

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 101198 / September 26, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22205

<p>In the Matter of</p> <p>DRAFTKINGS INC.,</p> <p>Respondent.</p>

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (the “Exchange Act”) against DraftKings Inc. (“DraftKings,” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds that:

Summary

1. This matter concerns Massachusetts-based publicly-traded company DraftKings’ violation of Regulation FD, a rule under the Exchange Act that prohibits public companies from

selectively disclosing material, nonpublic information to certain persons outside the company. In July 2023, material, nonpublic information concerning DraftKings' second quarter 2023 (the quarter ended June 30, 2023) earnings was selectively disclosed to certain persons outside the company via social media, specifically the personal X (formerly Twitter) and LinkedIn accounts in the name of DraftKings' CEO operated by DraftKings' public relations firm.

2. DraftKings provides customers with online sports betting ("Sportsbook"), online casino ("iGaming"), and daily fantasy sports product offerings. DraftKings began obtaining state licenses for its Sportsbook and iGaming products in 2018 and has expanded the number of states in which the company services customers. In announcing its first quarter results on May 5, 2023, DraftKings stated that growth in states where it had existing operations was a "critical element" of DraftKings' business model. On July 27, 2023, following the close of the company's fiscal second quarter on June 30, 2023, DraftKings' public relations firm published a post on the personal X account of DraftKings' CEO, which stated: "There's massive potential for growth in new markets—but we're still seeing really strong growth in existing states. Our 2018-2019 state vintage grew over 80% on the revenue basis year-over-year in Q1. With those numbers, we expect robust growth even without new states opening." DraftKings' public relations firm also published a similar post on the personal LinkedIn account of DraftKings' CEO. The disclosure was selective in that the posts were released on the CEO's personal X account and personal LinkedIn account, neither of which is an official source of DraftKings' company information, and both of which are followed by some holders of DraftKings' shares. The content of the posts that DraftKings was "still seeing really strong growth in existing states" was also both material and nonpublic because information about growth during the second quarter in those states where DraftKings had existing operations was not generally known or available to the public when DraftKings' public relations firm published the posts on July 27, 2023.

3. Shortly after the social media posts were published, DraftKings' communications staff recognized the error. Within a half hour of the X account post DraftKings' communications staff instructed the public relations firm to remove the social media posts, which were taken down. Notwithstanding the fact that DraftKings' communications staff recognized the error, DraftKings made no prompt public disclosure by releasing to the general public the same information that was in the July 27 social media posts. Instead, the first disclosure DraftKings made to the general public, including investors, following the July 27 social media posts was on August 3, 2023, when it publicly released its financial earnings for the quarter ended June 30, 2023. DraftKings' selective disclosure of material, nonpublic information without making a prompt public disclosure constituted a violation of Regulation FD and Section 13(a) of the Exchange Act.

Respondent

4. **DraftKings Inc.** is a Nevada corporation with its principal place of business in Boston, Massachusetts. DraftKings' securities are registered pursuant to Section 12(b) of the Exchange Act, and its shares trade on Nasdaq under the ticker symbol DKNQ.

Facts

DraftKings' Business Plan Emphasizes Growth in Existing Markets

5. In 2018, DraftKings launched the first online Sportsbook in New Jersey and, since 2018, DraftKings has steadily expanded the number of states in which it offers its Sportsbook product. DraftKings launched its iGaming product in 2019 and has also expanded the number of states in which iGaming is offered. Growth in those states where DraftKings has previously launched its Sportsbook and iGaming products is a key component of DraftKings' business plan. DraftKings' first quarter 2023 financial earnings report recognized the importance of this trend. In a "Business Update" released with its first quarter 2023 earnings results, DraftKings stated: "We are also continuing to experience strong trends in our most mature online Sportsbook and iGaming state vintages. In each of our 2018-2019 and 2020-2021 state vintages, first quarter 2023 handle grew more than 25% compared to the same period in 2022, revenue grew at least 80% year-over-year This trend is a critical element of our business model; our older states continue to generate revenue growth."

The CEO's X Account and LinkedIn Posts on July 27, 2023

6. Pursuant to DraftKings' Regulation FD Policy, DraftKings observes a "quiet period" during which DraftKings employees are prohibited from discussing financial or operational results and referring to, or commenting on, any previously issued forward-looking financial guidance. DraftKings' Regulation FD Policy defines the "quiet period" as running from the last day of the last month of the calendar quarter through the first full trading day after the filing with the Commission of DraftKings' next Form 10-Q (quarterly report) or Form 10-K (annual report). DraftKings issued its Form 10-Q for the second quarter of 2023 (the quarter ended June 30, 2023) before the securities markets opened on August 4, 2023. Accordingly, for the second quarter of 2023, the first day of the "quiet period" was June 30, 2023, and the last day of the "quiet period" was August 4, 2023.

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

8. At 5:52 p.m. on July 27, 2023, DraftKings' public relations firm published a post on the personal X account of DraftKings' CEO that stated in its entirety:

There's massive potential growth in new markets – but we're still seeing really strong growth in existing states.

Our 2018-2019 state vintage grew over 80% on the revenue basis year-over-year in Q1. With those numbers, we expect robust growth even without new states opening.

9. That same day, DraftKings' public relations firm published a post on the CEO's personal LinkedIn account, which stated:

Not only do we see a massive potential for growth in new markets – but we’re still seeing really strong growth in existing states.

Our 2018-2019 state vintage grew over 80% on the revenue basis year-over-year in Q1. When you’re seeing that kind of scale out of your existing markets, you can expect many years of robust growth even without new state launches – and of course new state launches will only contribute further.

