Is Regulation Fair Disclosure Constitutional?

Regulating Speech to Prevent Insider Trading

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On October 3, 2002, at the Kenilworth, New Jersey headquarters of Schering Plough, two dozen financial analysts poured cups of coffee and ate cookies from small plates while awaiting the arrival of Dick Kogan, the elfin, sometimes irascible, CEO of the company. Conversation centered squarely on the company's stock price, which had been under considerable pressure over the past three days, and which reflected concern over the loss of market exclusivity for Claritin, the company's biggest drug. While no one knew the precise nature of the conversations, Mr. Kogan had been on a roadshow meeting with some of Schering Plough's largest investors in Boston. There, he had reportedly provided dour forecasts of sales and earnings, suggesting that analysts had not sufficiently accounted for the impact of the loss of Claritin. Upon arriving in the conference room, Mr. Kogan made the rounds, shaking the analysts' hands and grinning amiably. He himself found the refreshments and made his way to the front of the room with a plateful of cookies. While he nibbled and held court, audience members peppered him with questions about future financial performance and reasons behind a more than 15% decline in the price of Schering Plough's shares. At one point, Mr. Kogan indicated that 2003 earnings would be "terrible"[1] and at another he indicated that there would not be so many cookies at next year's meeting.

What the analysts surmised, but had not yet confirmed, was that Mr. Kogan had met in turn with four institutional investors and disclosed through conversation and tone that the company would not meet earnings expectations. Three of the four firms punctuated their meetings by selling a significant amount of stock, while analysts for two of the four firms downgraded their ratings. Later that evening, the company issued a press release intended to clarify the situation but, by that time, the damage had been done. The Securities Exchange Commission (S.E.C.) brought

[1] Floyd Norris, *Marketplace; S.E.C. Penalizes Schering-Plough Over a Fair Disclosure Violation*, NEW YORK TIMES (Sep. 10, 2003), https://www.nytimes.com/2003/09/10/business/market-place-sec-penalizes-schering-plough-over-a-fair-disclosure-violation.html.

administrative proceedings against Schering-Plough and Mr. Kogan for having violated a new statute, known as Reg Fair Disclosure (Reg FD), which forbids selective disclosure to investment professionals. It did not, however, initiate proceedings against the institutions which acted on the information. Mr. Kogan, who ultimately agreed to pay $50,000 for his indiscretion, announced his retirement one month later. Schering Plough agreed to pay a $1 million fine.

Background

Shortly after the financial crisis of the early 1930s, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, the latter of which created the S.E.C. "One of the primary purposes behind both of the Acts was to protect the investing public from fraud by ensuring that issuers of securities provide full disclosure".[2] Over time, however, the S.E.C. and the courts have interpreted these acts more broadly, incorporating the notion of market fairness and integrity. According to the S.E.C., its mission is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[3]

In the 1980's, the Supreme Court heard several cases that still impact scholars' analyses of insider trading. In *Chiarella v. United States*, the petitioner worked for a financial printer and received takeover bids notifications as part of his job. While the companies' identities were concealed, Chiarella deduced them and traded on that information; he was subsequently convicted of insider trading. The Supreme Court reversed on appeal, holding that Chiarella did not have a relationship with the companies involved and, therefore, did not have a duty to disclose, despite possessing nonpublic market information. Three years after *Chiarella*, the Court heard *Dirks v. S.E.C.* Raymond Dirks was a financial analyst working for a broker dealer.

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[2] Alyssa Wanser, *COMMENT: The Facebook Status that Sparked an SEC Investigation: Regulation Fair Disclosure and the Growth of Social Media*, 30 Touro L. Rev. 723, 728 (2014).
[3] *About the SEC*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/about.shtml (last visited Jun. 1, 2021).

He received information from a former officer of an insurance company suggesting its financial measures were fraudulently overstated. While he did not trade on the information, Dirks communicated with institutional investors that did. The Court, in finding Dirks not guilty of insider trading, determined that the officer disclosed the information to unmask the fraud and, therefore, received no personal benefit.

