

**CELEBRITY EXECUTIVES AND SOCIAL MEDIA:
ARE HIGH FOLLOWER COUNTS SUFFICIENT TO
SATISFY SEC DISCLOSURE OBLIGATIONS?**

STETSON BIGGS*

INTRODUCTION

Celebrities have long dominated the social media scene. Traditionally, the users with the most engagement have been musicians, film stars, and athletes.¹ However, with the developing and evolving uses of social media, corporations and their executives have achieved follower counts that compare to or outnumber those celebrities that have traditionally held the top spots. For example, YouTube now has over 70 million Twitter followers, making it the site's ninth most followed account.² Additionally, corporate executives, such as Bill Gates and Elon Musk, collectively have over 65 million Twitter followers.³

These high-profile corporate executives have achieved celebrity status, amassing millions of followers on social media. Similar to Steve Jobs, who served as the innovative face of Apple, they have become an integral and indispensable part of their respective companies' public appearance.⁴ The public views these executives as visionaries and oracles as they regularly engage with customers and shareholders through social media. As a result, these executives often garner widespread attention for their

* J.D., 2019, Sandra Day O'Connor College of Law at Arizona State University.

¹ FRIEND OR FOLLOW, <https://friendorfollow.com/twitter/most-followers/> (last visited Nov. 18, 2019).

² *Id.*

³ *Id.*

⁴ See *When the CEO is the Brand, But Falls from Grace, What's Next?*, KNOWLEDGE@WHARTON (Apr. 7, 2004), <http://knowledge.wharton.upenn.edu/article/when-the-ceo-is-the-brand-but-falls-from-grace-whats-next/>.

actions.⁵ Since the beginning of industry, these iconic individuals have impressed their knowledge and leadership upon customers, investors, and markets.⁶ Some of the first iconic executives in American history include Henry Ford and John D. Rockefeller while modern examples include Warren Buffet, Steve Jobs, and Elon Musk. However, while several corporate executives have become household names, many have not. For example, McDonalds' CEO, Steve Easterbrook, has a mere 12,000 followers on Twitter while Walmart's CEO, Doug McMillon, does not even have an account.⁷ As opposed to iconic executives whose profiles are indistinguishable from their companies, the public views these ordinary executives as faceless and temporary administrators with little bearing on investment decisions.⁸

This distinction between celebrity and ordinary executives raises questions about what duties, responsibilities, and privileges celebrity executives might have as compared to ordinary executives when it comes to federal disclosure requirements on social media. With social media becoming increasingly popular and interactive, it has become an obvious forum to share information for broad and rapid dissemination. Once executives establish a significant social media presence and gain large public followings, it makes sense for them to share information about their companies through social media while personally engaging with investors.

Furthermore, granting greater freedom to certain executives to share information on their personal accounts will benefit investors as the accounts attain wide recognition as a source of important investment information. In the social media era, individuals, celebrities, and corporate executives often post on a whim, publishing their thoughts in real time.⁹ While executives attempt to open an honest and unimpeded dialogue

⁵See Tom Taulli, *What Investors Look for in a CEO*, FORBES (Mar. 17, 2018, 10:34 AM), <https://www.forbes.com/sites/tomtaulli/2018/03/17/what-investors-look-for-in-a-ceo/#254077b5d4de>.

⁶ See KNOWLEDGE@WHARTON, *supra* note 4.

⁷ See FRIEND OR FOLLOW, *supra* note 1.

⁸ See Rachel Gillett, *21 of the most and least loved top CEOs*, BUS. INSIDER (Nov. 3, 2017, 7:29 AM), <https://www.businessinsider.com/famous-ceos-most-and-least-popular-2017-10>.

⁹See Liz Moyer, *Securities lawyers shocked by Elon Musk's tweet, point to potential legal minefield*, CNBC (Aug. 7, 2018, 4:02 PM), <https://www.cnbc.com/2018/08/07/elon-musk-tweet-shows-the-hazards-of-being-an-interesting-ceo.html>.

with investors and followers, their actions can become dangerous, causing investors to act on an executive's late-night thoughts. Despite these dangers, the modern investor expects this type of behavior from leaders that it views as brilliant, but eccentric.¹⁰ Like never before, investors have personal insight into an executive's immediate thoughts and feelings. Because some executives have obtained such substantial followings, their thoughts as published on social media should satisfy fair disclosure regulations without express prior notice to investors from their companies.

This article will address the Securities and Exchanges Commission ("SEC") disclosure requirements found in Regulation Fair Disclosure ("Regulation FD") as applied to celebrity executives. Part I will define the parameters of Regulation FD. It will then examine those rules as they apply to social media. Part II will address the adequate notice requirement and determine whether Regulation FD requires express prior notice. Part III will consider how a high-profile executive's personal social media account might become a recognized channel of distribution that is designed to provide broad dissemination. Part IV will explain the consequences a celebrity executive may face in making unauthorized disclosures on social media. Finally, Part V will present an argument that the SEC should issue clearer guidance on Regulation FD and social media by clarifying that express prior direction is not required for executives that satisfy certain criteria.

I. REGULATION FAIR DISCLOSURE

The SEC has established several guidelines for the dissemination of information.¹¹ One such guideline is Regulation FD which the SEC released in 2000.¹² Regulation FD prohibits public companies from disclosing non-public, material information unless the information is distributed to the public first or simultaneously.¹³ With Regulation FD's implementation,

¹⁰ See *infra* pp. 122–24.

¹¹ See *Compliance and Disclosure Interpretations*, SEC. & EXCH. COMM'N, <https://www.sec.gov/divisions/corpfin/cfguidance.shtml> (last visited Nov. 18, 2019).

¹² Regulation FD, 17 C.F.R. § 243.100 (2000).

¹³ *Id.*

drafters intended to limit selective disclosure.¹⁴ Selective disclosure occurs when individuals within a public company furnish market-moving information to a select number of investors, allowing these investors to act on the information and gain an unfair advantage over other investors who do not have access to the same information.¹⁵

Two major considerations implicate Regulation FD: (1) whether the disclosed information is public and (2) whether the information is material.¹⁶ A key factor in determining if information is public is whether the company disseminates the information in a manner that makes the information available to investors at large.¹⁷ For instance, information in an 8-K is public even though many casual investors may not regularly follow a company's releases or SEC filings.¹⁸ But, because the 8-K is publicly available and accessible, it is "public" and satisfies Regulation FD. Although securities laws leave autonomy and ultimate decision-making authority to investors, federal securities laws require access to information to balance investor and corporate responsibility.¹⁹

Materiality is a more controversial question because the SEC does not formally define the term.²⁰ In *TSC Industries, Inc. v. Northway, Inc.*, TSC Industries issued a joint proxy statement to its shareholders recommending approval for a proposal to exchange all TSC common and preferred stock for a purchasing company's Series B stock and warrants.²¹ Shareholders brought action claiming that the proxy statement contained material omissions.²² Justice Marshall stated in the majority opinion that a fact is material if there is a "substantial likelihood that a

¹⁴ *Fair Disclosure, Regulation FD*, SEC. & EXCH. COMM'N, <https://www.sec.gov/fast-answers/answers-regfdhtm.html> (last visited Nov. 18, 2019).

¹⁵ 17 C.F.R. § 243.100.

¹⁶ *Id.*

¹⁷ *See* Sec. & Exch. Comm'n v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968).

¹⁸ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,868 (2008) (to be codified at 17 C.F.R. pt. 241 and 271).

¹⁹ *What We Do*, SEC. & EXCH. COMM'N, <https://www.sec.gov/Article/whatwedo.html> (last visited Nov. 18, 2019).

²⁰ 17 C.F.R. § 243.100 (2000).

²¹ *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

²² *Id.*

reasonable shareholder would consider it important” in making an investment decision.²³ In other words, if the facts “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available,” then those facts are material.²⁴ Additionally, Regulation FD’s initial release included some examples of events that may constitute material information. These events include: earnings, mergers, acquisitions, tender offers, joint ventures, new products, new discoveries, developments regarding customers or suppliers, changes in management control, defaults on senior securities, stock splits, dividends, redemptions or repurchases of securities, sales of securities, and bankruptcy.²⁵ While there is no clear test for determining materiality, the specific examples help guide the analysis.

Although Regulation FD seeks to limit selective disclosure, it does not absolutely prohibit company officers from communicating with shareholders or other individuals.²⁶ Some limited exceptions permit the company to disclose information to select individuals.²⁷ For instance, a company may communicate with a person who owes the company a duty of confidence, including legal counsel and financial advisors.²⁸ Companies may also make agreements with people who agree to maintain the information in confidentiality.²⁹ While a promise not to trade on the information is not required, insider trading laws may still apply.³⁰ Additionally, companies may make communications in connection with an offering of registered securities.³¹ Companies must note that this exemption only applies to registered

²³ *Id.* at 449.

²⁴ *Id.*

²⁵ *Final Ruling: Selective Disclosure and Insider Trading*, SEC. & EXCH. COMM’N, <https://www.sec.gov/rules/final/33-7881.htm> (last visited Nov. 18, 2019).

²⁶ 17 C.F.R. § 243.100 (2000).

²⁷ *Id.*

²⁸ *Regulation FD*, SEC. & EXCH. COMM’N (June 4, 2010), <https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm>.

²⁹ *Id.*

³⁰ Anna T. Pinedo & Brian D. Hirshberg, *FREQUENTLY ASKED QUESTIONS ABOUT REGULATION FD*, Morrison & Foerster (2017), <https://media2.mofo.com/documents/faqs-regulation-fd.pdf>.

