

# Regulation FD – Staying out of Trouble

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# Netflix Prompts the SEC to Provide Guidance on the Use of Social Media

- **July 2012** -- CEO of Netflix publicly posted on Facebook to over 200,000 subscribers that Netflix' members had enjoyed over 1 billion hours in June (no press release; no Form 8-K)
- **December 2012** -- Netflix and its CEO, each received a "Wells Notice" from the SEC – alleged violations of
  - Regulation FD;
  - Section 13(a) of the Exchange Act; and
  - Rules 13a-11 (Current Reports on Form 8-K) and 13a-15 (Controls and Procedures) under the Exchange Act.
- **April 2013** -- the SEC determined not to pursue an enforcement action against Netflix or its CEO and provided guidance on the use of social media for Regulation FD purposes.





# CEO Arguments Posted on Facebook

- “First, we think ***posting to over 200,000 people is very public***, especially because many of my subscribers are reporters and bloggers.”
- “Second, while we think my public Facebook post is public, we don’t currently use Facebook and other social media to get material information to investors.”
- “We think ***the fact of 1 billion hours of viewing in June was not ‘material’*** to investors.”
- “Finally, while our stock rose the day of my public post, the increase started well before my mid-morning post was out.”

# SEC's Response to the CEO's Arguments

- Apply 2008 Guidance on the Use of Company Web Sites (2008 Guidance)
- Identify forms of communication that a company intends to use for the dissemination of material non-public information (including social media channels and the types of information that may be disclosed through these channels)

**Where?** Company website, Form 8-K

**Why?** To 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

**Who?** Netflix filed Form 8-K on April 10, 2013 providing such disclosures (update such guidance if media channels change; it is also good practice to refile/repost it on an annual basis)



# Public Disclosure Is the Cornerstone of Regulation FD

- A company ***selectively discloses*** material nonpublic information → the company must make ***public disclosure*** of such information:
  - Intentional selective disclosure → ***simultaneous*** public disclosure.
  - Non-intentional selective disclosure → ***prompt*** public disclosure (the later of 24 hours or the commencement of the next day's trading on the NYSE after senior official learns about such non-intentional disclosure).
- ***Public disclosure*** followed by ***selective disclosure*** → no violation of Regulation FD (close in timing + no additional information is provided; affirming earnings guidance weeks after the initial disclosure may be problematic)

# How Can Public Disclosure Be Achieved?

- Filing of a Form 8-K, or
- Another method of disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public (e.g., press release, company website and now social media):
  - Is a Facebook post a recognized channel of distribution of information about the company, its business, financial condition and operations?
  - Does disclosure of information through social media tools make it available to the securities marketplace in general?




# How Can Public Disclosure Be Achieved? (cont'd)

## Magic Formula:

Recognized Channel of Distribution  
Effective Dissemination of Information  
+ Reasonable Waiting Period  

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Public Disclosure



- **Beware!** Antifraud provisions of the federal securities laws apply to information posted on the company website/social media channels (Exchange Act Section 10(b) and Rule 10b-5) → the disclosure itself is very important no matter which channel is used

## To Do List

- Provide notice of the use of social media channels
- Routinely post important information on such channels
- Check whether information posted on the social media channel is regularly picked up by the market and further distributed by the media
- Consider the following factors:
  - size of the company
  - market following the company
  - level of complexity of the information
- Adopt social media policies to ***establish parameters*** for appropriate social media disclosures of company information