

FRIENDS, FOLLOWERS, AND FAIRNESS: SEC FAIR DISCLOSURE REQUIREMENTS IN A CHANGING INFORMATION MARKETPLACE

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INTRODUCTION

It is said that a picture is worth a thousand words. However, is a forty-three word Facebook post worth a possible Securities and Exchange Commission (“SEC”) investigation? Since 2006, Netflix CEO Reed Hastings has used his personal Facebook account to share everything from YouTube videos to pictures of his children.¹ In keeping with his social persona, Hastings has often used his Facebook page to share the achievements of Netflix and its senior leadership.² On July 3, 2012, Hastings posted on his Facebook page: “Congrats to Ted Sarandos, 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!”³

While the post received 293 “likes” from the page’s followers,⁴ the SEC had a less favorable reaction. On December 5, 2012, the SEC launched a formal investigation into whether Hastings’s Facebook post violated the commission’s Regulation Fair Disclosure (“Reg FD”) requirements, which mandate that all investors have fair notice of when and where a company will post material financial information.⁵ The SEC believed that Hastings’s post violated this requirement by posting a piece of material financial information without making the rest of the investment community simultaneously aware of the disclosure.⁶ Suspicion of improper disclosure only grew when Netflix’s share price rose significantly in the days following the post.⁷

1. See Reed Hastings, FACEBOOK (Dec. 15, 2011), <https://www.facebook.com/reed1960?fref=ts> (showing a picture of his children playing in the snow); *id.* at Dec. 21, 2011 (providing a YouTube video advertising Samsung’s Smart TVs).

2. See, e.g., *id.* at Jan. 4, 2012 (stating, “Just 10 years ago, most people connected over dialup. Today we announced that Netflix members streamed over 2 billion hours of video from us in Q4. Hard to imagine what the internet [sic] will enable 10 years from now. Very exciting.”); *id.* at Feb. 8, 2013 (remarking, “Great NYT Magazine spread on Ted the Original Algorithm Sarandos, the guy who bet our farm on House of Cards.”).

3. *Id.* at July 3, 2012.

4. *Id.*

5. See generally Chris Isidore & David Goldman, *Netflix Faces SEC Probe over Facebook Post*, CNN MONEY (Dec. 7, 2012, 12:18 PM), <http://money.cnn.com/2012/12/07/technology/netflix-facebook-sec/> (describing the general objectives of Reg FD requirements).

6. See Halah Touryalai, *Don’t Blame the SEC, Netflix CEO’s Facebook Post is Questionable*, FORBES (Dec. 7, 2012, 2:14 PM), <http://www.forbes.com/sites/halahtouryalai/2012/12/07/dont-blame-the-sec-netflix-ceos-facebook-post-is-questionable/> (explaining the main issue underlying the SEC’s proposed investigation of Hastings’s conduct).

7. But see *id.* (describing how the increased stock price may also be attributed to a favorable Citigroup research report that had been released on the same day as Hastings’s

The possibility of an enforcement action over a social media post prompted myriad reactions from the financial community. Some commentators focused on how disclosure of information to a large social media audience is analogous to a press release.⁸ Others chided the SEC for opening an investigation when, in the estimation of one analyst, “more people saw Mr. Hastings’ Facebook post than have viewed any regulatory announcement in corporate history.”⁹ Even Hastings criticized the SEC’s view that sending a message to 200,000 people, many of whom were bloggers and reporters, could not be considered “public” disclosure.¹⁰

Notably, the SEC changed course shortly after opening its investigation. Instead of seeking an enforcement action against Netflix, the SEC used the incident as an opportunity to revisit its disclosure requirements. On April 2, 2013, the SEC published the first set of new Reg FD interpretative guidelines since 2008.¹¹ Within these guidelines, the SEC set new standards for when and how material financial disclosures could be shared by companies and executives via social media.¹²

While some praised the SEC’s decision to be a “government agency that actually thinks innovation is a good thing,”¹³ not everyone shared that sentiment. For example, the SEC was criticized for adopting a policy that invited more confusion than clarity.¹⁴ Seventy-seven percent of CFOs and investor relations professionals from major public companies believed the SEC’s report provided inadequate guidance.¹⁵ In the words of numerous

post).

8. See Abram Brown, *Netflix CEO Reed Hastings’ Facebook Flap Forces SEC into 21st Century*, FORBES (Apr. 2, 2013, 3:57 PM), <http://www.forbes.com/sites/abrambrown/2013/04/02/sec-enters-21st-century-approves-twitter-and-facebook-for-official-disclosures/> (noting that it took the SEC twenty minutes to tweet the new guidelines after posting them on their web site).

9. Andrew Hill, *SEC’s Ruling Won’t Make Many Facebook Friends*, FINANCIAL TIMES BUSINESS BLOG (Apr. 3, 2013, 11:42 AM), <http://blogs.ft.com/businessblog/2013/04/secs-ruling-wont-make-many-facebook-friends/>.

10. Isidore & Goldman, *supra* note 5.

11. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Exchange Act Release No. 69,279, [2012-2013 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,972 (Apr. 2, 2013) [hereinafter SEC Report of Investigation Pursuant to Section 21(a) of the Exchange Act].

12. *Id.* ¶ 84,972-73.

13. Joshua Gallu, *SEC Approves Using Facebook, Twitter for Company Disclosures*, BLOOMBERG (Apr. 3, 2013, 11:23 AM), <http://www.bloomberg.com/news/2013-04-02/sec-approves-social-media-use-for-companies-social-material-disclosure.html>.

14. See KCSA Strategic Communications, *SEC Social Media Guidelines Still Unclear for Investor Relations*, KCSA (Apr. 3, 2013), http://www.kcsa.com/kcsa_news_040413_2.php (noting that the vast majority of CFOs and investor relations professionals do not think the SEC has given enough guidance on how to use social media to disclose company information).

15. *Id.*; see also KCSA Strategic Communications, *KCSA Strategic Communications*

attorneys in disclosure practices, when it comes to using social media outlets for disclosure, their advice would be, “[d]on’t do it.”¹⁶

Numerous articles and reports have discussed the complex compliance issues created by these new guidelines.¹⁷ While compliance is an important part of deciphering the SEC’s view of fair disclosure, it is not the most important or valuable inquiry stemming from this new report.