³¹ *Id.*

securities.³² There is no exception for communications regarding unregistered securities.³³

Securities laws have long sought to provide fairness for investors by limiting informational asymmetry.³⁴ Informational asymmetry exists when companies release information to a select few or retain the information for insiders.³⁵ Disclosure rules allow investors to be sufficiently informed before making an investment.³⁶ If investors have fair access to material information, they will each have a fair opportunity to trade on the information.³⁷

A. DOES REGULATION FAIR DISCLOSURE APPLY TO SOCIAL MEDIA?

In 2008, the SEC took its first significant step towards applying Regulation FD to social media when it released guidance on Regulation FD as applied to company websites (2008 Release).³⁸ This was a much needed clarification to the rules, as society had become increasingly reliant on the internet for information. The SEC recognized that company websites are an efficient and inexpensive way to disseminate information to investors.³⁹ In the release, the SEC began by providing guidance on if and when information is “public,” therefore making Regulation FD applicable.⁴⁰ According to the text of Regulation FD, “[i]n order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react.”⁴¹ This means that companies must consider if (1) the company website is a recognized channel of distribution, (2) the company website disseminates the information in a manner that

³² 17 C.F.R. § 243.100 (2000).

³³ *Id.*

³⁴ *See* SEC. & EXCH. COMM’N, *supra* note 19.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862 (Aug. 7, 2008) (to be codified at 17 C.F.R. pt. 241 and 271).

³⁹ *Id.* at 45,863.

⁴⁰ *Id.*

⁴¹ *Id.* at 45,867.

makes it available to the securities marketplace in general, and (3) a reasonable waiting period has passed for the market and investors to react to the information.⁴²

Whether a company's website is a recognized channel of distribution depends on the steps the company takes to alert the market that information will come from its website, the company's disclosure practices, and the extent of investors' and the market's use of the company's website.⁴³ Here, the concept of "dissemination" focuses on the manner in which the company posts the information on its website and the information's ready and timely accessibility to investors and the markets.⁴⁴ Factors to consider in determining whether information has been "disseminated" include the following: whether the company lets investors and markets know that it will disclose information from such a channel; how it lets investors and markets know this; whether the company has a pattern of posting such information through the channel; the extent to which the information posted is regularly picked up by the market and reported in the media; whether the channel is kept current and accurate; whether the company uses other methods to disseminate information; and the nature of the information.⁴⁵

Additionally, the SEC's 2008 Release described how to make information public in satisfaction of Regulation FD if a selective disclosure occurs.⁴⁶ Prior to this release, the law required companies to furnish an 8-K or use some other broad form of communication promptly after an unintentional selective disclosure or simultaneously in the case of an intentional disclosure.⁴⁷ With the 2008 Release, companies could now use their company websites to make disclosures without using an 8-K if their website has a large enough following.⁴⁸ Company websites with large followings might not implicate Regulation FD and might satisfy the public requirements since the information's

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 45,868.

⁴⁷ 17 C.F.R. § 243.100 (2000).

⁴⁸ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

release might not constitute a selective disclosure.⁴⁹ To determine if an informational release that a company makes via its website satisfies the public requirement, companies must consider the factors found in the 2008 Release.⁵⁰ Companies should use these factors to determine if the website is a recognized channel of distribution and if the information is “posted and accessible” and therefore “disseminated.”⁵¹ Additionally, companies should consider the website’s ability to meet the simultaneous or prompt timing requirements once a selective disclosure occurs.⁵² Though these analyses can be complex, companies have the responsibility both to evaluate the law and its own website to determine if a website posting satisfies these requirements.⁵³

In 2013, the SEC provided specific guidance on whether Regulation FD applied to social media (2013 Release).⁵⁴ In 2012, Reed Hastings, the CEO of Netflix, revealed to his 200,000 followers on his personal Facebook account that Netflix had achieved one billion hours of content viewing.⁵⁵ Hastings had never used his personal Facebook account to disclose material information for Netflix nor had Netflix ever directed investors to his personal account for investment information.⁵⁶ This disclosure was substantial enough to warrant an SEC investigation into whether Hastings had violated Regulation FD by revealing market-moving information.⁵⁷ In 2013, the SEC issued an opinion stating that he had violated Regulation FD, but that it would not take action against him or Netflix.⁵⁸ Instead, the SEC recognized that Regulation FD’s application to social media was unclear and took the opportunity to clarify Regulation FD and its application to social media.⁵⁹

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ SEC. & EXCH. COMM’N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: NETFLIX, INC. AND REED HASTINGS (2013), <https://www.sec.gov/litigation/investreport/34-69279.pdf>.

⁵⁵ *Id.* at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The SEC relied on its 2008 Release regarding Regulation FD and company websites to conclude that social media can be a proper channel of distribution under certain circumstances.⁶⁰ The social media account must be a recognized channel of distribution, disseminate the information in a manner that makes it available to the securities marketplace in general, and allow a reasonable waiting period for the market and investors to react to the information.⁶¹ Like they do for company websites, companies must intensively examine the factors found in the 2008 Release to determine if a social media account is a recognized channel of distribution that is designed to facilitate broad dissemination.⁶²

B. DO TWEETS REALLY MOVE MARKETS?

While executives with small social media followings are unlikely to see stock prices increase or decrease with a single post, at least initially, executives with large followings often create immediate changes in stock price when they share material information.⁶³ Elon Musk, who has 23 million Twitter followers, regularly caused sharp increases and decreases to Tesla's stock price with his tweets.⁶⁴ For example, on April 1, 2018, Musk tweeted that Tesla had gone bankrupt.⁶⁵ Although this was an April Fool's Day joke, Tesla's stock immediately dropped 5 percent.⁶⁶ On June 12, 2018, Musk announced a reorganization on his Twitter account that would result in a firing of 9 percent of Tesla's workforce.⁶⁷ Stock prices quickly increased from \$332 per

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 3.

⁶² *Id.* at 5.

⁶³ Alex Davies, *A Brief History of Elon Musk's Market-Moving Tweets*, WIRED (Aug. 29, 2018, 5:31 PM), <https://www.wired.com/story/elon-musk-twitter-stock-tweets-libel-suit/>.

⁶⁴ *Id.*

⁶⁵ Elon Musk (@elonmusk), TWITTER (Apr. 1, 2018, 3:02 PM), <https://twitter.com/elonmusk/status/980566101124722688?lang=en>.

⁶⁶ Jena McGregor, *Elon Musk's April Fools' tweets were 'not a joking matter,' experts say*, WASH. POST (Apr. 3, 2018, 10:55 AM), https://www.washingtonpost.com/news/on-leadership/wp/2018/04/03/elon-musks-april-fools-tweets-were-not-a-joking-matter-experts-say/?utm_term=.3e5e48565cae.

⁶⁷ Elon Musk (@elonmusk), TWITTER (June 12, 2018), <https://twitter.com/elonmusk/status/1006597562156003328>.

share to \$342 per share.⁶⁸ This market fluctuation indicates that investors closely follow executive social media accounts and also react to their updates. Because investors react to the information that executives and companies share, executives and companies must take caution in sharing information. The SEC is surely aware and is ready to enforce disclosure rules against any violations.⁶⁹

II. THE PRIOR NOTICE FACTOR

Generally, in order to be a recognized channel of distribution, a company must direct investors to the channel beforehand.⁷⁰ Although a social media account can be a suitable medium for communicating with investors, it is not suitable “if the access is restricted or if investors don’t know that’s where they need to turn to get the latest news.”⁷¹ For instance, the fact that Netflix had never directed investors to Hastings’s page was a major reason for his violation of Regulation FD.⁷² This is a factor to which the SEC usually gives substantial weight.⁷³

Before directing investors to a social media account, a company must determine what mediums are proper for providing such direction. The 2008 Release proposed that a company might include the disclosure of a social media account in its periodic reports, such as the company’s Form 10-Ks.⁷⁴ A company may also use press releases, particularly if it plans to share specific information with investors.⁷⁵ If a company directs investors to a social media account using one of these mediums, it will likely

⁶⁸ Claudia Assis, *Tesla to layoff 9% of its workforce, Elon Musk says*, MARKET WATCH (June 12, 2018, 5:16 PM), <https://www.marketwatch.com/story/tesla-to-layoff-9-of-its-workforce-elon-musk-says-2018-06-12>.

⁶⁹ The SEC brought action against Elon Musk just over one month after he tweeted that he had funding secured to take Tesla private. *See* Sec. & Exch. Comm’n v. Elon Musk, No. 1:18-cv-08865, at *1 (S.D.N.Y. Sept. 27, 2018).

⁷⁰ *See* SEC. & EXCH. COMM’N, *supra* note 54, at 7.

⁷¹ *SEC Says Social Media OK for Company Announcements if Investors Are Alerted*, SEC. & EXCH. COMM’N (April 2, 2013), <https://www.sec.gov/news/press-release/2013-2013-51.htm>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

⁷⁵ *Id.* at 45,868.

satisfy Regulation FD's requirements.⁷⁶ A company may also direct investors to an executive's social media account using a social media account or the company website if that medium is a recognized channel of distribution.⁷⁷ So long as the account has a substantial following, it should give investors sufficient opportunity to gain access to the account by registering, subscribing, or following. Companies often play it safe by releasing a press release and an 8-K directing investors.⁷⁸ Although this is the safest approach, it is not always necessary.⁷⁹

However, the SEC has provided little guidance on the extent of the direction. While the SEC has brought relatively few Regulation FD enforcement actions, the best way to determine whether the extent of the notice is sufficient is to examine a company's direction for investors and examine the SEC's response.⁸⁰ Tesla directed investors to its CEO's personal social media account in a 2013 8-K section labeled, "Interested in keeping up with Tesla?"⁸¹ This section provided that product and company information are available at teslamotors.com and that press releases and investor information have their own designated webpages.⁸² It then identifies Musk's and Tesla's Twitter accounts as sources of "additional information."⁸³ This is a potentially problematic way of directing investors to Musk's personal Twitter account since the 8-K merely uses the vague term "additional information." Investors may not be aware that Musk might share pertinent market and investment information on his

⁷⁶ *Id.*

⁷⁷ *Id.* at 45,867.

