneously.[51] On the other hand, if the disclosure is "non-intentional," the issuer must make its public disclosure promptly, meaning "as soon as reasonably practicable," after learning of the disclosure.[52]

Regulation FD was created for a number of reasons, many of which have had a significant impact on the securities markets and the way that companies disclose information. The primary reason for adopting Regulation FD was to rectify a problem that was outside the scope of insider trading laws—those that were not privy to confidential information were at a disadvantage in the market.[53] The SEC also

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[48] *Id.* at 51,718 (including specifying the issuer personnel to be held responsible, as well as limiting those outside persons to whom an issuer communicates to only market professionals and holders of the issuer's securities).

[49] *Id.* at 51,719 (citing 17 C.F.R. § 243.100(a)).

> Rule 100 of Regulation FD sets forth the basic rule regarding selective disclosure. Under this rule, whenever:
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> (1) an issuer, or person acting on its behalf,
>
> (2) discloses material nonpublic information,
>
> (3) to certain enumerated persons (in general, securities market professionals or holders of the issuer's securities who may well trade on the basis of the information),
>
> (4) the issuer must make public disclosure of that same information:
>
> (a) simultaneously (for intentional disclosures), or
>
> (b) promptly (for non-intentional disclosures).

Id.

[50] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719.

[51] *Id.* at 51,722 (quoting 17 C.F.R. § 243.101(a)).

[52] *Id.* (citing 17 C.F.R. § 243.101(d)) (stating that it "defined 'promptly' to mean 'as soon as reasonably practicable' (but no later than 24 hours) after a senior official of the issuer learns of the disclosure and knows (or is reckless in not knowing) that the information disclosed was both material and non-public.").

[53] *Id.* at 51,717; *see also Insider Trading*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/insider.htm (last visited May 2, 2014) (defining illegal insider trading as "buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the secu-

found that selective disclosure led to "a loss of investor confidence in the integrity of [the] capital markets," and it was concerned with investors' skepticism about market efficiency.[54] Similarly, the SEC was concerned that management must be treating material information as somewhat of a commodity, using it to gain goodwill with analysts or investors.[55] All of these reasons led to the promulgation of Regulation FD, and because of the technological developments at the time, adoption of the rule would be easier for issuers.[56] The emergence of the Internet allowed the ready release of information to the public because it presented a number of new methods to communicate with investors.[57] Overall, the motivation behind creating Regulation FD directly correlated with the principal objective of the Acts—to create fairness and efficiency in the capital markets.

2. Regulatory Language

The language of Regulation FD provides, "[w]henever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information . . . ."[58] Essentially, an "issuer" subject to this regulation includes either a company that has a class of securities registered under the Exchange Act[59] or one that is required to file reports under the Exchange Act.[60] Further, a person acting on

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rity.").

[54] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716 (finding further that "[i]nvestors who see a security's price change dramatically and only later are given access to the information responsible for that move rightly question whether they are on a level playing field with market insiders" and went on to establish a comparison between selective disclosure and insider trading).

[55] *Id.* at 51,716-17 (maintaining that "in the absence of a prohibition on selective disclosure, analysts may feel pressured to report favorably about a company or otherwise slant their analysis in order to have continued access to selectively disclosed information.").

[56] *Id.* at 51,717 (explaining that "technological developments have made it much easier for issuers to disseminate information broadly. Whereas issuers once may have had to rely on analysts to serve as information intermediaries, issuers now can use a variety of methods to communicate directly with the market.").

[57] *Id.* (enumerating press releases, Internet webcasting, and teleconferencing).

[58] 17 C.F.R. § 243.100(a).

[59] 15 U.S.C. § 78l(a) (2010) (providing registration requirements for securities under the Securities and Exchange Act of 1934).

[60] 15 U.S.C. § 78o(a)(1) (2010) (providing registration and regulation of brokers and dealers under the Securities and Exchange Act of 1934).

behalf of an issuer is defined as either an officer or director of the issuer corporation, or an agent or employee of the issuer who regularly communicates with securities market professionals or security holders.[61] By establishing this list, the SEC limited the scope of the Regulation to senior management of the company, investor relations professionals, and those who regularly interact with the stockholders.[62] Additionally, the SEC expressly stated that a person who discloses information, while also breaching a duty owed to the issuer, would not be considered acting on behalf of the issuer and would instead be penalized under insider trading laws.[63]

The Regulation further enumerates those persons to whom a company may not engage in selective disclosure; this includes stockbrokers or dealers, investment advisors, institutional investment managers, investment companies, or any other person affiliated with any of the aforementioned.[64] These categories generally include any analysts or market professionals who would likely trade based on the selectively disclosed information.[65] In addition to those specified persons, one who is acting on behalf of an issuer is also restricted from releasing material information to a person who may be a holder of the issuer's securities if it is "reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information."[66] In essence, this section of the rule bars an issuer from disclosing material information to those persons who would be most likely to receive the information from the issuer and, presumably,

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[61] 17 C.F.R. § 243.101(c):

> Person acting on behalf of an issuer. "Person acting on behalf of an issuer" means any senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer's investment adviser), or any other officer, employee, or agent of an issuer who regularly communicates with any person described in § 243.100(b)(1)(i), (ii), or (iii), or with holders of the issuer's securities. An officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer.

[62] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (including any employee who was directed by senior management to make a selective disclosure).

[63] *Id.*

[64] 17 C.F.R. § 243.100(b)(1)(i)-(iii).

[65] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719 (limiting the scope of Regulation FD to include disclosures made to "securities analysts, market professionals, institutional investors, or others who regularly make or would reasonably be expected to make investment decisions involving the issuer's securities.").

[66] 17 C.F.R. § 243.100(b)(1)(iv).

trade based on that valuable information.[67]

Conversely, the rule also lists the types of persons to whom an issuer would be permitted to engage in selective disclosure. This includes persons who owe the issuer a duty of trust, such as an agent, or alternatively, one who agrees to hold the information in confidence.[68] In this case, a breach of the duty of trust between the parties would result in misappropriation under the laws of insider trading, as opposed to selective disclosure.[69] Thus, the law recognizes that issuers may have confidential relationships with persons outside the organization, to whom the issuer may share material, nonpublic information.[70] The final exception provides that an issuer is not guilty of selective disclosure when it discloses information to an organization that is in the business of issuing credit ratings, so long as its ratings are made publicly available.[71] Once again, these exclusions limit the overall scope of Regulation FD, so as to ensure fairness and avoid the threat of extensive liability.

Another important definitional consideration is what constitutes "material nonpublic information."[72] Again, the Regulation does not define these terms, but instead relies on the definition found in case law.[73] Information is "material" if "there is a substantial likelihood that a reasonable shareholder would consider it important" when making an investment decision.[74] It is not necessary that a reasonable investor would change his investment decision based on the information, provided that he "would have viewed it as significantly altering the 'total mix' of information available."[75] Essentially, a ma-

[67] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,719.

[68] 17 C.F.R. § 243.100(b)(2)(i), (ii) (including agents such as an attorney, investment banker, or accountant).

[69] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,720 (stating "[a]ny misuse of the information for trading by the persons in these two exclusions would thus be covered under either the 'temporary insider' or the misappropriation theory of insider trading. This approach recognizes that issuers and their officials may properly share material nonpublic information with outsiders, for legitimate business purposes, when the outsiders are subject to duties of confidentiality.").

