

SEC Charges Public Company with Regulation FD Violation over CEO'S Social Media Posts

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The Securities and Exchange Commission (SEC) recently charged a public company with violations of Regulation Fair Disclosure (“Regulation FD”) stemming from social media posts by the company’s CEO. These charges are evidence of a trend toward increased Regulation FD enforcement by the SEC.

THE VIOLATION OF REGULATION FD

On July 27, 2023, a public relations firm for a public company (the “Company”) posted on the CEO’s personal X and LinkedIn accounts (the “Posts”) that the Company was seeing “potential for growth in new markets” and was “still seeing really strong growth in existing states.”^[1]

However, at the time of the Posts, the Company had not yet published its second-quarter-2023 financial results or otherwise publicly disclosed the information in the Posts.^[2] Communications staff at the Company realized the error, and within 30 minutes from the Posts’ publication, the public relations firm had removed the Posts.^[3]

Regulation FD prohibits public companies from selectively disclosing material nonpublic information to certain individuals, including investors,^[4] and, when unintentional selective disclosure is made, requires that public disclosure follow as soon as reasonably practicable.^[5] The SEC charged the Company with violating Regulation FD and section 13(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) for selectively disclosing material nonpublic information to investors who saw the Posts on the CEO’s personal social media accounts.^[6] Further, the SEC charged the Company with failure to make the “required prompt, public disclosure” after realizing the error, because it failed to publicly disclose the information about its second-quarter financial earnings for seven more days.^[7]

THE SETTLEMENT

Without admitting or denying the SEC’s findings of violations of Regulation FD and section 13(a) of the Exchange Act, the Company consented to cease and desist from any further violations.^[8] Pursuant to the Company’s settlement with the SEC, it agreed to (1) pay a \$200,000 civil penalty to the SEC and (2) train all employees with corporate-communication responsibilities on compliance with Regulation FD.^[9]

KEY TAKEAWAYS

Public Companies Must Use Extreme Care in Social Media Communications. Social media can be an acceptable place for company announcements so long as (1) investors are all alerted that information may be disseminated that way and (2) the social media accounts are not restricted to only some investors.^[10] Public companies should establish or review their Regulation FD policies to ensure that they provide accurate rules and restrictions on disclosure of material nonpublic information and that the policies cover public company executives' private social media accounts.

Accidents Happen, but When They Do, Prompt Action Is Essential. While having effective policies is important to ensure Regulation FD compliance, public companies must also undertake prompt corrective action, if any violations occur, by disclosing the information within 24 hours or within the next business day of discovering that information has been selectively disclosed.^[11] In this case, the Company had Regulation FD policies in place that prohibited the use of social networks to disseminate material nonpublic information, and had a quiet period between the end of the quarter and the filing of the Company's quarterly report during which Company spokespersons were barred from discussing any financial or operational results.^[12] However, the violations still occurred and the Company was still charged with violating Regulation FD for failing to take corrective action.

SEC Enforcement of Regulation FD Is Slowly Rising. In the 24 years since Regulation FD was adopted, SEC enforcement has been rare. However, several Regulation FD enforcement actions over the past few years^[13] demonstrate that the SEC is starting to focus more on companies' disclosure compliance and fairness to investors. Public companies should establish or review their Regulation FD policies to ensure that all employees and third parties maintain compliance.

Winston's *Capital Markets and Securities Law Watch* will continue to monitor SEC enforcement of Regulation FD and the SEC's positions on public-company selective disclosure and will post additional updates as they become available.

[1] Administrative Proceeding, Exchange Act Release No. 101198, at 2 (emphasis added) (Sept. 26, 2024).

[2] SEC Press Release (Sept. 26, 2024).

[3] Administrative Proceeding, Exchange Act Release No. 101198, at 2 (Sept. 26, 2024).

[4] *Id.* at 1–2.

[5] *Id.* at 5.

[6] *Id.*

[7] *Id.*

[8] *See id.* at 1.

[9] *Id.* at 6.

[10] SEC Press Release, SEC Says Social Media OK for Company Announcements If Investors Are Alerted (May 22, 2013).

[11] Administrative Proceeding, Exchange Act Release No. 101198, at 5 (Sept. 26, 2024).

[12] *Id.* at 4.

[13] *See* SEC Reg FD Charge in 2022; *see* SEC Reg FD Charge in 2019; *see* SEC Reg FD Charge in 2010.

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