⁷⁸ See Richard J. Sandler, Davis Polk, & Wardwell LLP, *How to Use Social Media for Regulation FD Compliance*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Apr. 16, 2013), <https://corpgov.law.harvard.edu/2013/04/16/how-to-use-social-media-for-regulation-fd-compliance/>.

⁷⁹ See *infra* p. 118.

⁸⁰ Stuart Steinberg & Michael Doluisio, *A Refresher on Regulation FD and the SEC's Policing of Selective Disclosures*, DECHERT LLP (Apr. 2, 2018), <https://www.dechert.com/knowledge/publication/2018/4/a-refresher-on-regulation-fd-and-the-sec-s-policing-of-selective.html>.

⁸¹ Tesla Motors, Inc., Current Report (Form 8-K) (Nov. 5, 2013).

⁸² *Id.*

⁸³ *Id.*

Twitter account. As investors, they may believe that all pertinent information will be available on the designated investor page. While they have notice to monitor Musk's Twitter account, the direction minimizes its importance in comparison with other sources.

Furthermore, the 2008 Release suggested that companies that include website addresses in their reports should also make investors aware that they routinely post important information at that address.⁸⁴ By merely stating that Musk's personal account provides "additional information," there is no suggestion that important information will routinely appear on his account. This is problematic because even if investors are aware that pertinent investment information might come from Musk's personal account, they may not be aware that they should regularly follow his account to receive routine updates and information. Because this direction does not make all investors aware that they should subscribe to Musk's account for regular updates, other investors who happen to follow him will receive an advantage.

In contrast, Facebook directs investors to CEO Mark Zuckerberg's personal Facebook account in a much clearer and unambiguous fashion.⁸⁵ A Facebook 8-K from April 27, 2016, states, "Facebook uses the investor.fb.com and newsroom.fb.com websites as well as Mark Zuckerberg's Facebook Page (<https://www.facebook.com/zuck>) as means of disclosing material non-public information and for complying with its disclosure obligations under Regulation FD."⁸⁶ This form of direction is more likely to comply with Regulation FD because it does not distinguish between the different types of information that each source shares. The direction ensures that investors know that they should be equally aware of each source in following Facebook's informational disclosures.

While Tesla's direction seems to be problematic, the SEC has not accused Musk or Tesla of violating Regulation FD.⁸⁷ In a recent settlement for fraud, the SEC accused Tesla of not properly

⁸⁴ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867.

⁸⁵ Facebook, Inc., Current Report (Form 8-K) (Apr. 27, 2016).

⁸⁶ *Id.*

⁸⁷ See *infra* p. 133–34.

monitoring and filtering Musk's tweets.⁸⁸ However, the SEC recognized that Tesla had directed investors to Musk's account in a 2013 8-K.⁸⁹ It also acknowledged that, since that time, Musk had regularly disseminated material information through his Twitter account to investors and followers.⁹⁰ The SEC did not indicate that it had any problem with the manner in which Tesla directed investors to Musk's account, nor did it indicate that Musk had violated Regulation FD during the period in question.⁹¹ This indicates that either Tesla's direction in its 8-K was sufficient, or that Musk's regular tweeting habits and large following satisfied Regulation FD.

Ultimately, providing direction to investors is a sure way to establish a recognized channel of distribution. Notifying investors directly is more likely to satisfy the SEC when making disclosures. While it may not be necessary, it is certainly helpful.

A. IS EXPRESS PRIOR NOTICE REQUIRED?

The SEC stated in its 2013 Release that without prior direction, an executive's personal social media is "unlikely to qualify as a method 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public' within the meaning of Regulation FD."⁹² This is even true of executives with large social media followings.⁹³ However, by merely expressing that qualification was unlikely, the SEC left open the possibility that a company executive with a large enough social media following may satisfy the rule without providing prior direction to the account.⁹⁴ The key is whether investors know where to go to receive the latest news.⁹⁵

In its 2008 Release, the SEC indicated that companies with large enough followings may satisfy the element of making

⁸⁸ *Elon Musk Settles SEC Charges; Tesla Charged With and Resolves Securities Law Charge*, SEC. & EXCH. COMM'N (Sept. 29, 2018), <https://www.sec.gov/news/press-release/2018-226>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 3.

the information public.⁹⁶ This same logic should apply to social media accounts. Because the SEC provides other factors such as whether an account has a pattern of posting such information⁹⁷ and the frequency with which the market and media pick up on the information,⁹⁸ the SEC seems to have endorsed a functional equivalence standard. Actual access to an account as well as reasonable foreseeability that the account will continue to share information serve as the equivalent of providing prior notice. So long as investors have access to the account and are aware that the account will share investment information, the account should satisfy the factor that investors receive prior notice.

Additionally, interpretive releases are not positive law, meaning that they do not create new requirements for Regulation FD.⁹⁹ Neither do such administrative releases increase liability under federal securities laws.¹⁰⁰ Rather, they create safe harbors and reveal strategies that the SEC might use in enforcing regulations.¹⁰¹ To impose additional requirements, there must be a formal amendment to Regulation FD.¹⁰² As such, the factors that the 2008 Release presents are not requirements. This includes whether a company has expressly notified investors that a particular account will share pertinent investment and market information. Therefore, for a post to implicate and satisfy Regulation FD, it must simply be material and disseminate the information in a broad and non-exclusionary manner to the public.¹⁰³

Also, social media in 2019 is vastly different than social media in 2013. The SEC made clear that Regulation FD should evolve alongside technology and recognized that changing technology continues to facilitate the dissemination of information.¹⁰⁴ Social media continues to grow among celebrities,

⁹⁶ See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Researching the Federal Securities Laws Through the SEC Website*, SEC. & EXCH. COMM'N (Dec. 4, 2012), <https://www.sec.gov/reportspubs/investor-publications/investorpubssecuritieslawshtm.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 17 C.F.R. § 243.100.

¹⁰⁴ See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

average users, and corporate executives.¹⁰⁵ In 2012, when Reed Hastings announced that Netflix viewers had achieved one billion viewing hours a month, the most followed Twitter celebrity was Lady Gaga with roughly 20 million followers.¹⁰⁶ In 2019, Katy Perry is the most followed person on Twitter with roughly 107 million followers, more than five times the amount of followers that Lady Gaga had in 2012.¹⁰⁷ Between 2012 and 2018, YouTube's Twitter following increased from nine million to 71 million followers.¹⁰⁸ Similarly, Tesla's Musk has a follower count increased from 225,000 followers to 23.4 million followers during the same period.¹⁰⁹ In 2012, to reach one million followers was a significant feat; now, users gain millions of followers each year.

Furthermore, not only have high-profile executives gained more followers, more people now use social media.¹¹⁰ In 2012, roughly 57 percent of the U.S. population had a social media account.¹¹¹ In 2018, that percentage increased to 77 percent.¹¹² While the general population continues to increase its social media adoption, investors are doing so also.¹¹³ A 2014 study revealed that three-fourths of millionaire investors use social media.¹¹⁴ This increase in social media adoption is a technological evolution that further facilitates the dissemination of information. Like never

¹⁰⁵ See *infra* notes 114–119.

¹⁰⁶ Ramona Emerson, *Celebrities On Twitter: The 19 Most Popular Stars*, HUFFINGTON POST (Mar. 15, 2012, 10:15 AM), https://www.huffingtonpost.com/2012/03/14/celebrities-on-twitter-most-popular-users_n_1345188.html.

¹⁰⁷ FRIEND OR FOLLOW, *supra* note 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See J. Clement, *Share of U.S. population with a social media profile 2008-2019*, STATISTA (Aug. 9, 2019), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Bryan Borzykowski, *How investors are using social media to make money*, CNBC (June 9, 2016, 10:15 AM), <https://www.cnbc.com/2016/06/09/how-investors-are-using-social-media-to-make-money.html>.

¹¹⁴ See *Social Media Use Among Affluent Investors*, SPECTREM GROUP (Feb. 26, 2018), <https://spectrem.com/Content/social-media-usage-affluent-investors.aspx>.

before, both executives and investors are equipped to engage in market and investment related communications via social media because they are increasingly familiar with and reliant on its technology for information. Because these groups now maintain a significant presence on social media, Regulation FD has naturally evolved to the point where express prior notice is not always necessary.

Beyond incredible growth in recent years, social media companies like Twitter and Instagram have increasingly focused efforts on establishing a platform for high-profile individuals to share important information with their followers.¹¹⁵ They advertise their follower counts, provide ad-free experiences, and supply coveted blue checkmarks that represent verified status.¹¹⁶ Algorithms also ensure that average users view important content that popular celebrities share, even if those users do not subscribe to that particular celebrity's feed.¹¹⁷ Public companies are aware of these perks and most have joined social media in some form.¹¹⁸ Currently, at least 88 percent of public companies have some kind of social media account.¹¹⁹ As social media platforms continue to cater to high-profile individuals and entities, social media becomes an increasingly valuable tool to companies.

With increasing follower counts and access to high-profile users, informational asymmetry is a diminishing concern.¹²⁰ Corporate executives with large followings are able to reach broad audiences instantaneously. As evidenced by increased investor participation in social media, more users and investors

¹¹⁵ Felix Salmon, *Elon Musk and the Unnerving Influence of Twitter's Power Users*, WIRED (June 5, 2018, 11:05 AM), <https://www.wired.com/story/elon-musk-and-the-unnerving-influence-of-twitters-power-users/>.

¹¹⁶ *About verified accounts*, TWITTER, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> (last visited Nov. 18, 2019).

¹¹⁷ *About your Twitter timeline*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-timeline> (last visited Nov. 18, 2019).

