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Inflated Private Offering: Regulating Corporate Insiders and Market Moving Disclosures on Social Media

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Inflated Private Offering: Regulating Corporate Insiders and Market-Moving Disclosures on Social Media

The U.S. Securities and Exchange Commission enacted Regulation Fair Disclosure ("Regulation FD") to prohibit companies from disclosing material information to select parties but not the public at large. The rapid advancement of technology since Regulation FD's enactment has dramatically altered the ways companies distribute information to the public. Social media's grasp on Americans' daily lives continues to grow, as does investors' demands for timely, relevant information. However, many public disclosures made through social media platforms cannot satisfy Regulation FD's threshold requirement that disclosures be reasonably designed to provide broad, nonexclusionary distribution. This Note argues that social media's current incompatibility with Regulation FD has a chilling effect on corporate speech that will only worsen as technological innovation continues. This Note further proposes a "social media safe harbor" to Regulation FD, which allows issuers and corporate insiders to disclose material information freely through social media and provides individual investors with simultaneous, unencumbered access to this information. This safe harbor would, in turn, increase the perception of fairness and increase the number of disclosures in the markets.

> *Just want to [say] that the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point!*
>
> —Elon Musk[1]

INTRODUCTION

On the night of August 7, 2018, Tesla CEO and founder Elon Musk tweeted: "Am considering taking Tesla private at $420. Funding secured."[2] The news took his over twenty-two million[3] Twitter followers by surprise. Twitter users, Tesla employees, and news outlets alike began questioning Musk's seriousness.[4] He soon followed with several more tweets, stating that "investor support [was] confirmed"; the deal would be structured to allow public shareholders to keep their shares in a private Tesla, and it only needed a shareholder vote to be implemented.[5] The market responded accordingly to the news: Tesla's stock price closed up 10.98 percent from the previous day.[6]

After a week of investor speculation, however, Musk revealed in a lengthy blog post on the Tesla website that funding for the deal was

1. Elon Musk (@elonmusk), TWITTER (Oct. 4, 2018, 1:16 PM), https://twitter.com/elonmusk/status/1047943670350020608 [https://perma.cc/7Y3D-R2B9].

2. Complaint at 1–2, SEC v. Musk, No. 1:18-cv-8865 (S.D.N.Y. Sept. 27, 2018) [hereinafter Musk Complaint].

3. *Id.* at 1, 18.

4. *See id.* at 13 ("At 1:00 PM EDT, approximately 12 minutes after Musk published his tweet stating, 'Am considering taking Tesla private at $420. Funding secured,' Tesla's own head of Investor Relations sent a text to Musk's chief of staff asking, 'Was this text legit?' "); Matt Levine, *Elon Musk Has Some Fun with Tesla*, BLOOMBERG (Aug. 8, 2018, 9:06 AM), https://www.bloomberg.com/opinion/articles/2018-08-08/elon-musk-has-some-fun-with-tesla [https://perma.cc/FJA6-8HCW] (questioning why Musk sent the tweet and analyzing the tweet's possible meanings and ramifications).

5. Musk Complaint, *supra* note 2, at 2, 15.

6. *Id.* at 2.

far from secured.[7] The post clarified that the basis for Musk's "funding secured" claim was a single meeting with the Saudi Arabian sovereign wealth fund, and that it would be "premature" to provide details about any going-private plan.[8] In reality, the going-private deal had no funding, no structure, no investor support, and no mechanism to preserve retail investors' involvement in a private Tesla.[9] Unsurprisingly, Musk abandoned the going-private proposal three weeks after sending the "funding secured" tweet.[10]

Once Musk clarified that he would not take Tesla private after all, its stock price fell fifteen percent from its August 7 closing price, prompting outcry by Tesla shareholders[11] and a swift investigation by the U.S. Securities & Exchange Commission ("SEC").[12] The SEC's

7. The SEC's complaint lists precisely why the going-private transaction was not "certain," including:

> Musk knew that he (1) had not agreed upon any terms for a going-private transaction with the Fund or any other funding source; . . . (3) had never discussed a going-private transaction at a share price of $420 with any potential funding source; . . . (5) had not contacted existing Tesla shareholders to assess their interest in remaining invested in Tesla as a private company; . . . [and] (7) had not determined whether retail investors could remain invested in Tesla as a private company . . . .

Id. at 19.

8. Elon Musk, *Update on Taking Tesla Private*, TESLA (Aug. 13, 2018), https://www.tesla.com/blog/update-taking-tesla-private [perma.cc/TW73-EBXM].

9. Musk Complaint, *supra* note 2, at 19.

10. *See* Elon Musk, *Staying Public*, TESLA (Aug. 24, 2018), https://www.tesla.com/blog/staying-public [https://perma.cc/V25E-2ENT] (explaining that "[i]f and when a final proposal is presented, an appropriate evaluation process will be undertaken").

11. Musk Complaint, *supra* note 2, at 16. There is currently a federal securities class action against Tesla, Musk, and Tesla's Board of Directors pending in the Northern District of California. *See* Class Action Complaint, *In re* Tesla, Inc. Sec. Litig., No. 3:18-cv-04865 (N.D. Cal. Aug. 10, 2018). The plaintiff class consists of shareholders who purchased or sold Tesla common stock from August 7, 2018, through August 17, 2018, and the action alleges that Musk and Tesla violated Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 and that Tesla's Board of Directors violated Section 20(a) of the Securities Exchange Act of 1934. Consolidated Class Action Complaint at 2, *In re* Tesla, Inc. Sec. Litig., No. 3:18-cv-04865 (N.D. Cal. Jan. 16, 2019). According to the complaint, "[b]y misleading investors regarding the proposed going-private transaction and its funding, Musk, either intentionally or with deliberate recklessness, harmed virtually every single other person and/or entity trading Tesla securities during the Class Period." *Id.* at 4.

12. Ultimately, Musk was exposed to liability due to the truthfulness of his statements, not how he disclosed the statements. On August 27, 2018, the SEC charged him with violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Musk Complaint, *supra* note 2, at 3. The SEC's complaint alleged that, among other things, "Musk made multiple materially false statements on August 7, and taken together, his August 7 statements left market participants with the false and misleading impression that if Musk chose to take Tesla private at $420 per share, the only outstanding requirement to be satisfied was a shareholder vote." *Id.* at 16. On September 29, 2018, the SEC announced that Musk settled these charges. Press Release, SEC, Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226 [https://perma.cc/6HY9-QDWS]. The settlement required Musk to step down as Tesla's Chairman and pay a $20 million penalty. The settlement also required Tesla to pay an additional $20 million penalty, appoint two

investigation focused on the truthfulness of Musk's tweets, and thus whether he violated the Commission's antifraud laws.[13] Yet even if the details about the Tesla deal were true, news media outlets had already begun questioning whether Musk had violated U.S. securities laws by distributing this market-moving information solely through Twitter.[14] The answer to this question required delving into an SEC regulation that is somehow both recently enacted and out of date: Regulation Fair Disclosure.

The SEC enacted Regulation Fair Disclosure ("Regulation FD") largely in response to concerns about public companies selectively distributing material information to market analysts and institutional investors before releasing that information to the general public, giving them an informational and financial advantage over retail investors.[15] Despite the practice's similarity to "tipping" under insider trading laws, it likely could not give rise to legal liability.[16] In response, the SEC created Regulation FD to render such selective disclosure illegal. The SEC heralded the regulation as furthering its commitment to protecting investors and maximizing fairness by creating an even playing field.[17] Industry players largely opposed Regulation FD, characterizing it as duplicative, unnecessarily broad, and possibly unconstitutional.[18]

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new independent directors to its board, and put in place additional procedures to oversee Musk's communications. *Id.*

13. Musk Complaint, *supra* note 2, at 2–3 (alleging that Musk violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 by making "false and misleading public statements and omissions"). Broadly speaking, antifraud laws refer to securities laws that "prohibit fraudulent activities of any kind in connection with the offer, purchase, or sale of securities." *The Laws That Govern the Securities Industry*, SEC, https://www.sec.gov/answers/about-lawsshtml.html (last modified Oct. 1, 2013) [https://perma.cc/8TW5-BMY6].

14. *See, e.g.,* Benjamin Bain & Gregory Mott, *Can Elon Musk Tweet That? The SEC Is Digging In*, BLOOMBERG (Aug. 13, 2018, 4:36 PM), https://www.bloomberg.com/news/articles/2018-08-07/can-elon-musk-tweet-that-the-sec-may-have-an-opinion-quicktake [https://perma.cc/A2ED-3MKV] (questioning whether Musk violated Regulation FD); Steve Goldstein, *Did Elon Musk Break Any Laws with His Going-Private Tweet Today?*, MARKETWATCH (Aug. 7, 2018, 9:40 PM), https://www.marketwatch.com/story/did-elon-musk-break-any-laws-with-his-going-private-tweet-today-2018-08-07 [https://perma.cc/G4RX-UJKA] (remarking that the tweet may not meet SEC fair disclosure requirements).

15. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,715–16 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243). This Note focuses largely on "sell-side" analysts, who work for a brokerage firm and produce research reports about companies' investment criteria to the firm's clients.

16. *See infra* notes 52–77 and accompanying text (discussing insider trading precedent and contrasting it with selective disclosure prohibitions).

17. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,718.

18. *See id.* at 51,718–20 (summarizing industry group opposition to the regulations); Letter from Joseph McLaughlin to Jonathan Katz, SEC Secretary (June 30, 2000), http://www.sec.gov/rules/proposed/s73199/mclaugh1.htm [https://perma.cc/39KA-RQAM] (questioning the First Amendment issues raised by the potential "chilling effect").

Regulation FD requires that issuers make simultaneous and far-reaching public disclosure of any nonpublic information they disclose to select groups.[19] Issuers comply with this requirement by filing a Form 8-K with the SEC or distributing the information themselves through means "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[20] Many news outlets questioned whether Elon Musk's "funding secured" tweet met this threshold and thus complied with Regulation FD, regardless of his twenty-two million Twitter followers and powerful social media presence.[21]

This Note will explore Regulation FD's development, from its enactment in 2000 to its status in the age of social media. It will ultimately propose a safe harbor provision that clearly delineates when issuers and corporate insiders are not subject to the regulation's requirements. Part I provides an overview of Regulation FD's provisions and enforcement as well as the SEC's subsequent guidance, which attempts to elucidate the regulation's application to new technologies. Part II analyzes the specific problems that arise when Regulation FD is applied to information distributed through social media and assesses scholars' proposed solutions to these problems. Lastly, Part III proposes that a revised Regulation FD should incorporate a social media safe harbor provision to clarify the regulation's application to corporate insiders' use of social media to disseminate market-moving information.

19. 17 C.F.R. § 243.100(a) (2019). In pertinent part, Regulation FD defines "issuer" as

> [a company] that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (17 U.S.C. 78*l*), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any closed-end investment company (as defined in Section 5(a)(2) of the Investment Company Act of 1940) . . . .

17 C.F.R. § 243.101(b). The term "issuer" will be used throughout this Note to refer generally to the securities-issuing companies that are bound by Regulation FD's provisions.

20. 17 C.F.R. § 243.101(e)(2). While public companies are legally required to file annual (Form 10-K) and quarterly (Form 10-Q) reports with the SEC, they are also required to file a Form 8-K whenever a major event occurs that shareholders should know about. *Form 8-K*, SEC, https://www.sec.gov/fast-answers/answersform8khtm.html (last modified Aug. 10, 2012) [https://perma.cc/98JW-AU5V]. These major events include changes in management, bankruptcy, and material modifications to the rights of security holders. *See id.*

21. *See, e.g.*, Goldstein, *supra* note 14 (discussing whether Musk's tweet, which the media quickly disseminated, satisfied Regulation FD's distribution requirements).

I. FAIRNESS AND FLEXIBILITY: THE RISE AND EVOLUTION OF REGULATION FD IN THE INTERNET AGE

When publicly traded companies release material information to the general public, the market typically responds efficiently, bringing the price either up or down.[22] The modern securities regulatory apparatus is founded on this single concept.[23] Due to the power that material information has on the capital markets, the SEC's mandatory disclosure regime dictates the *type* of information firms must make available to the general public.[24] SEC filing requirements are perhaps the most well-known example of mandatory disclosure. Companies must make certain types of information public by filing forms with the SEC at specific times throughout the year and when important

22. This conclusion is also known as the Efficient Market Hypothesis ("EMH"), which states that stocks always trade at their fair value on stock exchanges in an efficient market. *See* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970) (reviewing the "theoretical and empirical literature on the efficient markets model"). The semi-strong form of the EMH, the most widely accepted form, states that stock prices efficiently adjust to incorporate all publicly known information. *Id.* at 383, 409; *see also* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (ruling that a defendant can rebut a presumption of reliance in securities fraud by proving that the alleged misrepresentation did not affect the price or the plaintiff would have bought or sold the stock even if he was aware the price was tainted by fraud); Basic Inc. v. Levinson, 485 U.S. 224, 241–48 (1988) (ruling that securities fraud plaintiffs may invoke a rebuttable presumption of reliance on the integrity of the security's price based on the "fraud on the market" theory; the theory states that most publicly available information is reflected in market price). For an example of how the market responds to new information, Tesla's stock price rose twelve percent after the company announced that it earned $311.5 million in the third quarter of 2018. Claudia Assis, *Tesla Stock Jumps as Wall Street Cheers 'Historic' Quarter*, MARKETWATCH (Oct. 25, 2018, 1:28 PM), https://www.marketwatch.com/story/tesla-stock-jumps-as-wall-street-cheers-historic-quarter-2018-10-25 [https://perma.cc/H98L-C2A4]. Soon after, the company's stock price dropped ten percent after the company announced that it delivered fewer vehicles than analysts expected for the fourth quarter of 2018 and was lowering the price of three car models by two thousand dollars. Matt Burns, *Tesla Stock Price Crashes 10% on Vehicle Price Cut, Missed Delivery Estimates*, TECHCRUNCH (Jan. 2, 2019, 8:42 AM), https://techcrunch.com/2019/01/02/tesla-stock-price-crashes-10-on-vehicle-price-cut-missed-production-numbers/ [https://perma.cc/J3HL-UQZD].

