

How the SEC Report on Netflix Affects Corporate Use of Social Media to Disseminate Information





About CMP.LY

CMP.LY offers the only purpose-built social media disclosure solution. For more than three years, CMP.LY has worked with leading brands and agencies to address disclosure challenges and demonstrate best practices. For more information about CMP.LY solutions, and to stay abreast of industry updates, please visit www.cmp.ly.

Legal Disclaimer

This document is not intended to provide legal advice and you should seek the advice of counsel to discuss specific application of disclosure solutions to your unique circumstances.

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On April 2, 2013, the SEC released a report describing the investigation of Netflix CEO, Reed Hastings and his disclosure of material, nonpublic information via his personal Facebook page.

The SEC used this report as an opportunity to update the Commission Guidance on the Use of Company Web Sites originally published on August 7, 2008 to take into account the use of social media channels. The report reinforces all the language of the original document and underscores that the original guidance was intended to apply to new technologies for dissemination of information as they develop. More specifically, the report provides further clarification that: social media networks—when used properly—are acceptable platforms for dissemination of corporate information; Regulation FD applies equally to social media communications; and identifies the most important factors for achieving compliance with the Regulation when using social media for corporate communications.

Background of the Investigation

On July 3, 2012 Mr. Hastings posted an update to Facebook that revealed Netflix had delivered streaming video in excess of 1 billion hours in the preceding month, which represented a 50% increase in volume over the company's previous public statement. Prior to this announcement, Netflix had never used the CEO's Facebook page to disseminate information to the public and the company had not informed shareholders that his Facebook page was an official channel for communications of this nature. The SEC investigated the matter and chose not to pursue an enforcement action, but rather to use the report of the investigation as an opportunity to provide further clarification in regards to how the 2008 Guidance applies to social media.



Best Practices for Use of Social Media for Dissemination of Information to the Public

There are a few key considerations that we at CMP.LY feel are fundamental to developing and establishing best practices, including:

- Provide the public with advance notice through your existing channels of which social media accounts you will be using to publish information.
- Make sure to use social media channels that the investing public can freely access.
- Avoid using officer and employee personal social media accounts unless you plan to specifically designate them as sources of company information.
- Apply the same level of scrutiny to information disseminated through social media that you would elsewhere.
- Make certain to follow the individual guidelines for dissemination of social media in electronic channels as laid out in the 2008 guidelines.



The Top Things You Need to Know about the Use of Social Media to Disseminate Company Information

1. The SEC Is Supportive

The SEC takes a positive view in general toward any development that will make it easier for the investing public to access information. The Commission has explicitly stated its support for companies' use of electronic platforms such as corporate websites, blogs and now social media for dissemination of information to the public—so long as it is done responsibly.

2. Choose Your Channels Wisely

Remember that the core principle of Regulation FD is the prohibition against selective sharing of material, non-public information to select individuals. Therefore, when choosing which channels to use to disseminate company information, select platforms that the public can freely access and avoid using the personal accounts of individual officers or employees unless you plan to make those recognized company channels.

3. Give Reasonable Notice

Your social accounts will only stand up under Regulation FD analysis if they are “recognized channels for distribution” when you begin to publish information on them. The SEC recommends using your corporate website and other, more traditional channels to give advance notice of which social accounts you plan to use and to repeat this information on a regular basis.

4. The Standards Are the Same

All of the rules of Regulation FD apply to communications in social media. Despite the fact that platforms like Facebook and Twitter are popularly viewed as more informal, conversational forums than traditional channels, the requirements for compliant sharing of information remain the same (for more detail on these, see page 5 below).

5. Keep It under Control

The SEC has explicitly stated that companies are responsible for the communications that representatives make in interactive forums on their behalf and instructed companies to establish controls and procedures for making those representatives aware of their responsibilities, monitoring their activities on these platforms and certifying compliance. You should employ the same approach to social media. (Note that, as always, you are not responsible for comments made by unaffiliated third parties, nor are you obligated to respond to them.)

6. It Doesn't Hurt to Repeat Yourself

At least until such time as your Twitter handle, Facebook page, etc. are well known as “recognized channels for distribution”—and even afterwards—it is a good practice to also disseminate material, non-public information through additional, more established channels such as your company website, corporate press releases and of course EDGAR filings in a timely fashion.



What Has Changed?

The Netflix report does not propose any new rules; rather, it clarifies the 2008 guidance in order to illustrate how it applies to social media. The report encourages responsible use of social media for dissemination purposes and provides guidance on the key considerations necessary to bring Facebook, Twitter and other corporate accounts into compliance as recognized distribution channels.


The report stresses the need to give the investing public sufficient advance notice prior to using a social account as a distribution channel in order to establish it as a recognized distribution channel. Once this step is complete, the Commission advises that companies simply apply the 2008 guidance on Regulation FD analysis and compliance standards generally, and the guidance on interactive web site features in particular, to their use of the social channel.

What Does this Mean for Companies Disseminating Information via Social Media?

Companies that have an existing practice of using social media to distribute information should determine whether or not they have provided appropriate notice of that fact to the public. Likewise, those that are planning new social dissemination efforts should review their plans to publicize the account(s) they will be employing. Best practice is to give notice both through the channel itself and through your existing recognized channels, such as the corporate website, press releases, etc. Companies should then continue to provide notice of all their recognized social channels periodically on an ongoing basis.