The SEC’s decision to publish these new interpretative guidelines was not an accident. Since its inception in 2000, Reg FD has sought to create an investment climate that promotes fairness through public disclosure.¹⁸ The SEC and its leadership have long recognized that technology would have a significant impact in shaping and defining what is “public” and “fair” in the investment space.¹⁹ Even though the SEC’s social media guidelines are an attempt to liberalize the flow of financial information to investors, the Commission’s emphasis on fairness may actually chill the use of technologies that best align investor interests with fair disclosure.²⁰ In other words, the SEC’s emphasis on a 20th century definition of fairness may not advance the interests of 21st century investors.

This comment seeks to explore how the SEC’s new social media guidelines may actually harm investors by undermining the goals behind Reg FD’s adoption. Even though it is important to address the challenges

Launches Investor Relations Social Media Index, KCSA (Dec. 11, 2013), http://www.kcsa.com/kcsa_news_121113.php (discussing that initially only two companies in the Fortune 100 had notified the SEC about an intention to use social media for disclosures purposes as of the end of 2013).

16. Frances Denmark, *New SEC Ruling Plays it Safe on Corporate Disclosure via Social Media*, INSTITUTIONAL INVESTOR, Apr. 29, 2013, at 35, available at http://www.institutionalinvestor.com/Article/3197961/Banking-and-Capital-Markets/New-SEC-Ruling-Plays-It-Safe-on-Corporate-Disclosure-Via-Social-Media.html#_VEldlxYrfdl.

17. See e.g., Deborah S. Birnbach, R. Todd Cronan, Lisa R. Haddad & Michael T. Jones, *SEC Clarifies Social Media Use and Reg FD Compliance*, GOODWIN PROCTER (Apr. 5, 2013), http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/0405_SEC-Clarifies-Social-Media-Use-and-Reg-FD-Compliance.aspx?article=1 (explaining the multitude of compliance challenges created by the new guidelines).

18. See Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm’n, Opening Statement at the Open Meeting on Regulation Fair Disclosure (Aug. 10, 2000), available at <https://www.sec.gov/news/extra/seldisal.htm> (stating that Reg FD was promulgated to further the core principles of integrity and fairness).

19. See Laura S. Unger, Comm’r, U.S. Sec. & Exch. Comm’n, Rethinking Disclosure in the Information Age: Can There Be Too Much of a Good Thing? (June 26, 2000), available at <https://www.sec.gov/news/speech/spch387.htm> (describing the inherent uncertainties that come with the internet, technology, and disclosure).

20. See David A. Katz & Laura A. McIntosh, *The Board, Social Media and Regulation FD*, N.Y. L.J., March 28, 2013, at 5 (explaining, “[T]he societal value placed on transparency and the immediate, widespread communication of material information to all investors is no longer in question; the issue is only how best to implement regulation supporting this value.”).

these guidelines create for issuers and investors,²¹ an equally important issue to address is how the SEC's shifting culpability requirements for "fair" disclosure may hinder Reg FD's mission of promoting trust and providing open access to relevant financial information. To understand this problem, I will first trace the SEC's early conception of Reg FD policies. Next, I will explain how recent guidelines are no longer in sync with changes in the investment community. Finally, I will discuss the implications of the SEC's attempt to better align Reg FD with modern conceptions of "fairness."

I. THE PURSUIT TOWARDS FAIRNESS: 2000 REG FD GUIDELINES

A. *Rhetorical Conceptions of Reg FD*

The need for Reg FD arose from growing concern that institutional investors had gained a strategic advantage in receiving relevant financial information. Through insider conference calls and private conversations, institutional investors and analysts received material financial information before it became available to the public.²² Such practices led to a growing concern that once this information actually reached the public, the information would have already "resulted in a significant change in the share price or higher than usual trading volume."²³

Despite the problematic nature of this activity, then-existing securities laws had not clarified when such trading behavior would be considered illegal.²⁴ In response to these selective disclosure practices, then-SEC Chairman Arthur Levitt stated in 1999, "[f]or over sixty years, our markets have been a model for transparency and integrity."²⁵ However, the "long established precepts of financial reporting, and ethical restraint" had

21. See e.g., Alyssa Wansor, *The Facebook Status that Sparked an SEC Investigation: Regulation Fair Disclosure and the Growth of Social Media*, 30 *TOURO L. REV.* 732, 744-55 (2014) (explaining how the indeterminacies in the new guidelines may actually create more social media-related challenges than opportunities for investors and issuers).

22. See *Fact Sheet: Selective Disclosure and Insider Trading Rule Proposals*, SEC. & EXCHANGE COMM'N (Dec. 15, 1999), <https://www.sec.gov/news/extra/sdiscfaq.htm> (stating that "[i]n many reported incidents, companies selectively disclosed important information – such as upcoming earnings figures—in conference calls or meetings that are open only to selected securities analysts and/or institutional investors, and which exclude members of the public and the media.").

23. *Id.*

24. *Id.*

25. Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm'n, Statement at the Open Commission on Audit Committee Oversight, Selective Disclosure, and Insider Trading (Dec. 15, 1999), available at <https://www.sec.gov/news/extra/alsdisc.htm>.

become compromised by this “emerging culture of gamesmanship within the financial reporting process.”²⁶ Levitt believed that such gamesmanship compromised the vision that, as a nation, “we pride ourselves on having the purest form of meritocracy in the world” and therefore “ground ourselves in a trust that, through equal opportunity, everyone has a chance to succeed.”²⁷

In reaction to challenges to these historical premises, the Commission became “increasingly concerned” that “[t]hose privy to selectively disclosed information have an unfair advantage over other investors.”²⁸ Chairman Levitt analogized the state of the investment market to a “neighborhood with gated entrances and tall fences.”²⁹ To counteract this problem, Levitt viewed Reg FD as a tool to bring “all investors, regardless of the size of their holdings, into the information loop—where they belong.”³⁰ He wanted all American investors to know that it was “well past time to say, ‘Welcome to the neighborhood.’”³¹

B. Creating a Distinct Enforcement Area

Despite the novelty of these practices, Chairman Levitt claimed, “Regulation FD was not intended to be revolutionary.”³² Instead, the regulation as proposed had been “clearly drafted to change behavior and to end practices that were universally regarded as unfair.”³³