23. *See* Kevin S. Haeberle & M. Todd Henderson, *Information-Dissemination Law: The Regulation of How Market-Moving Information Is Revealed*, 101 CORNELL L. REV. 1373, 1384 (2016) (observing that the modern securities regime is set up with antifraud regulations and doctrines so that investors can rely on mandatory disclosures, which then change the fundamental values of companies, as reflected in their stock price).

24. *Id.* The SEC's mandatory disclosure regime requires, on the most basic level, that public companies make certain types of information public by filing that information with the SEC. Based off the doctrine of caveat emptor, the mandatory disclosure regime assumes that when investors have access to material, company-specific information, they can make rational investment decisions and hold companies accountable for their actions. *See* Daniel M. Gallagher, *The Importance of the SEC Disclosure Regime*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 16, 2013), https://corpgov.law.harvard.edu/2013/07/16/the-importance-of-the-sec-disclosure-regime/ [https://perma.cc/DN7M-ZPHD] (recounting the history and goals of the mandatory disclosure regime).

company events occur.[25] Yet Regulation FD, a product of "information-dissemination law," enhances the mandatory disclosure regime by dictating *how* and *when* firms make this information public.[26] Both the mandatory disclosure regime and Regulation FD focus on a common goal: "[M]aking the stock market fairer for ordinary, long-term investors."[27]

Material information about a public company "moves the market," or in other words, affects the price of a specific stock once particular market participants learn about it.[28] Certain types of information—such as financial performance indicators, merger plans, and changes to management—all typically move a stock price either up or down.[29] Since many companies can anticipate how this information will affect the market, the decision *how* and *when* they release the information to the public can be a powerful tool. Before Regulation FD's enactment, issuers could selectively disclose market-moving information hours, days, or weeks before releasing it to the public to curry favor by providing advanced notice to market analysts and institutional investors.[30] Although this practice cuts against the

25. SEC filings that are required at certain points in time include Form 10-K (annual report) and Form 10-Q (quarterly report). Filings that are required after important company events include Form 8-K (current report) and Form SC 13G/A (statement of acquisition of beneficial ownership by individuals). *Forms List*, SEC, https://www.sec.gov/forms (last visited Oct. 23, 2019) [https://perma.cc/LDN7-BJNL].

26. 17 C.F.R. § 243.100 (2019); Haeberle & Henderson, *supra* note 23, at 1385 ("[Information-dissemination law] seeks to ensure that an ever-increasing range of market-moving information is made available to all investors at the same exact time when first being shared with the public." (footnote omitted)).

27. Haeberle & Henderson, *supra* note 23, at 1377.

28. *See id.* at 1385 n.5 ("Information 'moves markets' when it results in changes to prices upon being learned by certain market participants."). "Market-moving" information should not be confused with information that is "material," although the terms are often used interchangeably. *Id.* Doctrinally, information is material if there is a substantial likelihood that a reasonable shareholder would consider the information important when deciding whether to invest. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (distinguishing materiality as a matter of law and as a matter of fact). For example, in *TSC Industries*, the Supreme Court found that it was not material for shareholders in a target company to know that an acquiring company "may" have already been a parent of the target company. *See id.* at 451–52. While the Supreme Court held that it was too speculative to be material as a matter of law, the stock market would have incorporated that undisclosed information to change the value of the acquisition and "move" the price of the acquiring company. *Id.*

29. *See infra* note 136 and accompanying text (listing examples of material information given in Regulation FD's Adopting Release).

30. *See, e.g.*, Saul Hansell, *Bank of New York Plans Larger Bad-Loan Reserve*, N.Y. TIMES (June 20, 1996), https://www.nytimes.com/1996/06/20/business/bank-of-new-york-plans-larger-bad-loan-reserve.html [https://perma.cc/JDL7-Q7NS] ("The bank disclosed the new reserves for credit card losses in a conference call with analysts yesterday afternoon before the stock market closed, but a press release was not issued until after 4 P.M. Eastern time."). However, many comment letters sent in response to Regulation FD's proposal questioned the seriousness of selective disclosures' effect on the market. *See* Committee on Federal Regulation of Securities of

rationale for mandatory disclosure, it would be difficult to prosecute as insider trading and is not banned outright.[31] The SEC proposed Regulation FD as a much-needed measure to halt the industry's frequent exercise of selective disclosure, creating clear liability for both its intentional and unintentional practice.[32] Whether Regulation FD has achieved this goal remains unclear.[33]

The SEC drafted Regulation FD to provide issuers with flexibility in their disclosure methods, but this flexibility has also created a fair amount of confusion. While the SEC adopted Regulation FD at the beginning of the Internet Age, it drafted the regulation with traditional media platforms in mind, such as press releases or financial publications. Although recent technological advances such as social media websites have given investors greater access to market-moving information, securities regulations, including Regulation FD, have been slow to respond to these growing opportunities. This Part details Regulation FD's provisions and the SEC's subsequent attempts to clarify their application to emerging technologies.

A. Regulation FD

Enacted in 2000, Regulation FD prevents public companies from disclosing material, nonpublic information to select groups by requiring simultaneous and far-reaching public disclosure.[34] The regulation states that "[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 below], the issuer shall make

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the Business Law Section of the American Bar Association, Comment Letter on Proposed Rule on Selective Disclosure and Insider Trading (May 8, 2000), https://www.sec.gov/rules/proposed/s73199/keller2.htm [https://perma.cc/RS6B-KFNX] [hereinafter ABA Comment Letter] ("The Commission's assertion of the existence of a problem is based primarily upon anecdotal evidence.").

31. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,716 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243):

> Issuer selective disclosure bears a close resemblance to ordinary tipping and insider trading. . . . Yet, as a result of judicial interpretations, tipping and insider trading can be severely punished under the antifraud provisions of the federal securities laws, whereas the status of issuer selective disclosure has been considerably unclear.

(internal quotation marks omitted). *But see* Susan B. Heyman, *Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 CARDOZO L. REV. 1099, 1124–33 (2015) (arguing that Regulation FD is redundant and selective disclosure should only be prosecuted as a subset of insider trading).

32. 17 C.F.R. § 243.100(a) (2019).

33. *See* Haeberle & Henderson, *supra* note 23, at 1378, 1428–30 (arguing that Regulation FD harms retail investors who trade directly through retail-level brokerage houses).

34. *Fact Sheet: Regulation Fair Disclosure and New Insider Trading Rules*, SEC, https://www.sec.gov/news/extra/seldsfct.htm (last modified Oct. 17, 2000) [https://perma.cc/WM4Z-R2TH].

public disclosure of that information . . . ."[35] The speaker must know or be reckless in not knowing that the information is material and nonpublic.[36] In the case of an intentional disclosure, the speaker must make a public disclosure simultaneously; for a nonintentional disclosure the speaker must make a public disclosure "promptly."[37] This Note considers Regulation FD's intentional prong and, thus, the simultaneous disclosure requirement.[38]

The regulation applies to communications made by an issuer (or any person acting on its behalf) to any member of four enumerated groups: (1) broker-dealers,[39] (2) investment advisors,[40] (3) investment companies,[41] or (4) stockholders of the issuer.[42] Enforcement actions have focused largely on disclosures made by a person acting on behalf of an issuer, such as a director or a C-suite executive, to financial analysts and institutional investors (which belong to the first and fourth groups, respectively).[43] Failure to make a public disclosure under

35. 17 C.F.R. § 243.100(a).

36. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,718. This requirement was added in response to public comments that demanded the SEC narrow the regulation's scope. *Id.*

37. 17 C.F.R. § 243.100(a). In pertinent part, Regulation FD defines "promptly" to mean "as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) . . . ." 17 C.F.R. § 243.101(d).

38. Non-intentional disclosures are outside the scope of this Note.

39. The term "broker" is defined in Section 3(a) of the Securities Exchange Act of 1934 as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4) (2012). The term "dealer" is defined as "any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5). Members of this group are typically both a broker and a dealer.

40. The term "investment advisor" is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 as

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

15 U.S.C. § 80b-2(a)(11).

41. The term "investment company" is defined in Section 3 of the Investment Company Act of 1940 as "any issuer which is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities . . . ." 15 U.S.C. § 80a-3(a)(1).

42. 17 C.F.R. § 243.100(b)(1)(iv). However, disclosures made in connection with a registered securities offering or by advisers who are in a relationship of trust with the issuer (such as attorneys, investment bankers, accountants) or who are bound by confidentiality agreements are exempt from Regulation FD liability. 17 C.F.R. § 243.100(b)(2). The SEC explained in Regulation FD's Adopting Release that these exemptions are included because any misuse of nonpublic information by exempted groups would fall squarely under insider trading liability. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,720 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243).

43. *See infra* Section I.A.2 (exploring the SEC's enforcement of Regulation FD).

Regulation FD does not constitute a violation of the SEC's catchall antifraud provision, Rule 10b-5, or create private liability of any kind.[44]

The SEC gives companies flexibility in the channel they use to communicate this information. However, this flexibility has also led to considerable confusion, especially in light of recent technological advancement and the proliferation of communication channels. Under the regulation, an issuer makes a public disclosure when it files a Form 8-K with the SEC.[45] Alternatively, an issuer does not need to file a Form 8-K if it "disseminates the information through another method . . . of disclosure that is reasonably designed to provide *broad, non-exclusionary distribution of the information to the public*."[46] In the regulation's Adopting Release, the SEC clarified that an issuer could meet this "broad, non-exclusionary" requirement by employing "a widely circulated news or wire service, . . . press conferences or conference calls."[47]

1. Rationale and Intended Effects

Though Regulation FD was enacted to remedy the practice of selective disclosure specifically, its broader purpose is to preserve confidence in the capital markets by promoting fairness and preventing the misuse of nonpublic information.[48] Regulation FD counteracts the public perception of unfairness in the capital markets that arises from issuers' preferential treatment of analysts and institutional investors

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44. 17 C.F.R. § 243.102. Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. Rule 10b-5 grants the SEC wide latitude in prosecuting many kinds of fraudulent activity, including insider trading and accounting fraud. For example, the SEC charged Elon Musk with violating Rule 10b-5 as a result of his "funding secured" tweet. *See supra* notes 12–13 and accompanying text.

45. *See* 17 C.F.R. § 243.101(e)(1).

46. 17 C.F.R. § 243.101(e)(2) (emphasis added). The SEC estimates that thirteen thousand issuers make Regulation FD disclosures approximately five times a year for a total of fifty-eight thousand submissions annually. Proposed Collection; Comment Request, 83 Fed. Reg. 31,801, 31,801 (July 9, 2018). This number does not include the approximately seven thousand issuers that file Form 8-Ks to comply with the regulation. *Id.*

47. Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,723–24.

48. *See id.* at 51,719 (explaining the goals of Regulation FD, including "promot[ing] full and fair disclosure of information by issuers and enhanc[ing] the fairness and efficiency of our markets").

over retail investors.[49] Many of the over six thousand public comments made in response to the Regulation FD proposal were from individual investors who "expressed frustration with the practice of selective disclosure, believing that it place[d] them at a severe disadvantage in the market."[50] Retail investors also expressed a desire for access to information, such as earning disclosures, that was often released to analysts first. They claimed that retail-level brokerage firms have a financial interest in keeping this information from them.[51]

Regulation FD's aim is similar to that of insider trading laws—to prevent the misappropriation of nonpublic information that belongs to someone else.[52] Unlike insider trading laws, however, a violation of Regulation FD does not require that the recipient of the nonpublic information trade on the information or financially benefit from it in any way—only that the issuer disclose nonpublic information to a select group.[53] Many industry insiders viewed this expansion of liability as the SEC's attempt to get around the Supreme Court's narrow construction of insider trading liability in *Dirks v. SEC*.[54] In *Dirks*, the Court denied the SEC's contention that a person is prohibited from trading whenever

49. *See id.* at 51,716 ("Investors 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.").

50. *Id.* at 51,716–17.

51. *See* Brian Anderson, Comment Letter on Selective Disclosure and Insider Trading (Aug. 8, 2000), https://www.sec.gov/rules/proposed/s73199/0808b02.htm [https://perma.cc/J9EG-8MY8] ("As an individual investor I am perfectly capable of evaluating corporate earnings disclosures or other data just as well as the professional managers on Wall Street."). Many comments on the proposed Regulation FD also decried the brokerage firms' stance as being paternalistic, stating that they were more than able to understand corporate financial documents. *See, e.g.*, Rick Boice, Comment Letter on Selective Disclosure and Insider Trading (Aug. 9, 2000), https://www.sec.gov/rules/proposed/s73199/0808b02.htm [perma.cc/J9EG-8MY8] ("After reading some of the comments from Wall Streeters, I can't believe their paternalistic attitude. As an individual investor, I depend on all information provided and I don't appreciate having information spoon-fed to me by the major brokerage houses, especially when it is a day late.").

52. *See* Matt Levine, *Front-Running Amazon with Buildings*, BLOOMBERG OPINION (Oct. 22, 2018, 10:32 AM), https://www.bloomberg.com/opinion/articles/2018-10-22/front-running-amazon-with-buildings [https://perma.cc/RGB5-P6MC] (discussing the application of insider trading law to real estate speculation in response to Amazon's announcement of a new headquarters).

