

LEVICK

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**Why Netflix
Shouldn't
Back Down**



Reed Hastings, CEO of Netflix

COVER IMAGE: Netflix, Inc. is an American provider of on-demand Internet streaming media in North and South America, the Caribbean, United Kingdom, Ireland, Sweden, Denmark, Norway, Finland and flat rate DVD-by-mail in the United States. It started its subscription-based digital distribution service in 1999 and by 2009 it was offering a collection of 100,000 titles on DVD and had surpassed 10 million subscribers.

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NATIONAL SECURITY'S BUSINESS IMPACTS

with Clark Ervin



In this LEVICK Daily video interview, we discuss U.S. national security issues and their impacts on business with Clark Ervin, a partner at Patton Boggs and the former Inspector General at the State Department and Department of Homeland Security. While America remains far safer than before 9/11, a myriad of threats still demand not only government attention, but private sector preparedness as well.



Why Netflix Shouldn't Back Down

Wells Letters Can't Compete with Little Red Envelopes

Richard S. Levick, Esq.

Originally Published on *Fastcompany.com*

Under Chairman Mary Schapiro, the U.S. Securities and Exchange Commission (SEC) has done a Herculean job of moving from what was becoming an increasingly irrelevant and antiquated government agency to one that is again an essential element of our body capital. All indications are that Elisse Walter will continue the Commission's transition into the 21st Century unabated.

But when it comes to social media, Regulation FD, and what constitutes a "public" disclosure, it's hard to see the SEC as anything but a typewriter-driven bureaucracy. There's a very good chance that the courts will scold the Commission's Luddite views if their case against Netflix ever goes to trial.

Earlier this month, Netflix received a dreaded Wells Notice over the alleged posting of material information to CEO Reed Hastings' public Facebook page in July 2012. The SEC enforcement staff believes that Mr. Hastings broke with Reg FD when he posted a 43-word message about the one billion hours of video subscribers accessed in June of 2012. Already,

a number of pundits—the *Wall Street Journal's* Holman Jenkins, in particular—have questioned the wisdom of the enforcement staff's decision to classify Hastings' social media activity as anything but public. Those pundits aren't alone.

"If I were advising Netflix, I would tell the company to tell the SEC to bring it on," says Neil Eggleston, a partner at Kirkland & Ellis LLP who has defended a number of high-profile companies and individuals entangled in regulatory enforcement matters. "It seems to me that this is a misguided attempt at regulation through enforcement that is entirely divorced from the origins of Reg FD. The rule was put in place to prevent selective disclosure of material information to certain analysts, thereby providing them an unfair market advantage. Moreover, Reg FD only requires that material information be publically disseminated; it does not mandate *how* that information should be publically disseminated.

"Thus, to say that a Facebook post to 245,000 followers breaks with Reg FD is a stretch. This is

not a case of targeted dissemination—and if Netflix makes that case in court, I think it will win.”

Mr. Eggleston’s insights hit the nail on the head in an age when social media have fundamentally changed how public companies communicate with the marketplace. Does anyone believe that Netflix’s 10-Q or 8-K filings are as widely read as Mr. Hastings’ Facebook page? Does a traditional news release (the SEC’s preferred communications channel) have the viral allure of a tweet of a popular CEO?

The answer to both questions is a resounding no. And, as such, the SEC’s case against Mr. Hastings and Netflix represents a tremendous opportunity to finally open the flood gates for the entire sphere of public companies seeking new ways to hasten the speed and expand the reach of their key financial messages. After all, one could easily argue that Mr. Hastings stands for full and fair disclosure while the SEC demands allegiance to the telegraph in the age of the Internet.

Whether intentional or not, Mr. Hastings’ Facebook post made a compelling statement about social media’s utility in the IR realm for the simple reason that it had a dramatic impact. His page has more than 246,000 subscribers who facilitated a viral effect when he shared the record-breaking video view stats. They were rapidly disseminated amongst subscribers’ social networks, bloggers, analysts, and even traditional journalists. The result was a jump in stock price from under \$70 a share to more than \$80—with the post being the only data point available for explaining the increase.

As of this writing, the stock is trading around \$89 a share, even with the SEC investigation somewhat dimming investors’ excitement. With Carl Ichan circling overhead (he now holds a 10 percent stake in the company), the lasting spike created by Mr. Hastings’ very public post ought to be widely credited should the company be able to keep the corporate raider at bay.



Another important point to note...is that IR engagement via social media falls directly in line with what the SEC is trying to accomplish in the Dodd-Frank era."