The SEC began by identifying the target audience for Reg FD. The Commission did not envision these requirements as a tool for policing communications within the broker-dealer community.³⁴ Instead, the SEC wanted the “responsibility for avoiding selective disclosure, and the risks of engaging in it, [to fall] squarely on the issuer.”³⁵ However, even though the regulation “focus[ed] primarily on communications between issuers and analysts,” investment bankers also had responsibilities in the disclosure equation.³⁶

26. *Id.*

27. Levitt, *supra* note 18.

28. SEC. & EXCH. COMM’N, *supra* note 22.

29. Levitt, *supra* note 18.

30. *Id.*

31. *Id.*

32. Richard Walker, Director, Division of Enforcement, SEC, Speech by SEC Staff: Regulation FD — An Enforcement Perspective (November 1, 2000), *available at* <https://www.sec.gov/news/speech/spch415.htm>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Therefore, to regulate this activity, the proposed Reg FD policy had two primary requirements.³⁷ First, “whenever an issuer intentionally discloses material information, it [must] do so through public disclosure, not through selective disclosure.”³⁸ Second, “whenever an issuer learns that it has made a non-intentional material selective disclosure the issuer [must] make prompt public disclosure of that information.”³⁹ Under the proposed guidelines, the “public disclosure” requirement would be satisfied by filing information with the SEC, through a press release, or by “providing public access (for example, by phone access or webcast) to the conference call or meeting.”⁴⁰ Chairman Levitt explained that if a company made an “unintentional selective disclosure,” they would be obligated to make that information known to the public “in short order.”⁴¹

C. Critical Reception and SEC Reaction

During the comment period, the SEC received 6,000 letters, mostly from individual investors expressing their interest in fairer market practices.⁴² During this process, there had been discussion that the SEC lacked enough evidence about selective disclosure problems to justify a new rule.⁴³ The SEC’s head of enforcement, Richard Walker, countered that complaints about Reg FD’s “far-reaching effects on disclosure practices” indicated two realities: (1) that selective disclosure had been more widespread than originally thought and (2) that retail customers faced even steeper disadvantages as a result of the previously allowed practices.⁴⁴

The most common concerns of Reg FD critics focused on the possibility “that these rules will ‘chill’ the flow of information as companies respond by providing less disclosure altogether.”⁴⁵ However, Chairman Levitt envisioned that the guidelines would “provide issuers with a great deal of flexibility in the way they distribute information—including the use of new technologies over the Internet to offer extraordinary broad access at minimal cost.”⁴⁶ Despite pushing for these higher standards, Levitt hedged his claims by explaining that “[w]hile these rules don’t

37. SEC, *supra* note 22.

38. *Id.*

39. *Id.*

40. *Id.*

41. Levitt, *supra* note 25.

42. Press Release, Sec. & Exchange Comm’n, Commission Votes to End Selective Disclosure (August 10, 2000), *available at* <http://www.sec.gov/news/extra/endseldi.htm>.

43. Walker, *supra* note 32.

44. *Id.*

45. Levitt, *supra* note 25.

46. *Id.*

require this, I strongly urge corporate America to open up your conference calls to all investors. Place them on the Internet. The basic principle of fairness deserves no less.”⁴⁷

In the face of these complaints, the SEC sought to clarify that “there is no need for fear or hysteria, and you should not let the securities bar convince you otherwise.”⁴⁸ He clarified that the new regulations had not been “designed as a trap for the unwary, as many law firms are counseling.”⁴⁹ For example, he cited how the “express language” of the regulation did not seek liability for failure to make a required public disclosure.⁵⁰ Instead, a violation would only exist if an issuer “acted recklessly or intentionally in making a selective disclosure.”⁵¹ Such a violation would not occur if the issuer simply incorrectly determined the materiality of a certain piece of information.⁵² Instead, such an omission would need to “represent an ‘extreme departure’ from standards of reasonable care” in order to reach the level of a Reg FD violation.⁵³

To address the “chilling effect,” the SEC explained that “any such effect being observed is largely due to an over-abundance of caution, fed by the dire predictions of numerous law firms and others opposed to the rule.”⁵⁴ To protect against any “chilling effect,” the Commission set out to make it “crystal clear that Regulation FD will not cover communications with the media, or ordinary-course business communications with an issuer’s customers or suppliers.”⁵⁵ The SEC’s head of enforcement, Richard Walker, rebuffed claims of “overzealous” enforcement efforts by explaining that “[t]here will be no FD SWAT Teams.”⁵⁶ On the contrary, he believed that “second guessing reasonable disclosure decisions made in good faith, even if we don’t agree with them,” would “frustrate the purpose of the rule.”⁵⁷ In addition, the SEC did not intend “to test the outer limits of the rule by bringing cases that aggressively challenge the choices issuers are entitled to make regarding the manner in which a disclosure is made.”⁵⁸ Instead, he expressed confidence that increased experience with these provisions would allow issuers to “become increasingly comfortable with

47. *Id.*

48. Walker, *supra* note 32.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Levitt, *supra* note 18.

56. Walker, *supra* note 32.

57. *Id.*

58. *Id.*

its requirements” and therefore “adjust their practices in conformity with the rule.”⁵⁹

D. Adaptability of the Original Reg FD Policies

As a result of the public comments, the SEC made a series of changes that narrowed the scope of the proposed regulation.⁶⁰ For example, the SEC decided that the regulation would only apply to issuer communications with the following groups: (1) marketing professionals and (2) “holders of the issuer’s securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information.”⁶¹ The regulation would not be applicable to “issuer communications with the press, rating agencies, and ordinary-course business communications with customers and suppliers.”⁶² The SEC also lessened the scope of the regulation by explaining that it would only apply to communication from the issuer’s senior management team.⁶³ Perhaps most interesting is the SEC’s hedging language that the revised Reg FD requirement “does not impede legitimate business communications or expose issuers to liability for selective disclosure arising from arguable but mistaken judgments about the materiality of information.”⁶⁴

E. The Envisioned Future of Reg FD Policies

While Reg FD had largely been a reaction to unfair selective disclosure practices in the past, the SEC simultaneously recognized that it could not ignore how communication technology would adapt the applicability of these practices. The emergence of the Internet at the turn of the 21st century led SEC officials to believe that “it is the responsibility of this and successor Commissions to continually evaluate the impact of laws and regulations on our markets and seek ways to adjust in an increasingly competitive global environment.”⁶⁵ When Chairman Levitt stepped down in 2001, his temporary successor, Laura Simone Unger, took over the Commission at a time when communication technology was rapidly changing both the investment market and the savvy of investors themselves.