53. *See* Heyman, *supra* note 31, at 1101, 1124–28 (discussing the overlap of Regulation FD and insider trading laws). Also, the groups regulated by Regulation FD, such as sell-side and buy-side analysts, institutional investment managers, and other market professionals, are arguably those most likely to trade on the disclosed information.

54. 463 U.S. 646 (1983). *But see* Laura S. Unger, SEC Commissioner, Speech: Fallout from Regulation FD, (Oct. 27, 2000), https://www.sec.gov/news/speech/spch421.htm [https://perma.cc/XP6P-U3PJ] ("Regulation FD does not expand or change the law of insider trading to address the missing link found by the Dirks' Court."); *see also* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,594 (Dec. 28, 1999) ("The approach we propose does not treat selective disclosure as a type of fraudulent conduct or revisit the insider trading issues addressed in *Dirks*.").

she knowingly receives material, nonpublic information.[55] Instead, the Court held that this trading prohibition only applies when the insider breaches her fiduciary duty to shareholders by "receiv[ing] a direct or indirect personal benefit from the disclosure."[56] This ruling significantly cut back on the SEC's ability to prosecute the disclosure of material nonpublic information to securities analysts.[57]

The goal of most securities regulations is to incorporate accurate information into the market, which results in stock prices that better reflect firms' fundamental value.[58] Information asymmetry directly correlates to inferior prices for portfolio traders and ordinary investors because "when information traders have knowledge of information that is not yet incorporated into market prices, liquidity providers . . . will protect themselves by quoting inferior prices until the information asymmetry is resolved."[59] Thus, reducing the information asymmetry in the public markets creates more accurate prices and a fairer market.

2. Enforcement Actions

Enforcement actions for Regulation FD violations are, on the whole, relatively scarce—the SEC has only initiated seventeen since the regulation's enactment.[60] In 2000, the Director of the SEC's

55. *See Dirks*, 463 U.S. at 651, 652 (describing the SEC's arguments and reversing the judgment against Dirks).

56. *Id.* at 663.

57. However, scholars have noted that subsequent case law considerably weakened the fiduciary limitation on insider trading, and thus this limitation may no longer be as great an issue in prosecuting issuers and analysts. *See* SEC v. Dorozhko, 574 F.3d 42, 49–50 (2d Cir. 2009) (extending the SEC's policing power by allowing an outside trader to be liable for insider trading if he made an affirmative misrepresentation to obtain nonpublic information); SEC v. Cuban, 634 F. Supp. 2d 713, 726–29 (N.D. Tex. 2009) (holding that insider trading liability may be predicated on an unwanted duty where the recipient of the information was not seeking the information, but agreed not to trade on the basis of the information), *vacated and remanded*, 620 F.3d 551 (5th Cir. 2010); Heyman, *supra* note 31, at 1104 ("This private gain need not be an economic benefit; it can be in the form of a personal reputational benefit or a gratuity offered to a relative or friend.").

58. Haeberle & Henderson, *supra* note 23, at 1384.

59. *Id.* at 1410.

60. *See* SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 701 (S.D.N.Y. 2005); TherapeuticsMD, Inc., Exchange Act Release No. 86708, 2019 WL 3933685 (Aug. 20, 2019); Brian Pappas, Litig. Release No. 23914, 2017 WL 3614292 (Aug. 22, 2017); Lawrence D. Polizzotto, Exchange Act Release No. 70337, 2013 WL 4773958 (Sept. 6, 2013); David Ronald Allen, Litig. Release No. 22208, 2011 WL 10915927 (Dec. 22, 2011); Fifth Third Bancorp, Exchange Act Release No. 65808, 2011 WL 5865859 (Nov. 22, 2011); Office Depot, Inc., Litig. Release No. 3199, 2010 WL 4134972 (Oct. 21, 2010); Patricia A. McKay, Exchange Act Release No. 63154, 2010 WL 4134969 (Oct. 21, 2010); Stephen A. Odland, Exchange Act Release No. 63153, 2010 WL 4134968 (Oct. 21, 2010); Presstek, Inc., Litig. Release No. 21443, 2010 WL 784231 (Mar. 9, 2010); Christopher A. Black, Litig. Release No. 21222, 2009 WL 3047574 (Sept. 24, 2009); Chandramowli Srinivasan, Litig. Release No. 20296, 2007 WL 2778650 (Sept. 25, 2007); Flowserve Corp., Exchange Act Release No. 51427, 2005 WL 677810 (Mar. 24, 2005); Senetek PLC, Exchange Act Release No. 50400, 2004 WL 2076191 (Sept. 16, 2004); Schering-Plough Corp., Exchange Act Release No. 48461, 2003 WL 22082153 (Sept. 9,

Enforcement Division, Richard Walker, stated that the division would be looking for two types of Regulation FD violations: (1) "[E]gregious violations involving the intentional or reckless disclosure of information that is unquestionably material" and (2) "those who deliberately attempt to game the system either by speaking in code, or stepping over the line again and again."[61] As a result, enforcement actions have largely focused on selective disclosure of financial performance measures and earnings guidance to analysts or other market professionals.[62] *In re Raytheon Co.* is an example of one such action. There, the company's CEO allegedly disclosed quarterly and semiannual earnings guidance to analysts without disclosing any of the information to the public.[63] The SEC instituted cease-and-desist proceedings against Raytheon and the CEO but did not assess monetary penalties.[64]

The SEC, however, has also filed enforcement actions against individuals who indirectly disclosed financial information, either by veiling the information in opinionated language or speaking in code.[65] For example, in *SEC v. Presstek, Inc.*, the SEC initiated an enforcement proceeding against Presstek CEO Edward Marino in response to his private statement over the phone to the managing partner of an investment company that Presstek's financial performance for the quarter was "not as vibrant" as expected and "overall a mixed picture."[66] Marino later settled these charges and agreed to pay a civil penalty.[67] Also, in *SEC v. Office Depot, Inc.*, the SEC alleged that Office Depot's

2003); Siebel Sys., Inc., Litig. Release No. 17860, 2002 WL 31643062 (Nov. 25, 2002); Raytheon Co., Exchange Act Release No. 46897, 2002 WL 31643026 (Nov. 25, 2002); Secure Computing Corp., Exchange Act Release No. 46895, 2002 WL 31643024 (Nov. 25, 2002). Many of these actions stem from the same transaction, such as in the case of *Office Depot*, where the SEC initiated actions against Office Depot, Stephen Odland (CEO), and Patricia McKay (CFO). *See* Office Depot, Inc., Litig. Release No. 3199, 2010 WL 4134972 (Oct. 21, 2010); Patricia A. McKay, Exchange Act Release No. 63154, 2010 WL 4134969 (Oct. 21, 2010); Stephen A. Odland, Exchange Act Release No. 63153, 2010 WL 4134968 (Oct. 21, 2010). I will discuss some of these cases *infra*.

61. Richard H. Walker, Director, Div. of Enf't, SEC, Speech: Regulation FD—An Enforcement Perspective (Nov. 1, 2000), http://www.sec.gov/news/speech/spch415.htm [https://perma.cc/JPF2-JLDG].

62. *See* David L. Axelrod et al., *SEC Signals New Phase of Regulation FD Enforcement*, BALLARD SPAHR LLP (Aug. 20, 2019), https://www.ballardspahr.com/alertspublications/legalalerts/2019-08-20-sec-signals-new-phase-of-regulation-fd-enforcement [https://perma.cc/QA2B-H3V8].

63. Raytheon Co., Exchange Act Release No. 46897, 2002 WL 31643026, at *2 (Nov. 25, 2002).

64. *Id*. at *1.

65. These enforcement actions fall under Richard Walker's category of "those who deliberately attempt to game the system either by speaking in code, or stepping over the line again and again." Walker, *supra* note 61.

66. Complaint at 5, SEC v. Presstek, Inc., 1:10-cv-10406 (D. Mass. Mar. 9, 2010).

67. *See* Edward J. Marino, Exchange Act Release No. 66990, 2012 WL 1681308, at *1 n.1 (May 15, 2012).

CEO and CFO communicated to analysts that they should lower their estimates of the company by referring the analysts to other companies' public announcements about the slowing economy negatively affecting their financial performance.[68] Office Depot settled with the SEC and agreed to pay a $1 million penalty.[69] Lastly, in *SEC v. Schering-Plough Corp.*, Schering's CEO met privately with analysts, portfolio managers, and institutional investors and "through a combination of spoken language, tone, emphasis, and demeanor" allegedly disclosed negative information about the company's earnings.[70] Schering and the CEO both settled with the SEC.[71]

Since the vast majority of the SEC's Regulation FD enforcement actions have resulted in settlement or administrative proceedings, there is minimal case law analyzing Regulation FD's application in borderline situations. To date, *SEC v. Siebel Systems, Inc.* is the only case in which a defendant successfully challenged Regulation FD in court. There, the Southern District of New York dismissed the SEC's complaint alleging that Siebel's CFO violated Regulation FD by making statements at two private events, including statements that new deals were coming into the sales pipeline and that the company's business activity levels were "good" or "better."[72] The court ruled that the CFO's statements were neither material nor nonpublic, since they were similar to other statements Siebel's CEO had made on an earlier publicly accessible earnings call.[73] Information is material, the court reasoned, only if a reasonable investor "would have considered the information as having significantly altered the 'total mix' of information made available."[74] The ruling closed with a warning that Regulation FD provides "no support" for the SEC's "extremely heightened level" of scrutiny of the company's statements and that "[s]uch an approach places an unreasonable burden on a company's management and spokespersons to become linguistic experts, or otherwise live in fear of violating Regulation FD."[75]

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68. *See* Complaint at 1, SEC v. Office Depot, Inc., No. 9:10-cv-81239 (S.D. Fla. Oct. 21, 2010).

69. Office Depot, Inc., Litig. Release No. 3199, 2010 WL 4134972 (Oct. 21, 2010).

70. Schering-Plough Corp., Exchange Act Release No. 48461, 2003 WL 22082153, at *1 (Sept. 9, 2003).

71. *Id.*

72. SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 701 (S.D.N.Y. 2005).

73. *Id.* at 704 ("Specifically, Mr. Goldman's private statement regarding the existence of five million dollar deals in the company's pipeline for the second quarter was equivalent in substance to the information previously disclosed by Mr. Siebel.").

74. *Id.* at 703 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). This is an objective determination that can also be triggered by "[t]acit communications, such as a wink, nod, or a thumbs up . . . ." *Id.* at 708 n.14.

75. *Id.* at 704.

As these enforcement actions demonstrate, despite Regulation FD's broad language, the SEC has only brought enforcement actions in variations of a narrow set of circumstances: C-suite executives disclosing information about a company's financial performance to analysts and institutional investors. The low number of enforcement actions could be the result of several factors, including fewer actual violations, the SEC's shift in focus to misconduct resulting from the 2008 financial crisis, or an unclear line distinguishing selective disclosure from insider trading.[76] Alternatively, concerns about the regulation's chilling effect on corporate speech, as voiced by the *Siebel* court, may have given the SEC pause.[77]

B. SEC Guidance on the Use of Company Websites (2008)

After industry insiders called on the SEC to clarify Regulation FD, the SEC issued an interpretive release in 2008 to address how companies can use their websites to provide information to investors in compliance with securities laws.[78] This guidance was one of several SEC releases meant to update securities regulations and consider their application in the Internet Age.[79] In it, the SEC contends that it has "long recognized the vital role of the Internet and electronic communications in modernizing the disclosure system under the federal securities laws and in promoting transparency, liquidity and efficiency in our trading markets."[80] Yet the guidance also echoes the SEC's concerns that relaxing Regulation FD could compromise fairness in the market.[81] Therefore, the SEC declined to set out any brightline

76. Christopher Ippoliti, *Governing the Corporate Insiders: Improving Regulation Fair Disclosure with More Robust Guidance and Stronger Penalties for Individual Executives*, 8 J. BUS. ENTREPRENEURSHIP & L. 13, 40–42 (2014).

77. *See Siebel Sys.,* 384 F. Supp. 2d at 704 (cautioning the SEC about its aggressive enforcement of Regulation FD).

78. Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241).

79. *See* Use of Electronic Media, 65 Fed. Reg. 25,843 (May 4, 2000) (codified at 17 C.F.R. pt. 241) (providing guidance on the electronic delivery of disclosure documents and company liability for website content, as well as other matters). In this guidance, the SEC noted the speed at which technological advances are developing and the need to revisit the guidance to update and supplement it as appropriate. *See id.* at 25,844 ("Additionally, because technology is evolving rapidly, we seek comment on a number of issues to assist us in determining whether further regulatory action is necessary."). The SEC also demonstrated its openness to technological advancement by implementing an Electronic Data Gathering and Retrieval ("EDGAR") system in 1995, which all companies must use to submit their SEC filings and make the filings accessible to the general public. *See* SEC, 1995 ANN. REPORT 59, https://www.sec.gov/about/annual_report/1995.pdf [https://perma.cc/28E5-AE3F] (discussing the phase-in for EDGAR).