[70] *Id.*

[71] *Id.* (finding that "[r]atings organizations, like the media, have a mission of public disclosure; the objective and result of the ratings process is a widely available publication of the rating when it is completed. [Thus], for the exclusion to apply, the ratings organization must make its credit ratings publicly available.").

[72] 17 C.F.R. § 243.100(a).

[73] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721.

[74] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[75] SEC v. Mayhew, 121 F.3d 44, 52 (2d Cir. 1997) (citing *TSC Indus.*, 426 U.S. at 449;

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terial fact is one that may have a significant effect on the future of the company and, in turn, affect investors' decisions to buy or sell the company's securities.[76] The SEC has provided examples of information that may be material, including earnings information and the announcement of mergers and acquisitions, tender offers, new products or discoveries, and changes in management; yet, this list is not exhaustive, and does not seek to ascertain the materiality of the examples provided.[77] Further, it has been determined that information is "nonpublic" if "it has not been disseminated in a manner making it available to investors generally."[78]

The final issue regarding the language used in the rule is what constitutes a "public disclosure" to satisfy Regulation FD. The SEC has determined that "the required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public."[79] This language gives issuers considerable flexibility in determining the way in which to disclose information to the public. The first option for issuers of securities is fairly straightforward. Issuers can file a Form 8-K, which is the report that companies must file with the SEC to announce major events to inform shareholders, including events affecting financial information, trading markets, and corporate governance.[80]

Flynn v. Bass Bros. Enters., 744 F.2d 978, 985 (3d Cir. 1984)).

[76] *Id.* (quoting *Texas Gulf Sulphur Co.*, 401 F.2d at 849 which held that "[m]aterial facts include those 'which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities.' ").

[77] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721. Such examples include:

> (1) Earnings information; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries, or developments regarding customers or suppliers (e.g., the acquisition or loss of a contract); (4) changes in control or in management; (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report; (6) events regarding the issuer's securities—e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and (7) bankruptcies or receiverships.

Id.

[78] *Id.*

[79] *Id.* at 51,716.

[80] *Form 8-K*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/form8k.htm (last visited May 2, 2014). For an example of a Form 8-K, see *Form 8-K Cur-*

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However, if a company does not wish to file the Form 8-K, it can instead disseminate information through a different method or a combination of methods to satisfy this requirement.[81] The SEC proposed possible approaches for issuers to release information in order to "make effective, broad, and non-exclusionary public disclosure, given the particular circumstances of that issuer."[82] Examples include issuing a press release distributed through a circulated news service, or by inviting the public to listen to a press conference, either in person, or by telephone or electronic transmission, so long as the public is given adequate notice.[83] Thus, the SEC's purpose of using flexible language was to permit issuers to utilize current technologies capable of providing public access to the company's events.[84] However, the SEC specifically stated that posting information on a company's website would not, by itself, be an appropriate means of public disclosure.[85] Issuers' websites may only be used when there is a combination of methods being used to disseminate information, once again providing considerable flexibility to issuers.[86]

Although the SEC has given issuers flexibility in deciding an appropriate method to release public information, it also places a responsibility on the issuer to ensure the method is reasonable for its particular practices.[87] The SEC purposely provided this flexibility in the manner of disclosure to allow companies to use methods that will

rent Report, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/forms/form8-k.pdf (last visited May 2, 2014).

[81] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723 (citing 17 C.F.R. § 243.101(e)(2). "[The SEC is] recognizing alternative methods of public disclosure to give issuers the flexibility to choose another method . . . of disclosure that will achieve the goal of effecting broad, non-exclusionary distribution of information to the public.").

[82] *Id.* at 51,724.

[83] *Id.* (explaining that an ideal combination of methods would be to utilize a "press release to provide the initial broad distribution of the information, and then discuss its release with analysts in [a] subsequent conference call, without fear that if it should disclose additional material details related to the original disclosure it will be engaging in a selective disclosure of material information.").

[84] *Id.*

[85] *Id.* (noting that the SEC did not bar websites from being used completely, stating, "[a]s technology evolves and as more investors have access to and use the Internet, however, we believe that some issuers, whose websites are widely followed by the investment community, could use such a method.").

[86] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,724.

[87] *Id.* (finding that "[i]n determining whether an issuer's method of making a particular disclosure was reasonable, we will consider all the relevant facts and circumstances, recognizing that methods of disclosure that may be effective for some issuers may not be effective for others.").

be effective, while realizing that they may change and develop as technology evolves. As anticipated, eight years later, the SEC was compelled to issue a press release interpreting the validity of new methods.

C. 2008 Interpretive Release

Given the speed with which technology was advancing and the development of company websites, in 2008 the SEC issued a press release[88] to provide guidance regarding the use of company websites to meet the disclosure requirement of Regulation FD.[89] The primary focus of the press release was on the SEC's new interpretation of what is considered "public" for purposes of Regulation FD, pertaining to information posted on company websites.[90] At the time of the proposal, the emergence of the Internet was modernizing the way a company could release information about itself and its securities, in turn, promoting the efficiency of the trading markets.[91] The advancements in technological communications have led to more timely disclosures and the effortless ability to disseminate those disclosures to the market.[92] Thus, by having ready access to company information, investors began to rely on company websites as a vital source of information to facilitate investment decisions.[93]

Considering the significant technological advances at the time and the increased use of the Internet by investors, the SEC elected to

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[88] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,863 (applying also to other antifraud provisions and certain Exchange Act provisions of the federal securities laws).

[89] *SEC Interpretive Releases*, *supra* note 12. "The Commission occasionally provides guidance on topics of general interest to the business and investment communities by issuing 'interpretive' releases, in which [the Commission] publish[es] [its] views and interpret[s] the federal securities laws and SEC regulations." *Id.*

[90] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,863.

[91] *Id.* (citing *The Impact of Recent Technological Advances on the Securities Markets*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/news/studies/techrp97.ht m (last visited May 2, 2014) (illustrating that the SEC analyzed the benefits of the increased use of technology for investors and the securities markets)).

[92] *Id.* (citing Internet Availability of Proxy Materials, Release No. 34-55146, at 8 (Jan. 22, 2007), http://www.sec.gov/rules/final/2007/34-55146.pdf (finding that approximately 80% of investors in mutual funds have access to the Internet)).

[93] *Id.* (quoting Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports, 67 Fed. Reg. 58,480, 58,492 (Sept. 16, 2002) ("Online access to Internet information also helps to democratize the capital markets by enabling many small investors to access corporate information.")).

provide guidance in determining whether a disclosure on a company website would be considered "public," in that it would comply with Regulation FD.[94] To offer guidance pertaining to this issue, the SEC found that in order for information to become public, "it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information."[95] Thus, as applied to websites, information becomes "public" when three elements are present: (1) the website is a recognized channel of distribution, (2) information posted on the website becomes available to the securities marketplace, and (3) there has been a reasonable waiting period for the market to react to the information.[96]

Each element must be analyzed separately; with regards to the first element, a website is a recognized channel of distribution depending on the way in which the company alerts the public of its website and the way it discloses information.[97] As for the second element, information is validly disseminated to the market if the manner in which information is posted on a website is proper and the information is accessible to investors.[98] To determine whether these two elements are satisfied, a company should consider whether the market is aware of its decision to post on its website, if there is a pattern for doing so, or whether the information is readily available to the public and the media.[99] Finally, for a company to determine the third element, the presence of a "reasonable waiting period," it should consider the size of the market following the company, the way in which information is accessed on the website, and the extent to which the market is aware of the company's use of its website.[100] If, upon

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[94] *Id.* at 45,866.