59. *Id.*

60. *Fact Sheet: Regulation Fair Disclosure and New Insider Trading Rules*, SEC. & EXCHANGE COMM’N (August 10, 2000), <https://www.sec.gov/news/extra/seldsfct.htm>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Levitt, *supra* note 18.

During this period, Unger described how a majority of her time as Commissioner had been spent “speaking about the impact of the Internet on investors and the securities markets.”⁶⁶ She viewed the Internet as “rapidly eroding the informational advantages formerly enjoyed only by big players in the markets” and this had resulted in “breaking down barriers to individual investors’ participation in offerings and the corporate governance process.”⁶⁷

As a result of these changes, she recognized that the SEC would soon need to tackle the question of, “what investors will do with the truckloads of information.”⁶⁸ To answer this question, Unger believed that the SEC would need to dig deeper to answer several other different, yet correlated questions. These questions included, “[w]ill the Internet deliver timely, relevant information to make investors more knowledgeable or will it be more like a dump truck depositing information that overwhelms and buries them?”⁶⁹ Despite these more nuanced inquires, Unger felt that perhaps the most important question underlying all of these changes would be “whether average investors really want and need the level of information provided to professionals.”⁷⁰

Despite these challenges, Unger envisioned an information marketplace where “an informed investor will become a more involved investor.”⁷¹ She assumed that the future investor would be “cyber-savvy and have online brokerage accounts.”⁷² While she believed that not every investor would take advantage of this information, she assumed that most would.⁷³

Unger also viewed communication technology as a tool that would not only shape the knowledge base of investors, but also alter the dynamic between investors and financial institutions. She viewed the Internet as a tool that would allow investors to both critique company decisions and help “unify their voices when there is a particular matter of concern.”⁷⁴ Perhaps most prophetic was her belief that the SEC would need to “look beyond [its] traditional role of mandating specific company disclosures to determine what other information may help investors make meaningful voting and investment decisions.”⁷⁵ While she “unequivocally” shared her

66. Unger, *supra* note 19.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Unger, *supra* note 19.

75. *Id.*

predecessor's goal of "curbing selective disclosure," she predicted that certain proposals which aimed to give consumers more information may have the opposite effect.⁷⁶

II. LIBERALIZING DISCLOSURE: 2008 REG FD INTERPRETIVE GUIDELINES

Despite many of Unger's prophecies about the impact of communication technologies on disclosure practices, the SEC did not substantively revise its Reg FD guidelines until 2008. Within these new guidelines, the SEC addressed how "[o]ngoing technological advances in electronic communications have increased both the markets' and investors' demand for more timely company disclosure and the ability of companies to capture, process and disseminate this information to market participants."⁷⁷ Such guidance had been "expected" due to "the speed at which technological advances are developing, and the translation of those technologies into investor tools."⁷⁸

A. *Impact of the Internet on Disclosure Expectations*

Much of the 2008 interpretative guidelines addressed how the Internet changed the way investors located disclosure information. The SEC explained that the Commission "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."⁷⁹ For that reason, the Commission "believ[ed] that the Internet has helped to transform the trading markets by enabling many retail investors to have ready access to company information."⁸⁰

Such changes in the financial information marketplace necessitated the SEC's acknowledgment of both the Internet's impact on disclosure practices and the growing prominence of company web sites as the epicenter of financial information. Under the new interpretive guidelines, the SEC acknowledged that "there has been a dramatic increase in the use of company Web sites since our 2000 Electronics Release and the adoption

76. *Id.*

77. Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, 73 Fed. Reg. 45,862, 45,863 (Aug. 7, 2008), *available at* <https://www.sec.gov/rules/interp/2008/34-58288.pdf>.

78. *Id.*

79. *Id.*

80. *Id.*

of Regulation FD.”⁸¹ Therefore, company web sites had become “an obvious place for investors to find information about the company.”⁸² For this reason, the SEC wanted the new guidelines to “encourage the continued development of company Web sites as a significant vehicle for the dissemination to investors of important company information.”⁸³

The openness of this policy went as far as recognizing that “in very limited circumstances, a company’s Web site can even serve as a standalone method of providing information to investors.”⁸⁴ The SEC’s new stance on online disclosures represented that “[a] fundamental principle underlying these interpretations and rules is that, where access is freely available to all, use of electronic media is at least equal to other methods of delivering information or making it available to investors and the market.”⁸⁵ Therefore, liberalizing disclosure requirements “allow[ed] companies to include more ‘interactive’ and current information on their Web sites than was the case previously.”⁸⁶ Such a change would “[move] Web sites away from the filing cabinet or ‘static’ paradigm to a ‘dynamic’ paradigm, one shaped by the market’s desire for more current, searchable and interactive information.”⁸⁷

B. SEC Trepidation over the Use of New Disclosure Mediums

Despite praising the virtues and opportunities for online disclosure efforts, the 2008 guidelines also echoed the SEC’s fundamental concerns about the ways in which liberalizing disclosure practices would compromise the fairness framework of Reg FD. Within the guidelines, the SEC reiterated that Reg FD sought to “address the problem of selective disclosure of material information by companies, in which ‘a privileged few gain an informational edge—and the ability to use that edge to profit—from their superior access to corporate insiders’”⁸⁸ Gaining information in this way violated the principle that investment gains should come from an investor’s own “skill, acumen, or diligence.”⁸⁹

The theme of fairness is most notable in the SEC’s treatment of when and how disclosure within online forums would be considered adequately public for the purposes of Reg FD. The guidelines stressed that great care

81. *Id.* at 45,866.

82. *Id.* at 45,864.

83. *Id.* at 45,862.

84. *Id.* at 45,866.

85. *Id.* at 45,864.

86. *Id.*

87. *Id.*

88. *Id.* at 45,866.

