

SOCIAL MEDIA POSTS RESULT IN SEC FINES FOR REGULATION FD VIOLATIONS

COMPANIES SHOULD TAKE CARE TO ENSURE THAT THEIR COMMUNICATIONS TEAM IS WELL VERSED IN THE REQUIREMENTS OF REGULATION FD

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WHAT HAPPENED

On September 26, 2024, the SEC [announced](#) that it had settled charges with DraftKings Inc. for selective disclosure of material non-public information on the CEO's personal X (formerly Twitter) and LinkedIn accounts in violation of Regulation FD. The SEC identified disclosure regarding DraftKings' continuing sales growth on the accounts before the company had publicly released its financial results. The company's public relations firm – which had made the postings – quickly deleted the posts at the company's request. The SEC found fault with DraftKings' failure to promptly disclose the information to the public, as required by Regulation FD.

To settle the SEC's charges, DraftKings agreed to pay a \$200,000 civil penalty, to cease and desist from future violations and to provide Reg. FD training to personnel with corporate communications responsibilities.

TAKEAWAYS

Regulation FD has remained an area of focus of the SEC's enforcement efforts, as evidenced by charges it has brought over the past 20 years. Accordingly, public companies should:

- Periodically provide employees training on Reg. FD and the company's disclosure and social media policies to ensure awareness of the rules.
- Review and strengthen, as appropriate, controls and procedures to promptly disclose any MNPI that is unintentionally selectively disclosed in violation of Reg. FD.
- Before using social media outlets such as X or Facebook to announce key information, alert investors in advance what outlets will be used to disseminate such information in compliance with the SEC's [2013 guidance on use of social media](#).

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According to the SEC [order](#):

Release of news of “strong growth in existing states” in social media posts

DraftKings’ public relations firm produced content for and operated social media accounts in the name of a few senior executives, including their personal X and LinkedIn accounts. DraftKings’ staff reviewed and approved content before it was published.

On July 27, 2023, DraftKings’ public relations firm posted previously undisclosed news that the company was “. . . still seeing really strong growth in existing states”, first on the CEO’s personal X account, followed by the CEO’s personal LinkedIn account. Both accounts were followed by some company shareholders, making the disclosure subject to the requirements of Reg. FD. The company’s communications staff recognized that the information should not have been posted, and within a half hour of the initial post on the CEO’s X account, requested that the public relations firm remove the posts, which they subsequently did. No further disclosure was made regarding the sales growth until August 3, 2023, when DraftKings published its earnings release.

Regulation FD requirements

In August 2000, the SEC adopted Regulation FD to combat selective disclosure. Subject to certain exceptions, a company, or a person acting on behalf of a company, is prohibited from selectively disclosing MNPI to market professionals and holders of the company’s securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information. Regulation FD requires prompt public disclosure of MNPI that is *unintentionally* disclosed. Prompt is defined by Regulation FD as public disclosure as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange) after a senior official of the company learns that there has been a non-intentional disclosure by the issuer or 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. If a company *intentionally* discloses MNPI on a selective basis, then public disclosure must occur simultaneously.

Alleged violations of Regulation FD and company policies

Because the disclosure of DraftKings’ existing state growth had not previously been disclosed, and the two relevant CEO social media accounts were followed by shareholders, the SEC alleged that Regulation FD required disclosure through a Form 8-K or an alternative method of disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In announcing the action, the SEC confirmed its prior guidance that social media announcement of key information may be made in compliance with Reg. FD so long as companies

provide investors with prior notice about which social media will be used. By implication, the SEC believes this standard was not satisfied by DraftKings.

Additionally, the SEC noted that the disclosure violated:

- The company's social media policy, which required prior written approval by the communications team before sharing any potential or actual confidential or financial/performance information about the company via social media.
- The company's Reg. FD Policy, which prohibits disclosure of MNPI through social media, because:
 - The disclosure may be considered selective disclosure; and
 - During a "quiet period" (which began here on the last day of the second quarter and ended the day after announcement of second quarter earnings), the company's authorized spokespersons are prohibited from discussing certain financial or operational results or guidance.

The violations of these policies likely explains the company's undertaking to provide training regarding Reg. FD itself and the company's Reg. FD policy.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



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