¹¹⁸ *How Social Media On Tomorrow's Mobile Network Will Be Game-Changing For Business*, FORBES (June 21, 2018), <https://www.forbes.com/sites/tmobile/2019/06/21/how-social-media-on-tomorrows-mobile-network-will-be-game-changing-for-business/#7eb5968358ad>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

view social media as way to obtain investment information.¹²¹ Investors seek and expect to find relevant investment information on social media.¹²² The fact that corporate executives like Elon Musk and Tim Cook have significantly more followers than their respective companies shows that investors are aware of who represents the companies in which they invest and expect those individuals to furnish relevant investment information through social media.¹²³ Although executives may simply have more entertaining accounts that draw more followers, executives often share the same information as their official corporate accounts.¹²⁴ Other companies have verified corporate accounts that do not share regular updates, leaving executives to maintain the company's social media presence.¹²⁵ Regardless, investors appreciate the ability to converse with executives in a more personal and responsive way. Evidence shows that companies generally reply only to users who have product or policy questions.¹²⁶ Conversely, executives regularly engage in direct, personal conversations with followers and are willing to give investment information that customer service centers are unequipped to provide.¹²⁷ As a result, investors now have straightforward and immediate access to the inner workings of companies through their executives.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., Elon Musk (@elonmusk), TWITTER (Feb. 7, 2019, 11:20 AM), <https://twitter.com/CNNBusiness/status/1093590238184816646>; see also Tesla (@Tesla), TWITTER (Feb. 7, 2019, 3:53 PM), <https://twitter.com/Tesla/status/1093659031091044354>.

¹²⁵ Compare Apple (@Apple), TWITTER, <https://twitter.com/apple?lang=en> (last visited Nov. 18, 2019), with Tim Cook (@tim_cook), TWITTER, https://twitter.com/tim_cook?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserpppercent7Ctwgrp percent5Eauthor (last visited Nov. 18, 2019).

¹²⁶ Katy Steinmetz, *Does Tweeting at Companies Really Work?*, TIME (Aug. 14, 2017), <http://time.com/4894182/twitter-company-complaints/>.

¹²⁷ See Renée Ruggeri, *Tweet Trust: Why Having CEOs on Twitter Aids Investor Participation*, PUBLIC RELATIONS STRATEGIST (Oct. 13, 2015), https://apps.prsa.org/Intelligence/TheStrategist/Articles/view/11247/1117/Tweet_Trust_Why_Having_CEOs_on_Twitter_Aids_Invest#.XcHe4HdFxFZ.

Other evidence that the SEC does not require express prior notice includes its inaction against Reed Hastings and Netflix. Although Netflix had not previously directed investors to Hastings's account nor had Hastings ever used his personal Facebook account to share investment information, he had over 200,000 followers and the media reported on the story shortly after Hastings published the information.¹²⁸ In fact, Hastings's followers included reporters from the *New York Times*, *The Wall Street Journal*, and *Forbes*.¹²⁹ Hastings violated Regulation FD, but the harm he caused to investors was minimal because he and the media disseminated the information relatively quickly and efficiently.¹³⁰ Nevertheless, the SEC likely would have brought action against him had investors sustained greater harm because vigorous enforcement is integral to its efforts to protect investors and market integrity.¹³¹ Accordingly, investor protection and compensation likely would have outweighed sympathy for Hastings's situation had investors and market integrity been at risk. Though lack of clarity was the SEC's principal reason for inaction, its decision also indicates that there was not a significant enough threat to investors or market integrity even though investors received no prior notice.

Investors need advance notice of where to expect investment and market information so that they know where to go for investment and market information. However, with advances in technology and increased social media participation, many investors have constructive notice that information will come from a particular account. This constructive notice is sufficient to satisfy the SEC's requirements in its interpretive releases that investors receive adequate notice of informational disclosures. While not all personal social media accounts have sufficient followings to bypass the express prior notice factor, there are a select few that are able to avoid it.

¹²⁸ SEC. & EXCH. COMM'N, *supra* note 54, at 5.

¹²⁹ Joseph A. Grundfest, *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?* 3–4 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 131, 2013).

¹³⁰ SEC. & EXCH. COMM'N, *supra* note 54, at 5.

¹³¹ See Mary Jo White, SEC Chair, Testimony on Oversight of the SEC, Address Before the U.S. House of Representatives Committee on Financial Services (May 16, 2013) <https://www.sec.gov/news/testimony/2013-ts051613mjwhtm>; see also 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, 47 (2014).

III. HOW CAN A HIGH-PROFILE EXECUTIVE'S PERSONAL SOCIAL MEDIA ACCOUNT BECOME A RECOGNIZED CHANNEL OF DISTRIBUTION WITHOUT PRIOR NOTICE TO INVESTORS?

Since 2013, the SEC has not provided any new guidance on Regulation FD and social media. While express prior notice is not necessarily required, when an executive's personal social media account would satisfy Regulation FD without it remains unclear. Without express prior guidance or direction, investors must attempt to keep track of ever expanding and changing disclosure channels. This has traditionally been an impossible task, but with the growth and development of social media and the large followings that some high-profile executives maintain, there may be a select number of individuals who do not need to provide express prior direction to their account. Executives should consider the other factors found in the SEC's 2008 Release and determine if their accounts satisfy Regulation FD in becoming a recognized channel of distribution that is designed to provide broad dissemination of information. These factors include whether the executive has a pattern of posting important investment information on its personal social media account; whether the company or the executive uses other mediums to share information; and the extent to which the market and media regularly pick up the information that the executive shares on its personal social media account.¹³² Because prior notice is such an important aspect of Regulation FD, substantial satisfaction of the above factors is essential to creating a recognized channel of distribution.

A. PATTERN OF POSTING

The first consideration in determining if an executive's social media account is a recognized channel of distribution is whether the executive has a pattern of posting on its social media account.¹³³ Although the SEC's 2013 Release provided that an executive's personal social media account is unlikely to satisfy

¹³² Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹³³ *Id.*

Regulation FD without express prior notice that the account will serve as a channel of distribution, the pattern of posting on the account may be a major component of satisfying the requirements.¹³⁴ Again referring to Reed Hastings, he had no prior history or pattern of posting market moving information on his Facebook page.¹³⁵ For this reason, his post caught the public and investors off guard. No prior activity from his personal account had indicated that such an announcement might occur. A pattern of posting material information creates a channel on which investors can rely for information.¹³⁶

In comparison, other executives have more regular posting habits. To illustrate, Elon Musk regularly posts updates regarding Tesla on Twitter to his 23 million followers.¹³⁷ Although his seemingly impulsive tweets have landed Tesla and himself in trouble with the SEC and other regulatory agencies on several occasions, the SEC has not questioned his compliance with Regulation FD.¹³⁸ Above all, Tesla has ensured that its investors are aware that Musk's personal Twitter account may disseminate official company information by directing investors towards his account.¹³⁹ However, Musk has also developed a pattern of regularly sharing official company information on his personal Twitter account.¹⁴⁰ A quick scroll through Musk's Twitter account will reveal that he posts almost daily about Tesla and its related ventures.¹⁴¹ Furthermore, he has expressed that he regularly works 120 hours a week, depriving himself of a personal life and time with his family.¹⁴² His Twitter feed demonstrates that he eats, sleeps, and breathes Tesla. He has tweeted about allowing

¹³⁴ See SEC. & EXCH. COMM'N, *supra* note 54, at 7.

¹³⁵ *Id.* at 4.

¹³⁶ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹³⁷ See SEC. & EXCH. COMM'N, *supra* note 88.

¹³⁸ See Davies, *supra* note 63, at 1.

¹³⁹ Tesla Motors, Inc., Current Report (Form 8-K) (Nov. 5, 2013).

¹⁴⁰ Davies, *supra* note 63, at 1.

¹⁴¹ See Elon Musk (@elonmusk), TWITTER, <https://twitter.com/elonmusk>. (last visited Nov. 18, 2019).

¹⁴² Catherine Clifford, *Elon Musk: 'You're gonna go a little bonkers if you work 120 hours a week'*, CNBC (Nov. 5, 2018, 12:35 PM), <https://www.cnbc.com/2018/11/05/elon-musk-on-working-120-hours-a-week-youll-go-bonkers.html>.

employees to unionize,¹⁴³ pursuing new Tesla related ventures,¹⁴⁴ and about taking Tesla private.¹⁴⁵ Although many of his posts provoke legal concerns, all further cement his ability to disclose material information on his personal Twitter account because he has a recognizable habit of sharing important company information on his personal account. A recognizable habit of sharing ensures that investors are aware of where to go to obtain relevant investment information.

In developing a pattern, company executives should be consistent both in the information they share and where they share it.¹⁴⁶ This is relevant to the second consideration of whether the company or executives use other mediums to disclose information.¹⁴⁷ Executives must view each social media account as a distinct channel. For example, a pattern of sharing information on Twitter will not permit an executive to suddenly share information on Facebook or Instagram. The executive must develop a pattern for each channel in order to satisfy this factor.¹⁴⁸ Consistency in medium allows investors to reasonably infer where information will come from. Companies should also ensure that there is consistency among officers. If information comes from varying officers' accounts, then the executive's account is less likely to establish a pattern of sharing information.¹⁴⁹ If a company uses multiple sources, investors will have a hard time following each of them and knowing which sources to watch.

¹⁴³ See Elon Musk (@elonmusk), TWITTER (May 20, 2018, 11:44 PM), https://twitter.com/elonmusk/status/998454539941367808?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E998454539941367808&ref_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F9%2F30%2F20891314%2Felon-musk-tesla-labor-violation-nlr.

¹⁴⁴ Elon Musk (@elonmusk), TWITTER (Oct. 12, 2018, 9:39 AM), <https://twitter.com/elonmusk/status/1050788043907448834?lang=en>.

¹⁴⁵ Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 9:48 AM), <https://twitter.com/elonmusk/status/1026872652290379776?lang=en>.

¹⁴⁶ Alyssa Wanser, *The Facebook Status That Sparked an SEC Investigation*, 30 *Touro L. Rev.* 723, 753 (2014).