89. *Id.* (internal quotation marks omitted).

must be taken “when providing guidance on when information is considered public for purposes of assessing whether a subsequent selective disclosure may implicate Regulation FD.”⁹⁰ Despite advances in technology making it “an appropriate time to provide additional guidance regarding the public nature of disclosures on company Web sites for purposes of Regulation FD,” the SEC would not take a position on “whether and when information on a company’s Web site is considered public for purposes of determining if a subsequent selective disclosure of such information may implicate Regulation FD”⁹¹ Instead, the SEC placed the burden of interpreting these standards on issuers themselves. Companies would need to consider whether and when: (1) A company Web site is a recognized channel of distribution, (2) posting of information on a company Web site disseminates the information in a manner making 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.⁹²

In addition, the decision of “whether a company’s Web site is a recognized channel of distribution of information” would be dependent “on the steps that the company has taken to alert the market to its Web site and its disclosure practices, as well as the use by investors and the market of the company’s Web site.”⁹³

III. A BRAVE NEW WORLD FOR DISCLOSURE: 2013 REG FD REPORT ON SOCIAL MEDIA USE

The SEC’s most recent set of interpretive guidelines echo a similar uneasy tension with accepting new communication mediums for disclosure while promoting Reg FD’s initial framework. Unlike the 2008 guidelines, the need for the 2013 guidelines became apparent not just by recognizing a changing communication technology environment. Instead, the SEC’s own decision to launch a possible enforcement action over Reed Hastings’ Facebook post prompted the Commission to review its policies in light of a possible disconnect between disclosure policy and acceptable corporate communication practices.⁹⁴ For this reason, the 2013 guidelines approached the current state of fair disclosure practices in two parts.

90. *Id.*

91. *Id.*

92. *Id.* at 45,867.

93. *Id.*

94. SEC Report of Investigation Pursuant to Section 21(a) of the Exchange Act, *supra* note 11, ¶ 84,973.

A. *SEC's Analysis of the Netflix Controversy*

The first half of the new guidelines explained why the SEC had initially decided to pursue an enforcement action against Netflix. In this section, the SEC described how its concern with Hastings' post stemmed from more than just the content of the post.

The SEC outlined several problematic features of the Hastings post. First, the SEC argued that the investment community did not have adequate notice from Netflix that financial information would be posted on Hastings' Facebook page.⁹⁵ In support of its concerns, the SEC identified that Hastings' personal Facebook page had not been previously used "to announce company metrics."⁹⁶ Second, neither Hastings nor Netflix had followed the post with the kinds of corresponding documentation that are normally associated with the disclosure of relevant financial information.⁹⁷ Third, Hastings had not sought out the advice of other company executives and regulatory officials in the company, such as Netflix's CFO or the investor relations department, before posting the content.⁹⁸ Fourth, Netflix had not taken any action through its other communication channels to inform investors that material financial information would be located on the Facebook page.⁹⁹

Compounding these variables were numerous comments by Hastings, which established the importance of the content contained on his Facebook profile. The SEC expressed concern that Hastings had previously described the company's streaming hours figures as a "milestone" and "a measure of an engagement and scale in terms of the adoption of our service and use of our service."¹⁰⁰ Discussing such a milestone on his personal Facebook page appeared especially problematic since any previous time Netflix posted online information, it directed investors to the company's social media pages, blog, or web site.¹⁰¹ The consistency of this disclosure method was substantiated by a December 2012 comment in which Hastings stated that "we [Netflix] don't currently use Facebook and other social media to get material information to investors; we usually get that

95. *Id.* ¶ 84,975.

96. *Id.*

97. *Id.*; *see also id.* at 84,974 (noting, "Netflix did not file with or furnish to the Commission a Current Report on Form 8-K, issue a press release through its standard distribution channels, or otherwise announce the streaming milestone.").

98. *Id.* ¶ 84,974.

99. *Id.* ¶ 84,973 ("The post was not accompanied by a press release, a post on Netflix's own web site or Facebook page, or a Form 8-K.").

100. *Id.* ¶ 84,974 (internal quotation marks omitted).

101. *Id.*

information out in our extensive investor letters, press releases and SEC filings.”¹⁰²

The disconnect between Netflix’s past disclosure habits and Hastings’ post raised red flags about the acceptability of the post. However, the SEC also expressed significant concern about the speed with which the post had been shared it’s impact on the financial markets. Even though Netflix had not announced the milestone streaming numbers through any other conventional disclosure channel, it took only two hours for a technology-focused blog and several news outlets to pick up the story.¹⁰³ Unsurprisingly, the financial press also began reporting the news shortly after the closing of markets on the release date, and analysts reacted positively to the news.¹⁰⁴ Much to the concern of the SEC, Netflix’s stock price rose from \$70.45 on the day after the post to \$81.72 on the following day.¹⁰⁵

B. Addressing Social Media Disclosure Concerns

While the first half of the SEC’s report chastised Hastings and Netflix for their social media disclosure practices, the Commission recognized that the Hastings situation created “uncertainty concerning how Regulation FD and the Commission’s 2008 Guidance apply to disclosures made through social media channels.”¹⁰⁶ The uncertainty required the Commission to address two questions: (1) how should current Reg FD policies be applied to Hastings’ Facebook post, and (2) how should the Commission’s 2008 guidelines be applied to “emerging technologies,” including social media platforms?¹⁰⁷

In theory, the Report was not “aimed at inhibiting corporate communication through evolving social media channels.”¹⁰⁸ For that reason, the SEC did “not wish to inhibit the content, form, or forum of any such disclosure” and was “mindful of placing additional compliance burdens on issuers.”¹⁰⁹ Therefore, the guidelines sought to serve as an acknowledgment that companies “are increasingly using social media to communicate with shareholders and the market generally.”¹¹⁰ The SEC appreciated “the value and prevalence of social media channels in

102. *Id.* ¶ 84,975 (internal quotation marks omitted).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* ¶ 84,973.

107. *Id.*

108. *Id.* ¶ 84,976.

109. *Id.* ¶ 84,975.