What’s leading to this growth?

Organic demand is growing and we’re also taking market share, we’re increasing our hold rate without losing demand just by offering more ways for customers to play.

#Entrepreneurship #StartUps #Business

10. The statement in both posts that, as of July 27, 2023, DraftKings was “still seeing really strong growth in existing states” was nonpublic, as DraftKings had not previously disclosed in any other forum that DraftKings continued to achieve growth in existing markets in the second quarter of 2023. DraftKings’ staff reviewed and approved the content of the two July 27 posts.

11. Publication of the X account and LinkedIn posts violated multiple DraftKings policies. DraftKings’ Social Media Policy prohibits sharing “any potentially or actual confidential or financial / performance information about the Company” via social media except if an employee receives prior written approval of the DraftKings communications team. In addition, Section 11 of DraftKings’ Regulation FD Policy, titled “Use of Social Networks,” which states that: “Use of social networks, including corporate blogs, employee blogs, chat boards, Facebook, Twitter and the like to disclose material, nonpublic information may be considered selective disclosure and is prohibited under this Policy.” Section 8 of its Regulation FD Policy provides that, during the “quiet period” described above, DraftKings’ authorized spokespersons are prohibited from discussing financial or operational results or guidance, including previously disclosed results, and referring to or commenting on any previously issued forward-looking guidance.

12. Some DraftKings shareholders follow the CEO’s personal X and LinkedIn accounts. Accordingly, posting this content on the CEO’s personal X and LinkedIn accounts constituted selective disclosure, as some but not all DraftKings shareholders received the information.

DraftKings’ Response Following the Publication of the Posts

13. Shortly after the X account post was published on July 27, members of DraftKings’ communications staff recognized that the public relations firm should not have posted the content contained in the post. Within a half hour of the X account post, DraftKings’ communications staff instructed the public relations firm to remove the social media posts, which were taken down.

DraftKings Announced Its Second Quarter Earnings on August 3, 2023

14. Following the deletion of the July 27, 2023 social media posts, DraftKings made no disclosure to the general public until August 3, when the company announced its financial earnings for the second quarter of 2023 (the quarter ended June 30, 2023). In a slide deck outlining its second quarter earnings results released to the public on August 3, DraftKings included a slide titled: “2018-2021 States Are Growing Revenue >70% with Contribution Profit Growing Faster.” That slide compared results from DraftKings’ existing markets (*i.e.*, states where DraftKings started operations in 2018-2021) in the second quarter of 2022 against those results in the second quarter of 2023. The slide stated that year-over-year revenue growth was over 70%, that “Adjusted Gross Margin” increased more than 800 basis points, and that year-over-year external marketing expense declined more than 10%.

15. On a conference call the following morning during which management of DraftKings publicly discussed its financial results (often referred to by public companies and the securities industry as an “earnings call”), DraftKings’ Chief Executive Officer and Chief Financial Officer confirmed the importance of the growth in existing markets. The CFO identified growth in existing markets as a reason for DraftKings to revise its full year 2023 revenue guidance upward. Similarly, in response to a question during this earnings call from a stock analyst about growth outlook and the breakdown by state vintage, the CEO emphasized that growth in older states “makes [] a very big impact on the overall business.” The official second quarter earnings release and related statements confirm the materiality of the information disclosed in the X account and LinkedIn posts.

Cooperation

16. In determining to accept the Offer, the Commission considered cooperation afforded the Commission staff during the investigation.

Violations

17. As a result of the conduct described above, DraftKings violated Regulation FD, which prohibits public companies (sometimes also referred to as “issuers” of securities), or persons acting on their behalf, from selectively disclosing material, nonpublic information to certain persons outside the company, including holders of the issuer’s securities. Whenever such an issuer or person acting on its behalf discloses material, nonpublic information to any such person, Regulation FD requires that the company also disclose the information to the public. 17 C.F.R. § 243.100(a). In the case of non-intentional selective disclosure, Regulation FD requires that the public disclosure be made “promptly,” which Regulation FD defines to mean “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 issuer . . . 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.” 17 C.F.R. §§ 243.100(a)(2) and 243.101(d). DraftKings failed to make the required prompt, public disclosure.

18. Regulation FD creates reporting obligations for public companies under Section 13(a) of the Exchange Act. Accordingly, by violating Regulation FD, an issuer also violates Section 13(a).

Undertakings

19. Respondent has undertaken to:

a. Within thirty (30) days of the issuance of this Order, require all DraftKings employees who have responsibilities relating to corporate communications to attend training regarding Regulation FD and DraftKings' Regulation FD Policy.

b. Within forty (40) days of the entry of this Order, certify, in writing, compliance with the undertakings ordered pursuant to Section IV.B below. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The certification and supporting material shall be submitted to Celia D. Moore, Assistant Director, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission may provide, with a copy to the Office of Chief Counsel of the Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

c. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent DraftKings' Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that:

A. DraftKings cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act or Regulation FD.

B. DraftKings shall comply with the undertakings enumerated in Section III, paragraphs 19(a) and 19(b) above.

C. Within 10 days of the entry of this Order, DraftKings shall pay a civil money penalty in the amount of \$200,000 to the Commission for transfer to the general fund of the United States Treasury, subject to Securities Exchange Act of 1934 Section 21F(g)(3). If timely payment

is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request.
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the Respondent and the file number of the proceedings; a copy of the cover letter and check or money order must be sent to Celia D. Moore, Assistant Director, Securities and Exchange Commission, 33 Arch Street, Boston, MA 02110, or such other address as the Commission staff may provide.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary