

Using Social Media to Communicate With Investors: The SEC ‘Likes’ This

On April 2, 2013, the Securities and Exchange Commission (the “SEC”) issued a report of investigation (“Report”) to provide guidance to the increasing number of public companies that are using social media to communicate with their shareholders and the investing public. The Report provides that public companies may use social media, such as Facebook and Twitter, for the dissemination of material, nonpublic information in compliance with Regulation Fair Disclosure (Regulation FD), provided that the company has made investors, the market, and media aware of the channels of distribution it expects to use.¹ The Report relies heavily upon the guidance previously set forth by the Commission in its August 7, 2008 Release No. 34-58288 concerning the Use of Company Web Sites (“2008 Guidance”) and it contains a reminder to issuers that “disclosures to persons enumerated in Regulation FD, even if made through evolving social media channels, must still be analyzed for compliance with Regulation FD.”²

In this alert, we will discuss the SEC’s Report and will highlight some important takeaways for companies which either use or intend to use social media as a medium in which to disseminate material, nonpublic information.

Regulation FD (Fair Disclosure)

“Regulation FD provides that when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer’s securities who may well trade on the basis of the information), it must make public disclosure of that information.”³ When the disclosure of material, nonpublic information is intentional, distribution of the same information to the public must be made simultaneously. When the disclosure of material, nonpublic information is inadvertent, distribution of the same information to the public must be made promptly afterwards.⁴ The required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is “reasonably designed to effect, broad non-exclusionary distribution of the information to the public.”⁵ Regulation FD is intended to ensure that all investors have the ability to gain access to material information at the same time.⁶

¹ Report of Investigation Pursuant to Section 21 (a) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings, Exchange Act, Release No. 69279 (April 2, 2013)

² *Id.* at page 8.

³ 17 C.F.R. §243.100. Final Rule: Selective Disclosure and Insider Trading, Exchange Act, Release No. 34-43154, 65 Fed. Reg. 51,716 (Aug. 15, 2000)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

As set forth in the SEC's Report, Regulation FD is applicable to company communications made through social media channels.

The 2008 Guidance on the Use of Company Web Sites

In 2008 the SEC offered guidance to companies concerning the use of web sites to disseminate information electronically to investors and the market in compliance with Regulation FD.⁷ The 2008 Guidance offered a non-exhaustive list of factors to be considered in evaluating whether a corporate web site constitutes a recognized channel of distribution. The factors set forth include:

- Whether and how companies let investors and the markets know that the company has a web site and that they should look at the company's web site for information;
- Whether the company has made investors and the markets aware that it will post important information on its web site and whether it has a pattern or practice of posting such information on its website;
- Whether the company's web site is designed to lead investors and the market efficiently to the information about the company; whether the information is prominently disclosed on the web site in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- The extent to which information posted on the web site is regularly picked up by the market and the media;
- The steps the company has taken to make its web site and the information accessible;
- Whether the company keeps its web site current and accurate;
- Whether the company uses other methods in addition to its web site posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.⁸

"The central focus of this inquiry is whether the company has made investors, the market, and the media aware of the channels of distribution it expects to use, so these parties know where to look for disclosures of material information about the company or what they need to do to be in a position to receive this information."⁹ The posting of information on a company's web site, in and of itself, may be a sufficient method of public disclosure under Rule 101 (e) of Regulation FD.¹⁰

⁷ Commission Guidance on the Use of Company Websites, [Release No. 34-58288](#) (August 7, 2008)

⁸ *Id.* at pgs 20-22.

⁹ [Release No. 69279](#) at pg. 3.

¹⁰ [Release No. 34-58288](#) at pg. 25.

The SEC's 2008 Guidance does not address the use of social media to disseminate material, non public information.

Netflix, Hastings and the Use of Social Media to Disclose Company Information

Pointing to the factors set forth in the 2008 Guidance, in its April 2, 2013 Report, the SEC clarifies that public companies under certain circumstances may disseminate material non-public information via social media in compliance with Regulation FD if investors previously have been alerted that the specific social media will be used to disseminate such information.

The Report stemmed from an investigation by the SEC of Netflix and its Chief Executive Officer, Reed Hastings, concerning a certain Facebook post regarding his company's "streamlining milestone." The post had been made by Mr. Hastings on his personal Facebook page which was not otherwise made available to the public. Netflix did not file with or furnish to the Commission a current report on Form 8-K, issue a press release through its standard distribution channels, or otherwise announce the streamlining milestone. Facebook members could have subscribed to Mr. Hastings' Facebook page but neither Hastings nor Netflix had previously used Hastings' Facebook page to announce company metrics. Nor had they taken steps to make the investing public aware that Hastings' personal Facebook page might be used as a medium for communication information about Netflix.¹¹

While Mr. Hastings' and Netflix's conduct did not rise to the level of sanctionable conduct, the SEC found that "...disclosure of material, non public information on the personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose, is unlikely to qualify as a method 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public' within the meaning of Regulation FD."¹² The SEC elaborated further that "[t]his is true even if the individual in question has a large number of subscribers, friends, or other social media contacts, such that the information is likely to reach a broader audience. Personal social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information."¹³ As such, while it may be appropriate to post material non-public information on a company's Facebook account, it is not likely to be deemed appropriate to post the information through a company's employee's social media outlet unless advance notice is given to investors. Indeed, advance notice to investors of the social media outlet a company intends to use to disseminate important information is key to the SEC's Report. With advance notice, "investors and the markets [are given] the opportunity to take the steps necessary to be in a position to receive important disclosures [by] e.g., subscribing, joining, registering or reviewing that particular channel."

Takeaways

Companies which use or intend to use social media as a medium in which to disseminate material-non-public information should learn the following from the SEC's Report:

¹¹ [Release No. 69279](#) at pgs. 3-5.

¹² *Id.* at pg. 7.

¹³ *Id.*

- While it is acceptable to use social media to disseminate material non-public information, companies must ensure that all investors have the ability to gain access to such information at the same time. To achieve this, a company may want to disclose in its shareholder communications, press releases and public filings that information will be posted on the company's social media page. Further, a company may want to mention in its communications that it may regularly use its social media outlet as a key source of company information. The more specificity as to where and when investors can find future announcements the better.

Importantly, companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's social media outlet.

- It should be easy for investors to find information. While the SEC's Report indicates that it is acceptable to use a subscription-based social media outlet, such as Facebook and Twitter, to the extent a social media outlet may be accessible only for a premium, a company should consider not using that outlet or also filing a Form 8-K.
- Policies and procedures concerning the use of social media by employees should be put in place or updated to ensure that employees are not disseminating material non-public information through their personal social media outlets. Should a company choose to allow a specific employee, such as its Chief Executive Officer, to disseminate information through his or her personal social media outlet, the company should make sure to mention in its communications that the employee's personal social media outlet is a key source of company information. The company should be granted unfettered access to the employee's personal social media outlet and should monitor the same to ensure that the information disseminated is accurate and available to all investors, rather than just a select few.

The SEC's Report stresses that the Commission "appreciates the value and prevalence of social media channels in contemporary market communications" and that it "supports companies seeking new ways to communicate and engage with shareholders and the market."¹⁴ While companies may view this as a green light to use social media to communicate with investors, we encourage companies to proceed with caution in this rapidly evolving area.

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¹⁴ *Id.* at pg. 8.

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