110. *Id.* ¶ 84,973.

contemporary market communications” and wanted to use the Report to support “companies seeking new ways to communicate and engage with shareholders and the market.”¹¹¹

Despite this seeming embrace of social media in the disclosure context, the SEC exhibited significant discomfort with allowing executives, such as Hastings, to post material financial information on social media.¹¹² To interpret the acceptability of company and executive social media disclosure, the SEC relied on its 2008 guidelines as “a relevant framework for applying Regulation FD to evolving social media channels of distribution.”¹¹³ Such an analogy seemed relevant because company use of social media channels is “not fundamentally different from the ways in which the web sites, blogs, and RSS feeds addressed by the 2008 Guidance are used.”¹¹⁴

The SEC reiterated, “[t]he 2008 Guidance, furthermore, specifically identified ‘push’ technologies, such as email alerts and RSS feeds and ‘interactive’ communication tools, such as blogs, which could enable the automatic electronic dissemination of information to subscribers.”¹¹⁵ For that reason, the SEC viewed “[t]oday’s evolving social media channels” as “an extension of these concepts, whereby information can be disseminated to those with access.”¹¹⁶ Therefore, corporate social media pages could be analogized to web sites that are “created, populated, and updated by the issuer.”¹¹⁷

Despite viewing the 2008 guidelines as a touchstone for accepting disclosure through company social media accounts, the Report took a less favorable view towards disclosure through personal accounts. For example, the SEC explained that “[p]ersonal social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information.”¹¹⁸

C. Tension over the Fairness of Social Media Disclosures

Despite finding precedent for social media disclosure in its past guidelines, the SEC did not seem to fully embrace such a change. Once again, the burden of fairness fell on the issuers. In the SEC’s view, the

111. *Id.* ¶ 84,976.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 84,973.

115. *Id.* ¶ 84,976.

116. *Id.*

117. *Id.*

118. *Id.*

most important consideration continued to be “that widespread access to company information is a key component of our integrated disclosure scheme, the efficient functioning of the markets, and investor protection.”¹¹⁹ The SEC expected issuers to “examine rigorously the factors indicating whether a particular channel is a ‘recognized channel of distribution’ for communicating with their investors.”¹²⁰ Therefore, “identifying the specific social media channels a company intends to use for the dissemination of material non-public information” is an invaluable aspect of providing these groups with “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.”¹²¹ The SEC took the position that “[w]ithout such notice, the investing public would be forced to keep pace with a changing and expanding universe of potential disclosure channels, a virtually impossible task.”¹²² Thus, the SEC sought to “caution issuers that a deviation from their usual practices for making public disclosure may affect [their] judgment as to whether the method they have chosen in a particular case was reasonable.”¹²³

IV. ANALYSIS OF THE EVOLUTION OF REG FD STANDARDS

While the SEC has framed its social media guidance as “flexible enough to address questions that arise for companies that choose to communicate through social media,” it may indirectly have a far greater impact on the future of disclosure practices.¹²⁴ However, understanding these future implications requires an analysis of how past guidelines have changed the SEC’s view of the meaning of fair disclosure.

A review of the purpose and function of Reg FD illustrates the challenge of regulating fairness in an increasingly complicated information marketplace. The proposed purpose of Reg FD and its initial standards show a strong tendency towards equating fairness with access. The adoption of Reg FD was motivated by the concern that selective disclosure

119. *Id.* ¶ 84,974 (quoting Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, Investment Company Act Release No. 25,829, 73 Fed. Reg. 45,862, 45,863 (Aug. 7, 2008)).

120. *Id.* ¶ 84,976.

121. *Id.*

122. *Id.*

123. *Id.* ¶ 84,973 (citing Selective Disclosure and Insider Trading Rule, 17 C.F.R. § 243.100 (2011)).

124. Press Release, Sec. & Exchange Comm’n, SEC Says Social Media OK for Company Announcements if Investors are Alerted, (Apr. 2, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574#.Uyt6TvldXAI>.

practices restricted public access to relevant financial information.¹²⁵ Making fairness synonymous with access logically flowed from an information marketplace in the late 1990s and early 2000s in which the exchange of material information occurred through interpersonal means or closely held conference calls. The only way to ensure that investors could fully join the “neighborhood” was to provide them with equal access to this material financial information.

While the SEC’s initial guidelines focused on this relationship, evolving communication technologies have slowly eroded the overall importance of access. From Reg FD’s early adoption, SEC leadership recognized that the growth of the Internet would inevitably lead to consumers having increased access to financial information.¹²⁶ For that reason, it was not a stretch for the SEC to accept disclosures via company web sites. Such web sites represented the Internet face of companies and provided all investors with the ability to view and access material financial information.

However, the 2013 social media guidelines represented a significant departure from the fairness/access relationship. The growth of social media use by companies has arguably provided investors with unprecedented access to financial information. Instead of having to check company web sites periodically, investors can now choose the kind of information they want to receive and access it in real time. If the SEC still viewed accessibility of information as the most important component of fair disclosure, Hastings’ post would have been less likely to attract attention. Any individual could access the posted content and 200,000 people had received it. This access-focused view of disclosure is likely why Hastings expressed frustration that the SEC would deem such a post insufficiently public to satisfy disclosure requirements.

The SEC’s new guidelines presented not just an opportunity to address the social media question, but also signaled a shift away from viewing fair disclosure as a matter of providing access. Instead, the SEC’s stance on social media can be viewed as a growing concern that fairness must now be evaluated through the lens of notice. There are several reasons to support such a view. First, the 2008 guidelines presented the underpinnings of a notice-based view of fair disclosure. Within the 2008 guidelines, the SEC justified its acceptance of disclosure via company web sites by explaining that investors had begun to accept company web sites as reasonable sources for company-related disclosures.¹²⁷ Web site disclosures allowed investors to have widespread access to financial information. Notice in the context

125. *See supra* text accompanying notes 22-23.

126. *See supra* Section I.E.