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

81. The 2008 Guidance reiterates that Regulation FD sought to "address the problem of selective disclosure of material information by companies, in which a privileged few gain an

rule for when information disseminated online is considered public and instead placed the burden on issuers to weigh several contributing factors.[82]

The guidance states that information disseminated on a website can be considered public—and thus appropriate under Regulation FD—when (1) a company website is a recognized channel of distribution; (2) posting the information on a company website disseminates the information in a manner that makes it available to the securities marketplace in general; and (3) there has been a reasonable waiting period for investors and the market to react to the posted information.[83] The guidance also provides a nonexhaustive list of considerations in examining whether these elements are present, including whether the company has a pattern of posting on the website and whether the information on the website regularly gets picked up by the market and reported in news outlets.[84]

One may argue that the number of factors to consider in this highly fact-specific inquiry obscures the guidance's self-professed goal of clarifying Regulation FD's application. Ultimately, however, these factors are a proxy for whether an issuer is providing fair notice and timely accessibility of material corporate information to investors and the markets.[85] This guidance documents a marked departure from the Commission's prior interpretation that access was equivalent to fairness, illustrating instead "a growing concern that fairness must now be evaluated through the lens of notice."[86]

informational edge—and the ability to use that edge to profit—from their superior access to corporate insiders . . . ." *Id.* at 45,866.

82. In the 2008 Guidance, the SEC warned that distributing information on a website that is "readily accessible to the general public" does not necessarily mean that the disclosure is considered "public" under Regulation FD. *Id.* at 45,868. Thus, the regulation's definition of "public" is a higher standard than the ordinary meaning of the word. This further illustrates that the SEC's concern is not pure accessibility, but fair notice.

83. *Id.* at 45,867.

84. *See id.* Other listed considerations include:

> Whether the company's Web site is designed to lead investors and the market efficiently to information about the company . . . . The steps the company has taken to make its Web site and the information accessible, including the use of "push" technology, . . . [w]hether the company uses other methods in addition to its Web site posting to disseminate the information . . . [and] [t]he nature and complexity of the information.

Id. at 45,867–68.

85. The guidance further highlights the importance of notice by suggesting "advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware . . . and will thereby facilitate the broad dissemination of information." *Id.* at 45,868.

86. Stan Polit, Note, *Friends, Followers, and Fairness: SEC Fair Disclosure Requirements in a Changing Information Marketplace*, 17 U. PA. J. BUS. L. 619, 636 (2015) (explaining the shift in the SEC's definition of fairness from one based in access to one in notice).

C. The Reed Hastings Rule (2013)

Four years after the SEC released *Commission Guidance on the Use of Company Websites*, it faced another context in which Regulation FD's application was anything but clear: social media. On July 3, 2012, Reed Hastings, the CEO of Netflix, posted a message on his personal Facebook page: "Congrats to Ted Sarados, and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we'll blow these records away. Keep going Ted, we need even more!"[87] Hastings's public Facebook page had approximately two hundred thousand subscribers at the time of the post, which included analysts, shareholders, and reporters, but it took some time before Netflix's stock price reflected the streaming milestone.[88] A technology blog and a few news outlets picked up the Facebook post in the following hours, and analysts began talking about the milestone as a positive customer engagement measurement after the market closed that day.[89] Netflix did not announce the milestone through a Form 8-K or a standard press release, although it did send the announcement to several reporters about an hour after the Facebook post.[90] Netflix stock rose from $70.45 at the time of Hastings's Facebook post to $81.72 at close of the following trading day.[91]

Though Hastings's Facebook post seemed innocuous enough, it was Netflix's failure to give public notice about the post that drew the SEC Enforcement Division's attention.[92] Netflix had never used Hastings's personal Facebook page to announce company metrics, and Hastings had stated in 2012 that "we [Netflix] don't currently use Facebook and other social media to get material information to investors; we usually get that information out in our extensive investor

87. Netflix, Inc., & Reed Hastings, Exchange Act Release No. 69279, 2013 WL 5138514, at *4 (Apr. 2, 2013). Hastings had previously explained that streaming was "a measure of an engagement and scale in terms of adoption of our service and use of our service," and thus an important indicator of growth. *Id.* at *3. Also, one billion streamed hours in June was a nearly fifty percent increase in streaming hours from Netflix's January 25, 2012, announcement that it had streamed two billion hours over a three-month quarter. *Id.* at *4.

88. *Id.* at *4.

89. *Id.*

90. *Id*. The report notes that, while Netflix did disclose the information to a few reporters, it did not disseminate the information to a larger mailing list normally used for corporate press releases. *See id.* Netflix issued a press release about its quarterly earnings release the same day as Hastings's Facebook post, but did not mention it in the press release. *Id*.

91. *Id*.

92. *See id.* at *7 (noting that Hastings and Netflix failed to provide the public with adequate notice that material information would be distributed through Hastings's personal Facebook page); *see also* Polit, *supra* note 86, at 633 ("The disconnect between Netflix's past disclosure habits and Hastings' post raised red flags about the acceptability of the post.").

letters, press releases and SEC filings."[93] Still, Hastings's disclosure did not look like the selective disclosures the SEC had previously prosecuted: Hastings did not control who received the information, the disclosure was not a phone call or a private meeting with analysts or institutional investors, and he disclosed the information through a publicly accessible social media platform.[94]

Ultimately, the SEC chose not to initiate an enforcement action against Hastings or Netflix and instead issued a report commonly referred to as "the Reed Hastings Rule."[95] The report did not directly address why the SEC chose not to file an action but stated that during the Hastings investigation the Commission became aware of pervasive uncertainty surrounding the application of Regulation FD and the 2008 Guidance to social media disclosures.[96] Thus, the report explored "1) the application of Regulation FD to Hastings's post; and 2) the applicability of the Commission's August 2008 Guidance . . . to emerging technologies, including social networking sites."[97] The SEC clarified that although Regulation FD grew out of a specific concern about issuers selectively disclosing material information to analysts and investors, it also applied to disclosures like Facebook posts that are made to a broad group, including both persons specifically enumerated in Regulation FD (shareholders, broker-dealers, etc.) and unenumerated persons.[98]

As in the 2008 Guidance, the key metrics for determining Regulation FD compliance when an issuer uses social media to disclose material, nonpublic information include whether the method of

93. *Netflix, Inc., & Reed Hastings*, 2013 WL 5138514, at *4 (alteration in original).

94. *See* Joseph A. Grundfest, *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?* 17 (Stanford Law Sch. Rock Ctr. for Corp. Governance, Working Paper Series No. 131, 2013), https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/405104/doc/slspublic/Grundfest%20Regulationin%20Age%20of%20Facebook%20and%20Twitter.pdf [https://perma.cc/D7XH-GZ3F] (arguing that an enforcement action against Hastings "would dramatically extend Regulation FD far beyond" any enforcement actions previously filed by the SEC).

95. *See Netflix, Inc., & Reed Hastings*, 2013 WL 5138514; *see also* Daniel Roberts, *Elon Musk's Tesla Tweet Brings the 'Reed Hastings Rule' Into Play*, YAHOO! FIN. (Aug. 8, 2018), https://finance.yahoo.com/news/elon-musks-tesla-tweet-brings-reed-hastings-rule-play-153337861.html [https://perma.cc/7BK9-EW4C] (recounting the development of the Reed Hastings Rule).

96. *See Netflix, Inc., & Reed Hastings*, 2013 WL 5138514, at *1 (concluding that it was in the public interest to issue the report and clarify Regulation FD's application to social media disclosures).

97. *Id.*

98. *Id.* at *6; *see also* 17 C.F.R. § 243.100(b)(1) (2019) (extending the disclosure requirement to enumerated groups "outside the issuer"). For example, if an issuer discloses material information on a social media site and that information is disseminated to a large group of people that includes one shareholder, it must comply with Regulation FD.

disclosure is sufficiently public and provides fair notice.[99] The report emphasizes:

> [T]he steps taken to alert the market about which forms of communication a company intends to use for the dissemination of material, non-public 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.[100]

For example, issuers can create public notice by including information about their social media accounts in periodic reports, press releases, or on the company website.[101] Issuers can also recommend that investors and the general public subscribe, follow, or register on the relevant social media accounts so that they are in a position to receive important disclosures.[102] Though the report emphasizes that every case must be evaluated on its own facts, these methods would likely enable social media platforms to rise to the level of a "recognized channel of distribution."[103]

Lastly, the report addressed disclosures made through a corporate officer's personal social media profile, such as the Reed Hastings or Elon Musk cases.[104] The SEC warned that without advance notice to investors that an officer's personal social media profile will be used for corporate disclosures, the website is unlikely to qualify as a method "reasonably designed to provide broad, non-exclusionary distribution of the information to the public"—even those profiles with

99. *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,867–68 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241) (highlighting the importance of notice and emphasizing that a publicly accessible website posting does not necessarily meet the public disclosure threshold under Regulation FD).

100. *Netflix, Inc., & Reed Hastings*, 2013 WL 5138514, at *6.

101. *See id.*

102. *See id.*:

> [D]isclosures 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.

103. *Id.*; *see also* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,865 ("Indeed, today we have reached a point where the availability of information in electronic form . . . is the superior method of providing company information to most investors, as compared to other methods.").

104. A brief comparison between Hastings's and Musk's use of social media reveals Regulation FD's overlap with antifraud laws such as Rule 10b-5. While Hastings's Facebook status announced a company milestone that was rooted in fact, Musk's tweet announced a going-private deal that was unlikely to occur. While both used social media platforms to distribute material nonpublic information and thus potentially violated Regulation FD, only Musk potentially violated antifraud laws. In fact, the SEC's complaint against Musk only alleged violations of Section 10(b) of the Exchange Act. *See* Musk Complaint, *supra* note 2, at 22.

a large number of social media followers.[105] While the SEC generally has responded to recent technological advancements with flexibility, it has declined to extend this flexibility to corporate disclosures made through officers' social media accounts. The SEC's outdated response to the rise of the "Social CEO" is a problem this Note explores and solves.

II. THE SOCIAL CEO: AN ANALYSIS OF REGULATION FD'S WEAKNESSES IN A CHANGING TECHNOLOGICAL LANDSCAPE

Social media's rise is one of the most significant changes to the business world in the last century. How the SEC chooses to regulate corporate social media disclosures directly affects whether issuers incorporate the practice into their business or ignore it altogether for fear of legal consequences. Social media use continues to increase, and the platforms themselves are evolving at breakneck speed.[106] In 2008, when the SEC released the *Commission Guidance on the Use of Company Web Sites*, only twenty-one percent of adults in the United States used social media.[107] By 2018, that number skyrocketed to sixty-nine percent.[108] In 2018, sixty-four percent of Americans aged fifty to sixty-four said they use social media, up from seven percent in 2008.[109] Internet users are visiting social media sites more frequently, with fifty-one percent of Facebook users saying they visit the website several

105. *Netflix, Inc., & Reed Hastings*, 2013 WL 5138514, at *7 (quoting 17 C.F.R. § 243.101(e)(2)). The report's dismissal of officer social media accounts that are highly publicized, such as Elon Musk's, seems to ignore the reality of online information dissemination in favor of a simplistic rule. Consider that at the time of his "funding secured" tweet, Elon Musk had approximately twenty-two million Twitter followers. As of August 21, 2019, he has approximately twenty-eight million followers. Yet, under the Reed Hastings Rule there is no presumption that Musk's disclosures made on Twitter provide broad, nonexclusionary distribution to the public. Luckily for Tesla and Musk, Tesla filed a Form 8-K in 2013 indicating that Musk's Twitter account would be used as a channel of investor information. *See* Tesla Motors, Inc., Current Report (Form 8-K) (Nov. 5, 2013), https://www.sec.gov/Archives/edgar/data/1318605/000119312513427630/d622890d8k.htm [https://perma.cc/4RXJ-H8JB] (designating Elon Musk's Twitter account as a channel of investor information). Many companies followed suit after the Reed Hastings Report was released.

106. *See Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), http://www.pewinternet.org/fact-sheet/social-media/ [https://perma.cc/7GN2-UY95] (detailing the growth of social media use since 2005).

107. *Id.*

108. *Id.* Now, approximately seven out of ten Americans use social media. *Id.*

109. *Id.* This age bracket has major influence over the capital markets, as the mean age of an owner of a taxable investment account, such as stocks, bonds, and mutual funds, was fifty-one years old in 2012. *See* Gary Mottola, *A Snapshot of Investor Households in America*, FIN. INDUSTRY REG. AUTHORITY 1, 3 (Sept. 2015), https://www.finrafoundation.org/files/snapshot-investor-households-america [https://perma.cc/ZG2Z-QHZR] (examining demographic information about households in the United States that own securities investments).

times a day.[110] There is also growing overlap among the use of social media platforms: the typical (median) American now uses three of the eight most popular social media platforms.[111]

Companies are increasingly adopting social media and incorporating it into their business model. In a study of the 2018 Fortune 500 companies' social media usage, ninety-eight percent actively used LinkedIn, ninety-one percent actively used Twitter, and eighty-nine percent actively used Facebook.[112] Of these same companies, only four do not have active corporate social media accounts.[113] Issuers are also increasingly looking to engage with millennials by growing their presence on highly visual platforms like Instagram.[114] While only eight percent of the Fortune 500 actively used Instagram in 2013, sixty-three percent did in 2018.[115] The social media sphere is constantly shifting and innovating, and issuers are increasingly demonstrating a willingness to experiment with new technologies.

At the same time, the CEOs of these companies have been much less willing to increase their use of social media. In 2016, sixty percent of Fortune 500 CEOs had no social media presence at all and only twenty-five Fortune 500 CEOs had active Twitter accounts.[116] This lack of social media engagement could be attributable to several factors, including CEOs being too busy to maintain an active social media

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110. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/ [https://perma.cc/CS3L-J54N].

