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REPORT

DISCLOSURE

Do Anonymous Internet Postings Violate Regulation FD?

BY PAUL HUEY-BURNS, CATHERINE BOTTICELLI, AND ADAM MOORE

What are the implications under Regulation Fair Disclosure ("Regulation FD")[1] if a senior corporate executive posts messages anonymously on an investor message board or other internet forum? There have been several publicly-reported instances in which an executive or a person associated with an executive engaged in such conduct.[2] It is likely that such situations will become more common as executives who have grown up in an internet-dominated environment become ranking officers in their corporations and as corporations themselves seek to take advantage of blogs and other internet–based communications strate-

Paul Huey-Burns and Catherine Botticelli are partners and Adam Moore is an associate in the Washington, D.C. office of Dechert LLP. Although the authors have represented corporate and individual clients in situations that have raised issues related to the subject matter of this article, readers should not draw any inferences as to the facts and circumstances of any particular matter.

[1] 17 C.F.R. §§ 243.100-103, which provides, in part:

§ 243.100 General rule regarding selective disclosure.

(a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e):

(1) Simultaneously, in the case of an intentional disclosure; and

(2) Promptly, in the case of a non-intentional disclosure.

(b)(1) Except as provided in paragraph (b)(2) of this section, paragraph (a) of this section shall apply to a disclosure made to any person outside the issuer:

(i) Who is a broker or dealer, or a person associated with a broker or a dealer . . . .;

(ii) Who is an investment adviser . . . an institutional investment manager . . . or a person associated with either of the foregoing . . . .;

(iii) Who is an investment company . . . .; or

(iv) Who is a holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information.

[2] *See, e.g.*, Brad Stone & Matt Richtel, *The Hand That Controls the Sock Puppet Could Get Slapped*, N.Y. Times, July 16, 2007 (corrected on July 17, 2007), *available at* http://www.nytimes.com/2007/07/16/technology/16blog.html (citing incidents involving Conrad M. Black, CEO of Hollinger International, John P. Mackey, CEO of Whole Foods Market, and Patrick M. Byrne, CEO of Overstock.com).

 ISSN 0037-0665

gies. The issue also has implications for regulatory policy. The internet has become the equivalent of a public forum (at least for certain companies with a broad public following) and the Securities and Exchange Commission has begun to recognize that traditional dividing lines between widely and selectively disseminated information may no longer be valid.[3]

Internet Chat Rooms and the Securities Markets The use of the internet as a forum for discussing securities was already widespread when the SEC adopted Regulation FD[4] and the practice has expanded since then.[5] Companies commonly use their corporate websites to disseminate information to shareholders, and the use of corporate blogs has expanded and become a ''popular means for sharing information.''[6]

Individuals discuss securities on chat rooms and bulletin boards, and in moderated discussions.[7] Some broker-dealers have sponsored online discussion forums,[8] while others have declined to offer such services because of ''legal or reputational risk.''[9] The proliferation of online securities discussion has prompted issuers to become concerned about the impact of such discussions on stock prices.[10] The SEC warns investors to be wary of information obtained through these internet forums and has brought enforcement actions against various internet frauds.[11]

Blogs have become an important medium for corporate communications.[12] The use of blogs in general is growing rapidly.[13] Corporate blogs are a small but growing part of this trend.[14] In 2005 there were some 5,000 corporate blogs in the United States,[15] and an increasing number of Fortune 500 companies are publishing blogs.[16] These often take the form of CEO blogs, employee blogs, and customer relations blogs.[17] CEO blogs have been used as a communication tool by corporate managers. Executives at prominent firms such as Sun Microsystems and General Motors write popular blogs that attract hundreds of thousands of visitors per month.[18] Employee blogs have been used to facilitate communication among employees and between employees and management.[19] Microsoft employee blogs, for example, have been credited with improving the company's image.[20] Blogs have also been used to communicate with customers and to spread product information.[21]

Overview of Regulation FD. Regulation FD prohibits an issuer or persons associated with an issuer from selectively disclosing material nonpublic information. It is not surprising that tension would develop between this restrictive regulation and the free-wheeling nature of internet communications. The SEC has recognized specifically that postings on electronic forums raise issues under Regulation FD.[22]

The Commission adopted Regulation FD because it perceived that issuers were ''disclosing important nonpublic information, such as advance warnings of earnings results, to securities analysts or selected institutional investors or both, before making full disclosure of the same information to the general public.''[23] As then-Chairman Arthur Levitt, the primary proponent of Regulation FD, explained: ''[A]s Wall Street analysts play an increasingly visible role in recommending stocks, some in corporate management treat material information as a commodity — a way to gain and maintain favor with particular analysts. What's more, as analysts become more and more dependent on the 'inside word,' the pressure to report favorably on a company

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[3] We discuss the SEC's ''Guidance on the Use of Company Websites,'' Release No. 34-58288 (Aug. 1, 2008) (hereinafter ''Use of Company Websites'') below. *See also* Electronic Shareholder Forums, Release No. 34-57172 (Jan. 28, 2008) (noting that ''commenters generally favored the continued development of electronic shareholder forums as a means of facilitating communication among shareholders and between shareholders and companies'').

[4] Securities and Exchange Commission, ON-LINE BROKERAGE: KEEPING APACE OF CYBERSPACE (1999), 75, *available at* http://www.sec.gov/pdf/cybrtrnd.pdf.

[5] Anna T. Pinedo & James R. Tanenbaum, *The Danger of Blogging*, INT'L FIN. L. REV., Oct. 2007 (The 2007 Global Report), *available at* http://www.iflr.com/?Page=17&ISS=23918&SID=696657. *See also*, Use of Company Websites, *supra* note 4, at 6-7 (''Investors are turning increasingly to electronic media and to company and third-party websites as sources of information to aid in their investment decisions, particularly since many types of investment-related company information are a variable only in electronic form. We believe that the Internet has helped to transform the trading markets by enabling many retail investors to have ready access to company information'') (citations omitted).

[6] *Id.*

[7] Securities and Exchange Commission, *supra* note 5, at 75 (Popular securities discussion forums include those offered by America Online, Yahoo! Finance, Silicon Investor, TeeStreet.com, Raging Bull, Motley Fool and others).