127. *See supra* Section II.A.

of web sites was not a concern because these sites were already where investors reasonably believed that they could acquire such knowledge.¹²⁸

Similarly, social media disclosures present investors with even greater access to relevant information. Investors now have the ability to choose how and where they would like to receive that information, thus solving the access problem. However, social media disclosures, unlike company web site disclosures, presented notice issues because investors would be less likely to view these platforms as the go-to source for financial information. For example, Lynn Turner, former SEC Chief Accountant, claimed that the SEC's social media decision should be considered "bad policy" because "[m]any investors, especially those over 50, who in the aggregate have the most invested, still do not use social media."¹²⁹ Therefore, unsurprisingly, the new guidelines allow for social media disclosures only if investors have notice that social media is where material information will be posted.¹³⁰ George Canellos, acting director of the SEC's enforcement division at the time Report had been published, explained that "[m]ost social media are perfectly suitable methods for communicating with investors, but not if the access is restricted or if investors don't know that's where they need to turn to get the latest news."¹³¹ These concerns over notice can also explain the SEC's reluctance to endorse social media disclosures via the personal Facebook accounts of company executives.¹³²

A. *Possible Shift in Culpability Standards*

Interestingly, the SEC's paradigmatic shift towards a notice-based view of fair disclosure has also been met with a different view of the culpability standard for enforcement actions. Even though the SEC did not decide to issue an enforcement action against Netflix or Hastings, the very threat of such an action seems to be a strong departure from the SEC's initial conception of when an enforcement action would be acceptable. The early comments from SEC leadership at the time of Reg FD's adoption appeared to allay the fears of companies by embracing a "benefit of the

128. See *supra* note 82 and accompanying text (citing the SEC's interpretive release regarding the use of company websites, which noted that company websites had become "an obvious place for investors to find information about the company.").

129. Gallu, *supra* note 13.

130. See *supra* Section III.C.

131. Nikhil Kumar, *Company Results... you can now hear them first on Twitter*, LONDON EVENING STANDARD (Apr. 3, 2013), available at <http://www.standard.co.uk/business/business-news/company-results-you-can-now-hear-them-first-on-twitter-8558210.html>.

132. See *supra* Section III.B.

doubt” approach to disclosure problems.¹³³ Possible Reg FD enforcement actions would only arise from gross deviation from the normal standard of care.¹³⁴

The threatened investigation over the Hastings post once again indicates that the SEC may be more focused on notice rather than access as a signal that a deviation from these standards has occurred. The possibility of an enforcement action indicates perhaps two different views on the future of Reg FD enforcement. One view is that the SEC has lowered the culpability standard to one that places greater responsibility upon issuers to ensure that information shared on social media pages is compliant with Reg FD guidelines. Such a view would be consistent with the SEC’s past emphasis on increased issuer responsibility in the disclosure context.

The second, and perhaps more compelling view, is that shifting the fairness paradigm towards notice allows the SEC to more effectively protect investors against pseudo-disclosure efforts by companies. In the social media space, it is particularly easy for companies, such as Netflix, to argue that its post is “public” enough to satisfy an access-based view of adequate disclosure. Since most companies communicate with investors across a wide variety of online platforms, it is easy to argue against an accusation of bad faith. The very existence of these communication platforms symbolically supports a company’s view that it actively promotes the free flow of information with its investors.

In contrast, a notice-based system significantly raises the bar for compliance. Companies would have to adopt more formal policies to ensure its social media platforms are synchronized with more traditional disclosure locations, such as company web sites. The SEC’s apparent dismay that neither Hastings nor Netflix had displayed the content of the Facebook post on one of the more traditional disclosure platforms supports synchronization. The SEC’s focus on the location of the content, as much as the content itself, illustrates a belief that social media disclosures can be acceptable but will likely raise regulatory red flags if they are the only mechanism used.

B. Creation of New Chilling Effects

Unfortunately, the SEC’s shift towards equating fairness with adequacy of notice may produce the exact kind of chilling effect that had concerned early Reg FD opponents. In today’s communication

133. *See supra* text accompanying notes 48-59 (noting the SEC’s response to comments, which included a statement that Reg FD was not “a trap for the unwary” and addressing concerns about the possible “chilling effects” of Reg FD).

134. *Id.*

marketplace, providing access is a low threshold. There is already a widespread understanding that the growth and proliferation of social media outlets have meant that companies cannot hide in the shadows. Gone are the times when companies could actively, and rather openly, share information with only a select few. Now the expectation is that companies operate and effectively use a variety of online communication platforms. For that reason, providing access to company information has become an institutionalized norm rather than a sign of good corporate citizenship.

Even though the emergence of new communication platforms has advanced Reg FD's concern about access, it also creates new challenges in the sphere of notice. When Reg FD was first adopted, the SEC leadership conceptualized the investment public as being encompassed by one "neighborhood."¹³⁵ Therefore, it logically flowed that the issuers within this neighborhood had the obligation to ensure that investors had the tools and knowledge to adequately participate in the markets. However, the growth of more tailored communication channels puts the applicability of a universal neighborhood concept in question.

The emergence of new communication channels have resulted in many of Commissioner Unger's prophecies coming to life.¹³⁶ Investors now have more access to financial information than ever before. Fortunately, the ability of investors to choose the communication channels they wish to use, and the sources from which that information will come, solves Commissioner Unger's problem of information inundation. This has resulted in a shift where investors, rather than issuers, now have a significant ability to dictate what disclosed information is relevant. The fact that 200,000 people decided to follow one particular executive¹³⁷ is a strong indication that investors are now much savvier about where they believe relevant financial information will be located.

Unfortunately, with great opportunities come great challenges. The SEC's new emphasis on notice is problematic because the new guidelines paint social media outlets with a very broad brush. Unlike company web sites, social media platforms display and share information in a diversity of ways. How does one compare disclosure via a 140 character tweet versus disclosure through a Pinterest picture?¹³⁸

135. See *supra* text accompanying notes 29-30 (describing the SEC's "neighborhood" concept).

136. See *supra* text accompanying notes 70-75 (discussing Unger's views on emerging communication technology's future effects on the information marketplace).

137. See Isidore & Goldman, *supra* note 5 (noting that "Hastings currently has 245,000 Facebook subscribers on his account.").

138. Wansor, *supra* note 21, at 751 ("Although the SEC has expressly permitted the use of Facebook and Twitter, what about the other social media channels?").

Employing a one-size-fits-all approach to social media disclosure makes dealing with these diverse platforms a herculean task. For example, if a company operates numerous online platforms, must it use every channel to put investors on notice about relevant information?

Unfortunately, applying a universal view of notice to a diverse set of online platforms may result in social media only being useful to provide notice that financial information is located on a more conventional disclosure channel. Such a use for social media would be a waste because it only shifts the way investors gain notice about information rather than the way they receive, consume, and use such information.