Another important point to note—and one that lends this drama a certain sense of irony—is that IR engagement via social media falls directly in line with what the SEC is trying to accomplish in the Dodd-Frank era. As Mr. Hastings’ amply demonstrated, it has the reach to inform the widest possible swaths of the investing public. It has the speed to ensure that information reaches the marketplace in a timely fashion. Perhaps most important, it provides for two-way communications between shareholders and the companies they own. If there are other media that can inform and empower investors with such effect, they aren’t yet on my radar screen.

For all of these reasons, it’s hard to conclude that Mr. Hastings’ Facebook post is anything other than what the framers of Reg FD envisioned. At the same time, however, it is perfectly understandable that most public companies will want to see how this case plays out before jumping headfirst into the social media waters. The good news here is that they don’t have to.

Even if the unlikely outcome comes to pass and Netflix is ultimately found to have stepped outside regulatory boundaries, Mr. Hastings has provided us all with a salient reminder

that it really is fine for a public company to discuss material information on social media sites as long as the company avails itself of traditional disclosure options simultaneously. As such, the answer moving forward is for public companies to feel perfectly confident sharing material information on blogs, Facebook, Twitter, or even YouTube—as long as the information has gone out via a news release, 8-K, or 10-Q first or at the same time.

Despite the SEC’s misguided attempt to reign in Netflix, speech, and the Internet in one fell swoop, public companies ought not to be turned off to the myriad benefits of social media engagement in the IR context. Not even the SEC can put the toothpaste back into the tube, turn back the clock, and deny that social media are here to stay.

If the Commission ends up making its case in court, it will likely learn that lesson the hard way. Either way, it’s probably a good time for the SEC to sell its typewriters. ■

Richard S. Levick, Esq., President and CEO of LEVICK, represents countries and companies in the highest-stakes global communications matters—from the Wall Street crisis and the Gulf oil spill to Guantanamo Bay and the Catholic Church.

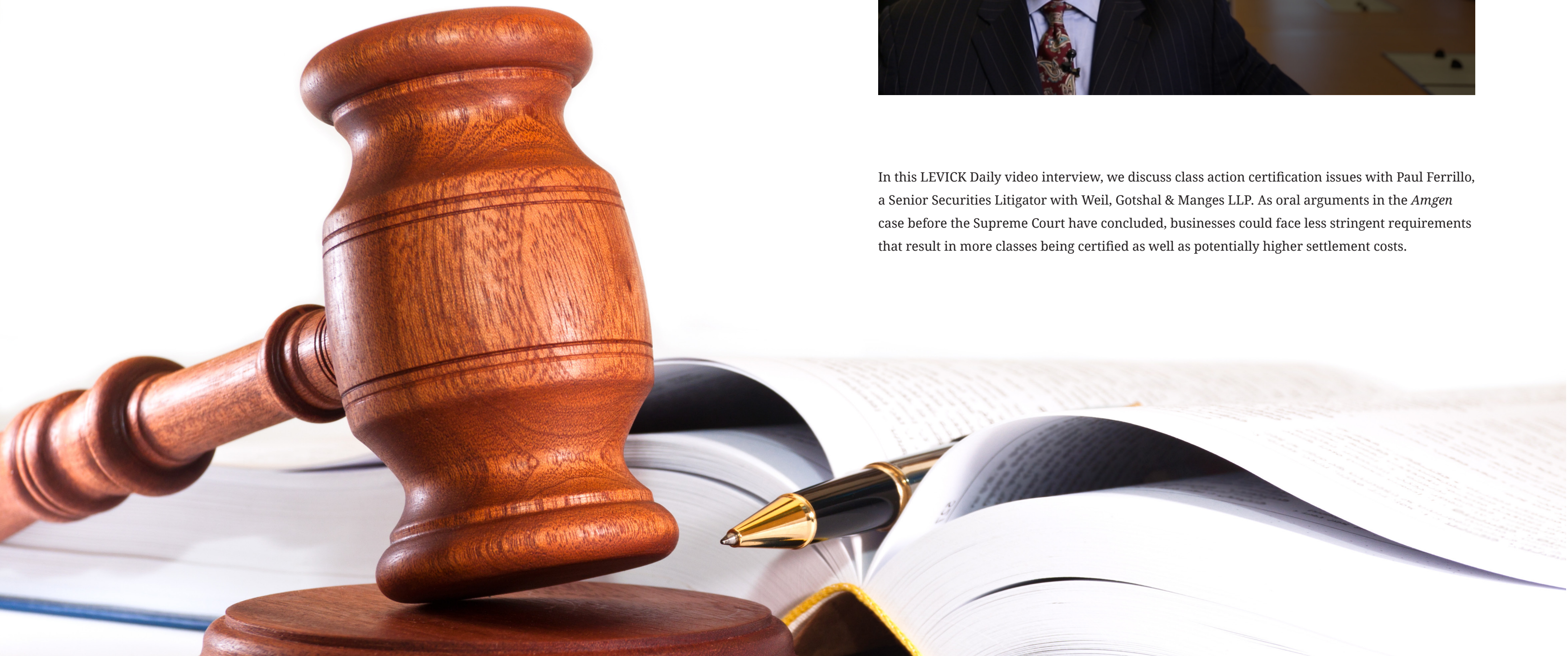
CLASS CERTIFICATION

with **Paul Ferrillo**



PAUL FERRILLO
SENIOR SECURITIES LITIGATOR,
WEIL GOTSHAL & MANGES, LLP

In this LEVICK Daily video interview, we discuss class action certification issues with Paul Ferrillo, a Senior Securities Litigator with Weil, Gotshal & Manges LLP. As oral arguments in the *Amgen* case before the Supreme Court have concluded, businesses could face less stringent requirements that result in more classes being certified as well as potentially higher settlement costs.



The SEC Gets Its Groove Back

Richard S. Levick, Esq.

Originally Published on Forbes.com

It won't likely come as big news to Elisse Walter, the new interim head of the Securities and Exchange Commission (SEC) who is replacing Mary Schapiro, that the securities industry will be significantly transformed in 2013. For Walter, it's going to be a continuing baptism by fire.

The transformation will be more decisive, perhaps, than anything we've seen during the last four turbulent years, in large part because of the Dodd-Frank rule-making and implementation that now confront the SEC. As Christopher Garcia observes, there are an "obscene" number of rules yet to be proposed, finalized, and implemented—hundreds of them, with many having potentially significant implications for the banks. The Volcker Rule is only the most obvious example, adds Garcia, a partner at Weil, Gotshal & Manges, LLP.

No doubt this looming sea change, along with the high drama of the post-2008 era, prompted a more focused evaluation of Schapiro than typically greeted her predecessors upon their departures. Indeed, there has been a penchant among the pundits to focus on the shortcomings

of Schapiro's tenure; on the Commission's failure to address and solve the systemic problems that were exacerbated by the economic crisis.

Much of that criticism could not, in fact, be more shortsighted.

The litany of criticism ranges from policy to enforcement. The Commission on Schapiro's watch was blamed for failing to address the dangers of High Frequency Trading and under-regulated Money Market Mutual Funds. Even now, as critics begrudgingly admit that Schapiro tightened the rules on those funds in 2010, they complain that the impact of the reform has been eroded by industry lobbyists. The pernicious influence of money and power in Washington, DC? Blame that on Schapiro too.

Frankly, it's all a little like criticizing Roosevelt because he did not end the Great Depression in his first term nor achieve real prosperity until the war boom. In the same way, the jaundiced assessment of Schapiro lacks historical perspective. Interestingly, it's the lawyers working closely with the SEC in recent years who have apparently maintained the more enlightened perspective and done Schapiro the





Elisse Walter
Chairman of the Securities
and Exchange Commission

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most justice—on and off the record—in their comments on her star performance.

In fact, she probably saved the SEC or, at least as Garcia says, “steered it through its most dangerous period.” One lawyer reminds us that the full-impact of the SEC’s whistleblower program won’t be felt until 2013, and that the success of those dramatic incentives will then be proven. Yet that’s only one initiative. In 2011, the Commission set a new agency record

for enforcement actions (735) and collected \$2.8 billion in penalties. And, at a time of obsessive budgetary constraints, Schapiro played her political cards to secure ample funding from Congress.

Again, though, 2013 is the year the rubber meets the proverbial road and, to extend our historical metaphor, Walter will play Truman to Schapiro’s Roosevelt. The Dodd-Frank rule-making is the most important challenge but

a host of other issues are also decisive. Flash crashes will naturally be a hot-button topic. Also “of particular interest will be how the SEC deals with the loosening of the historical restrictions on general solicitation and advertising under Rule 506 of Regulation D as well as the implementation of exemptions for crowd-funding,” says Robert Steinberg, a partner at Jeffer Mangels Butler & Mitchell LLP.

“From a political perspective,” adds Steinberg, “the Commission will have to deal with the possibility of a 2-2 deadlock between the current Republican and Democratic Commissioners until the Obama administration can name another to the Commission.”

That’s not the only political issue brewing. The SEC must grapple with some stiff inter-agency competition as the Consumer Financial Protection Bureau (CFPB) and the U.S. Commodity Futures Trading Commission (CFTC) both expand their Inside-the-Beltway profiles. That gauntlet has already been thrown down. As one Schapiro detractor wrote, the SEC’s “finalizing...the Dodd-Frank derivatives provisions was painfully slow, in stark contrast with the dynamism of the CFTC under Gary Gensler, which had far broader derivatives jurisdiction to deal with.”

Given all these exigencies, it is painfully obvious that the choice to replace Schapiro is crucial. Here, many of the same lawyers who praise Schapiro for salvaging the SEC from obsolescence are likewise keen in their support for Walter.

“She makes a lot of sense as a successor as there will not be a lot of getting up to speed necessary, given her experience, not only as a Commissioner of the SEC, but also as a senior executive at FINRA and on the SEC staff,” says Thomas McGonigle, chairman of the SEC Enforcement Practice Group at Murphy & McGonigle.

Yet the new SEC chairman will need a particularly rare combination of distinct leadership skills. First, the job will require tireless managerial oversight of the many daunting and multifaceted tasks at hand, especially the Dodd-Frank rule-making. As Dennis Kelleher, President and CEO of Better Markets, advises, the chairman “must [also] get serious about regulating high-frequency trading, payment for order flows, abusive practices, consolidated audit trails, and market transparency.”

Second, the job will require vision, the kind of vision that sees beyond the multiple crises of the day to a higher purpose; namely, the enactment of an agenda that tightly regulates a marketplace demonstrably in need of aggressive regulation—even as it encourages investment, growth, and job-creation.

Tall order. It’s our guess that, by December 31, 2013, Walter may be in for some of the same kind of criticism that has faced Schapiro. And it will probably be just as unfair. **L**

Richard S. Levick, Esq., President and CEO of LEVICK, represents countries and companies in the highest-stakes global communications matters—from the Wall Street crisis and the Gulf oil spill to Guantanamo Bay and the Catholic Church.

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Story of Fragrances

with Jennifer Abril



In this LEVICK Daily video interview, we discuss the release of the new documentary *The Story of Fragrances* with Jennifer Abril, President of the International Fragrance Association North America. Not just perfumes and colognes, detergents, candles, body lotions, and other products contain scents that create an emotional connection to a brand. It's a marketplace reality which demands that fragrance recipes be treated as protected trade secrets.

[Click here to watch *The Story of Fragrances*](#)

NACD BOARDVISION

Structuring Executive Severance Payments



In this week's edition of NACD BoardVision, we discuss golden parachutes with Steve Kalan, associate publisher of NACD Directorship, and Donald Kalfen of Meridian Compensation Partners. Boards of directors have a number of options in the structuring of executive severance payments. What they ultimately choose communicates a great deal to investors, analysts, and the marketplace as a whole.

BLOGS worth following



THOUGHT LEADERS

Amber Naslund

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Amber Naslund is a coauthor of *The Now Revolution*. The book discusses the impact of the social web and how businesses need to "adapt to the new era of instantaneous business."

Brian Halligan

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HubSpot CEO and Founder.

Chris Brogan

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Chris Brogan is an American author, journalist, marketing consultant, and frequent speaker about social media marketing.

David Meerman Scott

davidmeermanscott.com

David Meerman Scott is an American online marketing strategist, and author of several books on marketing, most notably *The New Rules of Marketing and PR* with over 250,000 copies in print in more than 25 languages.

Guy Kawasaki

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Guy Kawasaki is a Silicon Valley venture capitalist, bestselling author, and Apple Fellow. He was one of the Apple employees originally responsible for marketing the Macintosh in 1984.

Jay Baer

jaybaer.com

Jay Baer is coauthor of, "The Now Revolution: 7 Shifts to Make Your Business Faster, Smarter and More Social."

Rachel Botsman

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Rachel Botsman is a social innovator who writes, consults and speaks on the power of collaboration and sharing through network technologies.

Seth Godin

sethgodin.typepad.com

Seth Godin is an American entrepreneur, author and public speaker. Godin popularized the topic of permission marketing.

INDUSTRY BLOGS

Holmes Report

holmesreport.com

A source of news, knowledge, and career information for public relations professionals.

NACD Blog

blog.nacdonline.org

The National Association of Corporate Directors (NACD) blog provides insight on corporate governance and leading board practices.

PR Week

prweekus.com

PRWeek is a vital part of the PR and communications industries in the US, providing timely news, reviews, profiles, techniques, and ground-breaking research.

PR Daily News

prdaily.com

PR Daily provides public relations professionals, social media specialists and marketing communicators with a daily news feed.

BUSINESS RELATED

FastCompany

fastcompany.com

Fast Company is the world's leading progressive business media brand, with a unique editorial focus on business, design, and technology.

Forbes

Forbes.com

Forbes is a leading source for reliable business news and financial information for the World's business leaders.

Mashable

mashable.com

Social Media news blog covering cool new websites and social networks.

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