

securities lawflash

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SEC Issues Guidance on Social Media and Regulation FD

Public companies are encouraged to rigorously analyze SEC guidance prior to disseminating material information via social media.

On April 10, Netflix, Inc. filed a Form 8-K, disclosing various means through which it publicizes company information, including the use of specified social media outlets. The Netflix disclosure follows recent guidance from the U.S. Securities and Exchange Commission (SEC or the Commission) relating to the use of social media by public companies to disseminate material company information in compliance with Regulation Fair Disclosure (Regulation FD).¹ The title of the Commission's press release announcing the guidance, "SEC Says Social Media OK for Company Announcements if Investors Are Alerted," belies the rigorous analysis public companies must undertake to determine whether the social media outlets that they use are "recognized" channels of distribution such that their use would meet the requirement in Regulation FD that material information be distributed on a "broad, non-exclusionary" basis.² This LawFlash discusses the need for "careful Regulation FD analysis comparable to communications through more traditional channels"³ prior to the dissemination of material information through social media.

Regulation FD

Regulation FD prohibits public companies from selectively disclosing material nonpublic information to certain persons enumerated in the Regulation, which generally include securities market professionals and securityholders who may trade on the basis of the material nonpublic information.⁴ The Regulation "is intended to ensure that all investors have the ability to gain access to material information at the same time."⁵ Thus, whenever a public company or a person acting on its behalf intentionally discloses material nonpublic information to the persons enumerated in Regulation FD, the company must disseminate the information to the public simultaneously. If material nonpublic information is unintentionally disclosed to the enumerated persons, the information must be publicly disseminated promptly.

SEC's Recent Guidance

The Commission's recent guidance on the use of social media outlets is outlined in an April 2, 2013, Report of Investigation (the Report) resulting from the Commission's investigation of Netflix CEO's disclosure of data regarding customer usage of streamed content during June 2012 on his personal Facebook page in July 2012.⁶ This June 2012 data, which reflected a significant increase in the use of streamed content, was not otherwise disseminated by Netflix, and, at that time, investors had not been notified that the CEO's Facebook page would

1. SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69279 (Apr. 2, 2013), available at <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

2. SEC, SEC Says Social Media OK for Company Announcements if Investors Are Alerted (Apr. 2, 2013), available at <http://www.sec.gov/news/press/2013/2013-51.htm>.

3. Report, *supra* note 1, at 5.

4. 17 C.F.R. § 243.100; Final Rule: Selective Disclosure and Insider Trading, Release No. 34-43154 (Aug. 15, 2000), available at <http://www.sec.gov/rules/final/33-7881.htm>.

5. Press Release, *supra* note 2.

6. The Commission did not take any enforcement action against Netflix or its CEO with respect to the CEO's disclosure of the June 2012 data.

be used to disclose company information.⁷ In the Report, the Commission noted its awareness of the increased use of social media outlets by public companies to disseminate company information and the uncertainty regarding the applicability of Regulation FD and its “Commission Guidance on the Use of Company Web Sites”⁸ (the 2008 Guidance on Web Site Usage) to the use of social media.

Quoting Regulation FD in the Report, the Commission noted that public companies must consider whether the dissemination of material nonpublic information through social media outlets is “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”⁹ The Commission observed that the dissemination of material nonpublic information via a personal social media site, without advance notice that such a site would be used for these purposes, is unlikely to meet this distribution test. Further, the Commission noted that the principles outlined in the 2008 Guidance on Web Site Usage apply “with equal force to corporate disclosures made through social media channels.”¹⁰

2008 Guidance on Web Site Usage

In the 2008 Guidance on Web Site Usage, the Commission addressed whether web site disclosures made by a company are deemed “public” for purposes of Regulation FD. In that regard, the Commission noted, among other things, that information posted on a company’s web site is “public” if the company’s web site is a recognized channel of distribution. Whether a company’s web site is a recognized channel of distribution depends on “the steps that the company has taken to alert the market to its web site and its disclosure practices, as well as the use by investors and the market of the company’s web site.”¹¹ Further, the Commission stated that company web site postings should disseminate information in a manner that makes the information available to the securities market in general, which requires a company to focus on how information is posted on its web site and whether it will be timely and readily accessible to investors and the securities market.¹² The Commission outlined various factors that companies should consider in determining whether information is “‘posted and accessible’ and therefore ‘disseminated,’”¹³ including whether a company keeps its web site current and accurate, whether a company uses other methods to disseminate information, and “whether and to what extent those other methods are the predominant methods the company uses to disseminate information.”¹⁴