¹⁴⁷ *Id.*

¹⁴⁸ Commission Guidance on the Use of Company Websites, 73 *Fed. Reg.* at 45,862.

¹⁴⁹ Sandler, *supra* note 78.

Narrowing the sources for disclosure provide consistency and reliability in disclosures.

As an added security measure, some companies furnish an 8-K with every social media disclosure to ensure that they comply with Regulation FD.¹⁵⁰ While a disclosure via 8-K is sure to satisfy Regulation FD,¹⁵¹ if the company continues to double down on disclosures, the social media accounts that share the information will not become recognized channels of distribution. Investors will learn to rely on the 8-K as a crutch. If a company does eventually share information on a social media account without filing an 8-K, investors will be caught off guard.

In order to preserve a recognized channel of distribution, an executive must actually use the account or else the account will lose its status as a recognized channel of distribution.¹⁵² This means that an executive must not leave large lapses in time between disclosures.¹⁵³ Sporadic or inconsistent use is unlikely to develop the market following necessary to satisfy Regulation FD. While this does not mean that an executive must make frequent disclosures, it must make disclosures consistently and regularly.¹⁵⁴ That is, executives need not adhere to any definite time period between postings to preserve a recognized channel of distribution. Rather, the executive should create a pattern of sharing information when appropriate so that investors know to regularly refer to the account for information.¹⁵⁵ Irregular use of an account might lead investors and markets to disregard the account as a source of information. Investors are not on notice if they disregard the account due to inactivity. If investors are unaware of where to seek information, then the channel does not satisfy Regulation FD.

B. MEDIA AND MARKET ATTENTION

The next factor executives should consider is the regularity that news outlets and markets pick up the information that executives share on their social media accounts.¹⁵⁶ In cases

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

where news and media outlets are likely to pick up on the shared information, companies and executives may partially or wholly rely on the news outlets for public dissemination.¹⁵⁷ Since this factor manifests the SEC's acceptance of the functional equivalence concept, actual use by the market and investors can substitute for investor notification.¹⁵⁸

Executives with large social media followings are more likely to receive media attention and may not need to take any affirmative steps beyond posting the information for media outlets to begin to disseminate the information.¹⁵⁹ Regular media attention and market responsiveness are generally only available to those executives with large social media followings or those who have achieved celebrity status.¹⁶⁰ Executives of large companies with substantial followings can reasonably anticipate that the press will report on the information they share. Past practices and regularity of sharing information with media attention are useful in determining whether the media will report on a particular disclosure.¹⁶¹ If the media has reported on past social media posts, it is an indication that it will continue to report on similar information in the future. In contrast, executives with smaller followings may need to take more affirmative steps like manually contacting media outlets or calling press conferences for the media to pick up on the information.

However, while taking affirmative steps facilitates broad dissemination and helps executives avoid disclosure rules violations, it does not immediately establish the social media account as a recognized channel of distribution unless accompanying press releases expressly direct investors to the account for future disclosures.¹⁶² Over time, consistent media attention may direct investors and the market to the executive's account, causing an increase in followers.¹⁶³ If substantial enough, this increase in followers might cause the media to begin reporting on shared information without any affirmative direction from the company. In these cases, an executive may receive regular media

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See SEC. & EXCH. COMM'N, *supra* note 54, at 7.

¹⁶⁰ *Id.*

¹⁶¹ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹⁶² See SEC. & EXCH. COMM'N, *supra* note 54, at 7.

¹⁶³ *Id.*

and market attention and become a recognized channel of distribution. But, even if they lead large, public companies, executives with limited followings are unlikely to receive regular media attention. This is the case for the majority of executives.

Nevertheless, it is comprehensible that an executive of a large company might share material information on a personal social media account with a limited number of followers but still receive widespread media attention due to the information's significance or materiality. Even if the information were to receive widespread media attention, the disclosure would still likely result in a Regulation FD violation.¹⁶⁴ An isolated event of media publicity is unlikely to satisfy the requirement that the media regularly report on the shared information because investors would have been unaware that they should watch the social media account.¹⁶⁵ The fact that the post reached the masses through luck or fortuitous circumstances is unlikely to convince the SEC that the account is a recognized channel of distribution.¹⁶⁶ Without a prior history of sharing information on the account and regular media attention, the executive would not have known that the media would pick up on and broadly report the information. Such an executive is unlikely to have the same latitude that the SEC afforded to Hastings when he made a similar disclosure because it has since clarified Regulation FD's relation to social media. However, if the company or the executive takes affirmative steps to alert the media that the account will share or has shared information, the account is more likely to be a recognized channel of distribution because markets and investors will be aware that such information has or will come from the account.¹⁶⁷

Moreover, the speed at which the information circulates will contribute to the executive's satisfaction of Regulation FD. When Hastings published his Facebook post, the information's publication was short of instantaneous.¹⁶⁸ The first media outlet to report on the information was a technology blog that picked up the post about an hour after its publication.¹⁶⁹ The blog then shared the information on its Twitter account with its 2.5 million

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 7–8.

¹⁶⁶ *Id.*

¹⁶⁷ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹⁶⁸ See SEC. & EXCH. COMM'N, *supra* note 54, at 5.

¹⁶⁹ *Id.*

followers, leading to a handful of other outlets to report on the story within two hours of Hastings's initial posting.¹⁷⁰ Though Netflix also released the story to several media outlets, it did not release the information to its normal mailing list of news outlets which further delayed the story's dissemination.¹⁷¹ While an hour or two is not necessarily slow news reporting, it would still provide plenty of time for one of Hastings's Facebook followers to trade on the information, gaining an advantage over the rest of the market.

In comparison, when Elon Musk tweeted that he was considering taking Tesla private in August 2018, the mainstream media almost simultaneously picked up on the story.¹⁷² With no warning or facts to support his announcement, Musk tweeted, "Considering taking Tesla private at \$420. Funding secured."¹⁷³ Musk published his tweet at 9:48 AM PST and journalists and online news outlets began sharing the information by 10:08 am PST.¹⁷⁴ In just over an hour, Tesla's stock surged 7 percent.¹⁷⁵ His renegade tweeting habits coupled with his innovative ideas for society make him a prime target for media attention. His celebrity persona has granted him an incredible 23 million twitter followers. Though the SEC did not accuse Musk of violating Regulation FD,¹⁷⁶ he would have a strong argument that the information he shares is available to everyone. With Musk's 23 million followers and regular media attention, the information he shares is not only widely accessible, it is difficult to miss.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Steve Goldstein, *Did Elon Musk break any laws with his going-private tweet today?*, MARKETWATCH (Aug. 7, 2018), <https://www.marketwatch.com/story/did-elon-musk-break-any-laws-with-his-going-private-tweet-today-2018-08-07>.

¹⁷³ Musk, *supra* note 145.

¹⁷⁴ See, e.g., Rex Crum, *Elon Musk tweets that he's considering taking Tesla private; Tesla shares soar*, MERCURY NEWS (Aug. 7, 2018, 10:49 AM), <https://www.mercurynews.com/2018/08/07/elon-musk-tweets-that-hes-considering-taking-tesla-private/>.

¹⁷⁵ Jacob Sonenshine, *Tesla Private: A Visual Timeline of Elon Musk's Crazy Day on Twitter*, THE STREET (Aug. 7, 2018), <https://www.thestreet.com/markets/tesla-private-a-visual-timeline-of-elon-musk-crazy-day-on-twitter-14676727>.

¹⁷⁶ Moyer, *supra* note 9.

While an executive's celebrity status may provide enough protection and insulation from violating Regulation FD, the lines remain unclear and each case remains fact intensive.¹⁷⁷ There is no definite number as to how many followers an executive must have. Reed Hastings had just over 200,000 which was insufficient.¹⁷⁸ But, Elon Musk had 23 million and that seemed to be adequate to avoid a Regulation FD violation.¹⁷⁹ So, somewhere between 200,000 and 23 million is the number of followers that an executive's account should have to establish itself as a recognized channel of distribution without providing express prior notice.

The regularity of the posting is also unclear. Again, a single post is insufficient while frequent use of an account that only posts about the company is likely to be sufficient.¹⁸⁰ Executives should remain consistent and regular in sharing information as long lapses in time between disclosures delay pattern establishment.¹⁸¹ Also, the speed at which the media must report on the information is unclear. The internet and social media allow information to circulate quicker than ever. This means that social media participants might have a greater opportunity to trade on information than those who obtain the information from traditional news outlets. Even an hour can provide a significant advantage to investors who follow an executive's social media account. A pattern of posting, the amount of followers, the frequency of disclosures, and the regularity of media attention are all factors in determining whether the media's response was quick enough to satisfy the dissemination requirements.¹⁸²

IV. LIABILITY FOR VIOLATION OF REGULATION FAIR DISCLOSURE

Regulation FD is a disclosure rule, which means that a Regulation FD violation does not automatically imply a violation

¹⁷⁷ See SEC. & EXCH. COMM'N, *supra* note 54, at 5.

¹⁷⁸ *Id.*

¹⁷⁹ See Sec. & Exch. Comm'n v. Elon Musk, No. 1:18-cv-08865, at *1 (S.D.N.Y. Sept. 27, 2018).

¹⁸⁰ SEC. & EXCH. COMM'N, *supra* note 54, at 5.