[95] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867 (quoting In re Faberge, Inc., 45 S.E.C. 249, 255 (1973)).

[96] *Id.*

[97] *Id.*

[98] *Id.* (finding that "[b]ecause companies of all sizes now have the capacity to present information on their Web sites to all investors on a broadly accessible basis, and because investors correspondingly have the capability to easily find and retrieve information about companies by searching the World Wide Web, we now analyze the concept of 'dissemination' through a changed lens.").

[99] *Id.* (including many other examples as ways to determine whether the first two factors are satisfied).

[100] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867-68 (citing *Texas Gulf Sulphur Co.*, 401 F.2d at 854).

consideration, a company determines that the elements have been satisfied, it is likely that its website would be considered a valid public medium for posting information for investors.

The SEC ultimately changed its position regarding websites, finding that because of the growth of technology and reliance on the Internet, it was possible for a company to post material information on its website without implicating Regulation FD.[101] However, the permission to do so was not absolute since the company still had to analyze the enumerated factors to determine whether its website was an appropriate means for disseminating information to the public.[102] This press release essentially provided guidance as to how a company seeking to use its website to release information could comply with Regulation FD; thus, there was no change in the language of the Regulation itself. The SEC's decision to reinterpret what qualifies as a "public disclosure" served to influence the way it determined the effect of social media on Regulation FD.

D. SEC Enforcement Actions

Although it may seem difficult for companies to comply with Regulation FD, the SEC rarely institutes enforcement actions on this basis, doing so in less than fifteen instances.[103] To enforce Regulation FD, the SEC's Division of Enforcement can bring an action against either a company or an individual, who is usually an employee or officer of the company that is being investigated.[104] "Remedies

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[101] *Id.* at 45,868 (indicating that "posting of the information on the company's Web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD.").

[102] *Id.*

[103] Vanessa Schoenthaler, *Regulation FD: learn from prior SEC cases*, IR WEB REPORT (Apr. 11, 2011), http://irwebreport.com/20110411/regulation-fd-learn-from-prior-sec-cases/ (listing all of the enforcement actions by the SEC from the creation of Regulation FD to April 2011); *see also* Thomas P. Giblin & Stephen H. Kinney, *Recent SEC Regulation FD Enforcement Action Relevant to Redemptions*, MORGAN LEWIS (Feb. 1, 2012), https://www.morganlewis.com/index.cfm/publicationID/43ee2fc4-6f38-4f34-9ffd-c6a8a90c25ec/fuseaction/publication.detail (describing the SEC's enforcement action against Fifth Third Bancorp regarding Regulation FD in November 2011); *SEC Charges Former Vice President of Investor Relations With Violating Fair Disclosure Rules*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539799034 (last visited May 2, 2014) (explaining the 2013 investigation of First Solar, Inc.).

[104] Schoenthaler, *supra* note 103 (stating that only the SEC can bring an action against the company). "[T]here is no private cause of action for failing to comply with Reg FD, so a company's shareholders can't sue on the basis of a Reg FD violation alone." *Id.*

available to the SEC generally include injunctive relief, such as cease-and-desist orders, monetary penalties and required disclosure of the violation."[105] The remedy for all of the cases in which the SEC sought an enforcement action was consent to a cease-and-desist order;[106] a majority of the cases also resulted in a penalty, either to an individual, the company itself, or both, ranging from $25,000 to $1,000,000.[107]

The companies that were charged with violating Regulation FD had many similarities since the SEC instituted a number of the investigations as a result of disclosures made to certain analysts or advisors, which concerned the financial stability of the company.[108] For instance, several enforcement actions resulted from selectively disclosed, material earnings information to analysts and institutional investors either in the form of estimates or guidance, and a subsequent failure to disclose publicly.[109] Another situation in which the SEC sought action for violating Regulation FD was when companies held private meetings, only open to certain investors or analysts.[110] There were two instances in which the SEC instituted an action on this basis against Siebel Systems, Inc.; both actions were initiated as a result of the CEO's disclosure of information at a private meeting regarding the company's outlook, which was much bleaker than what was publicly disclosed.[111]

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[105] *Id.*

[106] 15 U.S.C. § 77h-1(a) (2010). This explains the cease-and-desist proceedings:

> Authority of the Commission. If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title [15 USCS §§ 77a et seq.], or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

Id.

[107] Schoenthaler, *supra* note 103 (noting that in many instances, both the company and an officer of the company were issued penalties when the officer was found to be responsible or was aiding and abetting a violation of Regulation FD).

[108] *Id.*

[109] *Id.* (including Raytheon Company, Schering-Plough Corporation, American Commercial Lines, Inc., Presstek, Inc., Office Depot, Inc.).

[110] *Id.* (including Siebel Systems, Inc. and Flowserve Corporation).

[111] *Id.* (demonstrating that although Siebel Systems, Inc. was charged with the first violation, the second was ultimately dismissed since the court found that the SEC was applying "an excessively strict interpretation of Regulation FD.").

A final situation in which the SEC has sought enforcement of Regulation FD is when a company alerted analysts or advisors about the happening of an event, such as the creation of a material contract, or an upcoming major development.[112] For instance, in the case of First Solar, Inc., after the company learned that it would not receive a major loan, it decided not to issue a press release immediately; yet, employees were aware that in order to comply with Regulation FD, they could not discuss the matter until it was officially released.[113] However, the former vice president violated Regulation FD by secretly calling approximately twenty analysts and institutional investors, alerting them of the news.[114] While he ultimately consented to a cease-and-desist order, as well as a $50,000 penalty, the SEC decided not to bring an action against the company due to its cooperation with the investigation, its promptly issued press release (upon discovery of the phone calls), and its remedial measures to address the reprehensible conduct.[115] Thus, although there have only been a small number of enforcement actions based on Regulation FD, it is nonetheless a rule that companies must be aware of and abide by, especially when dealing with information that has an effect on a company's financial stability.

E. Netflix Investigation & Social Media

During the past year, the SEC conducted an investigation of Netflix, Inc. ("Netflix") and its Chief Executive Officer, Reed Hastings, regarding whether Hastings violated Regulation FD when he posted potentially material, nonpublic information regarding the company on his personal Facebook page.[116] Founded in 1997, Netflix is the world's leading Internet-based television network that allows subscribers to receive movies in the mail and to stream content through the Internet.[117] On July 3, 2012, Hastings posted a message

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[112] Schoenthaler, *supra* note 103 (noting that Secure Computing Company "disclosed information about a material contract to two institutional advisors."); *see also SEC Charges Former Vice President of Investor Relations*, *supra* note 103 (discussing the SEC's action against a former vice president of First Solar, Inc., for making private phone calls to investors regarding the status of a loan).

[113] *SEC Charges Former Vice President of Investor Relations*, *supra* note 103.

[114] *Id.*

[115] *Id.* (noting, for example, that the "company conducted additional Regulation FD training for employees responsible for public disclosure.").

[116] Report of Investigation, *supra* note 4, at 1.