[8] *Id.* at 76.

[9] *Id.* at 79.

[10] *Id.* at 80.

[11] Securities and Exchange Commission, *Internet Fraud: How to Avoid Internet Investment Scams* (Jun. 8, 2007), *available at* http://www.sec.gov/investor/pubs/cyberfraud.htm. *See*, *e.g.*, Securities and Exchange Commission, *Securities and Exchange Commission v. Interactive Products and Services Inc. and Matthew Bowin*, Litigation Release No. 17450 (April 1, 2002), *available at* http://www.sec.gov/litigation/litreleases/lr17450.htm.

[12] Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 128 (2007) (''Blogs are a particular type of Web site in which an author, or several authors, posts messages in reverse chronological order'').

[13] *Id.* at 129; Norbert Walter, *Blogs: The New Magic Formula for Corporate Communications?*, E-CONOMICS: DIGITAL ECONOMY AND STRUCTURAL CHANGE, Aug. 2005, at 1, 4, *available at* http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000190745.pdf.

[14] Sprague, *supra* note 13, at 127.

[15] Walter, *supra* note 14, at 5.

[16] Pinedo & Tanenbaum, *supra* note 6.

[17] Walter, *supra* note 14, at 5.

[18] *Id.* at 6; Jonathan Schwartz, *Jonathan's Blog*, http://blogs.sun.com/jonathan/ (last visited Nov. 21, 2008); GM Fastlane Blog, http://fastlane.gmblogs.com/ (last visited Nov. 21, 2008).

[19] Walter, *supra* note 14, at 6.

[20] Sprague, *supra* note 13, at 132.

[21] *Id.* at 135.

[22] In the Electronic Shareholder Forums Release, *supra* note 4, the Commission noted that a company-sponsored electronic forum could be useful in ''expressing the views of the company's management and board of directors'' but cautioned ''[o]f course, anyone posting information on an electronic shareholder forum should consider the requirements of Regulation FD.'' *Id.* at 4 and fn. 5.

[23] Selective Disclosure and Insider Trading, Release No. 34-43154, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (Final Rule) (hereinafter ''Adopting Release'').

  SRLR ISSN 0037-0665

has grown even greater, as analysts seek to protect and guarantee future access to selectively disclosed information.''[24]

The Commission's proposal of Regulation FD, on December 20, 1999, generated significant public comment.[25] By the time the Commission adopted the regulation, by a 3 to 1 vote on August 24, 2000,[26] it had substantially narrowed the scope of the regulation in order ''to provide even greater protection against the possibility of inappropriate liability, and to guard further against the likelihood of any chilling effect resulting from the regulation.''[27] In the years since adoption, Commissioners and senior SEC officials have provided repeated assurances that Regulation FD is not ''a trap for the unwary'' and that enforcement cases will not be based on second-guessing reasonable judgments made in good faith by issuers, including judgments about materiality.[28] Despite these assurances, Regulation FD remains controversial.[29] Indeed, since its adoption in 2000, the Commission has brought only eight enforcement actions under Regulation FD. None of the actions involved internet postings and, but for *SEC v. Siebel Syst., Inc.*,[30] (''*Siebel II*''), all of the matters have been settled without the respondents admitting or denying wrongdoing.[31]

In *Siebel II*, the court admonished the SEC not to overreach and to take a practical approach in seeking to enforce the regulation. In that case, the Commission argued that a private statement by a company's CFO that there ''were'' some contracts valued at $5 million in the company's pipeline disclosed nonpublic information because a company spokesman had stated previously only that he ''suspect[ed] we'll see some [deals] greater than five [million].''[32] According to the Commission, because the CFO had used the present tense in his statement, it was a factually different statement than the prior disclosure, which had used the future tense. The *Siebel II* court dismissed the Commission's complaint, stating: ''It would appear that in examining publicly and privately disclosed information, the Commission has scrutinized, at an extremely heightened level, every particular word used in the statement, including the tense of verbs and the general syntax of each sentence.''[33]

Because the *Siebel II* court found that the SEC's complaint had failed to allege a cognizable cause of action for violation of Regulation FD, it did not reach the significant constitutional challenges to Regulation FD that the defendants had raised including, *inter alia*, a claim that the regulation impinges on conduct protected by the First Amendment.[34] This is an issue that has been addressed by commentators but has yet to be resolved by a court of law.[35] However, the *Siebel II* court did caution that ''the enforcement of Regulation FD by excessively scrutinizing vague general comments has a potential chilling effect which can discourage, rather than, encourage public disclosure of material information.''[36]

The Elements of Regulation FD As Applied to Anonymous Internet Postings. How, then, to reconcile the important policy considerations underlying Regulation FD with the reality of internet communications? An evaluation of the application of the regulation to the anonymous postings scenario is a helpful place to start. We conclude that, given the reality of internet communications, it would be very difficult for the SEC to find a violation of Regulation FD in such a scenario.

There are six elements to a Regulation FD violation:

- The disclosure must be selective.
- The disclosure must be by an issuer or a person acting on its behalf.
- The information must be nonpublic at the time of the disclosure.

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[24] *See*, *e.g.*, Securities and Exchange Commission, *SEC News Supplement: Opening Statement of Chairman Arthur Levitt, Open Meeting on Fair Disclosure*, Aug. 10, 2000, at ¶ 4, *available at* http:// www.sec.gov/news/extra/seldisal.htm.

[25] Selective Disclosure and Insider Trading, Release No. 34-42259, 64 Fed. Reg. 72,590 (Dec. 20, 1999) (Proposed Rule) (hereinafter ''Proposing Release''); Adopting Release, *supra* note 24, at 51,717.

[26] Securities Disclosure: Divided SEC Approves Modified Rule Limiting Selective Disclosure of Information, United States Law Week, 69 U.S. L. Wk. 2093 (2000) (hereinafter ''*Divided SEC*'').

[27] Adopting Release, *supra* note 24, at 51,718. *See also SEC v. Siebel Syst., Inc.*, 384 F. Supp. 2d 694, 702 (S.D.N.Y. 2005) (''[T]he SEC modified the proposed Regulation FD to include certain safeguards to narrow the applicability of Regulation FD so as *not to diminish* the flow of information'') (emphasis added).

[28] *Fair Disclosure or Flawed Disclosure: Is Regulation FD Helping or Hurting, Before the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, H. Comm. on Financial Services (2001) (Written Statement of U.S. Securities and Exchange Commission concerning Regulation FD (''Fair Disclosure'')), quoting Richard H. Walker, *Regulation FD - An Enforcement Perspective*, remarks to the Compliance and Legal Division of the Securities Industry Association (Nov. 1, 2000). (''These remarks, and similar ones by other Commission officials, have indicated that Commission enforcement of the regulation will be focused on clear violations'').

[29] U.S. Chamber of Commerce, *Report of the Current Enforcement Program of the Securities and Exchange Commission*, at 21 n.70 (March 2006); *Divided SEC*, *supra* note 5. *See also* Shannon M. Mudd, Note, *The Missing Piece of the Mosaic: Improving Regulation FD*, 80 WASH. U. L.R. 971, 973 (2002).

[30] 384 F. Supp. 2d at 708, *supra* note 28.

[31] *See*, *e.g.*, *In the Matter of Electronic Data Systems Corp.*, Release No. 34-56519, at 8 (Sept. 25, 2007) (disclosure to analysts); *In re Flowserve Corp.*, Release No. 34-51427, 2005 WL 677810, at *2 (March 25, 2005) (disclosure at event for investment analysts); *In re Senetek PLC*, Release No. 34-50400, 2004 WL 2076191, at *2 (Sept. 16, 2004) (updated information provided to research firm and financial advisory service); *In re Schering-PloughCorp.*, Release No. 34-48461, 2003 WL 22082153, at *3 (Sept. 9, 2003) (meetings with institutional investors); *In re Secure Computing Corp.*, Release No. 34-46895, 2002 WL 31643024, at *2-3 (Nov. 25, 2002) (calls with investment advisory firm portfolio manager, brokerage firm salesperson and institutional investor); *In re RaytheonCo.*, Release No. 34-46897, 2002 WL 31643026, at *2 (Nov. 25, 2002) (individual calls with analysts); *In re Siebel Systems, Inc. (''Siebel I'')*, Release No. 34-46896, 2002 WL 31643027, at *2 - 3 (Nov. 25, 2002) (call with analyst and invitation-only technology conference); *Report of Investigation Pursuant to Section 21(a): Motorola, Inc.*, Release No. 34-46898, 2002 WL 31650174, at *1 (Nov. 25, 2002) (calls to analysts by representative of Motorola).

[32] 384 F. Supp. 2d at 701, 704.

[33] *Id.* at 704.

[34] *Id.* at 709.

[35] *See*, *e.g.*, Antony Page & Katy Young, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1 (2005) (hereinafter ''*Controlling Corporate Speech*'').

[36] 384 F. Supp. 2d at 708.

■ The disclosure must constitute material information.

■ The disclosure must be to a holder of the issuer's securities or another person within certain enumerated categories, such as persons associated with a broker-dealer or an investment adviser.

■ Under the circumstances of the disclosure, it must have been reasonably foreseeable that the holder would trade on the basis of the information.

The first element of Regulation FD requires that the person making the posting *selectively* disclose material nonpublic information. Regulation FD was designed to address the problem of issuers making selective disclosure of material nonpublic information to analysts, institutional investors, or others, but not to the public at large.[37] Regulation FD is not implicated where information is disseminated in a manner ''reasonably designed to provide broad, non-exclusionary distribution . . . to the public.''[38] The question in the anonymous posting scenario, then, is whether such postings constitute selective disclosure.

All of the enforcement actions under Regulation FD to date have involved situations where the alleged disclosure was highly selective, such as meetings or telephone calls with relatively small groups of analysts or institutional investors.[39] In contrast, considering the Commission's intent in adopting Regulation FD and its increasing recognition of the internet as a public disclosure vehicle, posts on a public message board do not appear to constitute the kind of selective disclosure that gives rise to a violation of Regulation FD. (This analysis assumes that the corporate official's posts are either not anonymous (i.e., the official is identified as the source) or completely anonymous (i.e., no reader of the post knows that the official is the source). We discuss below the implications under Regulation FD if some, but not all, readers know the identity of the anonymous poster.)

At the time that it proposed Regulation FD in late 1999, the Commission took the position that information disseminated on the internet alone would not constitute a public disclosure.[40] By the time it adopted the final rule less than a year later, however, the Commission had shifted that position. At that time, although still questioning whether internet publication would always satisfy public disclosure requirements, the Commission took note of the ''online revolution'' and the potential of the internet as a communication tool and suggested that internet publication could satisfy the regulation in some circumstances.[41]

In the years since the adoption of Regulation FD, the ''online revolution'' has continued, effectively ''democratiz[ing] the securities markets.''[42] Courts have recognized that information published on the internet—including information on internet message boards—is effectively published to the world. The holding in *Ampex Corp. v. Cargle*,[43] is of particular interest. In that case a former employee had anonymously posted allegedly defamatory messages about his former employer. After the employer voluntarily dismissed its claim, the former employee sought attorneys fees under California's anti-SLAPP statute. Under the statute, the employee needed to show he had engaged in protected speech activity. The Court was asked to address whether anonymous internet postings on a Yahoo! Finance message board had been made in a public forum:

> When Cargle decided in August 2001 to join the conversation about the fortunes of Ampex, he did so by posting messages on the Yahoo! message board for Ampex. The question here is whether such postings were made in a public forum, traditionally defined as a place that is open to the public where information is freely exchanged. The term 'public forum' includes forms of public communication other than those occurring in a physical setting. Thus the electronic communication media may constitute public forums. Web sites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum for purposes of section 425.16. Thus the Yahoo! message board maintained for Ampex was a public forum.[44]

Similarly, in *Mathis v. Cannon*,[45] the court held that a posting on a Yahoo! message board was a ''publica-

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[37] Proposing Release, *supra* note 26, 64 Fed. Reg. at 72,594. *See also*, *e.g.*, Securities and Exchange Commission, *Fact Sheet: Regulation Fair Disclosure and New Insider Trading Rules* (Aug. 10, 2000) (describing the problem of issuers releasing ''material nonpublic information about a company to selected persons, such as securities analysts or institutional investors, before disclosing the information to the general public''), *available at* http://www.sec.gov/news/extra/seldsfct.htm. *See also* Commissioner Laura S. Unger, *Special Study: Regulation Fair Disclosure Revisited* (Dec. 2001) (Regulation FD is ''[a]imed at curbing the selective disclosure of material nonpublic information by issuers to analysts and institutional investors''), *available at* http:// www.sec.gov/news/studies/regfdstudy.htm.

[38] 17 C.F.R. § 243.101(e)(2).

[39] *See* note 32, *supra*.

[40] Proposing Release, *supra* note 26, at 72,597.

[41] Adopting Release, *supra* note 24, at 51,717 & 51,723; *see also*, *e.g.*, Arthur Levitt, Speech by SEC Chairman: Plain Talk About On-Line Investing (May 4, 1999), *available at* http://www.sec.gov/news/ speech/speecharchive/1999/spch274.htm (''[Y]ou can hardly pick up a newspaper, turn on a television, overhear a conversation, or talk to a friend without mention of the Internet. It has done nothing short of change the way our world works and the way our nation invests''). One academic study concluded that ''discussion boards seem to play an important role in rapidly disseminating news, sometimes 'breaking stories' before they are covered widely'' and that the ''boards are apparently serving to disseminate information to interested investors quite quickly.'' Sanjiv Das, Asis Martinez-Jerez, & Peter Tufano, *eInformation: A Clinical Study of Investor Discussion and Sentiment*, 34 FIN. MGMT. 103, 110 & 115 (2005).

[42] Nancy Libin & James Wrona, *The Securities Industry & The Internet: A Suitable Match?*, 01 COLUM. BUS. L. REV. 601, 630 - 31 (2001); *see also*, *e.g.*, Christopher Cox, Speech by SEC Chairman: Remarks Before the Securities Industry Association (Nov. 11, 2005), *available at* http://www.sec.gov/news/ speech/spch111105cc.htm (''[I]nteractive data is just like the Internet itself, which has changed and democratized everything . . . .''); Securities Offering Reform, Release No. 34-52056, 70 Fed. Reg. 44,722, 44,731 (Aug. 3, 2005) (''Modern communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly''); Use of Electronic Media, Release No. 34-52056, 65 Fed. Reg. 25,843, 25,844 (May 4, 2000) (''One of the key benefits of electronic media is that information can be disseminated to investors and the financial markets rapidly and in a cost-effective and widespread manner'').

[43] 27 Cal. Rptr. 3d 863 (Cal. Ct. App. 2005).

[44] *Id.* at 869 (internal quotations and citations omitted).

[45] 573 S.E.2d 376 (Ga. 2002).

  SRLR ISSN 0037-0665

tion'' within the meaning of Georgia's retraction statute. The court characterized its interpretation of the term ''publication'' to include such internet postings as one striking a balance in favor of ''uninhibited, robust, and wide-open debate in an age of communications when anyone, anywhere in the world, with access to the Internet can address a worldwide audience of readers in cyberspace.''[46]

The SEC, similarly, has recognized the power of the internet as a public disclosure vehicle and has moved forward with initiatives, such as the interactive data initiative and the e-proxy rules, in order to ''advance [the Commission's] goal of tapping the enormous power of technology and the Internet to simplify and improve disclosure.''[47] In a 2006 letter to Jonathan Schwartz, CEO of Sun Microsystems, Inc., Chairman Christopher Cox acknowledged that ''[s]ince Regulation FD was adopted in 2000, significant advances in information and telecommunications technology have occurred that have dramatically increased Internet use by businesses, consumers, investors, and government agencies. These advances have transformed the Internet into a primary means for the rapid dissemination and retrieval of information. Technology now plays an integral role in timely informing the markets and investors about important corporate information and developments.''[48]

Chairman Cox was writing in response to a letter from Mr. Schwartz, who was advocating for the position that because ''the Internet represents a broader user base than those able to afford subscriptions to traditional forms of media . . . usage of this or any other freely available company blog or web site should be considered sufficient in satisfying the objectives of Regulation Fair Disclosure.''[49] With regard to that particular question, Chairman Cox responded as follows:

> You are certainly correct that a corporate website is a tremendous vehicle for the broad delivery of timely information (and in the case of Sun, you note that your website receives an average of nearly one million hits per day). Many other companies are finding that this is true, and increasingly are posting significant amounts of information on their websites. Indeed, because information that is *not 'selectively disclosed'* or that is not material nonpublic information *is not subject to the public dissemination provisions* of Regulation FD, Sun and other public companies can already do this without implicating the provisions of Regulation FD.[50]

The SEC's August 2008 Guidance on the Use of Company Websites[51] confirms this trend. The release considered the circumstances under which companies comply or violate Regulation FD when they post information on their corporate websites, but the Commission has yet to discuss the implications if a company or one or more of its senior executives posts information on a website other than one sponsored by the company itself. The SEC discussed extensively the factors to consider in evaluating the former situation. Although this discussion suggests that the Commission does not believe that disclosure other than through corporate websites as yet constitutes public disclosure, the issue appears to be one of degree, and one can foresee a day when disclosure might be considered public.

The factors that the SEC considers relevant in evaluating whether dissemination of information through a website is public center on whether the dissemination is in a manner ''calculated to reach the securities market place in general through recognized channels of distribution.''[52] In turn, determining whether a company's website is a recognized channel of distribution involves, among other things:

- whether the company has informed investors and the markets that it maintains a website and intends for investors to use that website as a source of information;
- whether the company has designed the website as an efficient channel leading investors to important information, including the use of ''push'' technology to disseminate information other than in response to specific inquiries; and
- the nature of the information itself.[53]

Thus, as companies become more confident in the use of their websites as channels for distribution of important corporate information and as investors become more facile in accessing such channels, corporate websites might well become the standard method of public dissemination, supplanting press releases and other traditional distribution methods. This development presumably will draw other internet-based sources into the mainstream. It already is common practice for investors, on learning about a corporate development, to check websites other than the ''official'' corporate website in order to determine market reaction. At some point, the volume and quality of information flowing through such additional sources might well render them effectively ''public.''

Of course, the preceding discussion addresses situations where the poster's identity, as a corporation or as an individual associated with a corporation, is known. What of situations where the source of the information is not known? Truly anonymous internet postings do not violate Regulation FD if the message board has become, essentially, a public forum, because the same information is available to everyone. But let us suppose that the corporate executive has revealed his or her

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[46] *Id.* at 385-86. *See Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1321-22 (11th Cir. 2006) (''In sum, to access the electronic bulletin board messages, all one needs to do is register, create a password, and click 'I Agree to these terms.' Nothing inherent in any of these steps prompts us to infer that access by the general public was restricted''); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981 (N.D. Ohio 2003) (''message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with Internet access'').

[47] Securities and Exchange Commission, *2006 Performance and Accountability* Report, 2-3, *available at* http://www.sec.gov/about/secpar2006.shtml. *See also* Christopher Cox, Speech by SEC Chairman, *The Interactive Data Revolution: Improved Disclosure for Investors, Less Expensive Reporting for Companies* (May 30, 2006), *available at* http://www.sec.gov/news/speech/2006/spch053006cc.htm.

[48] Posting of Christopher Cox to *Jonathan's Blog*, http://blogs.sun.com/jonathan/entry/sunlight_on_a_cloudy_day. . .; (Nov. 3, 2006 02:30 PST) (hereinafter ''*Cox's Blog Post*''). In addition to mailing his response, Chairman Cox chose to post his response to Mr. Schwartz on Mr. Schwartz's Internet Blog because Chairman Cox thought that Mr. Schwartz would ''appreciate my taking advantage of the Internet's speed and potential for broad dissemination.'' *Id.*

[49] Posting of Jonathan Schwartz to *Jonathan's Blog*, http://blogs.sun.com/jonathan/entry/one_small_step_for_the (Oct. 2, 2006 02:35 PST).

[50] *Cox's Blog Post*, *supra* note 49 (emphasis added).

[51] *See* note 4, *supra*.

[52] Use of Company Websites, *supra* note 4, at 18 (quoting *Faberge, Inc.* 45 SEC 249, 255 (1973)).

[53] *Id.* at 20-23.

identity to selected participants on the message board. In other words, let us suppose that a subset of the participants on the message board know that the poster's statements are the utterances of one of the company's executives. In such situations, an argument could be made that the disclosure is selective to those individuals. To address such situations, we need to consider the other elements of Regulation FD.

The second element of a Regulation FD violation is that the person making the disclosure be acting on behalf of an issuer. An executive, acting in his or her public capacity, is a person whose statements are constrained by Regulation FD. And, presumably, the SEC would question whether an executive who began a statement with words to the effect of ''speaking only for myself'' had insulated himself or herself from liability under Regulation FD if he or she went on to reveal nonpublic corporate information. In that context, a senior executive, speaking in a forum in which his or her identity is known, never gets to make public statements relating to the corporation, other than in his or her corporate capacity. Similarly, in the situation that we have posited, an executive should not be able to avoid liability by cloaking his or her selectively-disclosed statement in the guise of broad, apparent anonymity.

The third element of a Regulation FD violation is that the information disclosed be material and non-public. Anonymous message board postings raise unique issues in this area. In the Regulation FD Adopting Release, the Commission adopted the prevailing definition of ''materiality'' established by *TSC Indus., Inc. v. Northway, Inc.*,[54] *i.e.*, that information is ''material'' if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision.[55] When Regulation FD was proposed and later enacted, commentators criticized the Commission for not providing greater clarity regarding the materiality standard,[56] and the SEC acknowledged that Regulation FD raises significant concerns, including the ''difficult[y]'' and ''potential burdens'' of making judgments about whether information is ''material.''[57] Indeed, Commissioner Laura Unger commented at the time that ''putting myself in the shoes of corporate management, I would not be sure what is or is not material.''[58] In light of this uncertainty, the SEC has stated that it would not ''bring enforcement actions under Regulation FD for mistaken materiality determinations.''[59]

Where a corporate official has posted anonymously, to the extent that some participants on a message board know the poster's identity, the question of whether a particular posting contains material information should be analyzed as two separate questions: First, is there a substantial likelihood that a reasonable investor who did not have any idea that the poster was a corporate executive would consider the information important? In other words, is the information material *per se*? Second, is there a substantial likelihood that a reasonable investor who knew that the poster was a corporate executive would consider the information important? In other words, the second question posits that the potentially material information is not: ''Poster thinks X''; but, rather: ''a person who may be a corporate executive posting using a pseudonym, appears to think X.''

A relevant factor in making a materiality determination is the medium through which the source of the information has chosen to disseminate it. There is a common perception that message board rumors move markets. We will leave it to economists to determine whether that is true in a particular situation. As a matter of legal analysis, however, the materiality of such information is suspect. Statements on internet message boards usually occur as points in wide-ranging discussion threads and in a medium characterized by the free flow of remarks of varying substance and merit. Because message board discussions are unregulated and unedited—and the commentary frequently is irrelevant and irreverent—reasonable investors would not consider such discussions to provide reliable bases upon which to make investment decisions.[60] (Of course, to the extent that a message board has become an accepted channel for corporate communications—an issue that we discussed above—the perceived reliability of statements made on such a board would tend to increase. The materiality of such statements would increase as well.)

Yahoo! specifically advises participants on its financial message boards not to rely on the information posted for investment purposes:

> SPECIAL ADMONITION FOR SERVICES RELATING TO FINANCIAL MATTERS
>
> If you intend to create or join any service, receive or request any news, messages, alerts or other information from the Service concerning companies, stock quotes, investments or securities, please read the above [general warnings] again. They go doubly for you. In addition, for this type of information particularly, the phrase 'Let the investor beware' is apt. ***The Service is provided for informational purposes only, and no Content included in the Service is intended for trading or investing purposes***.[61]

The SEC also has cautioned investors against investment decisions made on the basis of information obtained in internet chat rooms.[62] One would expect in-

[54] 426 U.S. 438, 449-50 (1976).

[55] *See also Basic v. Levinson*, 485 U.S. 224, 248-49 (1988). The ''substantial likelihood'' component of the materiality standard (*i.e.*, the information must be more than *potentially* important, it must be *substantially likely* to be important) often is overlooked, but places an additional burden on parties who would seek to demonstrate the materiality of any particular statement.

[56] *See*, *e.g.*, Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 BUS. LAW. 317, 342 (Feb. 2007).

[57] Proposing Release, *supra* note 26, 64 Fed. Reg. at 72,594-95.

[58] *Divided SEC, supra* note 27.

[59] Adopting Release, *supra* note 24, 65 Fed. Reg. at 51,718.

[60] Day traders and other investors who base their decisions on trading momentum rather than on corporate fundamentals may, in fact, respond to message board postings, speculating that such postings are a harbinger of the direction of a stock. Actions of such investors, however, should not lower the standard of what constitutes a ''reasonable investor.''

[61] Yahoo! Inc., Yahoo Terms of Service ¶ 22 (emphasis added), available at http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html.

[62] *See Internet Fraud*: *How to Avoid Internet Investment Scams*, *supra* note 12. As long ago as 1999, former Chairman Arthur Levitt provided a similar warning: ''For the future sake of this medium, I encourage investors to take what they see over chat rooms — not with a grain of salt — but with a rock of salt. By doing so, you protect yourself and you protect the Internet.'' Arthur Levitt, Speech by SEC Chairman: Plain Talk

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vestors in well-known, well-capitalized companies, the securities of which trade in liquid, efficient markets characterized by the availability of cogent analysis[63], to heed these warnings.[64]

Moreover, even if the message board participants knew that the poster was an executive of the company, they likely would diminish the importance of the information disclosed on the board. Absent some ''special arrangement'' between a corporate insider and a reader of a message board—a situation more akin to ''tipping'' in the insider trading context than to selective disclosure under Regulation FD—message board participants would have to question why an executive would choose the message board as a forum for disseminating information. Therefore, a reasonable investor would discount the significance of the information contained in the posts to reflect that uncertainty.[65]

Finally this discussion has surprising implications for the ability of an issuer to ''cure'' a potential violation of Regulation FD. Although Regulation FD does not have an explicit *scienter* standard, it has an implicit one that flows from the ''intentional/non-intentional'' distinction in 17 C.F.R..§ 243.100 (a)(1) & (2). An issuer can cure a non-intentional selective disclosure by ''prompt'' public disclosure. ''Prompt,'' in turn, is defined as not later than 24 hours after a senior officer ''learns that there has been a non-intentional disclosure by the issuer or a person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.''[66] Let's assume that the executive was not on notice that his or her posts contained information that was material and nonpublic—even to someone who knew the poster's identity—and that the SEC would not be able to demonstrate that the material nonpublic nature of the posts, if any, was so clear that the executive was reckless in believing to the contrary. In such a situation, it would not be enough that the poster made postings that contained material nonpublic information, he or she would have had to have recklessly failed to cure such disclosures once that conclusion was brought to his or her attention. Ironically, were the SEC to prove that a particular post contained material nonpublic information, the Company could cure the violation by issuing a press release the next day. This demonstrates, again, that the Commission never intended Regulation FD to apply to situations such as those presented by anonymous posts.

The fourth element of a Regulation FD violation is that the disclosure be made to a broker, investment adviser or investment company, or to a holder of the issuer's securities in circumstances in which it was reasonably foreseeable that such holders would trade as the basis of the information disclosed. Although message board participants have a common interest in the securities of a particular issuer and likely are investors (short or long) in those securities, it is not necessarily the case that such persons can be expected to trade on the basis of information posted on the message board. A corporate official who is posting anonymously, even if he or she were aware that some participants on the message board knew his or her identity, still might not reasonably foresee that ''holders'' of the company's securities who read the posts would trade based on information contained in the posts.

Message boards are a forum for the exchange of ideas, not a source of information that would predictably motivate a reasonable person to trade. As noted above, message board sponsors, regulators and other sources of information about message boards caution that information on the boards may not be reliable. Par-

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About On-line Investing (May 4, 1999), *available at* ttp://www.sec.gov/news/speech/speecharchive/ 1999/spch274.htm. State regulators have issued similar warnings. *See*, *e.g.*, Nevada Secretary of State, Online Investing Tips, *available at* http://sos.state.nv.us/securities/ investors/publications/more-online-tips.asp (''Many of the people participating in chat rooms and other online forums are amateur investors. Assume they are less well-informed than you are. Chat-room comments are frequently 'seat-of-the-pants' observations based on mere hearsay or worse. Don't accept such information without question and verification'').

[63] Enforcement actions in which the SEC has alleged that statements on internet chatrooms or message boards were material have tended to involve penny stocks and illiquid markets. *See*, *e.g.*, *SEC v. Refael Shaoulian,* Litigation Release No. 18146, 2003 WL 21148544 (Manx) (C.D. Cal. May 19, 2003); *SEC v. Yun Soo Oh Park a/k/a Tokyo Joe*, Litigation Release No. 16399, 2000 WL 4014 (N.D.Ill Jan. 5, 2000); *In the Matter of Kenneth Terrell*, Release No. 34-42,483, 2000 WL 248549 (March 2, 2000).

[64] There is a growing body of case law that reflects similar analysis. For example, courts considering defamation and other matters have been dismissive of the information available from such on-line sources. *E.g.*, *Rocker Mgmt., LLC v. Does 1-20*, No. 03-MC-33, 2003 WL 22149380, at *2 (N.D. Cal. May 29, 2003) (describing posts on Yahoo! message boards: ''The messages are replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole. . . . In this context, readers are unlikely to view messages posted anonymously as assertions of fact''); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981 (N.D. Ohio 2003) (''[T]he Defendant's statements were posted on an Internet message board. Such message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with Internet access, and no one exerts control over the content. Pseudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum''); *Global Telemedia Int'l Inc. v. Doe*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal 2001) (describing posts on Raging Bull message boards as ''full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents''); *Doe No. 1 v. Cahill*, 884 A.2d 451, 465 (Del. 2005) (''Ranked in terms of reliability, there is a spectrum of sources on the internet. For example, chat rooms and blogs are generally not as reliable as the *Wall Street Journal Online*. ***Blogs and chat rooms tend to be vehicles for expressions of opinion; by their very nature, they are not a source of facts or data upon which a reasonable person would rely***'') (emphasis added).