In 2000, as a response to *Dirks* and perceived inadequacies of insider trading laws, the S.E.C. created Regulation Fair Disclosure (Reg FD), and Rules 10b-5(1) and 10b-5(2). Reg FD attempts to level the playing field between professional investors and the general public. It mandates that when an issuer (a company with a registered security) "discloses material nonpublic information to certain individuals or entities—generally, securities market professionals, [it] must also make public disclosure of that information."[4] S.E.C. Rules 10b-5(1) and 10b-5(2) amend the agency's rules governing insider trading. Specifically, these rules define when the purchase of a security involved material, non-public information (MNPI) and "when a person receiving information is subject to a 'duty of trust or confidence' for purposes of the misappropriation theory of insider trading."[5] On paper, therefore, Reg FD and Rules 10b-5(1) and 10b-5(2) advance the S.E.C.'s mission. However, Reg FD both compels speech and covers speech which does not involve a personal benefit. "Therefore, Regulation FD can be seen as an end-run around the Supreme Court's jurisprudence in *Dirks* and other cases such as *Chiarella*."[6] Most importantly, "a violation of Regulation FD does not require that the recipient of the

[4] *Fair Disclosure, Regulation FD*, INVESTOR.GOV U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.investor.gov/introduction-investing/investing-basics/glossary/fair-disclosure-regulation-fd (last accessed Jun. 1, 2021).
[5] *Final Rule: Selective Disclosure and Insider Trading*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/rules/final/33-7881.htm (last visited Jun. 1, 2021).
[6] Antony Page & Katy Yang, *ARTICLE: Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 1, 10 (2005).

nonpublic information *trade* on the information or financially benefit from it in any way - only that the issuer *disclose* nonpublic information to a select group."[7]

Literature Review

The purpose of this paper is to review literature related to the First Amendment and Reg FD. It evaluates experts' analyses of the speech at issue then proceeds to evaluate Reg FD's impact on this speech. The review covers speech restraints, compelled speech, and content issues. Finally, the review introduces contemporary issues, such as the advent of social media, and reflects on Reg FD's future.

Part I: No Less Than Commercial Speech

In *Va. Pharmacy Bd. v. Va. Consumer Council*, the Court defined commercial speech as that "which does no more than propose a commercial transaction."[8] However, it also established that commercial speech is "not 'wholly outside the protection of the First Amendment'"[9] and that both the speaker and content are owed protections.

Most authors analyzing Reg FD's speech effects begin by clarifying the nature of the speech at issue. A substantial majority consider issuer disclosures to be commercial speech under the theory that these "relate directly to the purchase and sale of securities."[10] Some suggest, however, that Reg FD covers more than just commercial speech. Professor Antony Page and Attorney Katy Yang, for example, suggest that corporate disclosures to sell side analysts do not propose a commercial transaction, but instead attempt to influence the analyst's rating. Heyman

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[7] Maria Papenfuss, *NOTE: Inflated Private Offering: Regulating Corporate Insiders and Market-Moving Disclosures on Social Media*, 73 Vand. L. Rev. 311, 321 (2020) (emphasis added).
[8] Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 776 (1976).
[9] *Id.*
[10] Lloyd L. Drury, III, *COMMERCIAL SPEECH IN AN AGE OF EMERGING TECHNOLOGY AND CORPORATE SCANDAL: STATUTORY & REGULATORY PERSPECTIVE: Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. Rev. 757, 760 (2007).

points out that, in the wake of *Citizens United v. F.E.C.*, "Reg FD may ultimately be subject to a strict scrutiny review, as the current rules would prevent corporations from selectively disclosing any material information, including information with a political impact."[11] Finally, Page and Yang explore how Reg FD impacts "mixed" speech, which contains both commercial and non-commercial speech.

Reg FD's Effects on Speech

Apart from the nature of speech at issue, various authors explore how Reg FD impacts speech and whether it colors within the lines of the modern First Amendment doctrine. Specifically, many examine whether Reg FD 1) restrains speech, 2) compels speech and 3) is content based. Before examining how these authors interpret Reg FD's effects, however, it is worth considering Reg FD's specifications.