[117] *Company Overview*, NETFLIX, https://pr.netflix.com/WebClient/loginPageSalesNetWor

on his personal Facebook page, triggering the SEC investigation. The post stated that "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June."[118] Following the Facebook post, Netflix failed to either file a Form 8-K or otherwise release the information to the public; yet, various reporters learned of the information hours after the post.[119] Even though the news was not disseminated to the broad mailing list ordinarily used for corporate press releases, the result was a 15% increase in Netflix's stock price by the next trading day.[120] Not only has Netflix never used Hastings's personal Facebook page in the past to release information, but Hastings himself stated for public record that Netflix did not use any social media to communicate information to investors, but rather, it is released through press releases and SEC filings.[121]

In response to the investigation surrounding Netflix, the ultimate decision of the SEC was to allow issuers to apply the principles of the 2008 Guidance to corporate disclosures released through social media channels.[122] According to the press release on this matter, appropriate social media channels may include Facebook[123] and Twit-

ksAction.do?contentGroupId=10476&contentGroup=Company+Facts (last visited May 2, 2014). *See also* Robin Renford, *Netflix 1-month Free Trial: How to Get It With No Coupons Required*, FINANCESONLINE.COM, https://financesonline.com/netflix-1-month-free-trial-how-to-get-it-with-no-coupons-required/ ("To use Netflix, consumers sign up for a subscription on the company's website. For one low monthly price, Netflix members instantly watch unlimited movies and TV shows streaming over the Internet to PCs, Macs and TVs via a wide range of devices . . . .").

[118] Report of Investigation, *supra* note 4, at 4 (stating, further, that "[t]his announcement represented a nearly 50% increase in streaming hours from Netflix's January 25, 2012 announcement that it had streamed 2 billion hours over the preceding three-month quarter.").

[119] *Id.* (finding that although this information was not publicly released, Netflix did issue a press release regarding its second quarter 2012 earnings following the post, but did not mention the billion-hour milestone).

[120] *Id.* at 4-5.

[121] *Id.* at 5 (asserting that although Hastings's Facebook page had over 200,000 subscribers, which included "equity research analysts associated with registered broker-dealers, shareholders, reporters, and bloggers[,]" there was no previous indication that his personal page would be used to announce company information).

[122] *Id.* (affirming that "the principles outlined in the 2008 Guidance—and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information—apply with equal force to corporate disclosures made through social media channels.").

[123] *Company Info*, FACEBOOK, http://newsroom.fb.com/company-info/ (last visited May 2, 2014) (stating that Facebook's mission is to "give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them.").

ter,[124] so long as investors are alerted as to which websites will be used.[125] To ensure that a particular social media website is an acceptable means of communicating, investors must be aware of a company's decision to use social media and access to the sites cannot be restricted.[126] Further, although every case is analyzed on its particular facts, it is unlikely that the personal social media websites of officers or employees would qualify to be an appropriate means for disseminating information to the public.[127] Overall, the SEC has found that because a number of companies have increased their use of social media to interact with the investing public, issuers are now permitted to release public information through social media sites, provided that they continue to comply with Regulation FD and the 2008 Guidance.[128]

III. CONTROVERSY AND ISSUES SURROUNDING SOCIAL MEDIA

Although numerous companies are already using social media in their businesses, many of them are of the opinion that "social media is an experiment, as they try to understand how to best use the different channels, gauge their effectiveness, and integrate social media into their strategy."[129] The fact of the matter is that many businesses are not aware of how to use social media productively for marketing their business, not to mention how to successfully comply with SEC regulations. Therefore, the SEC's decision to permit the use of social media to comply with Regulation FD[130] may come with a few setbacks due to the possible downsides of using social media and the potential concerns of investors. Another possible problem

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[124] *About*, TWITTER, https://about.twitter.com/company (last visited May 2, 2014) (stating that Twitter's mission is to "give everyone the power to create and share ideas and information instantly, without barriers.").

[125] *SEC Says Social Media OK for Company Announcements if Investors Are Alerted*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574#.Un5-0XCsiSp (last visited May 2, 2014).

[126] *Id.*

[127] *Id.* (finding that although Hastings posted on his personal Facebook page, "[t]he SEC did not initiate an enforcement action or allege wrongdoing by Hastings or Netflix [due to the] market uncertainty about the application of Regulation FD to social media").

[128] Report of Investigation, *supra* note 4, at 8.

[129] *The New Conversation: Taking Social Media from Talk to Action*, HARV. BUS. REV. (2010), http://www.sas.com/resources/whitepaper/wp_23348.pdf at 1-2 (finding that of 2,100 companies surveyed, 58% are already using social media, whereas 21% are preparing to use social media).

[130] *SEC Says Social Media OK*, *supra* note 125.

with this decision is the SEC's reluctance to specify which social media websites are permitted and what type of information can be released. Thus, in order for businesses to successfully adhere to Regulation FD, they must make themselves aware of these potential issues and learn how to use social media effectively.

A. Investor Concerns

The growing use of social media to release important information raises concerns for investors because they have yet another medium that they must periodically check for company updates. This places a burden on investors to ensure they are subscribed with social media websites, as well as learn the essential features of each. Additionally, the overflow of information in the market could ultimately lead to negative effects such as increased market volatility or less disclosure, leaving investors in an inferior position. Finally, major privacy concerns can arise by imposing a burden on investors to register with social media websites. Providing personal information to numerous websites increases an investor's exposure to hackers and threatens his expectation of privacy. Investors must be aware of these potential concerns when considering new ventures.

Permitting the use of social media for disclosing material, nonpublic information not only places a burden on investors to subscribe to social media websites, but they must also be cognizant of company updates. This raises a concern for those smaller investors who may not be familiar with the different social media websites and their different uses, therefore, giving them a disadvantage in the market, which clearly goes against the intent of Regulation FD. By concluding that social media is an appropriate public forum, the SEC is essentially finding that disclosures are non-exclusionary even when companies require investors to subscribe or register in order to receive the released information.[131] In essence, in order for all investors to get the same access to market information, they are first com-

[131] Richard J. Sandler, *How to Use Social Media for Regulation FD Compliance*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 16, 2013, 9:44 AM), https://blogs.law.harvard.edu/corpgov/2013/04/16/how-to-use-social-media-for-regulation-fd-compliance/ (confirming that subscription-based websites can be used for Regulation FD purposes, clearing 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.").

pelled to register with the relevant social media websites.

Another concern for investors is social media's effect on market volatility, as well as the amount of disclosure in the market, since too much disclosure may ultimately lead to less disclosure overall. When Regulation FD was first proposed, companies and investors were apprehensive that the new rule would have the opposite effect of its purpose by reducing the flow of information because companies would choose not to release the information at all.[132] In turn, analysts would be worse off because they would lose their competitive advantage in the market, and stockholders would be at a disadvantage since there would be less information available.[133] As anticipated, after Regulation FD's adoption, there were two negative effects on the market—one was increased market volatility, and the other was that analyst coverage of smaller companies declined.[134]

Allowing social media to be an appropriate means for distributing information could lead to the same result as the initial adoption of Regulation FD: Too much disclosure may ultimately lead to companies avoiding social media and in turn limiting the information released to the market. Essentially, because there will be even more disclosure through social media channels than when Regulation FD was first adopted,[135] the negative effects that occurred in 2000 will be amplified. Undeniably, if these effects were to happen yet again, investors would be at a disadvantage since there will be less available information in the market.

Another major disadvantage to using social media is the threat of privacy concerns that can arise for the investors. "When a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment."[136] There can be

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[132] Steven M. Davidoff, *In Netflix Case, a Chance to Re-examine Old Rules*, N.Y. TIMES, Dec. 11, 2012, 7:13 PM, http://dealbook.nytimes.com/2012/12/11/in-netflix-case-a-chance-for-the-s-e-c-to-re-examine-old-regulation/?_r=0.

[133] *Id.*

[134] *Id.* (finding that because "there was now less information in the market about these smaller companies, investors subsequently demanded a bigger premium to invest, increasing financing costs.").