[65] Indeed, many of the statements that appear on a message board, even if a reader had attributed them to a corporate executive would be of a generalized nature akin to non-actionable ''puffery.'' *See*, *e.g.*, *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004) (''generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial''); *In re Tower Auto. Secs. Litig.*, 483 F. Supp. 2d 327, 337 (S.D.N.Y. 2007) (''corporate braggadocio utterly lacking in substance''); *In re Bally Total Fitness Secs. Litig.*, No. 04 C 3530, 2007 WL 551574, at *6 (N.D. Ill. Feb. 20, 2007) (''[t]he alleged comments by [officer and director] Hillman that the stock was a bargain and that Bally would continue to 'grow' its earnings are classic examples of sales 'puffing' and general corporate optimism, which are immaterial for purposes of the federal securities fraud laws'').

[66] 17 C.F.R. § 243.101 (d).

ticipants on message boards relating to well-capitalized companies appear to understand this. Given this reputation, the SEC would have difficulty arguing that the poster should have expected that individuals would trade on the basis of anonymous postings.

Finally, it would not be reasonably foreseeable that any trades would be *on the basis* of any information contained in the posts. Regulation FD's use of the phrase ''on the basis of'' in defining the elements of a violation is significant, and contrasts with other possible formulations, such as ''in possession of'' or ''by using'' the information disclosed.[67] Further, because the elements of a violation of Regulation FD are cumulative, the proper analysis is whether it was reasonably foreseeable that the particular, material, nonpublic information disclosed would have motivated the recipient of the information to trade.

After considering each of the elements of a violation of Regulation FD, therefore, we conclude that it would be unlikely that the SEC could demonstrate a violation of Regulation FD in the context of anonymous message board postings.

First Amendment Implications. The question or whether Regulation FD would survive First Amendment scrutiny has yet to be tested in the courts. Speech on the internet is not subject to reduced First Amendment protection.[68] Anonymous speech is also protected by the First Amendment.[69] The amount of First Amendment scrutiny applied to Regulation FD would depend upon both the character of the regulation and the regulated speech.

Several scholars have argued that Regulation FD raises First Amendment concerns while others have argued that securities regulations should not be subject to First Amendment scrutiny.[70] A number of scholars have argued that securities regulations should not be subject to ordinary First Amendment review because of the unique character of the regulated speech and the broad federal power in the field of securities regulation.[71] Those arguing that Regulation FD should be subject to First Amendment scrutiny are divided as to what level of scrutiny should be applied.[72]The case law demonstrates that there is ''no monolithic approach to the broad field of securities regulation.''[73]

Allen Boyer has argued that the First Amendment does not apply in the field of securities regulation.[74] Rather, representations regarding securities are ''inextricably bound up in the underlying transactions,'' and ''the legitimacy of state action should be judged in terms of the state's authority to regulate conduct and economic activity.''[75] Professors Antony Page and Katy Yang have argued that Regulation FD is a content based restriction targeting speech *per se* subject to the strictest First Amendment scrutiny.[76] Regulations targeting speech per se are distinguished from ''regulations targeting an industry's conduct that may evince itself through speech''.[77] Regulation FD arguably targets speech by compelling disclosure to a public audience or to suppressing it to a private audience.[78] Additionally, content based restrictions are subject to more exacting scrutiny than content-neutral time, place, and manner restrictions.[79] Regulation FD arguably targets content because it compels disclosure based on whether the speech contains material non-public information, considering the reaction of the audience in reaching this determination.[80]

If Regulation FD is subject to First Amendment scrutiny, the characterization of the speech impacted by Regulation FD will determine the level of constitutional scrutiny that will be applied. Regulation FD may be characterized as restricting or compelling commercial speech, mixed commercial and noncommercial speech, or fully protected noncommercial speech.[81] Posting to an internet forum could arguably encompass all of these categories. The protection afforded to commercial speech varies depending on whether the speech is pure commercial or mixed commercial speech and whether the speech is restricted or compelled. The Supreme Court has characterized pure commercial speech as both ''expression related solely to the economic inter-

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[67] In *United States v. O'Hagan*, the Supreme Court specifically left open the question whether inside information must also motivate the trade in question:

''As evidence that O'Hagan traded on the basis of nonpublic information misappropriated from his law firm, the Government relied on a conversation between O'Hagan and the Dorsey & Whitney partner heading the firm's Grand Met representation. That conversation allegedly took place shortly before August 26, 1988. O'Hagan urges that the Government's evidence does not show he traded on the basis of nonpublic information. O'Hagan points to news reports on August 18 and 22, 1988, that Grand Met was interested in acquiring Pillsbury, and to an earlier, August 12, 1988, news report that Grand Met had put up its hotel chain for auction to raise funds for an acquisition. O'Hagan's challenge to the sufficiency of the evidence remains open for consideration on remand.''

521 U.S. 642, 648 n.1 (1997) (citations omitted).

[68] *Reno v. ACLU*, 521 U.S. 844, 871 (1997).

[69] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), (holding that an Ohio statute prohibiting unsigned handbills was a regulation of core political speech subject to exacting scrutiny and that the anonymity of the author received the same measure of protection as the underlying speech).

[70] Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. Rev. 789, 790-91 (2007).

[71] *Id.* at 797-800 (citing Brief of Law Professors as Amicus Curiae in Opposition to Motion to Dismiss at 16-22, *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694 (2004) (No. 04 CV 5130(GBD)); *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 372-73 (D.C. Cir. 1988)).

[72] *Compare Controlling Corporate Speech,* supra note 36, at 37-40 (2005) (arguing that Regulation FD should be subject to strict scrutiny), *with* Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. Rev. 757 (2007) (arguing that Regulation FD should be subject to intermediate scrutiny).