111. *Id.* The study asked about eight social media platforms: Twitter, Instagram, Facebook, Snapchat, YouTube, WhatsApp, Pinterest, and LinkedIn. *Id.*

112. Nora Ganim Barnes et al., *The 2018 Fortune 500 Target Millennials and Seek Uncensored Expression*, U. MASS. DARTMOUTH CTR. FOR MARKETING RES., https://www.umassd.edu/cmr/research/social-media-research/2018-fortune-500.html (last updated July 3, 2019) [https://perma.cc/S6MJ-J3C9].

113. *Id.* These companies include Liberty Media (Rank: 377), Allegheny (Rank: 437), Old Republic International (Rank: 450), and Vistra Energy (Rank: 499). The study clarified:

> A company was counted as having a presence on each platform studied if the primary corporation had an active account. This was determined by examining both the date of the last post and the patterns of posting. Typically, a post in the last 30 days qualified for an active account . . . .

Id.

114. *See id.* (noting Instagram as one of the fastest growing platforms studied). Millennials increasingly rely on pictures, storytelling, and video to communicate, and the Fortune 500's growing use of Instagram and blogs indicates that these companies are taking notice. *Id.*

115. Nora Ganim Barnes et al., *2013 Fortune 500 Are Bullish on Social Media: Big Companies Get Excited About Google+, Instagram, Foursquare and Pinterest*, U. MASS. DARTMOUTH CTR. FOR MARKETING RES., https://www.umassd.edu/cmr/research/social-media-research/2013-fortune-500/ (last visited Oct. 23, 2019) [https://perma.cc/JZ3Y-B4EN]; Barnes et al., *supra* note 112.

116. *2016 Social CEO Report*, CEO.COM 1, 3, 6 (2016), https://web-assets.domo.com/blog/wp-content/uploads/2017/05/Report_SocialCEO_2016.pdf [https://perma.cc/RE7W-VX6N].

presence or not understanding the return on investment of social media engagement.[117] It may also result from CEOs' fear of exposure to legal liability as it remains unclear how SEC regulations (including Regulation FD) apply to their social media use.

Issuers and CEOs alike need a streamlined, low-cost method to distribute information to investors, and social media has undeniable advantages over traditional media.[118] Social media platforms such as Twitter and Reddit allow for quicker and more efficient information dissemination by eliminating middlemen like traditional news media outlets. Even beyond "traditional" social media platforms, firms are experimenting with new technology, like blockchain, to streamline investor communications.[119] Regardless of the specific platform, by using resources more efficiently and reducing information-gathering costs, firms can use the saved funds to increase shareholder value elsewhere in the company.[120] There is also a colorable argument that posting on social media results in broader dissemination than filing a Form 8-K or issuing a press release through traditional media.[121] The good news is that the SEC has demonstrated its responsiveness by acknowledging the need for continued guidance in light of technological

117. *See id.* at 14 (listing possible explanations for why CEOs are slow to adopt social media).

118. Even the SEC acknowledged this in its 2008 Guidance, stating: "[O]ne of the key benefits of the Internet is that companies can make information available to investors quickly and in a cost-effective manner." Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,863 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241); *see also* Lindsay Sherwood Fouse, Note, *Social Media Disclosure: A More Efficient Method of Disseminating Material, Nonpublic Corporate Information*, 17 DUQ. BUS. L.J. 49, 72 (2015) ("One stark benefit of social media disclosure is that this method of disclosure can result in more efficient use of resources in the marketplace through reduced information-gathering costs.").

119. Blockchain technology is commonly defined as a decentralized, permissioned, immutable ledger, and was first used as the transaction ledger for Bitcoin. *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (2008), https://bitcoin.org/bitcoin.pdf [https://perma.cc/W8FS-4ANX] (proposing a decentralized peer-to-peer network as the basis for Bitcoin's electronic payment system). For one example of blockchain's application to investor communications, see *Pulling Back the Curtain: Blockchain and Investor Communications*, EQUIBIT GROUP (Mar. 14, 2018), https://www.equibitgroup.com/media-center-blog-old/blockchain-and-investor-communications [https://perma.cc/ZL4X-LTGX] ("How companies engage, how shareholder sentiment is measured, how investors choose to receive documents: this can all be streamlined significantly and done at much lower costs through open and transparent channels. Because blockchain technology encrypts data, making it secure, there is transparency within the network.").

120. Fouse, *supra* note 118, at 72.

121. *See* Steven Davidoff Solomon, *In Netflix Case, A Chance to Re-examine Old Rules*, N.Y. TIMES: DEALBOOK (Dec. 11, 2012), https://dealbook.nytimes.com/2012/12/11/in-netflix-case-a-chance-for-the-s-e-c-to-re-examine-old-regulation [https://perma.cc/8LQJ-CVTM]:

> If the idea behind Regulation FD is to encourage disclosure, then 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.

innovation.[122] However, it has been more than five years since the Reed Hastings Report was issued, and more questions about Regulation FD's application have surfaced.[123] This Part analyzes Regulation FD's weaknesses, including its chilling effect on corporate speech and its inflexibility in light of technological innovation, and considers recently proposed solutions to these weaknesses.

A. Regulation FD Chills Corporate Speech

Several legal and technological issues plague the SEC's current application of Regulation FD to information disseminated through social media platforms. The overarching issue is that depending on the social media site they use, firms and corporate insiders could technically violate Regulation FD by disseminating "material nonpublic information" to followers, friends, or subscribers.[124] Under the regulation's current definition, even corporate officers like Elon Musk—who has upward of twenty million Twitter followers—could be held liable for selective disclosure.[125] This situation is a far cry from the closed conference calls and private meetings originally contemplated by the regulation's drafters.[126] Thus, Regulation FD runs the risk of chilling corporate speech or halting it altogether as social media continues to evolve.

1. The First Amendment Concern

Regulation FD puts issuers in an undesirable situation when faced with new material information about their company: they either

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122. *See* Netflix, Inc., & Reed Hastings, Exchange Act Release No. 69279, 2013 WL 5138514, at *2 (Apr. 2, 2013) ("In light of the 'rapid development and proliferation of company web sites since 2000' and with the expectation of 'continued technological advances,' the 2008 Guidance was designed to be flexible and adaptive." (quoting Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,863)).

123. Fouse, *supra* note 118, at 56–63.

124. 17 C.F.R. § 243.100(a) (2019).

125. *See Netflix, Inc., & Reed Hastings*, 2013 WL 5138514, at *7:

> [D]isclosure of material, nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose, is unlikely to qualify as a method "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" . . . . *This is true even if the individual in question has a large number of subscribers, friends, or other social media contacts*, such that the information is likely to reach a broader audience over time.

(emphasis added).

126. *See* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,591–92 (Dec. 28, 1999) ("In some cases, selective disclosures have been made in conference calls or meetings that are open only to analysts and/or institutional investors . . . .").

must restrict their speech entirely or engage in an unwanted public disclosure.[127] If the issuers choose to disclose, then the costs of legal counsel and compliance mechanisms reduce shareholder value and the company opens itself up to legal liability.[128] Thus, issuers often opt for silence instead of publicly disclosing information.[129] The ambiguity surrounding Regulation FD's application to information disseminated through social media posts likely compounds the negative effects of this "chilled speech."

When Regulation FD was proposed in 1999, both the SEC and industry insiders were highly conscious of the danger of chilled corporate speech. Many comments on Regulation FD's proposal warned that the regulation had the potential to significantly reduce the quality and quantity of information that issuers share with analysts, which would negatively affect all investors through less accurate stock prices and increased volatility.[130] The SEC even acknowledged this danger in Regulation FD's proposing release, stating: "We are sensitive to the concern that the proposed Regulation might 'chill' corporate disclosures . . . [i]f the Regulation has such a chilling effect, there would be a cost to overall market efficiency" and capital formation.[131] A study conducted by the National Bureau of Economic Research in 2004 revealed that this prediction, on some level, was true—small firms and firms that disclosed complex information were disproportionately affected by Regulation FD, with a more pronounced increase in their cost of capital.[132]

127. *See* Heyman, *supra* note 31, at 1105 (discussing how Regulation FD forces corporate executives to either limit their speech or undertake public disclosures).

128. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss the Complaint at 19–20, SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694 (S.D.N.Y. 2004) (No. 04 CV 5130 (GBD)), 2004 WL 3142264 (outlining the ways in which Regulation FD chills corporate speech).

129. *See* Armando Gomes et al., *SEC Regulation Fair Disclosure, Information, and the Cost of Capital* 40 (Nat'l Bureau of Econ. Research, Working Paper No. 10567, 2004), https://www.nber.org/papers/w10567.pdf [https://perma.cc/AQ37-F64A] (finding that after Regulation FD's enactment there was a substantial increase in the number of firms adopting a "quiet period" in order to reduce the legal risks associated with selective disclosures).

130. *See* John B. Hoffman, Comment Letter on Proposed Rule: Selective Disclosure and Insider Trading (May 1, 2000), https://www.sec.gov/rules/proposed/s73199/hoffman2.htm [https://perma.cc/X3W8-B84M] (concluding that Regulation FD will decrease the quantity and quality of communications between issuers and investors); *see also* Michael S. Caccese, Comment Letter on Proposed Rule: Selective Disclosure and Insider Trading (Aug. 8, 2000), https://www.sec.gov/rules/proposed/s73199/caccese1.htm [https://perma.cc/9YXH-PKL9] (citing to a National Investor Relations Institute survey that reported "53.1% [of issuers] will either eliminate or limit their communication practices with analysts" in response to Regulation FD).

131. Selective Disclosure and Insider Trading, 64 Fed. Reg. at 72,594.

132. *See* Gomes et al., *supra* note 129, at 44–45 (concluding that Regulation FD resulted in a higher cost of capital and smaller analyst following for some types of firms).

In its current state, Regulation FD works against the SEC's preference for mandatory disclosure, the hallmark of modern securities regulation.[133] Regulation FD suppresses information circulation by prohibiting any manner of disclosure that falls short of being public and simultaneous. Less information leads to inaccurate stock prices and more dispersed analyst forecasts, negatively affecting all market participants, albeit in different ways.[134] Additionally, as articulated in *SEC v. Siebel Systems, Inc.*,[135] Regulation FD's broad materiality standard creates the possibility that "nearly *anything* that a large corporation's CEO might have to say about the economy, politics, the weather, or the current state of his health might be characterized (if one were so inclined) as material information."[136] Thus, Regulation FD is overinclusive because it restricts more speech than is necessary to achieve its ends.[137]

While the courts have not considered Regulation FD's constitutionality, the Chamber of Commerce argued that Regulation

133. *See* Haeberle & Henderson, *supra* note 23, at 1384 (arguing the SEC's mandatory disclosure regime "is designed to ensure that [important companies] in the economy produce a wide variety of important information, and share it with outsiders."); *see also supra* note 24 and accompanying text (outlining the SEC's mandatory disclosure regime).

134. *See* Haeberle & Henderson, *supra* note 23, at 1400, 1410 (contrasting the effect of newly released information on high-speed information traders, which trade on the new information milliseconds after it is released, with private equity funds, which do not trade as quickly but benefit from the new, more accurate prices).

135. Information is material only if a reasonable investor "would have considered the information as having significantly altered the 'total mix' of information made available." SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 703 (S.D.N.Y. 2005) (quoting Basic v. Levinson, 485 U.S. 224 (1988)).

136. Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Motion to Dismiss at 2, SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694 (S.D.N.Y 2005) (No. 04 CV 5130 (GBD)), 2005 WL 176296 [hereinafter Chamber of Commerce Brief]. The SEC has declined to provide a brightline materiality rule specific to Regulation FD; however, it has provided a nonexclusive list of categories of information that are more likely to be deemed material. These categories 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.

Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,721 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243).

137. *See* Heyman, *supra* note 31, at 1109 (arguing that Regulation FD "restricts, burdens, and compels speech that is irrelevant to the SEC's stated purposes").

FD violates the First Amendment in its amicus curiae brief in *Siebel*.[138] The Chamber of Commerce contended that Regulation FD contravened fundamental First Amendment principles by simultaneously chilling and mandating protected speech.[139] The amicus brief argued that the district court should apply a strict scrutiny test to Regulation FD, as it had done in the past with "compelled-speech cases," and concluded that the regulation's means were not narrowly tailored to the SEC's interests in preventing selective disclosure because it burdened more speech than necessary.[140] The SEC, in turn, maintained that Regulation FD does not restrict speech content, but instead regulates how speech is disseminated and is thus constitutional.[141] The district court chose to read the statute narrowly and avoid the First Amendment question entirely.[142] The court did note, however, that "enforcement of Regulation FD by excessively scrutinizing vague general comments has a potential chilling effect that can discourage, rather than, encourage public disclosure of material information."[143] Thus, the court recognized that, on some level, the SEC's enforcement of Regulation FD contradicts its goal of fostering an efficient market through public disclosure.

2. Critiques of Past Solutions

While the *Siebel* court avoided a ruling on Regulation FD's constitutionality, scholars continue to question it and provide their own novel solutions.[144] In her article *Rethinking Regulation Fair Disclosure and Corporate Free Speech*, Susan Heyman argues that Regulation FD is simultaneously over- and underinclusive as liability is limited to a

138. *See Siebel Sys.*, 384 F. Supp. 2d at 709 n.16 (declining to address the constitutional challenges to Regulation FD); Chamber of Commerce Brief, *supra* note 136, at 11 (arguing that the regulation cannot survive the strict scrutiny test).

139. Chamber of Commerce Brief, *supra* note 136, at 11 ("At its essence, Regulation FD requires corporate executives either to share their material business information with *no one*, so as to avoid triggering the disclosure requirement, or to share it with *everyone*.").

140. *Id.* at 8. To survive the strict scrutiny test, a law must be (1) in furtherance of a compelling government interest and (2) narrowly tailored to achieve that interest. *See, e.g.*, Pac. Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8–21 (1986) (plurality opinion) (applying strict scrutiny to compelled third-party messages in utility bills); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–35 (1943) (applying strict scrutiny to a state regulation requiring a compulsory flag salute).