¹⁸¹ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

¹⁸² *Id.*

of anti-fraud provisions.¹⁸³ Offenders are subject to SEC enforcement actions, but they are not subject to civil liability.¹⁸⁴ Additionally, although executives act as agents of their corporate entities, Regulation FD applies to the issuer and to “any person acting on its behalf.”¹⁸⁵ This means that both the company and an executive that makes non-public, material disclosures on its personal social media account are subject to enforcement action.¹⁸⁶ Though the SEC has brought few enforcement actions,¹⁸⁷ they generally consist of fines or injunctions.¹⁸⁸ Regarding the policy for imposing penalties, the SEC has offered the justification that penalty provisions are appropriate both to deter and to penalize offenders.¹⁸⁹

While there are no formal causes of action that arise from a violation of Regulation FD,¹⁹⁰ and few cases of enforcement actions exist in the social media or internet context, tangential charges give insight into what the SEC might do when an executive violates Regulation FD. Although Regulation FD violations do not imply a violation of anti-fraud rules,¹⁹¹ charges of fraud and failure to establish sufficient social media guidelines for executives frequently accompany Regulation FD violations.¹⁹² Though the SEC ultimately determined that there was no Regulation FD violation, after tweeting about taking Tesla private, the SEC brought allegations against Tesla of failing to have

¹⁸³ 17 C.F.R. § 243.102 (2000).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ As of 2011, the SEC had brought about a dozen Regulation FD enforcement actions. Vanessa Schoenthaler, *Regulation FD: learn from prior SEC cases*, IR WEB REPORT (April 11, 2011), <http://irwebreport.com/20110411/regulation-fd-learn-from-prior-sec-cases/>.

¹⁸⁸ *Id.*

¹⁸⁹ See Memorandum of the Securities and Exchange Commission in Support of the Securities Law Enforcement Remedies Act of 1989, reprinted in H.R. No. 975, 101st Cong., at 7 (1989).

¹⁹⁰ Schoenthaler, *supra* note 187.

¹⁹¹ 17 C.F.R. § 243.102 (2000).

¹⁹² See SEC v. Tesla, Inc., No. 1:18-cv-8947, at *1 (S.D.N.Y. Sept. 29, 2018); see also SEC. & EXCH. COMM’N, *supra* note 88.

disclosure controls for Musk's tweets.¹⁹³ The SEC also brought allegations of fraud against Musk himself.¹⁹⁴ Tesla and Musk settled their respective charges with the SEC, but with some substantial contingencies.¹⁹⁵ The SEC required Musk to step down as chairman for three years.¹⁹⁶ It also required that Musk pay a \$20 million fine, which it then distributed to harmed investors.¹⁹⁷ Although pure Regulation FD violations usually result in personal fines that are significantly less than \$20 million,¹⁹⁸ this is an indication of the importance of social media responsibility that the SEC places on popular executives.

For failing to establish required disclosure controls for Musk's tweets, the SEC mandated that Tesla implement additional controls and procedures to monitor and filter Musk's social media communications.¹⁹⁹ This included appointing a new committee of independent directors to oversee the communications.²⁰⁰ While companies commonly filter executives' tweets, if not write them completely,²⁰¹ Tesla has never had any control over Musk's tweets.²⁰² In fact, after Musk tweeted about taking Tesla private, officers and executives quickly circulated text messages and phone calls inquiring if the tweets were real, fake, or a joke.²⁰³ Immediately after agreeing to

¹⁹³ See Complaint at 1, SEC v. Tesla, Inc., No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018).

¹⁹⁴ SEC. & EXCH. COMM'N, *supra* note 88.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See 15 U.S.C.A. § 78u (West 2015).

¹⁹⁹ SEC. & EXCH. COMM'N, *supra* note 88.

²⁰⁰ *Id.*

²⁰¹ See Andrea Fryrear, *How to Use Your CEO's Twitter Account to Build Brand Loyalty*, CONVINC & CONVERT, <https://www.convinceandconvert.com/social-media-strategy/ceo-twitter-account/> (last visited Nov. 18, 2019).

²⁰² Alexandria Sage & Ismail Shakil, *Elon Musk never sought approval for a single Tesla Tweet, U.S. SEC tells judge*, REUTERS (Mar. 18, 2019, 5:25 PM), <https://www.reuters.com/article/us-tesla-musk-sec/elon-musk-tweet-about-tesla-violates-settlement-agreement-u-s-regulator-tells-court-idUSKCN1R001J>.

²⁰³ Lucinda Shen, *The Most Shorted Stock in the History of the Stock Market.* Read Elon Musk's Letter to Employees About Taking Tesla Private, FORTUNE (Aug. 7, 2018), <http://fortune.com/2018/08/07/tesla-elon-musk-letter-to-employees-tesla-stock-tsla/>.

the settlement, Musk continued to tweet, criticizing the SEC and the settlement agreement.²⁰⁴ A judge approved the settlement without taking subsequent tweets that Musk had published into account.²⁰⁵ In these tweets, Musk referenced the SEC as the “Short Seller Enrichment Commission” and also stated that the \$20 million fine was “worth it.”²⁰⁶

While judges might overlook some bad behavior on social media, there is no guarantee that a judge will not take subsequent tweets into consideration when approving settlements. Martin Shkreli was another iconic, though controversial, executive who obtained celebrity status, in part due to his antics on social media.²⁰⁷ During his trial for securities fraud, Shkreli was not as lucky as Musk when he posted on Facebook that he would pay \$5,000 to anyone who would steal a lock of former presidential candidate Hillary Clinton’s hair during her book tour.²⁰⁸ Unfortunately for Shkreli, the judge saw this post and subsequently revoked his bail.²⁰⁹ The judge reasoned that the post signaled that Shkreli was a “real danger.”²¹⁰ Interestingly, Shkreli was not on trial for any violent crimes. Nevertheless, Shkreli suffered severe consequences for publishing his thoughts in real time. While this decision specifically regarded his bail,²¹¹ it serves

²⁰⁴ See Elon Musk (@elonmusk), TWITTER (Oct. 4, 2018, 1:16 PM), <https://twitter.com/elonmusk/status/1047943670350020608?lang=en>.

²⁰⁵ See Sage & Shakil, *supra* note 202.

²⁰⁶ See Elon Musk (@elonmusk), TWITTER (Oct. 26, 2018, 7:38 PM), <https://twitter.com/elonmusk/status/1056012218897059841?lang=en>.

²⁰⁷ See Jacob Frenkel, *Shkreli Provides Social Media Behavior and Governance Lessons for Millennials*, FORBES (Nov. 24, 2017, 11:14 AM), <https://www.forbes.com/sites/jacobfrenkel/2017/11/24/shkreli-provides-social-media-behavior-and-governance-lessons-for-millennials/#64f58fd1619a>.

²⁰⁸ *Id.*; see also Press Release, Dep’t of Justice, Martin Shkreli Sentenced to Seven Years’ Imprisonment for Multi-Million Dollar Fraud Scheme (Mar. 9, 2018) <https://www.justice.gov/usao-edny/pr/martin-shkreli-sentenced-seven-years-imprisonment-multi-million-dollar-fraud-scheme>.

²⁰⁹ Dep’t of Justice, *supra* note 208.

²¹⁰ See *United States v. Shkreli*, 15 CR 637 (KAM) 1, 12 (E.D.N.Y. Mar. 6, 2018).

²¹¹ *Id.*

as evidence that judges are aware of social media and assess social media activity in making decisions. In application, not only will judges consider the posts that violate Regulation FD, but they might also consider subsequent posts that the executive publishes after committing the violation. This might result in increased fines and more severe consequences for high-profile executives who misuse social media.

The lack of clarity in consequences demonstrates that the SEC retains broad discretion in issuing penalties for Regulation FD violations. In a 2013 settlement of a Regulation FD enforcement action with Lawrence Polizzotto, Vice President of First Solar, the SEC determined that it would not penalize Polizzotto because of his and the company's cooperation with its investigation.²¹² The SEC acknowledged that First Solar cultivated a culture of compliance within the company, self-reported the selective disclosure, and took remedial measures after the disclosure occurred.²¹³ Although this may be comforting news for some companies that already have compliance measures in place, it may be troubling for others that have renegade executives with substantial control over the company. Executives that unapologetically post on social media may shift the SEC's discretion towards larger fines and harsher penalties as they tweet without remorse.

Conversely, some argue that the social media sites themselves should be accountable for the violations that high-profile executives commit.²¹⁴ Social media sites recognize that many high-profile executives use their platforms as evidenced by the significant perks that platforms provide to these users free of monetary payments.²¹⁵ Additionally, social media sites already employ technology that they could extend to monitor for potentially material or market-moving information.²¹⁶

²¹² Press Release, Sec. & Exch. Comm'n, SEC Charges Former Vice President of Investor Relations With Violating Fair Disclosure Rules (Sept. 6, 2013) <https://www.sec.gov/news/press-release/2013-174>.

²¹³ *Id.*

²¹⁴ Charles Radclyffe, *The SEC Ought to Take on Twitter Not Musk*, FORBES (Sept. 28, 2018, 10:38 AM), <https://www.forbes.com/sites/charlesradclyffe/2018/09/28/the-sec-ought-to-take-on-twitter-not-musk/#536ce7c6bb87>.

²¹⁵ Salmon, *supra* note 115.

²¹⁶ Radclyffe, *supra* note 214.

Consequently, social media platforms could initiate protocols that ask high-profile users “are you sure?” before publishing such a post.²¹⁷ In fact, some social media platforms have already implemented similar mechanisms.²¹⁸ For example, Facebook temporarily banned all ads related to Initial Coin Offerings because they were generally fraudulent and extremely risky for inexperienced investors.²¹⁹ Also, all major social media sites currently monitor for violent and sexual conduct and remove material that violates their terms of use or the law.²²⁰ Nonetheless, while social media companies surely have the ability to monitor and provide safeguards for high-profile executives, placing liability on social media might not fit the spirit of SEC disclosure rules.

Disclosure rules place responsibility and accountability on companies and their officers.²²¹ Transferring that responsibility to third parties would be to assume that executives have no self-restraint or sense of accountability in publishing information. Already, high-profile individuals, like Elon Musk and President Donald Trump, frequently fail to exhibit impulse control on social media.²²² But, unlike average users who can impulsively post with limited consequences, careless postings by high-profile executives can have extensive repercussions. An executive’s ability to move markets with a single post can affect the monetary interests of employees, investors, and competitors. While

²¹⁷ *Id.*

²¹⁸ *Prohibited Financial Products and Services*, FACEBOOK, https://www.facebook.com/policies/ads/prohibited_content/prohibited_financial_products_and_services (last visited Nov. 18, 2019).

