

Corporate and Securities Alert: SEC Guidance on Using Social Media to Disclose Material Non-public Information

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Overview

On April 2, 2013, the Securities and Exchange Commission issued noteworthy guidance on the use of social media to disclose material information in compliance with Regulation FD (Fair Disclosure).

The SEC guidance took the form of a press announcement and investigative report about whether Netflix and Netflix CEO, Reed Hastings, violated Regulation FD when Mr. Hastings disclosed – on his personal Facebook page – favorable news about the number of hours of content that Netflix streamed in a month. After investigating, the SEC determined not to pursue an enforcement action in the matter. However, the investigative report did conclude that Regulation FD was not satisfied when a company’s material, non-public information was disclosed on the widely-followed personal social media site of a company executive, where investors were not informed that the company intended to disclose such information through that social media channel. The key takeaway is that companies may use emerging social media channels for their corporate communications, provided they manage them like other channels of communication to comply with Regulation FD.

Background

Regulation FD prohibits public companies and anyone acting on their behalf from disseminating material, non-public information selectively to shareholders and securities professionals where it is reasonably foreseeable that they will trade on that information, unless the information is simultaneously disclosed in a manner that is reasonably designed to achieve broad and non-exclusionary distribution to the public.

The SEC investigation followed Mr. Hastings’ July 3, 2012, use of his personal Facebook page, which had approximately 200,000 subscribers at the time, to announce that Netflix had streamed 1 billion hours of content in the prior month. This news was eventually discussed in stages by technology bloggers, research

analysts and the financial press, and Netflix stock rose from \$70.45 per share at the time of the post to close at \$81.72 per share the following trading day. Netflix had not previously announced the streaming milestone through any of its regular disclosure channels, such as investor letters, press releases or Form 8-K disclosures. Further, Netflix had not indicated that material information about Netflix might be communicated through Mr. Hastings’ Facebook page.

Investigative Report

At the conclusion of its investigation, while announcing that it had determined not to pursue an enforcement action in this matter, the SEC issued a report (“Report”) reminding companies that Regulation FD applies to social media channels that are used to disclose material, non-public information about public companies. The Report reinforces the SEC’s August 2008 guidance on the use of websites, blogs and other “push” technology forms of communication to provide material information to investors in compliance with Regulation FD, and applies that earlier guidance to the social media context.

In the Report, as in its 2008 guidance, the SEC recognized that companies may wish to use methods other than customary press releases and Form 8-K filings to disclose material information. Communications through social media channels require Regulation FD analysis comparable to that used for communications through traditional channels. If the disclosure is made to shareholders and investment professionals, and it contains material, non-public information about the company, then the company must consider whether it is being disseminated in a manner “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” The Report concluded 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 satisfy this standard. When extending corporate communications to new channels, a company must take steps to alert the investing public to the communication channels it intends to use to disseminate material information, and the types of information that might be disclosed through those channels.

Next Steps

As noted in the Report, the SEC guidance does not establish a "one size fits all" standard for disclosure practices. Companies considering the use of social media channels to disseminate material information to investors should be thoughtful and deliberate in that transition, in order to make certain that investors receive adequate advance notice of the use of the particular channel, and that investors do not find the channel unduly burdensome to monitor. Companies desiring to establish their websites or social media as Regulation FD compliant communication channels should consider notifying investors, through their periodic reports and press releases, of the sites or social media channels the company intends to use to disseminate material, non-public information, and to do so for a period of time before going "live" with that channel (for example, investors may need time to register to receive information through the channel). In any event, the company must be confident that the new channel will effectively disseminate information in a broad, non-exclusionary manner to the public before it is used to disseminate material information.

If you have questions about the application of this guidance from the SEC, please contact any member of your [Fenwick securities team](#).

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