C. *Stunting the Furtherance of the Social CEO*

Unfortunately, the new SEC guidelines may also have a chilling effect on one of the most promising opportunities presented by the acceptance of social media disclosure. Unlike at the time of Reg FD's adoption, executives now have more opportunities to connect with investors on a broad and consistent scale. However, the new SEC guidelines seem to chill such communication efforts by promoting company social media pages¹³⁹ as the superior avenue compared with executive pages.

The SEC's preference for company social media accounts ignores how rapid changes in communication mediums have fundamentally altered the way executives communicate and interact with Main Street. Unsurprisingly, the 2008 financial crisis has significantly damaged the American public's perception of executives.¹⁴⁰ While overall trust in CEOs has been on the rise, there are signals that those trends may not be continuing.¹⁴¹ However, the emergence of the "Social CEO" concept has shown strong connection between trust and engagement. A survey evaluating the impact of executive social media use found that 80.6% of respondents believed that CEO social media use is a very or somewhat important tool for engaging customers and investors.¹⁴² Unsurprisingly,

139. See *supra* text accompanying note 117 (noting the SEC's endorsement of corporate social media pages).

140. See S.D. "Shibu" Shibulal, *Infosys CEO: How to lead in a Post-Financial Crisis*, FORTUNE (June 20, 2014, 9:16AM), <http://fortune.com/2014/06/20/infosys-ceo-how-to-lead-in-a-post-financial-crisis-era/> (stating, "The events that led to the recent global economic crisis made it widely acknowledged as the crisis of trust.").

141. See EDELMAN, 2014 EDELMAN TRUST BAROMETER EXECUTIVE SUMMARY 6 fig. 12 (2014), available at <http://www.edelman.com/insights/intellectual-property/2014-edelman-trust-barometer/about-trust/executive-summary/> (explaining that trust in CEOs has risen 12% from 2009 to 2014. Despite these gains, trust in executives remained stagnant from last year).

142. BRANDFOG, 2013 CEO, SOCIAL MEDIA, & LEADERSHIP SURVEY 1 (2013), available at http://www.brandfog.com/CEOSocialMediaSurvey/BRANDfog_2013_CEO_Survey.pdf.

CEOs who do not actively disclose financial information via their social media accounts may be construed as actually hiding information.¹⁴³ When it comes to building trust, it appears that the medium is just as, if not more, important than the message itself.

Despite the clear benefits arising from social media use, executives have still shown a relative reluctance to embrace such platforms. For example, a survey of 130 company executives found that 48% did not engage with their company's social media strategy or even know any details about such plans.¹⁴⁴ Numerous forces have previously prompted this chilling effect. These variables include, but are not limited to, unfamiliarity with social media platforms and/or a reluctance or fear of repercussions surrounding misuse.¹⁴⁵ Such concerns are not unfounded. For example, Gene Morphis, the former CFO of Francesca's, was fired after tweeting about a board meeting on his private social media account.¹⁴⁶ Even though Morphis only had 234 Twitter followers, the possibility of the SEC interpreting his tweet as an attempt to share insider information prompted Francesca's to terminate his employment.¹⁴⁷ Stories such as these, in addition to the Hastings controversy, may further breed a mentality that the possibility of placing oneself or one's company in the regulatory cross-hairs may be enough to deter social media use all together.

Chilling social media disclosures by executives is an indirect harm of the new guidelines that should not be overlooked. Some commentators have argued that one of the more significant aspects of the SEC's new disclosure requirements is that it "further validates an executive's role in social media engagement."¹⁴⁸ By allowing for the possibility of executive disclosure, the SEC can be perceived as giving validity to the widespread belief in the social media world that the use of these communication tools should be a top-down endeavor.¹⁴⁹

Promoting a top-down approach advances the mission of Reg FD by employing a proven method of promoting trust and transparency in the

143. Jason Ouellette, *Should companies begin to use social media to disseminate financial data*, PR WEEK US (June 1, 2013), <http://www.prweek.com/article/1275624/companies-begin-use-social-media-disseminate-financial-data>.

144. Laura Montini, *Survey: Executives Have No Idea What's Going on With Social Media*, INC. (Nov. 5, 2013), <http://www.inc.com/laura-montini/executive-social-media-involvement.html>.

145. Evan LePage, *What the SEC's Social Media Decision Means for Enterprises*, HOOTSUITE BLOG (April 4, 2013), <http://blog.hootsuite.com/secs-social-decision-means/>.

146. Ryan Holmes, *Social Media Compliance Isn't Fun, But It's Necessary*, HARVARD BUSINESS REVIEW BLOG (Aug. 23, 2012, 1:00 PM), <http://blogs.hbr.org/2012/08/social-media-compliance-isnt/>.

147. *Id.*

148. LePage, *supra* note 145.

149. Montini, *supra* note 144.

investment community. One of Chairman Levitt's central tenets for Reg FD had been the belief that the health of US financial markets is tied to a perception of transparency.¹⁵⁰ While the 2008 financial crisis came with many stories of executive actions undermining confidence in U.S. markets, individuals in similar roles may play an equally important role in the rebuilding process. Encouraging executive social media use in the disclosure context supports Chairman Levitt's vision because it presents "an easy way to reassure that the information is accurate and important."¹⁵¹

The decision whether to use personal social media accounts for disclosure purposes illustrates a fringe challenge of an evolving conception of fairness. While thought leaders, such as Commissioner Unger, recognized that Reg FD would need to adapt with changes in communication technology,¹⁵² there had been less emphasis on how changes in technology would alter the relationship between the actors involved in disclosure. It is not surprising that as investors have evolved and adapted, the issuers themselves have concurrently changed. Therefore, the future of fairness must not just hinge on changing mediums, but changing relationships as well.

CONCLUSION

The initial premise of Reg FD has helped to promote increased fairness in the financial markets. However, the current information marketplace makes preserving these central pillars an increasingly challenging task. The world of conference calls to investors has been replaced by one where companies have more opportunities to communicate with more people in more ways than any time in history. Communicating in such a way is no longer a privilege enjoyed by large public companies and institutional investors; rather it has become an expectation by consumers. Understanding the SEC's past concerns over fair disclosure and the ideological shift in its guidelines help to inform how history will impact the future of disclosure practices.

150. See text accompanying notes 24-27 (noting that Chairman Levitt considered transparency as a bedrock principle of the securities markets).

151. LePage, *supra* note 145.

152. See *supra* Section I.E (detailing Commissioner Unger's views).