²¹⁹ *Id.*

²²⁰ *What Types of Behavior Does Facebook Identify as Abusive?*, FACEBOOK, https://www.facebook.com/help/1735443093393986?helpref=hc_global_nav (last visited Nov. 18, 2019).

²²¹ See Richard Walker, Dir. of Enforcement, Sec. & Exch. Comm’n, Speech by SEC Staff: RFD – An Enforcement Perspective (Nov. 1, 2000) (transcript available at <http://www.sec.gov/news/speech/spch415.htm>).

²²² See Elon Musk (@elonmusk), TWITTER, https://twitter.com/elonmusk?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserp percent7Ctwgr percent5Eauthor (last visited Nov. 18, 2019); Donald Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserp percent7Ctwgr percent5Eauthor (last visited Nov. 18, 2019).

corporate executives are ultimately human, they should adhere to higher disclosure standards because they maintain important information that widely affects investors.

At length, Regulation FD enforcement actions rarely exist on their own. They are often overshadowed by more significant charges such as fraud or insider trading. Still, the SEC's broad discretion in enforcing the rule permits it to impose greater fines and other meaningful penalties. Indeed, the SEC is increasingly vigilant in enforcing its regulations, especially against high-profile executives.²²³

V. THE SEC SHOULD ISSUE FURTHER GUIDANCE ON SOCIAL MEDIA AND REGULATION FAIR DISCLOSURE

Several high-profile executives maintain regular engagement with millions of people via their social media accounts.²²⁴ Not only do they have static followers, but they also have followers that ask questions, make comments, and otherwise participate in discussions.²²⁵ This regular engagement is ideal for securities laws because corporate officers are more transparent than ever as they provide real-time updates to investors. Social media is also an ideal medium to share such information because it is free, intuitive, and easily accessible to the public. Accordingly, the SEC should clarify that express prior notice is not always necessary and should embrace clear consequences for Regulation FD violations.

A. THE SEC SHOULD CLARIFY THAT EXPRESS PRIOR NOTICE IS NOT ALWAYS NECESSARY

With social media's transparency and accessibility, the SEC should clarify that high-profile executives that have substantial social media followings and engagement should not have to expressly direct investors to their account prior to sharing information. A pattern of posting, along with regular media engagement, should be sufficient to protect investors from informational asymmetry. Fully embracing the benefits of the

²²³ See SEC. & EXCH. COMM'N, *supra* note 71.

²²⁴ See Mark Zuckerberg, (Mark Zuckerberg), FACEBOOK, <https://www.facebook.com/zuck> (last visited Nov. 18, 2019); see also Cook, *supra* note 125.

²²⁵ *Id.*

digital age will provide increased access to information while removing impediments and fear from corporate executives.

While prior direction is not the most burdensome of requirements, determining whether prior direction is sufficiently specific or whether its location satisfies Regulation FD's requirements can be difficult and impose additional stress on companies. This is especially true of companies with high-profile executives who are actively engaged in social media. Iconic executives that investors view as business gurus or technological visionaries are often difficult to reign in.²²⁶ While these executives should comprehend corporate governance models and adhere to corporate formalities, they often understand the company, its future, and the market better than anyone else. Investors are aware of this as they struggle to differentiate between the company and the executive. In conjunction with the pedestal upon which these executives stand, fully embracing social media allows investors to obtain honest and thorough investment information directly from authoritative company officers. This clarification would allow executives to engage in more open and current dialogue with investors. Both investors and companies would benefit as information flows freely without regulatory impediments. Investors would have the ability to present questions directly to executives who will then be able to provide public and instantaneous responses without complications or delay.

Additionally, modern investors are much more aware, informed, and internet savvy than were those in past generations.²²⁷ In a digital information age, investors actively seek information from those who actively provide it.²²⁸ Investors now use social media to obtain news, seek advice, and share opinions.²²⁹ This illustrates that they are increasingly reliant on social media for all types of information. Increased reliance on social media signifies that more investment and market information should be available to them through social media channels. Permitting companies and executives to join the

²²⁶ Elizabeth Lopatto, *After the SEC settlement, who will review Elon Musk's tweets?*, THE VERGE (Oct. 5, 2018, 7:00 AM), <https://www.theverge.com/2018/10/5/17937768/elon-musk-sec-settlement-twitter-tesla-shareholder-lawsuit>.

²²⁷ Borzykowski, *supra* note 113.

²²⁸ *Id.*

²²⁹ *Id.*

conversations that are already taking place among investors without debilitating fear of regulatory violations will provide investors with greater access to information that they are prepared to receive.

Moreover, social media is a more efficient medium for disseminating information that protects a broader range of investors. A company that announces material information in a widely circulated newspaper like *The Wall Street Journal* or in an 8-K is likely to satisfy the requirement of broad dissemination.²³⁰ Antithetically, the suggestion that newspapers provide broad dissemination fails to account for the fact that most news outlets require a subscription to obtain access to their content. Retail investors often have no need to subscribe to corporate-based news mediums and are therefore more likely to miss important investment information.²³¹ Furthermore, investors with little investment experience may not even know to access an 8-K or to monitor other regulatory filings. While experienced investors are more likely to have certain news subscriptions and familiarity with regulatory filings, the SEC is less concerned with protecting sophisticated investors.²³² In contrast, social media provides free access to all internet users.²³³ It is intuitive and easy to use for even the most novice of investors. Even those who do not subscribe to a particular executive's account can access the account through simple web searches.²³⁴ Ideally, all investors would know to regularly follow news media and 8-K releases; but, the reality is that many do not.²³⁵ Even so, there is no minimal investor

²³⁰ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

²³¹ Mary Co White, Chair, Sec. & Exch. Comm'n, Address Before the Consumer Federation of America: Protecting the Retail Investor (Mar. 21, 2014) (transcript available at <https://www.sec.gov/news/speech/mjw-speech-032114-protecting-retail-investor>).

²³² *Fast Answers: Accredited Investors*, SEC. & EXCH. COMM'N, <https://www.sec.gov/fast-answers/answers-accredhtm.html> (last visited Nov. 18, 2019).

²³³ *Does it Cost Money to Use Facebook?*, FACEBOOK, https://www.facebook.com/help/186556401394793?helpref=uf_perma link (last visited Nov. 18, 2019).

²³⁴ *About Public and Protected Tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> (last visited Nov. 18, 2019).

²³⁵ Azi Ben-Rephael et al., *Who Pays Attention to SEC Form 8-K?* 3–4 (Kelley Sch. of Bus. Research Paper No. 17-24, 2017).

qualification standard that prevents competent individuals from investing in public companies. As a result, inexperienced and casual investors instinctively resort to social media as an obvious source of investment information.²³⁶

Although social media is generally more accessible than newspapers or journals, some high-profile executives have developed a habit of blocking followers that criticize them or disagree with their ideas.²³⁷ For instance, Musk has blocked at least three dozen people from viewing his Twitter feed.²³⁸ These people include investors, journalists, and critics of himself and Tesla.²³⁹ Most social media platforms allow users to limit who can see the information that they share.²⁴⁰ Though this feature preserves privacy and security, it presents hazards for an executive that is intolerant of criticism. For a high-profile executive, sharing material information after excluding followers may constitute selective disclosure. By excluding individuals from their social media feed, the executive shields parts of the public from the information, meaning that the account may not be public for Regulation FD purposes. Ultimately, blocking certain investors grants unblocked investors an advantage over blocked investors. However, even if an executive blocks users from viewing its content, users have the ability to view the executive's account by performing Google searches and by creating new social media accounts that the executive has not blocked.²⁴¹ Although an executive might attempt to block users, so long as the account is set to "public," anyone with an internet connection has immediate access to the account.²⁴²

²³⁶ Borzykowski, *supra* note 113.

²³⁷ Jan Wiczner, *How Elon Musk's Twitter Blocking Could Land Him in SEC Trouble*, FORTUNE (Aug. 10, 2018), <http://fortune.com/2018/08/09/tesla-elon-musk-twitter-sec-blocked/>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *How to Block Accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Nov. 18, 2019).

²⁴¹ *About Public and Protected Tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> (last visited Nov. 18, 2019).

²⁴² *Id.*

B. THE SEC SHOULD MANDATE SOCIAL MEDIA RESTRICTIONS FOR REGULATION FAIR DISCLOSURE VIOLATIONS

In addition to clarifying Regulation FD disclosure requirements, the SEC should institute clearer consequences for Regulation FD violations. Due to the SEC's broad discretion, Regulation FD enforcement has been inconsistent and unpredictable, thus, failing to adequately deter future offenses.²⁴³ Because consequences are unpredictable and because there are few precedential Regulation FD violations to serve as examples, rogue executives often take no prior thought before posting on social media.²⁴⁴

Deterrence is more likely if there is a strong possibility that Regulation FD violations may likely result in meaningful, individual penalties. Clear and predictable consequences would serve as a warning to executives when they are tempted to press "send" on a potentially material social media post. They will also allow companies and executives to better prepare themselves against enforcement actions with efficient social media compliance programs. While certain executives should have greater freedom in sharing information, they should still be accountable and take responsibility for their actions as irresponsible social media usage harms investors. In sum, clear consequences will not only protect executives, they will also protect investors from irresponsible disclosures.

Though fines have traditionally been the most common penalty for Regulation FD violations,²⁴⁵ fines alone do not sufficiently deter executives from violating Regulation FD on social media. The majority of high-profile celebrity executives have an extremely high net worth.²⁴⁶ Because of their wealth, even substantial fines are unlikely to deter their actions because they can be easily paid.²⁴⁷ Musk himself stated that a personal \$20 million fine was "worth it" after he arguably committed fraud with

²⁴³ Shannon M. Mudd, *The Missing Piece of the Mosaic*, 80 WASH. U. L.Q. 971, 994 (2002).