[73] Page & Yang, *supra* note 36, at 43 (citing *Lowe v. SEC*, 473 U.S. 181, 210 (1985); *SEC v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 374 (D.C. Cir. 1988); *US v. Wenger*, 292 F. Supp. 2d 1296, 1298 (D. Utah 2003)).

[74] Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 Colum. L. Rev. 474, 495 (1992).

[75] *Id.*

[76] Page & Yang, *supra* note 36, at 43 (arguing that Regulation FD should be subject to strict scrutiny).

[77] *Id.* at 40-42 (citing *Ohrilack v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978)).

[78] *Id.* at 42.

[79] *Id.* at 44 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

[80] *Id.* at 44.

[81] *Id.* at 66.

  SRLR ISSN 0037-0665

ests of the speaker and its audience''[82] and more narrowly as ''speech which does not more than propose a commercial transaction.''[83] Regulations on pure commercial speech may be subject to rational basis or intermediate scrutiny. Regulations compelling pure commercial speech have been subject to rational basis review when designed to prevent consumer deception or fraud but may be subject to a higher standard in other instances.[84] Restrictions on pure commercial speech that are not false or misleading have been subjected to intermediate scrutiny.[85] Restricted or compelled mixed commercial and noncommercial speech may be subject to strict scrutiny where the two types of speech are ''intertwined''[86] but not where advertising simply mentions a noncommercial issue.[87]

Scholars disagree regarding the nature of the speech impacted by Regulation FD. Professor Lloyd Drury has argued that Regulation FD impacts commercial speech and should be subject to intermediate scrutiny.[88] He argues that disclosures made pursuant to SEC regulations are commercial speech because such disclosures ''relate to proposing or effecting a transaction, hearers of this speech are less in need of protection than consumers of ordinary products, and the disclosures do not meet criteria for heightened First Amendment protection.''[89] Page and Yang have argued that Regulation FD should be subject to strict scrutiny.[90] Regulation FD may exceed even a broad definition of commercial speech because material nonpublic information may ''not only involve economic subjects, the speech may also concern corporate attitudes toward or involvement with world events political happenings, and other issues which affect a company's business.''[91] An internet discussion forum could easily touch on all of these issues.

Where posts by an executive contain what the SEC would consider material and non-public information, there still would be a question whether the speech was commercial or non-commercial. For example, information about the company's earnings forecasts might be commercial if there were an implicit suggestion that one should buy the company's stock.[92] On the other hand, information about company policies, such as an environmental initiative, may be intended to affect the opinions of other posters and could be non-commercial.[93]

Page and Yang have argued that Regulation FD would be unconstitutional if subjected to either intermediate or strict scrutiny. Intermediate scrutiny requires the government to show that a regulation of truthful commercial speech is ''not more extensive than necessary to serve [its] interests.''[94] Strict scrutiny requires that ''the restriction . . . is narrowly tailored to serve an overriding state interest.''[95] Regulation FD arguably serves three government interests. First, Regulation FD seeks to prevent unfair selective disclosure.[96] Second, Regulation FD seeks to prevent ''loss of investor confidence in the integrity of our capital markets.''[97] Finally, the SEC is concerned with selective disclosure used as a bribe to obtain favorable reviews by analysts.[98] The crux of the argument is that Regulation FD is more extensive than necessary because restrictions on trading based on material nonpublic information would address these concerns without restricting speech.[99] Thus, this regulation on speech is more extensive than necessary to serve the government's interests.[100] Page and Yang also argue that Regulation FD is over-inclusive in that ''all of the material nonpublic information that it targets is assumed to result in the harm of trading''[101] and under-inclusive for ''promoting fairness and investor confidence'' because it excludes certain issuers and situations where trading is likely.[102] All in all, these arguments could serve an executive well if the SEC ever sought to enforce Regulation FD based on internet chat room postings.

Conclusion. The Commission did not adopt Regulation FD in order to restrict postings on internet message boards. Indeed, the Commission, since the adoption of Regulation FD, has acknowledged and sought to advance the use of the internet as a public disclosure vehicle. The regulation was directed at combating the perceived practice of favored analysts and institutional investors receiving ''market-moving information'' before the news was shared with the general public.[103] An attempt to apply the regulation to anonymous postings would be contrary to the representations of the Commission and its senior staff — both currently and historically — that they would be conservative in applying Regulation FD, a position reinforced by the findings of the court in *Siebel II*. Moreover, there are significant First Amendment implications were the Commission to proceed with such a case.

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[82] *Id.* at 50 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)).

[83] *Id.* (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983)).

[84] *Id.* at 58-60 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *U.S. v. United Foods*, 533 U.S. 405, 416 (2001)).

[85] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

[86] Page & Yang, *supra* note 36, at 52 (quoting *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 630, 632 (1980)).

[87] *Id.* at 53 (citing *Bolger*, 463 U.S. at 61-62).

[88] Drury, *supra* note 73, at 771.

[89] *Id.*

[90] Page & Yang, *supra* note 36, at 62.

[91] *Id.* at 65.

[92] *Id.* at 46.

[93] *See Id.* (citing *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (2001)).

[94] *Id.* at 74 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

[95] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

[96] Page & Yang, *supra* note 36, at 67.

[97] *Id.* at 68 (quoting Securities and Exchange Commission, *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,716, 51,716 (Aug. 24, 2000)).

[98] *Id.* at 70 (citing Adopting Release, *supra* note 24, 65 Fed. Reg. at 51,716); *see also* Drury, *supra* note 73, at 788 (''If a litigant can provide courts with the empirical evidence that Regulation FD stifles a substantial amount of truthful speech by issuers, the courts should give serious consideration to whether it should strike down the regulation as an unlawful prohibition of commercial speech under the First Amendment'').

[99] *Id.* at 75.

[100] *Id.*

[101] *Id.* at 76.

[102] *Id.* at 80-81.

[103] *Controlling Corporate Speech, supra* note 36, at 3 (citing Arthur Levitt, *Take on the Street: What Wall Street and Corporate America Don't Want You to Know, What You Can Do to Fight Back* (Pantheon Books 2002)).