[135] *Id.* (stating that "allowing executives to comment freely on Facebook and Twitter, recognizing them as a public space akin to a news release, is almost certain to result in more disclosure, not less, and reach many more people than an S.E.C. filing would. The agency's position will only force executives to check with lawyers and avoid social media, chilling disclosure.").

[136] United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012) (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

no reasonable expectation of privacy when a social media user sets his privacy settings to public because he intends that whoever wishes to read the information posted may be free to do so.[137] Although a user with a private setting has a "more colorable argument about the reasonable expectation of privacy," the user is nonetheless disseminating information to the public and, therefore, remains unprotected by the Fourth Amendment.[138] Thus, regardless of a user's privacy setting, a company or investor who provides information on a social media website does not have any privacy protections.

A security concern for investors will be the requirement that they register with the applicable social media pages in order to receive the latest information that the company releases. Being compelled to register in order to gain access to material news will create security risks for users, which may jeopardize market stability.[139] Registration for a social media site such as Facebook requires the user to create a password and provide his first and last name, email address, birthday, and gender.[140] This creates a safety concern as users are obligated to provide a personal email address, which other users may have access to. If a user forgets his registered name on Facebook, he can enter some personal information to retrieve his profile; however, users can potentially use the same technique to discover other users' private information, such as their photo, name, or clues about a private email.[141] Although many users choose to keep their profile private, this type of search may still produce private information, as Facebook technically classifies a user's photo and name as public information.[142]

Evidently, supplying personal information may leave one vulnerable to hackers, and "[a]lthough hacking and other breaches of information security can be posed in multiple ways, [the] use of social media . . . may pose elevated risks."[143] Hacking is a concern for

[137] Rosario v. Clark Cnty. Sch. Dist., No 2:13-CV-362 JCM, 2013 U.S. Dist. LEXIS 93963, at *15 (D. Nev. July 3, 2013).

[138] *Id.* at *16.

[139] Palazzo, *supra* note 19 (finding, further, that "the SEC allowing the use of social media to disclose financial information 'poses a disservice to the investment community, threatening increased fragmentation of price-sensitive information.' ").

[140] *Sign Up*, FACEBOOK, https://www.facebook.com/ (last visited May 2, 2014).

[141] Adam Tanner, *Facebook Backdoor Gives Clues To Private Email Addresses*, FORBES (Jan. 17, 2014, 9:03 AM), http://www.forbes.com/sites/adamtanner/2014/01/17/facebook-backdoor-gives-clues-to-private-email-addresses/.

[142] *Id.*

[143] National Examination Risk Alert, *Investment Advisor Use of Social Media*, at 5 (Jan. 4,

those investors who must create a personal page to access the company's updates. Additionally, Nexgate, a company specializing in social media security, found that spam grew by 355% in the first half of 2013 across popular social networks.[144] It found that Facebook was one of the most infected sites, containing spam in roughly 1 of every 200 social messages.[145] Facebook is also the source of the largest number of phishing attacks, where hackers trick users into providing passwords or other personal information.[146] Overall, the use of social media to comply with Regulation FD is likely to raise concerns for investors by requiring them to become knowledgeable of social media, creating a disadvantage to them because of the possible effects on market information, and exposing them to privacy concerns.

B. Issuer Concerns

Major problems can arise for issuers as a result of the SEC's decision to allow the utilization of social media because of the various disadvantages to using social media websites. For instance, many corporate executives are not aware of how to properly incorporate social media into their marketing strategy, which could create many setbacks for those companies. Further, the use of social media websites gives rise to the risk of misinformation in the market, potentially due to unverified postings. Thus, in order to prevent the dissemination of wrong or incomplete information to investors, companies must be aware of how to monitor what is being shared on the sites. Finally, companies must also be aware of the privacy concerns that can arise in the event that one of their accounts gets hacked.

A 2012 study conducted by the Stanford Graduate School of Business showed that many corporate executives were not well-educated with regards to using social media in their business or even to release pertinent information.[147] According to the survey, there

2012), *available at* http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf.

[144] Christopher Zara, *Facebook Spam And YouTube Spam Rampant, Says 2013 Social Media Spam Report*, INT'L BUS. TIMES (Oct. 3, 2013, 2:45 PM), http://www.ibtimes.com/facebook-spam-youtube-spam-rampant-says-2013-social-media-spam-report-1414506.

[145] *Id.* (finding further that "Facebook and Google's YouTube were the most infected, containing more spam than other social networks by a ratio of 100 to 1").

[146] *Id.*

[147] *2012 Social Media Survey*, STANFORD GRADUATE SCHOOL OF BUSINESS: CENTER FOR LEADERSHIP DEVELOPMENT AND RESEARCH (2012), http://www.gsb.stanford.edu/cldr/research/surveys/social.html (demonstrating corporate executives' lack of knowledge regarding the use of social media, according to a survey conducted in 2012).

was a disconnect between companies' apparent understanding of social media and the lack of action that they were taking to incorporate it into their business strategy.[148] An alarmingly small percentage of the companies surveyed utilized metrics from social media to measure their corporate performance.[149] Although this survey was conducted over a year ago, it is probable that executives still have a lack of knowledge regarding the process of utilizing social media to collect information to enhance their corporate strategy. By failing to effectively utilize social media channels, companies risk losing control of their product branding, corporate reputation, and proprietary information.[150] The SEC's decision to permit social media websites to be used as a public forum will, therefore, create a disadvantage for those companies who lack the requisite knowledge on how to incorporate the sites into their business. Because those competitors who are knowledgeable of social media outlets will have a significant advantage, the new interpretation might give those struggling companies incentive to get up to speed.

Another disadvantage could be that the increased use of social media may lead to the sharing of misinformation, which could have a negative effect on the stock market by creating more volatile stock prices.[151] Undoubtedly, misinformation in the market would have a negative impact for companies if investors were receiving the wrong information and, consequently, they made an improper investment decision. The most likely cause of leaked misinformation is unverified postings, either by employees, third parties, or hackers. Some unauthorized posts may be harmless with regards to the effect on the market; yet, it might otherwise negatively affect a company's reputation. For instance, a Red Cross social media specialist inadvertently sent a tweet from the Red Cross' Twitter account regarding drinking

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[148] *Id.*

[149] *Id.* ("While 90% of respondents claim to understand the impact that social media can have on their organization, only 32% of their companies monitor social media to detect risks to their business activities and 14% use metrics from social media to measure corporate performance.").

[150] James McRitchie, *Video Friday: Use of Social Media By Senior & Board Level Executives is Pitiful*, CORPGOV.NET (Nov. 2, 2012), http://corpgov.net/2012/11/video-friday-use-of-social-media-by-senior-board-level-executives-is-pitiful/ (summarizing the information collected from the Stanford School of Business survey).

[151] Serena Ehrlich, *Understanding the True Risks of Utilizing Social Media for Financial Disclosures*, BUSINESS WIRE (Oct. 8, 2013, 7:31 AM), http://blog.businesswire.com/2013/10/08/understanding-the-true-risks-of-utilizing-social-media-for-financial-disclosure/.

beer and getting intoxicated.[152] Although this tweet obviously did not affect the market, the Red Cross' reputation was compromised, as it is a respected humanitarian organization.

