

Using Social Media to Disclose Corporate Facts?

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On April 2, 2013, the **Securities & Exchange Commission** issued a Report of Investigation clarifying that a public company may use social media outlets such as Facebook and Twitter to disseminate material information to investors while still complying with its Regulation FD requirements. In the Report and accompanying press release, the Commission explained that a company must take reasonable steps to alert investors and the market as to which social media outlets will be used to disseminate such information.

The report follows an inquiry by the SEC's Division of Enforcement into Netflix CEO Reed Hastings' July 2012 post on his personal Facebook page announcing that Netflix had streamed one billion hours in a single month for the first time (a 50% increase from Netflix's last announcement in January). At the time of his post, Mr. Hastings' Facebook page had more than 200,000 subscribers, including equity research analysts, shareholders, reporters and bloggers. While the post was quickly picked up by technology journalists, bloggers, and eventually the public, Netflix did not report the information to investors through a press release or Form 8-K filing as required by Regulation FD. Netflix's stock increased from \$70.45 at the time of Mr. Hastings' Facebook post to \$81.72 at the close of the following trading day. The SEC declined to pursue an enforcement action against Netflix and Mr. Hastings, electing instead to issue the report and clarify the application of Regulation FD and its August 2008 Guidance on the Use of Company Web Sites to public company disclosures made through social media.

Brief Summary of the Report

- Any information released via social media channels, such as Facebook and Twitter, is subject to Regulation FD.
- The SEC's 2008 Guidance applies equally to social media.
- Social media may be used to announce or disseminate material, nonpublic information so long as investors have prior notice of the company's intention to disclose such information through those channels, the channels to be used and the types of information that the company intends to disclose through those channels.

Background

Regulation FD and Section 13(a) of the Securities Exchange Act of 1934 prohibit public companies, or persons acting on their behalf, from selectively disclosing material, non-public information to certain securities professionals and shareholders where it is reasonably foreseeable that they will trade on that information before it has been disseminated to the investing public. The SEC's 2008 Guidance, which it drew strong comparisons to in the report, explained that for purposes of complying with Regulation FD, a company makes a public disclosure when it distributes information "through a recognized channel of distribution." Whether a company's website would be a recognized channel of distribution for purposes of Regulation FD, the SEC said would depend "on the steps the company has taken to alert the market to its web site and its disclosure practices." Companies were encouraged to include in their press releases and Form 8-K filings the corporate website address and, where applicable, make known that they will be posting relevant information there.

Discussion

In the report, the SEC states that the 2008 Guidance is equally applicable to the dissemination of information through social media channels. The report does not preclude the use of social media to disseminate material, nonpublic information so long as appropriate notice is given to investors as to which sites will be used to make such disclosures. To this end, the report cautions that public companies will be expected to rigorously examine factors indicating whether a particular channel is a "recognized channel of distribution" under Regulation FD.

Public companies, most of whom will be familiar with the 2008 Guidance by now, should recognize that this report does not change the 2008 Guidance. The SEC merely used this opportunity to extend its application to social media. While the area may have been clouded with uncertainty before, social media is now clearly within the domain of Regulation FD.

The report also does not change any 8-K filing requirements. Disclosure on Form 8-K is a permissible method of disseminating information for Regulation FD purposes, but nothing in the report or the 2008 Guidance modify in any respect any required Form 8-K reporting obligations.

Going forward, if a public company intends to use social media as a channel for corporate disclosure, they should identify the specific social media channels on their website and provide information on the steps that investors or the market need to take (e.g. subscribing, registering, "following" or "liking") to receive those disclosures. Additionally, while transitioning to using social media as a distribution channel for corporate disclosure, cross-posting the information directly to the corporate website is recommended.

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National Law Review, Volume III, Number 102

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