Once a company has effectively established the appropriate social media accounts as recognized distribution channels, it should focus on diligent adherence to the 2008 guidelines. Key applications of the guidance in the context of social media include:

- Keep your account(s) current, active and accurate.
- When providing summaries, commenting on complex issues or referencing previously published content, make sure to provide access to the full information, either in context or via hyperlink placed in close proximity to the relevant content.
- Beware of entanglement and adoption; when hyperlinking to third-party content, be sure to provide context for why you are providing the information and disclose—or disclaim—any connection to the source, as appropriate.
- Avoid hyperlinking to false or misleading information; even prominent disclaimer will not protect you from fraud if you knowingly disseminate deceptive content.
- Establish controls and procedures to monitor statements made by or on behalf of the company in social media.

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- Make representatives of the company aware of their responsibilities in social media and the fact that they cannot avoid these responsibilities by purporting to speak in their “individual” capacities.
 - If you choose to use your social media channels to release material, non-public information as an alternative to providing it in an Exchange Act report, certify that your CEO and CFO are responsible for maintaining your controls and procedures and the information has been made known to them.

Remember that the SEC judges Regulation FD violations on a facts-and-circumstances basis; be sure to comply with not just the letter, but also the spirit of the Regulation.

How CMP.LY Addresses these Challenges

CMP.LY offers solutions to address disclosure, compliance and measurement challenges across social media networks such as Twitter and Facebook. Our patent-pending technology helps businesses and individuals alike meet their legal obligations while increasing openness and transparency on the social web.

We created the CMP.LY Disclosure Standard to establish a simple, structured and documented method to deliver required disclosures in social media. It is designed as a system of layered notices; they all begin with a disclosure URL (or a visual badge) that can be inserted into any social media communication and used to link directly to a detailed disclosure page providing the full legal language or, instead, to a page of content (such as an article or a video), which will be framed with a banner summarizing the disclosure—and from which the reader can then view the full disclosure page. Our system addresses the need to communicate with consumers in plain English and in space-constrained environments while still delivering the often lengthy and nuanced disclosure content required of businesses. With tweet-friendly character counts, our Plain Language disclosure URLs provide notice of disclosures, disclaimers, warnings and other fine print in simple, recognizable words, without distracting from the message content or taking up too many characters.

Using our CommandPost products, businesses can create their own disclosures for distribution across their corporate and third-party networks and can then track the relevant social media channels to meet applicable monitoring requirements and/or measure program results. CommandPost works across the major social platforms, automatically and at scale.

Key Benefits of Using CommandPost

- **Simple Disclosure Standard:** The value of consistency to the consumer is underscored in the 2008 guidelines (and the Com Disclosures report recently issued by the FTC). Broad use of the CMP.LY Disclosure Standard can contribute greatly to the collective consumer experience and ensures that businesses can implement consistent policies across their organizations.



- **Clear and Conspicuous Language:** Every one of our disclosures can be delivered using plain language URLs that allow you to communicate disclosure information in the context of a short-form message even before the consumer clicks through to the full disclosure text.
- **Robust and Flexible Framework:** We make it easy to address a broad range of disclosure and compliance needs. With the CMP.LY Disclosure Standard, businesses can choose from a broad range of notice and display options that can be used to present disclosures clearly within the text of a message, in close proximity to the relevant content.
- **Universal Accessibility:** Our disclosure framework is optimized for use across platforms as well as mobile screens and operating environments, ensuring your disclosures are not compromised by technology limitations.
- **The Power of Layered Notices:** Our disclosure tools were designed to address disclosure needs in space-constrained environments. The CMP.LY framework provides the ability to combine multiple disclosures, lengthy disclosures, additional context and supporting information, without detracting from the consumer experience.
- **Unavoidable Presentation:** Our system ensures that consumers will see the relevant disclosure in the context of even the shortest tweet and, when used to link to content, provide complete disclosure text in conjunction with your content by means of disclosure banners and interstitials.
- **Documented Process:** When you create disclosures through CommandPost Oversight, you gain the benefit of a complete audit trail—from creation to the most recent use in social media—allowing you to show compliance and demonstrate best practices.
- **Centralized Recordkeeping:** CommandPost Oversight provides you with a consolidated repository of your social and digital disclosure and compliance documentation across all programs and platforms.
- **Automated Compliance Monitoring:** When controls and procedures are required, you can use CommandPost Oversight to automatically track social media accounts to record communications and monitor for the inclusion—and omission—of disclosure information across your owned channels as well as those of individual third parties.
- **Valuable Measurement Data:** When you add CommandPost Insight, you also gain access to program-specific data on reach, engagement, click-throughs and more. These tools allow you to measure performance, benchmark your programs and optimize your tactics—all in real time.



Where Can I Learn More?

The SEC provides businesses with resources, insights and access to closed investigations at www.sec.gov. Additionally, you may find the FTC's guidance on social media useful for your marketing efforts; you can find it along with other resources at www.ftc.gov.

The Word of Mouth Marketing Association (WOMMA) has been on the forefront of the issues of disclosure, transparency and ethics in WOM marketing since 2004. There are a number of resources available at www.womma.org/ethics and a recently updated Social Media Disclosure Guide can be found at www.womma.org/disclosure. In addition, WOMMA offers a daily SmartBrief at www.smartbrief.com/news/WOMMA/index.jsp. (Please note that the CMP.LY CEO Tom Chernaik is the Co-Chair of the WOMMA Members Ethics Advisory Panel.)

You can find more information about CMP.LY, our Disclosure Standard and our CommandPost products at www.cmp.ly. We provide ongoing updates on developments in social media regulation and other useful information in our newsletter, which you can sign up for here: <http://cmp.us2.list-manage.com/subscribe?u=7cbaeb9cae0053807f4388c87&id=1d590f7287>. If you would like to learn more about the FTC's .Com Disclosures report, please visit www.cmp.ly/dcdreport for our complete whitepaper.