141. *See* Plaintiff Securities and Exchange Commission's Opposition to Motion to Dismiss the Complaint at 21, SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694 (S.D.N.Y. 2005) (No. 04 Civ. 5130 (GBD)), 2004 WL 3142263 ("The Regulation is not content-based; it regulates only the manner in which speech is disseminated.").

142. *See Siebel Sys.*, 384 F. Supp. 2d at 708–09 (ruling that the statements at issue did not constitute a violation of Regulation FD).

143. *Id.* at 708.

144. *See id.* at 708–09 (ruling on grounds other than Regulation FD's constitutionality).

specific subset of corporate speakers yet arises regardless of whether the recipient traded on the information.[145] This overinclusivity violates the First Amendment and chills truthful corporate speech while failing to adequately address the SEC's concerns that insiders are profiting off an informational advantage that results from selective disclosures.[146] Thus, Heyman believes the regulation fails both the intermediate scrutiny test for commercial speech articulated in *Central Hudson* and the strict scrutiny test for political speech articulated in *Citizens United*.[147] To remedy this, Heyman suggests that the SEC repeal Regulation FD and instead focus on antifraud and insider trading prosecutions to combat harmful selective disclosures.[148] Alternatively, "the SEC could revise Reg[ulation] FD to include unlawful trading as a required element of a violation."[149] Thus, if Regulation FD were repealed or amended, the SEC would not have the statutory authority to prosecute the dissemination of information, only its use in trading.[150]

Repealing Regulation FD entirely is a drastic solution but carries some benefits for the SEC and investors.[151] By focusing on antifraud and insider trading enforcement instead, the SEC would give issuers the freedom to disclose material information however and whenever they choose (within antifraud law limitations), while also freeing up agency resources to enforce other types of offenses. Alternatively, amending the regulation to require unlawful trading

145. Heyman, *supra* note 31, at 1109.

146. *Id.* at 1140–41 ("The mere fact that some investors or analysts possess more information than others is neither surprising nor objectionable. . . . Without the subsequent trading, there is no advantage to be gained from receiving material nonpublic information.").

147. *Id.* at 1105; *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (applying strict scrutiny to laws that burden political speech and reiterating that the First Amendment applies to corporations); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (applying intermediate scrutiny to lawful commercial speech that is not misleading); Chamber of Commerce Brief, *supra* note 136, at 10–11 (arguing that Regulation FD does not satisfy the *Central Hudson* test). Heyman contends that the regulation's greatest constitutional weakness is the SEC's inability to demonstrate that the "broad prophylactic selective disclosure rules, which indiscriminately restrict speech regardless of whether it results in any trading activity," are narrowly tailored to the SEC's interest in preserving market confidence. Heyman, *supra* note 31, at 1145.

148. Heyman, *supra* note 31, at 1146–47 (arguing that in light of the SEC's broad interpretation of insider trading liability and effective investigatory techniques, the Commission should pursue vigorous enforcement of Section 10(b) of the Exchange Act and Rule 10b-5 to prosecute selective disclosures that result in insider trading).

149. *Id.* at 1147.

150. *Id.*

151. *See* Haeberle & Henderson, *supra* note 23, at 1420 (finding that, while high-speed information traders slightly benefit from simultaneous disclosure, ordinary investors whose trades occur in the moments after information is released are significantly worse off due to the compacted information asymmetry costs). Since investors without high-speed web-scraping technologies are largely unable to profit off simultaneous disclosures, there is little reason for the SEC to continue monitoring and suppressing corporate speech.

would alleviate any First Amendment concerns since it would no longer target mere information transmission.[152] However, Heyman's solution still creates the appearance of unfairness by allowing selective disclosures to continue. She assumes that the mere possession of material nonpublic information is harmless,[153] yet the SEC maintains that issuers could easily use selective disclosures to manipulate analysts and investors.[154] In their comment letters on Regulation FD, retail investors disagreed with Heyman's assumption and expressed a desire for a level playing field in which they have access to the same information as analysts.[155]

In *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?*,[156] former SEC Commissioner Joseph Grundfest similarly contends that Regulation FD is vulnerable as an unconstitutional restraint on truthful speech and out of date in light of recent technological advancement.[157] He argues:

> [B]ecause Regulation FD disfavors truthful speech with a particular content [material speech] when expressed by certain disfavored speakers [issuers and certain affiliates] and to certain disfavored recipients [members of four disfavored categories] and, here, made

152. *See* Heyman, *supra* note 31, at 1147 (arguing that the SEC's focus should be on "policing insiders and what they do . . . rather than on policing information per se and its possession" (quoting Dirks v. SEC, 463 U.S. 646, 662–63 (1983))).

153. *Id*. at 1141 ("Without the subsequent trading, there is no advantage to be gained from receiving material nonpublic information.").

154. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,716–17 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243):

> Regulation FD is also designed to address another threat to the integrity of our markets: *the potential for corporate management to treat material information as a commodity to be used to gain or maintain favor with particular analysts or investors*. . . . [For example], 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.

(emphasis added).

155. *See id*. at 51,716 ("Investors lose confidence in the fairness of the markets when they know that other participants may exploit 'unerodable informational advantages' . . . ."); Lloyd Zand, Comment Letter on Proposed Rule: Selective Disclosure and Insider Trading (Aug. 10, 2000), https://www.sec.gov/rules/proposed/s73199/0810b01.htm [https://perma.cc/EMA4-NN69] ("All the rule does is to level the playing field for the public, and give the majority of the public a fighting chance to compete with institutional investors and analysts to get a fair price for their securities.").

156. Grundfest, *supra* note 94. The paper is structured in the form of an amicus Wells Notice which advises the SEC to not file an enforcement action against Reed Hastings for his Facebook post about Netflix's streaming milestone. Notably, this paper was written after the SEC began investigating Hastings but before it released the Reed Hastings Report.

157. Grundfest outlines nine reasons why an enforcement action against Hastings should be rejected, including that "the Posting contains no material information," "any prosecution . . . would constitute a dramatic divergence from precedent," and the investigation "has already had a chilling effect on the use of social media." *Id.* at 4. He also highlights social media's accessibility and the speed at which Hastings's Facebook post was redisseminated through the internet and traditional media outlets, concluding that the SEC should embrace social media's role in corporate disclosure practices. *Id*. at 10–11.

> over disfavored media [social media rather than a press release or filing on Form 8-K], it is easy to see how the courts can conclude that Regulation FD . . . restricts speech in violation of First Amendment guarantees.[158]

Grundfest's solution to Regulation FD's constitutional weaknesses is to "require that all material disclosures by issuers be promptly posted on a Form 8-K without regard to the identities of the recipients of the disclosure or the means by which the disclosure is otherwise disseminated."[159] He also adds that the SEC would have a stronger argument that this regulation is "rational and imposes minimal, non-discriminatory costs on the market" if it redesigned its EDGAR system to function more like social media by allowing the public to subscribe to certain issuers' filings and enable push notifications.[160]

This solution requires simultaneous dissemination without discriminating against the information's content and, as a result, lessens the likelihood of any constitutional challenges.[161] Additionally, it eradicates any distinction among the different channels of communication, so all forms of media would be treated equally, including social media websites.[162] By treating platforms equally, the revised Regulation FD would likely encourage issuers and C-Suite executives to use social media to its fullest potential without fear of legal liability. Grundfest's additional suggestion that the SEC update EDGAR to include social media features such as push notifications would also increase individual investors' access to material information while embracing the overlapping goals of social media and the mandatory disclosure regime.[163] Still, requiring issuers to file a Form 8-K every time they disclose material nonpublic information on a social media site (or through any public platform) would increase legal fees and compliance costs. These costs may have a chilling effect on

158. *Id.* at 24 (alteration in original) (paraphrasing the Second Circuit's decision in *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012)).

159. *Id.* at 33. Applying this to the facts in the Reed Hastings Report, Hastings would follow Regulation FD if Netflix had promptly filed a Form 8-K with the SEC that disclosed Hastings's message but did not disclose that it was posted on Hastings's personal Facebook profile.

160. *Id.* While this suggestion may not seem immediately feasible, the SEC has been much more open to experimenting with its website's structure than other federal agencies, such as when it created the EDGAR online filing system or its fake "HoweyCoins" website. *See* HOWEYCOINS, https://www.howeycoins.com/index.html (last visited Oct. 24, 2019) [https://perma.cc/Y8QP-EU59] (website mimicking a fraudulent initial coin offering); *If You Responded To An Investment Offer Like This, You Could Have Been Scammed – HoweyCoins Are Completely Fake!*, SEC, https://www.investor.gov/howeycoins (last visited Oct. 24, 2019) [https://perma.cc/AC76-CMV8].

161. Grundfest, *supra* note 94, at 33 ("The argument that the regulation is content-based would also be weakened because the disclosures subject to regulation would not be limited to those made by certain issuers to members of four enumerated groups.").

162. *Id.*

163. *See supra* note 24 and accompanying text (describing the goals of mandatory disclosure).

corporate speech since issuers must choose between silence or disclosure at a cost.[164]

B. Regulation FD Cannot Adapt to New Technologies

The SEC enacted Regulation FD in 2000, the same year that the NASDAQ plunged seventy-eight percent in the dot-com crash, AOL acquired Time Warner for $165 billion, and the world's first website celebrated its tenth birthday.[165] The world was still many years away from the debut of Facebook in 2004, Twitter in 2006, and Snapchat in 2012.[166] The SEC drafted Regulation FD to address specific disclosure practices that had allegedly affected the market in the past instead of considering how the regulation would apply in the future.[167] Though the Commission has demonstrated its openness to adapting rules over time, Regulation FD has several weaknesses that will only worsen as time goes on and technology continues to evolve.

1. The Future of Disclosure

Social media, as opposed to a press release or an SEC filing, continues to be the most democratically accessible and cost-efficient platform for corporate disclosures.[168] But Regulation FD currently is too inflexible to keep pace with the evolution of social media and communication technologies. Though we cannot be sure what the future of social media will look like, it will likely extend social media's core characteristics: relationships, mobility, big data, and experimentation.[169] Other technologies, such as blockchain and

164. *See* Gomes et al., *supra* note 129, at 40–41 (finding that "quiet periods" increased after the SEC enacted Regulation FD). *But see* Grundfest, *supra* note 94, at 33 ("[B]ecause filing a Form 8-K is relatively inexpensive . . . the Commission would have a stronger argument that its regulation is rational and imposes minimal, nondiscriminatory costs on the market.").

165. *World Wide Web Timeline*, PEW RES. CTR. (Mar. 11, 2014), http://www.pewinternet.org/2014/03/11/world-wide-web-timeline/ [https://perma.cc/R4SZ-M3VH].

166. *How Social Media Made It Bigger by the Day*, SIMPLIFY360 (May 22, 2015), http://simplify360.com/blog/social-media-made-bigger-day/ [https://perma.cc/QX7U-XK5T].

167. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,716 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243). Several comments on the proposed Regulation FD alleged that selective disclosures were not truly having a negative effect on the capital markets, and that the SEC cherry-picked this issue as the object of its attention due to a small number of publicized articles. *See, e.g.*, ABA Comment Letter, *supra* note 30 ("The Commission's assertion of the existence of a problem is based primarily upon anecdotal evidence.").

168. *See* Fouse, *supra* note 118, at 72 ("Disclosure methods using social media is cost-effective because it is less costly even than making disclosures by filing a Form 8-K or making a press release, etc.").

169. *See* Chirag Kulkarni, *11 Ways Social Media Will Evolve in the Future*, ENTREPRENEUR (Aug. 3, 2017), https://www.entrepreneur.com/article/293454 [https://perma.cc/4EL5-XUP5] (describing trends and various potential future uses of social media).

decentralized platforms, remain poised to change the way parties communicate within capital markets.[170]

Social media also presents some barriers to access that may prevent it from reaching the level of "public disclosure" necessary to comply with Regulation FD, and these barriers must be addressed by any update to Regulation FD.[171] For example, social media platforms that restrict access to only those with registered accounts, such as Snapchat, would likely cause all disclosures to be selective disclosures under the current version of Regulation FD.[172] Social media disclosures may also disadvantage those investors that do not use social media websites.[173] These considerations lend themselves to a regulation that provides online communications with room to breathe without being overinclusive or burdensome.

In addition to social media, capital markets themselves are undergoing rapid changes that may counteract any beneficial effects Regulation FD once had on retail investors. The market is now largely electronic, and with each day, trades are happening faster and in greater numbers.[174] Recent research shows that new information is incorporated into stock prices in just two hundred milliseconds.[175] As such, information disseminated into the public sphere affects various types of traders differently.

American stock traders generally belong to one of four groups: information traders, portfolio traders, noise traders, and professional

170. For example, blockchain technology could be applied to investor relations in a way that would constantly monitor the truth of material statements. *See supra* note 119 and accompanying text (explaining the history of blockchain technology and current applications to investor communication).

171. 17 C.F.R. § 243.100(a) (2019).

172. Social media platforms that lack public-facing profiles, such as Snapchat, are generally excluded from this Note's analysis of online information dissemination practices. Tom Law, *How To Use Snapchat*, OBERLO (Oct. 4, 2018), https://www.oberlo.com/blog/use-snapchat-business-complete-guide-2018 [https://perma.cc/SEV6-SQA5].