Reg FD requires that issuers making an intentional disclosure of MNPI do so simultaneously to the public. In cases where an issuer makes an unintentional disclosure, it must "promptly" make this disclosure public; Reg FD defines "promptly" as within twenty-four hours.[12] Reg FD defines the categories of speakers it covers (issuers, senior management, and investor relations personnel), the nature of the content at issue (MNPI) and the audience it reaches (various categories of investment professionals).[13]

When it comes to speech restraints authors evaluate Reg FD's effects in terms of both quantity (i.e., whether it "chills" speech) and quality.

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[11] Susan B. Heyman, *ARTICLE: Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 Cardozo L. Rev. 1099, 1141 (2015).
[12] Joanna E. Barnes, *Regulation FD Will Result in Poorer Disclosure and Increased Market Volatility*, 29 Pepp. L. Rev. 609, 620 (2002).
[13] *Id.* at 611-620.

Chilled Speech

Given how Reg FD is written, many – including the S.E.C. itself -- have expressed concerns that it has the potential to chill speech. However, it remains unclear whether these concerns have been validated. Several authors discuss how Reg FD creates an "all or none" situation in which issuers find it easier and less costly to remain silent, rather than orchestrate a public disclosure. Depending on the nature of the MNPI, this might not only involve issuing a statement, but potentially disrupting counterparty relations or altering the competitive landscape. J.D. Candidate Maria Papenfuss indicates that issuers "faced with new material information about their company" must "restrict their speech entirely or engage in an unwanted public disclosure."[14] Given the associated costs and uncertainties, companies often choose to remain silent. She thus asserts that Reg FD works against the S.E.C.'s goal of promoting full disclosure.

In comparison, J.D./M.B.A. Candidate Derek Mirza, in analyzing *S.E.C. v. Siebel Systems, Inc.*, highlights the potential chilling effects of Reg FD on inadvertent disclosures. In addition to the effect resulting from excessive scrutiny of "vague general comments," he points to the fact that "corporate officers may be forced to communicate more cautiously with analysts and investors"[15] over fears that these analysts may *interpret* the speech as being material and thus create a liability.

While Mirza and Papenfuss offer support for how Reg FD may chill speech, others suggest that the data are inconclusive. Page and Yang, for example, cite a study by Ph.D. Candidate Vesna

[14] Maria Papenfuss, *NOTE: Inflated Private Offering: Regulating Corporate Insiders and Market-Moving Disclosures on Social Media*, 73 Vand. L. Rev. 311, 332 (2020).
[15] Derek J. Mirza, *Comment: Regulation FD: " Nit-Picking" the SEC's Selective Disclosure Enforcement*, 38 Ariz. St. L. J. 881, 898 (2006).

Straser indicating that, ""at least initially, companies responded to the regulation by providing *more* public information of lower quality."[16]

Lower Quality Speech

While data vary on whether the quantity of corporate disclosure has decreased post-Reg FD, experts suggest there is a stronger case for how the regulation has reduced the quality of information. The study by Straser represents one example. However, Mirza also highlights a Yale School of Management study suggesting that Reg FD has led to an increase in analyst "herding," which is the tendency to converge quickly around a consensus and leave investors with a more homogenized information set.[17]

Professor Susan Heyman points to an article by Bailey, et al, which summarizes several surveys conducted to evaluate Reg FD's effects. According to the article, "public communications of issuers are believed to be of lower quality. Thus, market participants perceive Reg FD as dampening the flow of information … sell-side analysts believe their recommendations are adversely affected … and buy-side analysts feel that Reg FD has had an adverse impact on their ability to advise portfolio managers."[18] The authors of the article, citing their own work on the matter, note "it is not true that Reg FD has reduced the quantity of information" but "preparing forecasts of future earnings has become more difficult with the adoption of Reg FD."[19]

Reg FD and *Central Hudson*

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[16] Antony Page & Katy Yang, *ARTICLE: Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 1, 31 (2005) (emphasis added).
[17] Derek J. Mirza, *Comment: Regulation FD: "Nit-Picking" the SEC's Selective Disclosure Enforcement*, 38 Ariz. St. L. J. 881, 914 (2006).
[18] Warren Bailey, Haitao Li, Connie X. Mao & Rui Zhong, *Regulation Fair Disclosure and Earnings Information: Market, Analyst, and Corporate Responses*, 58 J. Finance 2511 (2003)
[19] *Id.* at 2512.

Central Hudson Gas & Electric Corp. v. Public Service Commission established a four-part standard for how commercial speech would be covered under the First Amendment. This test mandates that 1. the speech is lawful and not misleading, 2. the asserted government interest is substantial, 3. the regulation at issue advance the government interest, and 4. the regulation is not more extensive than is necessary to serve that interest.[20]

If Reg FD does restrain some protected speech – either by chilling speech or reducing its quality -- the logical question to ask is whether it measures up to the four-part test in *Central Hudson*. Heyman suggests that it does not. At least some, if not the majority of the speech covered by Reg FD, is both truthful and directed at lawful activities. Further, a case can be made for the government having a substantial interest in preserving the integrity of the market by deterring unfair trading. That said, Heyman asserts that "it is not clear that Reg FD 'directly advances' [these] goals" because "the SEC's interests depend not on selective disclosure in isolation, but rather on trading that may result from the selective disclosure."[21] The fact that others are permitted to possess MNPI under Reg FD (e.g., ratings agencies, those owed a duty of confidence) supports this thesis. Heyman goes on to make an even stronger case for overbreadth. She points out that Reg FD "extends to speech that does not result in any trading activity"[22] and that it could achieve its purposes simply by "only targeting speech that results in trading."[23] Professor Lloyd Drury concurs, pointing out that "the true concern Regulation FD addresses is not that the information will not make it to the market promptly, but that some will have it before others and use it to their advantage. In other words, it is a matter of market integrity, not efficiency. However, the market integrity rationale is severely limited by the fact

[20] Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557, 564-566 (1980).
[21] Susan B. Heyman, *ARTICLE: Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 Cardozo L. Rev. 1099, 1140 (2015).
[22] *Id.* at 1141.
[23] *Id.*

that insider trading law, an existing enforcement mechanism, could be used to police infractions"[24]

Part II: Beyond Central Hudson - Compelled Speech, Mixed Speech and Content

Where *Central Hudson* governs commercial speech, there is considerable evidence in support of Reg FD reaching speech traditionally offered greater First Amendment protection. In an amicus brief filed in *S.E.C. v. Siebel Systems, Inc.*, the U.S. Chamber of Commerce (USCC) argues that Reg FD compels speech and is therefore subject to strict scrutiny protection. Specifically, the USCC cites *Riley v. National Federation of the Blind of North Carolina*, in which the Court noted "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it"[25] as well as *Miami Herald Pub. Co. v. Tornillo* and *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*. Page and Yang discuss how, in *Wooley v. Maynard*, the Court affirmed "the right to speak and the right to refrain from speaking"[26] as "complementary components of the broader concept of 'individual freedom of mind,'"[27] and how it acknowledged a "concomitant freedom not to speak publicly"[28] afforded by the First Amendment. Given that Reg FD mandates disclosure of MNPI, these arguments hold considerable weight.

Scholars go on to point out that issuers and their officers often make disclosures that contain both commercial and non-commercial speech. Page and Yang point out that this "mixed" speech is covered by Reg FD and is subject to strict scrutiny: "In *Village of Schaumburg v. Citizens for a*

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[24] Lloyd L. Drury, III, *COMMERCIAL SPEECH IN AN AGE OF EMERGING TECHNOLOGY AND CORPORATE SCANDAL: STATUTORY & REGULATORY PERSPECTIVE: Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. Rev. 757, 787 (2007).
[25] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988).
[26] Wooley v. Maynard, 430 U.S. 705, 714 (1977)
[27] *Id.*
[28] Antony Page & Katy Yang, *ARTICLE: Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 1, 55 (2005) (citing Wooley v. Maynard).

Better Environment... The Court also noted that it will treat speech involving a variety of interests, including interests that are traditionally within the protection of the First Amendment, as fully protected speech."[29] Heyman notes that, in *Citizens United*, "The Court held that corporations engaging in political speech are entitled to the same First Amendment protection as individuals."[30] Finally, citing *Riley*, Page and Yang emphasize that the Court "[does] not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[31] Given the increasing degree to which corporations incorporate political motives in business decisions, this raises considerable concerns for Reg FD's speech restraints. Consider, for example, if Macy's disclosed (or planned to disclose) that the company was going to sever its relationship with The Jessica Simpson Collection owing to Ms. Simpson's political statements. This disclosure contains both commercial and political speech and would likely subject Reg FD to strict scrutiny if adjudicated.

A final topic authors review is Reg FD's impact from a content perspective. For example, J.D. Candidate Alyssa Wanser notes that "One of the primary purposes behind [the '33 and '34 Acts] was to protect the investing public from fraud by ensuring that issuers of securities provide full disclosure."[32] Given that Reg FD largely covers truthful information, it does not advance the agency's interest. In fact, to the degree that Reg FD compels speech, any untruthful speech would actually reach a larger audience and "*more*, not fewer, people will be harmed."[33] Page and Yang make the case that Reg FD is content based. As a rebuttal to the S.E.C.'s

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[29] Antony Page & Katy Yang, *ARTICLE: Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 1, 51 (2005).
[30] Susan B. Heyman, *ARTICLE: Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 Cardozo L. Rev. 1099, 1104 (2015).
[31] Antony Page & Katy Yang, *ARTICLE: Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 1, 55 (2005) (citing Riley).
[32] Alyssa Wanser, *COMMENT: The Facebook Status that Sparked an SEC Investigation: Regulation Fair Disclosure and the Growth of Social Media*, 30 Touro L. Rev. 723, 728 (2014).
[33] Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Motion to Dismiss, S.E.C. v. Siebel Systems, Inc., et al., p. 12, 384 F.Supp.2d 694, 709 (S.D.N.Y. 2005).

characterization of Reg FD as a time, place and manner regulation, the authors assert that Reg FD covers specific content (MNPI), compels speech in a manner that influences its content (referencing *Miami Herald Publishing Co., v. Tornillo*) and is justified solely with reference to its content (referencing *Boos v. Barry*). Drury, on the other hand, argues that applying higher scrutiny to content-based speech is predicated on avoiding preferencing one view over another and that commercial speech jurisprudence standards are more appropriate in this situation.

Part III: Social Media and Reg FD

In 2008 and again in 2013, the S.E.C. responded to new technological developments affecting Reg FD. In 2008, the S.E.C. liberalized how issuers might make public disclosures and "proposed reinterpreting Regulation FD to permit posting on a company's website as a sufficient public disclosure to reflect the evolution of technology."[34] In 2012, Netflix CEO Reed Hastings used his personal Facebook account to announce that "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June."[35] The S.E.C. launched an investigation into whether Mr. Hastings had violated Reg FD, but ultimately declined to initiate a proceeding. Instead, the agency issued a report updating its views on social media specifically. In the report, the agency acknowledged that social media were not materially different from other "push" technologies and interactive technologies permitted under its 2008 Guidance and suggested that corporate social media pages could be used, so long as they were "created, populated, and updated by the issuer."[36]

[34] Alyssa Wanser, *COMMENT: The Facebook Status that Sparked an SEC Investigation: Regulation Fair Disclosure and the Growth of Social Media*, 30 Touro L. Rev. 723, 725 (2014).
[35] Stan Polit, *COMMENT: Friends, Followers, and Fairness: SEC Fair Disclosure Requirements in a Changing Information Marketplace*, 17 U. Pa. J. Bus. L. 619, 619 (2015).
[36] *Id.* at 634 (citing S.E.C.)