²⁴⁴ Moyer, *supra* note 9.

²⁴⁵ 17 C.F.R. § 243.100 (2000).

²⁴⁶ *Top 50 CEOs*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/list/top-50-ceos/> (last visited Nov. 18, 2019).

²⁴⁷ See Ippoliti, *supra* note 131.

a Twitter post.²⁴⁸ While board removal is probably an excessive consequence for a Regulation FD violation, increased social media oversight is a clear and proportional consequence that is likely to deter high-wealth executives who misuse their social media accounts. For executives that view themselves as essential oracles and leaders of their companies, any hindrance of their ability to candidly share information will likely diminish the control they feel that they have over their companies. A decreased perception of their ability to publicly lead their company may be a meaningful deterrent to these sometimes narcissistic executives.

Currently, the Securities Exchange Act of 1934 (“Exchange Act”) requires certain issuers to maintain disclosure controls for its officers.²⁴⁹ Issuers that fall under this section must ensure the company’s management reviews certain information prior to sharing to make timely decisions regarding required disclosure.²⁵⁰ As a result of Tesla’s violation of this provision, the SEC vaguely mandated that Tesla implement “controls and procedures to oversee Musk’s communications.”²⁵¹ The extent of the control, including whether Tesla must also review Musk’s personal communications, is unclear. Because the SEC has given no specific guidance, companies have discretion in creating controls. While Tesla has not revealed what it has done to manage Musk’s tweets, a system for managing social media disclosures might include appointment of an independent committee that reviews and analyzes each post before publication. Although there are numerous other models that companies can develop to manage an executive’s social media usage, restrictions must be reasonable to preserve the account as a recognized channel of distribution because overly restrictive controls may cause the account to become inactive. For example, a complete social media ban would be far too restrictive. Both companies and investors would be deprived of the benefits that social media provides while severely limiting executives’ ability to publicly lead their companies. Although the SEC does not provide or endorse any specific disclosure control system for companies, the Exchange Act and the SEC’s action against Tesla create a framework upon which the

²⁴⁸ See Elon Musk (@elonmusk), Twitter (Oct. 26, 2018, 7:38 PM), <https://twitter.com/elonmusk/status/1056012218897059841?lang=en>.

²⁴⁹ 15 U.S.C.A. § 78u (West, 2015).

²⁵⁰ *Id.*

²⁵¹ See SEC. & EXCH. COMM’N, *supra* note 88.

SEC might rely on to enforce similar requirements against Regulation FD offenders.

In outfitting these requirements to Regulation FD offenders, the SEC should reserve discretion to companies. This will allow companies to self-regulate and develop healthy disclosure controls that best suit their executives. However, the SEC should specifically establish the duration of such controls in each situation. Depending on the extent of the violation, the SEC could require that the controls last for a specified time period or indefinitely. While indefinite controls may serve as a greater deterrent, the SEC should use them sparingly because they could limit informational freedom and chill dissemination. Additionally, consistent enforcement is key in creating a meaningful deterrent. Without consistency, executives remain emboldened to take unnecessary risks in sharing information. Clear examples are more likely to cause executives to pause before posting on social media. This consistency will allow executives to retain freedom in social media usage while maintaining a sense of responsibility. In sum, the SEC should leave discretion to companies in establishing controls, but it should impose the penalty consistently to create a precedent that serves as an example to loose-lipped executives.

However, whether companies are able to control a renegade executive's social media activity is unclear. In considering Musk and Tesla, had Tesla been able to implement such controls after the SEC mandated that it filter Musk's tweets, it likely would have prevented Musk from immediately criticizing the SEC on Twitter.²⁵² Notwithstanding these considerations, Musk has since indicated that these social media restrictions have adversely affected his self-esteem and leadership style.²⁵³ In a recent television interview, Musk tearfully spoke about how placing restrictions on his ability to post on social media infringe upon his First Amendment rights and how the restrictions will create additional problems for him and for Tesla.²⁵⁴ While this is certainly odd evidence, the fact that Musk literally shed tears while speaking about his social media restrictions indicates the importance of social media communications to these high-profile

²⁵² See *United States v. Shkreli*, 15 CR 637 (KAM) 1, 12 (E.D.N.Y. Mar. 6, 2018).

²⁵³ *60 Minutes: Tesla CEO Elon Musk* (CBS television broadcast Dec. 9, 2018), <https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/>.

²⁵⁴ *Id.*

executives.²⁵⁵ Due to the importance of social media to the modern, high-profile executive, the SEC should impose restrictions on a Regulation FD offender's social media usage.

Though the SEC should implement more effective penalties for violations, penalties such as board removal may be too harsh. Musk was, in fact, removed from Tesla's board for tweeting about taking Tesla private; however, it was due to anti-fraud violations, not Regulation FD violations.²⁵⁶ There is no precedent indicating that the SEC might require board removal for a mere Regulation FD violation.²⁵⁷ Although Regulation FD protects investors and although disclosure is central to federal securities laws,²⁵⁸ a Regulation FD violation does not generally harm investors to the extent that the law should relieve the offender from its position within the company. Securities laws seek to limit informational asymmetry, but they do not eliminate it completely.²⁵⁹ Otherwise, little trading would occur. For most executives, board removal is the most severe penalty that can occur. Especially for commonly egotistical celebrity executives, losing control of their companies relieves them of their high societal position and drastically alters their lifestyle. Apple founder, Steve Jobs, became depressed and possibly suicidal when Apple's board forced him out, stating that his removal was "awful-tasting medicine."²⁶⁰ Other actions, such as more predictable fines and social media oversight programs, are more appropriate penalties that would provide adequate deterrence and would fit the wrongful actions.

Furthermore, board removal and excessive fines may chill the dissemination of information. In an effort to avoid the costs and burdens that accompany such penalties, corporations may be

²⁵⁵ *Id.*

²⁵⁶ Complaint at 21, SEC v. Tesla, Inc., No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018).

²⁵⁷ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

²⁵⁸ *Structured Disclosure at the SEC: History and Rulemaking*, SEC. & EXCH. COMM'N, <https://www.sec.gov/page/osdhistoryandrulmaking> (last visited Nov. 18, 2019).

²⁵⁹ *Id.*

²⁶⁰ Mark Sullivan, *Steve Jobs wandered depressed in Europe after being exiled by Apple*, VENTURE BEAT (Mar. 24, 2015, 11:59 AM), <https://venturebeat.com/2015/03/24/steve-jobs-wandered-depressed-in-europe-after-being-exiled-by-apple/>.

too cautious in regulating their executives' social media usage. Instead, they will likely resort to safer methods such as 8-Ks and press releases. While these methods disseminate information in accordance with Regulation FD, they are inferior to the scope and rapidity of social media.²⁶¹ There is a balance that the SEC must strike between freedom to share and effective deterrence against irresponsible disclosures. This balance lies in social media controls for executives who fail to exhibit appropriate esteem for the information they maintain.

Ultimately, even though lack of clarity has been a consistent criticism of Regulation FD since its inception,²⁶² the SEC has been reluctant to clarify the rule.²⁶³ In addressing criticisms surrounding the vague term "materiality," the SEC asserted that flexibility is essential to Regulation FD's enforcement.²⁶⁴ It reasoned that each case is different and that flexibility allows it to meet the circumstances of each case.²⁶⁵ In this same statement, the SEC maintained that it would not issue a bright-line test for materiality nor would it release a comprehensive list of material items that might implicate Regulation FD.²⁶⁶ However, the SEC compromised by providing a non-comprehensive list of items that might constitute material information and trigger Regulation FD.²⁶⁷ It also recognized in the same document, which it reiterated in the 2008 Release,²⁶⁸ that it was willing to adapt Regulation FD to changing technologies.²⁶⁹ This indicates that the SEC is willing to clarify Regulation FD's requirements if needed. With the way high-profile executives now share information on social media, the SEC should adhere to its statement that Regulation FD should evolve with technology and clarify Regulation FD's requirements along with the penalties that executives may sustain for its violations.

²⁶¹ See Ippoliti, *supra* note 131, at 34.

²⁶² Mudd, *supra* note 243, at 994.

²⁶³ Ippoliti, *supra* note 131, at 40.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 18.

²⁶⁷ *Id.* at 20.

²⁶⁸ Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

²⁶⁹ *Id.*

CONCLUSION

In comparison to music, television, and film, the internet is not a traditional place to find fame. Nevertheless, social media continues to catapult more people to fame for non-traditional reasons. Corporate executives are no exception. As executives become more accessible through social media, more of them will achieve celebrity status. Consequently, more executives are likely to post material that violates Regulation FD. Though social media slips may simply be an inevitable consequence of social media use,²⁷⁰ executives must remember their investors before their fans. As individuals with increased responsibility, they cannot adopt the same impulsive tendencies as celebrity personalities because investors, companies, and markets depend on their leadership.

But, if executives are willing to be responsible for their actions on social media, the SEC may be more welcoming of their celebrity personas in the modern marketplace. Investors appreciate their transparency, realness, and accessibility. All of these attributes, along with social media's growth and development, further permit investors to obtain information through a familiar and user-friendly medium. As such, Regulation FD and federal securities laws must continue to evolve to meet the needs and abilities of investors, issuers, and executives. In continuing to evolve and grant greater autonomy to both executives and investors, federal securities laws should recognize that celebrity executives are in a unique position that permits them to avoid selective disclosure on their personal social media accounts. Such recognition will afford greater freedom to executives and increase investors' access to information. But, with this recognition, the SEC should also impose social media restrictions as a consequence of pure Regulation FD violations. As more executives become aware of the non-monetary consequences that they are likely to suffer for irresponsible disclosures, they will become more thoughtful in their social media usage, thus, protecting investors and markets.

²⁷⁰ Lopatto, *supra* note 226.