However, not all unauthorized tweets are harmless, especially in a case where an account was hacked, which is a serious threat for companies. The stock market fell sharply after a fake tweet by the Associated Press alerted viewers of an attack on the White House, injuring President Obama.[153] Because many traders are constantly following Twitter updates for news that could affect the stock markets, after the news of an explosion, the Dow Jones industrial average plummeted 100 points within two minutes.[154] After the Associated Press confirmed that its Twitter account was hacked, the market rebounded quickly, demonstrating how vulnerable the stock market is to technological glitches.[155] Other examples of misinformation in the market as a result of hacking are the cases of Burger King and Jeep; both of their Twitter accounts spread false posts that they were bought out by a rival company.[156]

Misinformation can also arise through a third party posting on a company's social media page and issues may arise as to whether the company is liable for what is posted. Many firms allow third parties to post messages and hyperlinks on their social media sites; whereas, others establish policies limiting third party use to authorized users only, excluding the general public.[157] Firms should consider posting disclaimers on their sites, affirming that they do not endorse any

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[152] Dean Praetorius, *The Red Cross' Rogue Tweet: #gettngslizzerd On Dogfish Head's Midas Touch*, HUFFINGTON POST (Feb. 16, 2011, 1:30 PM), http://www.huffingtonpost.com/2011/02/16/red-cross-rogue-tweet_n_824114.html (stating that the tweet said "Ryan found two more 4 bottle packs of Dogfish Head's Midas Touch beer. . . . [sic] when we drink we do it right #gettngslizzerd."). After the incident, the Red Cross apologized, and Dogfish Head Brewery responded with tweets encouraging donations be made to the Red Cross. *Id.*

[153] Dina ElBoghdady, *Market quavers after fake AP tweet says Obama was hurt in White House explosions*, WASH. POST, Apr. 23, 2013, http://www.washingtonpost.com/business/economy/market-quavers-after-fake-ap-tweet-says-obama-was-hurt-in-white-house-explosions/2013/04/23/d96d2dc6-ac4d-11e2-a8b9-2a63d75b5459_story.html.

[154] *Id.* (stating further that the effect was not just on the stock market, but the fake tweet also affected the bond and commodity markets, as if the market reacted before anyone could even process what had happened).

[155] *Id.*

[156] *Id. See also* Dino Grandoni, *Jeep Twitter Account Hacked Day After Similar Attack On Burger King*, HUFFINGTON POST (Feb. 19, 2013, 3:06 PM), http://www.huffingtonpost.com/2013/02/19/jeep-twitter-hack_n_2718653.html.

[157] *Investment Advisor Use of Social Media*, *supra* note 143, at 5.

communications posted by third parties, therefore avoiding liability.[158] Thus, regardless of who is posting the false information, companies must be aware of this potential issue because misinformation leaked into the market can have a significant impact on stock prices.

Aside from the major disadvantages noted above, another drawback of using social media is a lack of visibility of important updates, which could affect the success of using social media as a form of disclosure. Many company updates will not be seen by its followers since approximately "84% of Facebook newsfeed stories are never seen and 71% of tweets are ignored."[159] Further, there will always be a potential for platform volatility due to the high probability that the website could go offline.[160] Finally, the use of social media sites could result in delayed access to news since "[s]ocial networks are unable to confirm equal visibility of news and tweets, making it very easy for trades to be made before the news has fully been disseminated."[161] Consequently, there are numerous downsides to using social media websites and companies must be aware of these potential threats if they choose to utilize them as a means of disseminating information.

C. Concerns With Implementation

The SEC has decided that its 2008 Guidance now applies not only to company websites, but also to "current and evolving social media channels of corporate communication."[162] This language leaves many unanswered questions, such as which social media sites may be used and how companies may alert investors of their decisions to use them. The SEC defines "social media" as "an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds."[163] However, although the definition of social media is

[158] *Id.*

[159] Ehrlich, *supra* note 151.

[160] *Id.* (finding that "social networks sometimes go offline. Whether it is for system maintenance, too much volume or a DOS attack, when you choose to disclose over a social network, you put yourself at the mercy of a network only a handful of years old.").

[161] *Id.*

[162] Report of Investigation, *supra* note 4, at 8.

[163] *Investment Advisor Use of Social Media*, *supra* note 143, at 1 n.2.

known, it is unclear which types of social media sites are acceptable. The SEC has expressly stated that "companies can use social media outlets like Facebook and Twitter to announce key information,"[164] but it failed to comment on the applicability of any other types of social media. The most common categories of social media are social networks, such as Facebook, where a user can connect with friends and others with similar interests through a profile, and microblogging sites such as Twitter, where users can provide short updates automatically sent out to anyone who has subscribed to receive them.[165] Others include bookmarking sites, which allow users to save, organize, and manage hyperlinks around the Internet; social news sites, which allow users to post a wide-variety of news, and the most popular stories among users are displayed first; media sharing sites, which allow users to upload and share media such as pictures and videos; and blogs and forums, which allow users to have conversations by posting messages.[166]

Although the SEC has expressly permitted the use of Facebook and Twitter, what about the other social media channels? Currently, Instagram,[167] a media sharing site that allows users to take photos and videos and share them with friends, is the world's fastest-growing social network and had an increase in users by 23% in 2013 alone.[168] Since Regulation FD now applies to social media the same way in which it applies to company websites,[169] is a company therefore now permitted to post a picture of its quarterly earnings on its Instagram page? It is unlikely that this is what the SEC was suggesting when it approved the use of social media channels to comply with Regulation FD. Companies must be cognizant of this issue, and be sure to use only those social media channels that would classify as an effective means for disseminating information to investors.

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[164] *SEC Says Social Media OK*, *supra* note 125 (stating, further, that "[t]he 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.").

[165] Tim Grahl, *The 6 Types of Social Media*, OUT:THINK, http://outthinkgroup.com/tips/the-6-types-of-social-media.

[166] *Id.*

[167] *FAQ*, INSTAGRAM, http://instagram.com/about/faq/ (last visited May 2, 2014).

[168] *Instagram surges ahead as world's fastest-growing social network*, CTV NEWS (Jan. 22, 2014, 1:12 PM), http://www.ctvnews.ca/sci-tech/instagram-surges-ahead-as-world-s-fastest-growing-social-network-1.1650961.

[169] *SEC Says Social Media OK*, *supra* note 125.

Further, it is unclear whether a company executive's personal social media account would be an appropriate source for releasing corporate information to the public. Without notice to investors that the site would be used for such a purpose, the SEC has deemed it unlikely to qualify as an acceptable medium, regardless of the individual's number of subscribers.[170] Thus, even if a company is using an acceptable type of social media, it must be sure to direct users to the corporate social media page, as opposed to the page of any individual employee.

Another issue that the SEC left unanswered is how companies should go about informing the public of their decision to use social media as a public forum. Although a company may disseminate information through a social media channel that it believes will distribute information broadly and non-exclusively, it can only do so if it has already informed the public of its intentions to use the site.[171] Alerting the public of these channels is critical for the fairness of the markets; otherwise, "the investing public would be forced to keep pace with a changing and expanding universe of potential disclosure channels, a virtually impossible task."[172] However, it is unclear exactly how companies should go about alerting investors, as well as the market in general, of this decision.

One way to provide appropriate notice, as the SEC suggests, is for the company to identify the specific social media channels that it intends to use on its corporate website, thereby giving investors the opportunity to learn how to receive updates directly from the social media sites.[173] The company may also consider providing hyperlinks on its corporate website to easily direct the viewer to the applicable social media page.[174] Further, because the SEC is silent as to other

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[170] Report of Investigation, *supra* note 4, at 7-8 (discussing further that "[p]ersonal 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. Without adequate notice that such a site may be used for this purpose, investors would not have an opportunity to access this information or, in some cases, would not know of that opportunity, at the same time as other investors.").

[171] *Id.* at 7.

[172] *Id.*

[173] *Id.* (finding that "disclosures on corporate web sites identifying the specific social media channels a company intends to use for the dissemination of 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.").

[174] *See, e.g.*, J.P. MORGAN, https://www.jpmorgan.com/pages/jpmorgan (last visited May

methods for providing notice to investors, companies could consider "including a statement in their press releases and other public reports that specifically refers to the company's social media accounts as a source for important information about the firm."[175] For instance, Investment Technology Group, Inc, a brokerage firm, issued a press release regarding its intent to disclose information on social media channels to comply with Regulation FD.[176] Similarly, Marchex, Inc., a mobile advertising technology firm, recently filed a Form 8-K to announce that it intends on using its Twitter account and company blog to disclose information about the company in the future to successfully comply with Regulation FD.[177]

"[A] public disclosure is not about being public but about being made where investors [know] the company regularly release[s] investor information."[178] Essentially, in order to make a social media page a recognized channel of distribution, companies need to create a pattern of posting such information on the social media site.[179] The company cannot instead post regularly to multiple different sources to release information, as it would be unreasonable to expect inves-

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2, 2014) (noting that the company provides links on the bottom of the homepage to all of its social media pages, including Twitter, YouTube, LinkedIn, and Facebook; clicking on the hyperlink redirects the user to the appropriate social media page).

[175] Rajib Chanda & Steve Zaorski, *Social Media Usage in the Financial Services Industry: Toward a Business-Driven Compliance Approach*, J. TAXATION & REG. FIN. INSTITUTIONS, May/June 2013, *available at* http://www.ici.org/pdf/13_seclaw_03.pdf.

[176] Form 8-K: Investment Technology Group, Inc., File Number 001-32722 (Aug. 8, 2013), http://www.sec.gov/Archives/edgar/data/920424/000110465913061510/a13-18279_18k.htm.

[177] Form 8-K: Marchex, Inc., File Number 000-50658 (Nov. 5, 2013), http://www.sec.gov/Archives/edgar/data/1224133/000119312513427676/d621951d8k.htm.

> Investors and others should note that we announce material financial information to our investors using our investor relations website, press releases, SEC filings and public conference calls and webcasts. Marchex intends to also use the following social media channels as a means of disclosing information about the company . . . and for complying with its disclosure obligations under Regulation FD:
>
> •Marchex Twitter Account (twitter.com/marchex)
>
> •Marchex Company Blog (blog.marchex.com)
>
> The information we post through these social media channels may be deemed material. Accordingly, investors should monitor the account and the blog mentioned above, in addition to following Marchex's press releases, SEC filings and public conference calls and webcasts.

Id. at Item 8.01.

[178] Davidoff, *supra* note 132.

[179] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867.

tors to check all possible sources. As a result, in order to release information on a social media site, a firm can only comply with Regulation FD by establishing a pattern and alerting the market of its intentions to do so. It can notify investors either by announcing it on a corporate webpage, noting it in company press releases, or including it in SEC filings.

IV. IMPROVEMENTS TO IMPLEMENTATION

It is apparent that there are numerous concerns surrounding the SEC's decision to implement a social media policy for Regulation FD. In order to mitigate these concerns, there are a number of improvements that can be enacted both by the SEC and by issuers of securities. The SEC must determine a better method for executing the social media policy, and issuers must learn how to effectively and appropriately use social media channels.

A. Suggestions for the SEC to Improve Implementation

The SEC's first step should be to issue a guidance concerning how companies can effectively use social media to comply with Regulation FD. Although the SEC had intended the 2008 Guidance regarding company websites to govern social media sites as well, more specific guidelines are necessary. Primarily, the SEC should expressly state which social media websites are appropriate; or, alternatively, limit a company's use to only two options: Facebook or Twitter, the most commonly used social media platforms. Because it is unrealistic to expect investors to subscribe to all social media platforms that a company may utilize, limiting them to just two alleviates the burden on investors. Additionally, the SEC was overly vague in its report regarding how companies can go about informing the public of its intent to use social media. Again, the SEC needs to be more specific and state exactly the appropriate means. As previously suggested, it is more logical to require companies to alert the public through one particular medium, such as by filing a Form 8-K. By creating uniformity across all companies, a standard will be created, and the occurrence of a violation would be clear.

The SEC should also consider addressing the level of materiality that is appropriate on social media platforms. Although companies can now post material, nonpublic information on their social

media pages, should they be allowed to post major news regarding an important company event? For example, it is doubtful that many investors would find it appropriate for a corporation to alert the public of a merger in a casual Facebook post. Consequently, it would be reasonable for the SEC to limit the type of information that can be disseminated on a social media site by enumerating those announcements that must be revealed through a filing.

Another suggestion that the SEC may consider is to redesign EDGAR,[180] its database for company filings, in order to mirror Facebook or Twitter in design; consequently, the investing public could simply subscribe to the EDGAR postings.[181] "The Commission would then become part of the social network rather than in tension with the social network."[182] Under these circumstances, EDGAR would act as the primary social media page and investors would receive updates automatically, without the complications of using other mediums. By mimicking other social media platforms, companies would get the same benefits because investors would be able to subscribe to their pages and receive the same updates. Although the SEC may not be interested in redesigning its website, it would be advantageous to do so because it would reduce the number of Regulation FD violations and could potentially make its system more efficient.

By transforming EDGAR into a social media page, the SEC would better serve the policies of Regulation FD. Most importantly, creating its own social media page would accomplish the overall purpose of Regulation FD: all investors would be on a level playing field since all available information would be accessible on one website. In such a case, when a company releases material information, all of the investors subscribed to the company would get the news at the same time. This would also eliminate the need for investors to worry about subscribing to multiple social media sites. Concurrently, many of the privacy risks that arise regarding sites such as Facebook or Twitter would be eliminated. Investors would only need to register

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[180] *Filings & Forms*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/edgar.shtml (last visited May 2, 2014) (clarifying that "[a]ll companies, foreign and domestic, are required to file registration statements, periodic reports, and other forms electronically through EDGAR. Anyone can access and download this information for free.").

[181] Joseph A. Grundfest, *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?* 33-34 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 131, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209525##.

[182] *Id.* at 34.

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with the SEC's page, presumably a more secure network, and would not be required to create their own profile, which would be reserved for companies.

Another issue that would be eliminated with the creation of the SEC's own social media page is the concern regarding the terminology used in the SEC's announcement defining the acceptable use of social media. There would be no need for clarification as to what the SEC intended to constitute "social media," nor would there be a need for companies to alert the public of its intention to use the site. Finally, there would be a substantial decrease in the risk of misinformation in the market as a result of unauthorized postings. Only companies would have access to the page, ensuring complete and accurate disclosure of information. This would, in turn, have a positive effect on the markets by reducing volatility and guaranteeing their integrity. In general, the SEC's implementation of its own social media platform would successfully serve the purpose of Regulation FD, while also eliminating risks posed by traditional social media platforms.

B. Suggestions for Issuers

Although issuers of securities do not have a voice in the matter, there are various measures that they can take to make implementation of a social media policy more effective. For instance, companies could consider enlisting the help of a business like KCSA Strategic Communications, a financial communications firm that integrates investor relations and brand marketing.[183] KCSA recently formed an investor relations group "dedicated to helping public companies develop social media policies to ensure compliance with Regulation [FD]."[184] The policy group is focused on helping companies conduct social media audits in order to determine whether their investors are even engaging in social media.[185] Once a determination is

[183] *Overview*, KCSA, http://www.kcsa.com/kcsa_overview.asp (last visited May 2, 2014).

[184] *News: KCSA Strategic Communications Forms Social Media Investor Relations Policy Group*, KCSA, http://www.kcsa.com/kcsa_news_051313.asp (last visited May 2, 2014) (stating that "[KCSA's CEO] has taken an active role in advocating for further clarity from the SEC on what steps public companies should take to incorporate social media into their IR communications.").

[185] *Id.* (confirming that this should be companies' main focus right now). "Given the lack of clarity from the SEC, companies are now considering which channels to use—Twitter, Facebook, Stockr, Blogs, etc. Until the SEC provides further direction, the channel is not what companies should be focusing on." *Id*.

made, it recommends that companies develop a social media policy, explicitly stating how it intends to utilize social media for their communications regarding investor relations.[186] In assisting companies with this process, KCSA not only helps establish a policy, but also ensures that companies understand how to comply with Regulation FD.[187] Further, KCSA conducted a study regarding Fortune 100 companies' effectiveness at using social media communications and found that 90% of them received a grade of "F,"[188] suggesting that many companies could afford to get some assistance from specialists.

Accordingly, companies who wish to utilize social media as a means for disseminating information should consider contacting a consulting group for guidance on how to successfully comply with Regulation FD. Meeting with the consulting group would not only ensure Regulation FD compliance, but it would improve companies' investor relations strategies as well. By using consulting groups, companies would learn how to effectively use social media, while also understanding what exactly constitutes a Regulation FD violation. Because the SEC's guidance regarding social media has been vague, companies could gain some clarity through this measure. Therefore, issuers should consider this easy solution when looking for ways in which to obtain guidance when struggling with the use of social media.

Another viable option for companies is to download a product called Nexgate, a cloud-based social media tool that integrates the company's social media accounts to reduce risk, protect the company's brand, and ensure regulatory compliance.[189] Nexgate simplifies compliance and risk management for social media sites by allowing the company to manage the apps that are connected to its social media, while also "significantly reduc[ing] the chances of a hack, compliance violation or employee error that could result in significant

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[186] *Id.*

[187] *Id.* ("The important thing to keep in mind is that social media is only a means to accomplishing an end. The end, of course, is compliance with Reg FD.").

[188] *News: 90% of Companies Fail to Use Social Media for Investor Relations*, KCSA, http://www.kcsa.com/kcsa_news_121213.asp (last visited May 2, 2014) ("The letter grades are based on four criteria (SEC filing on social media intentions, IR-specific social channels, etc.)—all of which are necessary to receive an A grade in the new Index. The fourth element in a successful strategy, according to KCSA, is a mobile app specific to Investor Relations . . . .").

[189] *Discover, Monitor, and Protect Your Social Media*, NEXGATE, http://nexgate.com/products/overview/ (last visited May 2, 2014).

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damage to [its] brand."[190] It automatically scans content and searches for violations and will notify the company in real-time of any issues, ensuring compliance with the leading social media regulatory requirements.[191] Additionally, it also monitors the social media pages for account tampering and hacks, and automatically removes any unauthorized content.[192]

Further, Nexgate has recently announced a new policy "designed to automatically detect, stop, intelligently archive, and report when content that constitutes an . . . SEC Regulation FD violation . . . is posted, tweeted, shared, or messaged using a social media account."[193] The program is enacted across all of a company's social media platforms and can automatically detect and remedy violations by ensuring any material news comes from an authorized disclosure account.[194] Clearly, this service would be an efficient solution to the issue of utilizing social media to comply with Regulation FD. Companies would no longer spend time searching for Regulation FD violations, as the service would automatically detect and correct them. Additionally, it would be a beneficial service for all companies who wish to protect themselves against hackers and other unauthorized content, another potential concern for all users of social media.

V. CONCLUSION

The SEC's decision to allow social media as a public forum coincides with the evolving nature of technology and the way in which people retrieve information. With the emergence of the social media industry, the SEC is forced to amend outdated rules to ensure they remain relevant and practical. Consequently, the SEC's decision to endorse social media is likely due to the fact that social media has

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[190] *Social Media Risk + Compliance*, NEXGATE, http://nexgate.com/solutions/social-media-risk-compliance/ (last visited May 2, 2014).

[191] *Id.* (stating that "Nexgate comes pre-built with policy templates and reports for some of the leading social media regulatory requirements . . . ."). Companies can select a policy or create its own, and customize the remediation action, regarding notifications. *Id.* Nexgate then automatically scans content across all of a company's social media sites, applies the policy, and provides detailed reports of its findings. *Id.*

[192] *Social Patrol From Nexgate*, NEXGATE, http://nexgate.com/products/socialpatrol-protect-your-social-media/ (last visited May 2, 2014).

[193] *Nexgate Reveals Stats on Over 100 Million Pieces of Social Media Data*, NEXGATE, http://nexgate.com/press-releases/nexgate-reveals-stats-on-over-100-million-pieces-of-social-media-data/ (last visited May 2, 2014).

[194] *Id.*

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become a major part of the average person's everyday life. That being said, it is probable that this is what the SEC based its interpretation on, presuming that a majority of companies, as well as investors, are amongst the 1.19 billion users on Facebook.[195]

It is evident that the SEC intended to serve the overall purpose of Regulation FD with its interpretation, yet it is unclear whether it actually does. Regulation FD was first created in order to address the problem of companies disclosing material, nonpublic information to select persons, as opposed to the public at large.[196] Thus, the SEC's entire rationale for proposing Regulation FD was to create a level playing field for all investors, regardless of size and power; otherwise, the integrity of the markets could no longer be trusted.[197] However, by permitting companies to use social media, there is a burden on investors to regularly monitor all of the forums in which a company chooses to post information. Additionally, investors are now exposed to privacy concerns by putting themselves at risk of cybercrimes.

Although deeming social media an appropriate public medium corresponds with the changes in society and technology, it is unlikely that investors are better off. Larger investment firms, nonetheless, have an advantage over those smaller, individual investors, in that they are usually staffed with social media analysts who are constantly checking for updates. Consequently, at this point in time, the SEC is not serving the overall purpose of Regulation FD, and it must establish some modifications in order to do so.

Overall, the SEC's decision to permit companies to post important information on social media for purposes of alerting the public is revolutionary. The SEC is conforming to the changing views of society due to the emergence of the social media industry and the growing reliance on the Internet in general. Although it seems appropriate for this to be the next step in Regulation FD's evolution, it has also come with various shortcomings. For one, the SEC's vague language regarding the permissibility of social media needs to be rectified. More significantly, the issues of privacy concerns and the potential for misinformation in the market need to be addressed to en-

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[195] Salvador Rodriguez, *Could Facebook really lose 80% of users by 2017? Not likely*, L.A. TIMES, Jan. 22, 2014, 1:39 PM, http://www.latimes.com/business/technology/la-fi-tn-facebook-lose-80-users-2017-not-likely-20140122,0,5369746.story#axzz2rpE0DM00.

[196] Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,591.

[197] *Id.* at 72,592.

sure the continued integrity of the markets. The SEC should consider revising its previous statement regarding social media by making clarifications and, perhaps, some alterations as well. The suggested modifications would not only make the permissible uses of social media more clear, but would also reduce the risk of some investors getting information first, the overall purpose of Regulation FD.