173. As of 2018, thirty-six percent of adults between the ages of fifty and sixty-four did not use social media, which comprises a significant portion of the investing population. *Social Media Fact Sheet*, *supra* note 106. In 2012, the mean age of an owner of a taxable investment account, such as stocks, bonds, and mutual funds, was fifty-one years old. *See* Mottola, *supra* note 109 (describing various demographic trends among investors). Is it enough that the redissemination of online disclosures makes it reasonably likely that they will reach these investors through traditional media outlets like financial newspapers? While it is seldom helpful to cater to the slowest adopters of new technology, it is worth considering when public notice is so closely linked to fairness.

174. *See* Hans R. Stoll, *Electronic Trading in Stock Markets*, 20 J. ECON. PERSP., Winter 2006, at 153 (examining how electronic trading has altered the stock market).

175. Grace Xing Hu et al., *Early Peek Advantage? Efficient Price Discovery With Tiered Information Disclosure*, 126 J. FIN. ECON. 399, 419 (2016) ("After a short window of roughly 200 milliseconds, there will be no further price drift afterward, implying the price discovery is accomplished rapidly by the high-frequency traders with early peek information.").

liquidity-providing traders.[176] Information traders—such as private equity funds or news-based, high-speed traders—buy and sell stocks based on new information about companies' values that is not yet reflected in market prices.[177] Portfolio traders, such as individual investors or index-based mutual funds, seek to accumulate, maintain, and liquidate diversified portfolios of stock over long periods.[178] Noise traders attempt to profit by trading on new information, yet because they rely on human processing, this information is typically already incorporated into market prices by the time they decide to trade.[179] Lastly, professional liquidity-providing traders do not transact for their own investment account but exist to transact with other traders at firm bid and ask price quotes.[180]

Each type of trader has different strategies and capabilities guiding them in the market, so their responses to new information differ. Although Regulation FD requires issuers to publicly disclose material information promptly after privately disclosing it, high information asymmetries remain in the post-release period (which may only last for a matter of seconds).[181] High-speed information traders have the technology to process this new information quickly and make subsequent trades at a higher or lower price.[182] Individual investors engaging in portfolio trading throughout the day, however, "lack . . . access to hyper-fast information-dissemination and trade-execution systems."[183] As such, they will remain in the dark about this new information until it is incorporated into the market. So, while high-speed information traders benefit slightly from simultaneous disclosure, ordinary investors whose trades occur in the moments after information is released are significantly worse off due to the compacted information asymmetry costs.[184] Similarly, the typical "mom and pop"

176. *See* Haeberle & Henderson, *supra* note 23, at 1397 (basing the four-type model of traders on common models found in market-microstructure economic scholarship).

177. *Id.* at 1398.

178. *Id.* at 1401.

179. *Id.* at 1403; *see also* Xing Hu et al., *supra* note 175, at 410 (concluding that high-frequency traders incorporate new information into a stock's price in roughly two hundred milliseconds).

180. Haeberle & Henderson, *supra* note 23, at 1405.

181. *Id.* at 1413 ("[U]nder current [information dissemination law], a large amount of information asymmetry is often condensed into a small period of time lasting as little as well under a second that ensues after new information is made available to all investors.").

182. *See id.* at 1399 (describing a dozen or so firms that dominate news-based high-speed trading through algorithms designed "to procure, process, and trade on new computer-readable information").

183. *Id.* at 1398, 1412 ("Today, the value of some types of market-moving information—such as that found in at least data-based public news announcements—often loses its value in literally less than the blink of an eye.").

184. *Id.* at 1420.

investor, who the SEC promised would be put on equal footing with sophisticated information traders, cannot process the new information quickly enough to make a profitable trade and thus is not financially benefited by Regulation FD.[185]

The concern that ordinary retail investors do not possess the advanced technology necessary to analyze and act upon new information in the market also extends into the social media realm. An overly broad interpretation of Regulation FD could lead to information overload for retail investors.[186] Investors have access to more financial information than ever before, and revising Regulation FD to allow corporate disclosures on any and all social media platforms may compound this problem.[187] One may argue that the SEC's focus on notice and access has inadvertently hurt retail investors who do not possess advanced web-scraping technologies, as "they are confronted with the prospect of having to cross-reference multiple corporate sites to arrive at the same information a fair step short of the rest of the herd."[188] If Regulation FD's effect on retail investors' ability to profit from new information is either negative or nonexistent, then perhaps its true value is in creating the appearance of a fair market.

2. Information Dissemination Windows

Kevin S. Haeberle and M. Todd Henderson's article *Information-Dissemination Law: The Regulation of How Market-Moving Information Is Revealed*[189] analyzes Regulation FD's effect on different

185. The term "mom and pop" investors is frequently used by the SEC to describe the individual retail investors that the securities regulation regime aims to protect by increasing fairness in the markets. *See e.g.*, Robert J. Jackson, Jr., Commissioner, SEC, Unfair Exchange: The State of America's Stock Market, Address at George Mason University (Sept. 19, 2018), https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets [https://perma.cc/9ZF3-3QN8].

186. The SEC was conscious of this concern on some level. *See* Laura S. Unger, *Special Study: Regulation Fair Disclosure Revisited*, SEC (Dec. 2001), https://www.sec.gov/news/studies/regfdstudy.htm [https://perma.cc/QH5A-TEYM] (conceding that many companies released longer press releases with more boilerplate language in response to Regulation FD, which caused information overload).

187. *But see* Kristi Olsen, Comment Letter on Proposed Rule: Selective Disclosure and Insider Trading (Aug. 10, 2000), https://www.sec.gov/rules/proposed/s73199/0810b01.htm [https://perma.cc/KM6F-EZRQ] ("The so-called concern about information overload for individuals is ridiculous. Theoretically we, as individual investors, get the same information as the analysts . . . just later than those working on Wall Street. Let us get 'overloaded' simultaneously with Wall Street.").

188. Jack Aldane, *IR30: A Look Back to August 2001 – Reg FD Hits IR*, IR MAG. (Oct. 22, 2018), https://www.irmagazine.com/regulation/ir30-look-back-august-2001-reg-fd-hits-ir [https://perma.cc/9XGS-NDT7].

189. Haeberle & Henderson, *supra* note 23. This article is one part of a series that considers the regulatory underpinnings of information dissemination in the capital markets. The other

types of investors and concludes that the regulation creates drastic information asymmetry in the seconds after issuers release new information.[190]

To solve this, the authors propose a "disclosure of disclosure" requirement, which "[r]equire[s] information producers to announce their intention to release any information that stands a decent chance of moving markets, and to do so well before making that release."[191] Providing the public with this information would allow individual investors to refrain from trading in the post-release period when information asymmetry is at its highest.[192] Haeberle and Henderson build on the disclosure of disclosure concept by also proposing an information dissemination shot clock, or "a requirement that the release of information occur within circumscribed windows set out in a transparent manner well ahead of time."[193] Issuers would have a set amount of time (anywhere from a second to a day) to disseminate material information among private and public parties, thus mitigating the post-release information asymmetry and giving investors sufficient notice to avoid it entirely.[194]

This solution makes Regulation FD entirely unnecessary, as it dictates *when* issuers must disclose information and leaves it up to the companies to decide *how* and *what* to disclose.[195] The information dissemination shot clock also ameliorates Regulation FD's ambiguous application to social media platforms by giving issuers the freedom to

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article in their series is Kevin S. Haeberle & M. Todd Henderson, *Making a Market for Corporate Disclosure*, 35 YALE J. ON REG. 383 (2018) [hereinafter Making a Market].

190. Haeberle & Henderson, *supra* note 23, at 1412. Thus, simultaneous-dissemination requirements actually harm ordinary investors since they do not have the means to "immediately procure, process, and trade" on information like more sophisticated information traders do. *Id.*

191. *Id.* at 1431–32.

192. *See id.* at 1435 ("[W]ith information revelation restricted to a relatively short, well-defined, and transparent window along these lines, ordinary investors and those trading on their behalf with notice as to when that time began and ended could temporarily exit the market."). These investors could then resume trading when the market has efficiently incorporated this new information into stock prices, which would take, on average, a fraction of a second. *See* Xing Hu et al., *supra* note 175, at 400 (describing this window as only two hundred milliseconds long).

193. Haeberle & Henderson, *supra* note 23, at 1434.

194. *Id.* The authors suggest that this information dissemination period could be a minute long at the top of each hour in the trading day, or from noon to 1:00 PM every Wednesday. The dissemination shot clock would be the same time for all issuers releasing market-moving information, which would make it easier for noninformation traders to exit the market until the information asymmetry passed. *Id.* at 1434–35. By implementing a market-wide information dissemination shot clock, investors avoid the "Apple-news-has-relevance-to-Samsung-stock problem" as they would not have to guess whether new information from one issuer would also result in information asymmetries in the price of a related issuer's stock. *Id.* at 1436.

195. *Id.* ("[N]o law requiring information to be made available to all market participants at the exact same time would be necessary. Nor would any additional examination of the nuanced and hard-to-quantify effects of Reg FD . . . .").

decide which platform to use for releasing material information, while also giving investors advance notice of the releases.[196] The information dissemination shot clock appeals to two often opposing values: flexibility in corporate speech and fair notice for public investors.

The shot clock, however, does not solve the overarching problem of individual investors' inability to trade profitably on new information. In this solution, the best outcome for retail investors is to avoid the market entirely while the information asymmetry in the post-release period is at its peak, only to later return when the stock prices have fully incorporated the new information. It seems inherently unfair to force certain parties out of the market for a set amount of time, but it appears to be the best-case scenario for those without sophisticated information trading technology.[197] What's more, the shot clock does not eliminate information asymmetry entirely but merely compacts it into a discrete amount of time.[198]

III. SOCIAL MEDIA SAFE HARBOR: EMBRACING THE FUTURE OF DISCLOSURE

While Regulation FD requires a forward-looking update to keep up with the pace of technological innovation, it should still retain its traditional goals: to empower retail investors, perpetuate efficient markets, and decrease information asymmetry.[199] The best way to achieve these goals is to create a free flow of timely, relevant, and accurate information to investors through uniformity of process.[200] Now more than ever, corporate executives are using social media to engage

196. By providing "disclosure of disclosure," issuers will specify the general parameters of their scheduled releases so that investors can direct their attention to the appropriate forum.

197. In their article *Making a Market for Corporate Disclosure*, Haeberle and Henderson propose a solution to the underproduction of corporate information that could also give retail investors a fair shot to compete with high speed information traders. The authors propose an information market where participants could pay for early access to corporate disclosures. While I do not discuss this proposed solution due to its limited effect on social media disclosures, it provides an in-depth analysis of broader information asymmetry issues in the current capital markets. *See* Haeberle & Henderson, *supra* note 189.

198. There is also a danger that if firms give "disclosure of disclosure" too far in advance, the information asymmetry will be stretched out between the announcement of the release and the actual release.

199. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,716–17 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243) (summarizing the goals of Regulation FD); *see also About the SEC*, SEC, https://www.sec.gov/about.shtml (last modified Nov. 22, 2016) [https://perma.cc/PVP4-K47D] ("The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust.").

200. *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,864 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241) (recognizing that technological advances allow issuers to fulfill "the market's desire for more current, searchable and interactive information").

with the public and forge their company's reputation, leading to the rise of the "Social CEO."[201] However, there is still some reluctance by many executives to incorporate social media into their company's broader strategy, possibly due to the uncertainty surrounding Regulation FD's effects.[202] Removing the regulatory barriers that surround social media as a public dissemination platform would open up the lines of communication between issuers and investors.

Two drastic solutions arise when considering Regulation FD's weaknesses: repeal it or require total silence. Repealing Regulation FD would unburden issuers but still allow a practice to continue that seems wholly unfair to Wall Street outsiders.[203] Alternatively, prohibiting issuers' use of social media to disseminate material information entirely would create efficiencies in compliance and enforcement, but it would likely encounter constitutional challenges and reduce market efficiency by restricting the free flow of information.[204] Thus, the solution to Regulation FD's problems lies somewhere between these two extremes. Section III.A proposes an amendment to Regulation FD that creates a social media safe harbor for issuers that disclose material nonpublic information through social media websites and supplies model drafting language. Section III.B considers the safe harbor's potential benefits

201. *See* Polit, *supra* note 86, at 640 (arguing that Regulation FD is stunting the growth of the Social CEO). One study shows that the average "high performing" CEO in 2017 had over four-hundred thousand social media followers and posts over two hundred times per year. RUDER FINN, THE SOCIAL CEO: HOW HIGH PERFORMING CEOS USE SOCIAL MEDIA 4 (Jan. 23, 2018), http://www.ruderfinn.com/wp-content/uploads/2018/01/Social-CEO-Report.pdf [https://perma.cc/8KEQ-C92H]. Ruder Finn researched the social media activity of one hundred CEOs from January, 2016, to June, 2017. *Id.* at 8. "High-performing" companies are defined as those that had above-average stock price growth against the S&P 500 Index during the research timeframe. *Id.* Additionally, half of "high performing" CEOs had two or more social media accounts. *Id*. at 3.

202. For example, 80.6 percent of respondents in the 2013 Brandfog CEO survey believe that CEO social media use is a very or somewhat important tool for engaging customers and investors. *See* BRANDFOG, 2013 CEO, SOC. MEDIA & LEADERSHIP SURV. 1 (2013), http://www.brandfog.com/CEOSocialMediaSurvey/BRANDfog_2013_CEO_Survey.pdf [https://perma.cc/2MDW-BRTV]. Yet, forty-eight percent of 130 surveyed corporate executives in 2013 did not engage with their company's social media strategy or even know details about the strategy. *See* Laura Montini, *Survey: Executives Have No Idea What's Going on With Social Media*, INC. (Nov. 5, 2013), https://www.inc.com/laura-montini/executive-social-media-involvement.html [https://perma.cc/BL7Z-RWAM].