As subject matter for authors' analyses, social media comes under scrutiny for two primary reasons. First, social media adds complexity to corporate disclosure. Several authors argue that the S.E.C.'s social media guidance is overly vague. The S.E.C. is silent on which platforms may be used and how issuers may notify audiences regarding their social media disclosure strategies. J.D. Candidate Stan Polit argues that social media has affected the onus of fairness, changing it from one of "access" to "notice." In an age where corporate information is everywhere on social media, knowing that information is available and *where* it is located is of greater importance. Second, utilizing social media for disclosures compels audiences to disclose sensitive personal information and familiarize themselves with various platforms. Authors reviewing the impact of the S.E.C.'s policies agree that this is potentially unfair.

Conclusion

These authors' strongest arguments and greatest consensus lie with the idea that Reg FD reaches too much protected speech to justify how it is structured. Despite fears of companies reducing the quantity of disclosures, the advent of Reg FD and the availability of new communication technologies, including social media, has led to a proliferation of corporate speech. However, the simultaneous push by the S.E.C. to curb insider trading, improper use of "expert networks", and the appearance of favoritism on the part of executives has certainly reduced the quality of issuer disclosures. On balance, there is little question that Reg FD chills certain speech, even if it leads to a greater amount of speech overall. Thus, at a minimum, Reg FD must stand up to *Central Hudson,* which it fails to do.

First, Reg FD addresses a very specific liability – the potential for an insider to pass on market-moving information to a specific audience (i.e., investment professionals and shareholders). Although *Central Hudson* addresses "corporate speech," corporations don't "tip" investors,

corporate insiders do. Thus, as written, Reg FD fails *Central Hudson*'s third test, which is to advance a *substantial* government interest. Reg FD does not reach ordinary employees speaking to professional investors, as is the case with "expert networks," or insiders tipping ordinary individuals. It likewise does not reach foreign issuers. If the CEO of Taiwan Semiconductor golfs with his buddy and tells her "We are bringing on a new fab next week that will allow us to increase production 15%", Reg FD does not apply.

Second, Reg FD impacts speech, not stock transactions. Thus, if the government's interest is to maintain fair, orderly, and efficient markets, there already exists a Rule, in 10b-5, that is both more effective and that accomplishes this objective while restricting less speech. Heyman raises the case of hedge fund manager, Raj Rajaratnam, who traded on information passed from Rajat Gupta, an insider at Goldman Sachs. Both men were convicted of insider trading. Had Rajaratnam not traded on the information, Heyman argues, there would have been no fraud perpetrated on the market, but Gupta would still have violated Reg FD.[37] Thus, Heyman concludes (and I agree) that Reg FD is unnecessarily broad.

Finally, when juxtaposed against recent trends in First Amendment jurisprudence and technological developments, Reg FD's standing becomes even more precarious. The Court's *Citizens United* ruling is certainly impactful. Corporations and their leaders have increasingly responded to social and political movements by straining for authenticity. As a result, companies' disclosures increasingly represent mixed amalgamations, rather than pure corporate speech. Although the S.E.C. has attempted to update Reg FD to account for the advent of the internet and social media, its corpus was written well before an insider might "tweet" information or participate in an online forum. Given how difficult it is to define MNPI,

[37] Susan B. Heyman, *ARTICLE: Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 Cardozo L. Rev. 1099, 1102 (2015).

especially in absence of a bright line definition, the S.E.C.'s enforcement challenges are likely to intensify.

For the most part, the S.E.C. has pursued settlements, rather than expose Reg FD to significant judicial scrutiny. However, with celebrity CEOs like Elon Musk thumbing their noses at the statute, the S.E.C.'s hand may ultimately be forced. If someone does muster the courage to stand up to Reg FD on free speech grounds, I doubt the statute will survive. This, though, may represent an improvement over the current state of affairs. Investors increasingly develop an information advantage using automated and decentralized procedures, such as scraping the internet. They less frequently obtain the answers to the test by calling up the CEO; the game simply is not worth the candle. Thus, should Reg FD fall by the wayside, one would expect issuers to make more high-quality information available which investors could then use to make markets more efficient.