203. *See supra* Section II.A.2 (examining the rationale and effects of repealing Regulation FD).

204. This would be modeled after the SEC's "gun jumping" rules that require a company to avoid making certain types of public statements during its initial public offering. "Gun jumping" is an expression used to commonly refer to Section 5 of the Securities Act of 1933. *See* 15 U.S.C. § 77e (2012) (prohibiting the distribution of any prospectus related to securities before certain requirements are met); Dwight S. Yoo & Rakhi I. Patel, *Skadden Discusses Jumping the Gun: Social Media and IPO Issues*, COLUM. L. SCH. BLUE SKY BLOG (Mar. 20, 2013), http://clsbluesky.law.columbia.edu/2013/03/20/skadden-discusses-jumping-the-gun-social-media-and-ipo-communications-issues [https://perma.cc/Z6R9-7NN8] (discussing gun jumping and social media).

and hurdles while comparing it to other scholars' proposed solutions discussed throughout this Note.

A. Social Media Safe Harbor

This Note proposes that the SEC amend Regulation FD to add a social media safe harbor for material disclosures disseminated through the social media profile of an issuer or any person authorized to speak on its behalf.[205] If the disclosure meets the safe harbor's requirements, then the disclosure is automatically qualified as a public disclosure that is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public[,]" which would avoid Regulation FD liability.[206] This safe harbor, however, would not insulate the declarant or associated issuer from antifraud or insider trading liability, and the SEC should continue to rigorously enforce these laws.[207] A continued focus on antifraud enforcement would ensure that statements similar to Elon Musk's "funding secured" tweet would be subject to punitive measures, but statements similar to Reed Hastings's congratulatory Facebook post would not.[208]

The definition of "social media" for the safe harbor should be broad enough to account for future technological development, but not overinclusive.[209] The California Court of Appeals defined a social media platform as a "[w]eb site[ ] where users are able to share and generate content, and find and connect with other users of common interests."[210] This definition captures the core characteristics of social media without being overly restrictive, so the safe harbor should incorporate this language. The safe harbor should also contain basic requirements that the social media platform is publicly accessible, registered under the

205. This amendment would not change Regulation FD in any way, and would only add the safe harbor provision.

206. 17 C.F.R. § 243.101(e)(2) (2019). This brightline rule would negate the need for any fact-specific inquiry, as proposed in the SEC's 2008 guidance. *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,867–68 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241) (listing factors issuers must consider in determining whether a disclosure made on a company website rises to the level of public disclosure).

207. *See* Heyman, *supra* note 31, at 1106 (arguing that the SEC should focus its efforts on antifraud and insider trading enforcement due to "the gradual erosion of the fiduciary duty requirement under Rule 10b-5, the recent pursuit of expert networks and hedge funds, and the novel investigatory techniques used by the government").

208. This is because Musk's tweet was arguably not truthful, while Hastings's Facebook post was truthful. *See supra* notes 1–8 and accompanying text (recounting the SEC's investigation and settlement with Elon Musk after the "funding secured" tweet).

209. *See* Heyman, *supra* note 31, at 1109, 1134 (concluding that Regulation FD's prohibitions are overinclusive and thus unconstitutional). Here, the danger of overinclusivity is that the definition would include technologies that do not serve the same purpose as social media.

210. People v. Lopez, No. H041713, 2016 WL 297942, at *4–5 (Cal. Ct. App. Jan. 25, 2016).

issuer or affiliated person's name, and employs push notifications. Lastly, a "bad faith" disqualification should continue to impose liability on issuers and other speakers who intend to subvert Regulation FD through social media disclosures.[211]

In order to fall within the social media safe harbor provision, an issuer or any person authorized to speak on its behalf must meet a limited set of requirements. An example of potential drafting language for the safe harbor is as follows:

a) **Social media safe harbor**. A disclosure made by an issuer or any person authorized to speak on an issuer's behalf that satisfies the conditions in this section shall be deemed to be a public disclosure within the meaning of 17 C.F.R. § 243.100(a).

b) Conditions to be met by disclosures subject to Regulation FD

    1) The issuer or the person authorized to speak on the issuer's behalf shall disclose material nonpublic information regarding that issuer or its securities simultaneously by disseminating it through a social media platform.

    2) The social media platform used to make a disclosure shall be publicly accessible.

    3) The social media platform shall be registered under the name of the issuer or a person authorized to speak on the issuer's behalf.

    4) The social media platform shall allow viewers to enable push notifications for specific accounts.

c) Definitions

    1) Social media platform. "Social media platform" means a website where users are able to share and generate content, and find and connect with other users of common interests.[212]

    2) Push notification. "Push notification" means technology where a user subscribes to an information channel so that when new information is available on the channel it is pushed out to the user.

    3) Publicly accessible. "Publicly accessible" means not requiring that a user create a profile in order access content on a social media platform.

211. For example, if a speaker attempts to selectively disclose material information by using a social media account that is only followed by a few select people, she would not be able to avail herself of the social media safe harbor. The "bad faith" disqualification also makes sure that "those who deliberately attempt to game the system" continue to be held liable. *See* Walker, *supra* note 61 (detailing the two groups on which the SEC focuses its Regulation FD enforcement actions).

212. As the California Court of Appeals ruled in *Lopez*, this definition of social media would be clarified and strengthened by examples of the social media platforms it was meant to include, either in the amendment's text or in subsequent guidance. While this definition currently is intended to include websites like Facebook, Instagram, YouTube, Twitter, LinkedIn, or anything similar, these examples should be updated every few years as the popular social media platforms change. *See Lopez*, 2016 WL 297942, at *4 (holding that the definition of social media was not unconstitutionally vague because it "was made sufficiently specific by the trial court when it clarified that [it] covered social media sites including Facebook, Instagram, Myspace . . . .").

d) "Bad faith" disqualification. No safe harbor under this section shall be available for any issuer or person authorized to speak on an issuer's behalf who intentionally subverts or attempts to subvert the purpose of Regulation FD, 17 C.F.R. § 243.100–02.

e) Compliance with this section has no effect outside of Regulation FD, 17 C.F.R. § 243.100–02.

This drafting language provides a simple starting point for any amendment to Regulation FD.

While the social media safe harbor is the crux of the solution, the SEC could further enhance corporate disclosure practices by embracing social media in other ways. For example, redesigning the EDGAR filing system to function more like social media would increase information accessibility by allowing the public to subscribe to certain EDGAR filings and enable push notifications.[213] The SEC could also amend the Form 10-K, the annual report issuers must file with the SEC, to include a mandatory section where issuers list all social media accounts they use to disseminate material nonpublic information.[214] Perhaps more appropriately, the SEC could enact a regulation or provide guidance requiring issuers to list all social media accounts they use to disseminate material nonpublic information on their company websites.

B. Extending Fairness and Flexibility into the Internet Age

The social media safe harbor extends Regulation FD's original goal of increasing transparency and accessibility to social media disclosures.[215] By carving out an unregulated space for issuers and CEOs to engage with investors, the SEC will promote the free exchange of information while also retaining protections for investors.

The safe harbor incorporates several of the benefits that would stem from repealing Regulation FD or prohibiting social media use altogether. First, the brightline rule will create administrative efficiencies by cutting down on the cost of compliance and enforcement. Issuers will not need to regularly consult legal counsel to constantly file Form 8-Ks or determine if their social media presence violates

213. *See* Grundfest, *supra* note 94, at 33 (proposing that the SEC clarify Regulation FD's application to social media disclosures through the administrative process, not through regulation by prosecution).

214. *See Form 10-K*, SEC, https://www.sec.gov/fast-answers/answers-form10khtm.html (last modified June 26, 2009) [https://perma.cc/D8NT-AZAM]. This would be much less burdensome than the current requirement that issuers file a Form 8-K every time they make a material disclosure, largely because the issuer would only have to file this information once a year. This disclosure would also be frequent enough to give investors notice regarding the issuer's social media practices.

215. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,716–17 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243) (summarizing the goals of Regulation FD).

Regulation FD.[216] The SEC will not need to expend resources monitoring executives' social media profiles or analyzing every disclosure they make.[217] Also, the safe harbor does not assign liability based on a disclosure's content or its method of dissemination and thus avoids any First Amendment concerns and reduces Regulation FD's chilling effect on corporate speech.[218] The safe harbor takes an evenhanded approach to all disclosures made on any social media platform that falls within its broad definition, allowing issuers and executives to speak freely.[219] Only those disclosures that violate antifraud rules or exhibit an intent to "game the system" are subject to legal liability.[220]

Unlike the more dramatic solutions, the social media safe harbor retains the protections that so many retail investors called for in Regulation FD's enactment.[221] The proposed amendment would not change or remove any of Regulation FD's current prohibitions, but only supplements them with the safe harbor. As a result, material nonpublic information still must be simultaneously disclosed to the public, either through a social media post, Form 8-K, or other combination of methods.[222] Thus, information will not be used by issuers as a bargaining chip or reach the investing public only after being funneled through multiple other parties.

The social media safe harbor is not without its weaknesses. For one, it does not solve a broader inequity in the capital market—retail investors' inability to profit off of new information in the milliseconds before it is incorporated into a stock's price.[223] This inequity is outside

216. *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,867 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241) (putting the burden on issuers to determine whether a website disclosure complies with Regulation FD through a fact-specific inquiry).

217. *See* SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 704 (S.D.N.Y. 2005) (warning the SEC that its high-level linguistic scrutiny is uncalled for).

218. *See supra* Section II.A (discussing Regulation FD's chilling effect on corporate speech).

219. This evenhandedness is similar to that of Grundfest's proposed solution. There, issuers would file a Form 8-K every time they disclosed material information on social media, but the Form would not contain the identities of the recipient or the name of the website used. *See* Grundfest, *supra* note 94, at 33. Thus, all social media disclosures would be treated equally. The social media safe harbor improves upon this solution as it does not require issuers to constantly file Form 8-Ks.

220. Walker, *supra* note 61 (detailing the two groups that the SEC focuses its Regulation FD enforcement actions on).

221. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,692, 51,717 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243) (summarizing the comments made in response to Regulation FD's proposal).

222. 17 C.F.R. §§ 243.100(a), 243.101(e) (2019).

223. *See* Haeberle & Henderson, *supra* note 23, at 1403 (discussing the disadvantages these retailers experience); *see also* Xing Hu et al., *supra* note 175, at 400 (concluding that high-frequency traders incorporate new information into a stock's price in roughly two hundred milliseconds).

the reach of Regulation FD and will only be solved either by providing retail investors with high-speed web scraping technologies or restraining information traders.[224] In light of this conclusion, Regulation FD's focus remains on the accessibility of information instead of financial advantage. The safe harbor achieves this by opening the channels of communication between companies and the investing public, bringing investors one step closer to a fair, efficient market.

One could also argue that since the SEC relies largely on antifraud and insider trading enforcement to protect investors and punish the misuse of corporate information, investors would be no worse off if Regulation FD was gone entirely.[225] This argument, however, relies on the assumption that no harm results from selective disclosure, when in fact issuers could use nonpublic information to curry favor or create bias among analysts and institutional investors.[226] Additionally, even if Regulation FD overlaps with other securities laws, it still serves a purpose by fostering confidence in the market's fairness and prohibiting a practice that detracts from this fairness.

Overall, the social media safe harbor's greatest strength is its feasibility. The SEC has demonstrated its openness to technological advancement by continuing to revisit various regulations and reconsider their applications in a new world.[227] Recently, the SEC has examined social media's effect on the capital markets and considered how it should adapt accordingly.[228] As such, the social media safe harbor is a logical extension of the SEC's actions that will have limited upfront costs but numerous benefits.

CONCLUSION

With Regulation FD, the SEC began a campaign to address selective disclosure, a problem that had negatively affected public perceptions of the market. To do so, the SEC had to balance two competing interests. Retail investors wanted a level playing field with

224. For another potential solution to this inequity, see Making a Market, *supra* note 189 (proposing a market for corporate disclosure).

225. *See* Haeberle & Henderson, *supra* note 23, at 1421 ("Ultimately, Reg FD's implications for [ordinary investors who engage in portfolio trading at random times] wellbeing are ambiguous . . . ."); Heyman, *supra* note 31, at 1146 (proposing that the SEC repeal Regulation FD and focus its efforts on prosecuting insider trading).

226. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,716–17 (stating that issuers could misuse nonpublic information even if the disclosure does not result in trading).

227. *See e.g.*, Netflix, Inc., & Reed Hastings, Exchange Act Release No. 69279, 2013 WL 5138514 (Apr. 2, 2013); Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862 (Aug. 7, 2008) (codified at 17 C.F.R. pt. 241).

228. *See e.g.*, *Netflix, Inc., & Reed Hastings*, 2013 WL 5138514.

financial giants, one where they were not beholden to information funneled through Wall Street analysts. On the other hand, issuers wanted less red tape, an efficient method to distribute material information, and open lines of communication with private and public parties. Regulation FD served as a compromise, but it has recently come up short as market dynamics continue to evolve. Social media's grasp on Americans' daily lives continues to grow, as does the demand for timely, relevant information. Yet public disclosures made through social media channels still struggle to meet the SEC's threshold requirement that they be reasonably designed to provide broad, nonexclusionary distribution. Social media's current incompatibility with Regulation FD has a chilling effect on corporate speech that will only worsen as technological innovation continues. Thus, a social media safe harbor would carve out an unregulated space where issuers could freely disclose material information and individual investors could have simultaneous, unencumbered access to this information. This safe harbor would in turn increase the perception of fairness and amount of disclosure in the market.

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