Implications

Prior to disseminating material nonpublic information via social media outlets, public companies must not only provide adequate advance notice of the social media outlets that will be used for the disclosure of important company information, but they must also determine whether information disclosed through social media outlets will be considered “disseminated” to investors and the securities market. Public companies should consider the 2008 Guidance on Web Site Usage in making this determination.

Additionally, given the “broad, non-exclusionary distribution” requirement for material information, a public company should consider, even when it has determined that it can effectively disseminate material information via social media outlets, whether to continue to disseminate material nonpublic information through “traditional” distribution channels also, such as press releases and reports filed under the Securities Exchange Act of 1934, as amended (the Exchange Act), particularly if these methods have been the “predominant methods” of dissemination by the company.¹⁵ Alternatively, similar to a suggestion in the 2008 Guidance on Web Site

7. In the Report, the Commission noted that Netflix’s stock rose from \$70.45 at the time of the CEO’s disclosure to \$81.72 at the close of the following trading day.

8. SEC, Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 7, 2008), *available at* <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

9. Report, *supra* note 1, at 6 (quoting 17 C.F.R. § 243.101(e)(2)).

10. Report, *supra* note 1, at 5.

11. 2008 Guidance on Web Site Usage, *supra* note 8, at 18–19.

12. Additionally, the Commission noted that, in evaluating whether information is public and therefore can be communicated to others, there must be a “reasonable waiting period for investors and the market to react to the posted information.” *Id.* at 18.

13. *Id.* at 20.

14. *Id.* at 21–22.

15. In some cases, disclosing material information in reports filed under the Exchange Act will be necessary to ensure that prospectuses for ongoing offerings of securities include all material information. Additionally, while the New York Stock Exchange requires listed companies to

Usage,¹⁶ a company could consider filing or furnishing a current report on Form 8-K or issuing a press release that alerts investors and the securities market to the company's plan to disclose important information at a specified time on an identified social media outlet.¹⁷ Disclosure through traditional distribution channels would help ensure that all existing and possible new investors and other participants in the securities market will have access to the same information at the same time.

Practical Considerations

- Public companies should consider whether their internal policies should be revised to prohibit employees and directors, who are not otherwise authorized to speak on behalf of the company, from using personal social media outlets to disclose nonpublic company information, as well as information about other companies, regardless of whether the information is material.
- Public companies that are interested in developing social media outlets as recognized channels of distribution for material company information should consider referencing these outlets in press releases or reports filed under the Exchange Act as methods through which company information will be disclosed and then monitoring investor and other use of the outlets to evaluate whether any outlet becomes a recognized channel of distribution.
- Public companies should consider whether to revise their Regulation FD policy to state that the company will not use corporate social media outlets to disseminate material nonpublic company information **unless** the company has first (i) determined that the social media outlets intended to be used will disseminate material nonpublic information on a broad, non-exclusionary basis (consistent with the factors outlined in the 2008 Guidance on Web Site Usage), (ii) disclosed on its web site and in filed reports that material nonpublic information may be disseminated through these social media outlets, and (iii) informed investors and the securities market about how to gain access to these outlets so that they can receive or obtain company information at the time it is so released. To the extent that a company determines that particular social media outlets have become recognized channels of distribution for the company and, thus, are appropriate ways for it to disseminate material information, the company should (i) consistently monitor the usage of its social media outlets to ensure that they remain recognized channels of distribution, (ii) identify specific persons to disseminate information that has been approved for distribution through such outlets, and (iii) consider whether press releases and/or reports under the Exchange Act should disclose the material information also or alert interested persons to the anticipated disclosure through the social media outlets.
- Public companies that choose to use social media outlets for the dissemination of corporate information should consider developing protocols and compliance trainings for those individuals who are authorized to speak on behalf of the company. Training could include company lawyers, professionals in marketing and communications, C-suite executives, and other company administrators.

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quickly disclose material news to the public by means of any Regulation FD-compliant method (or combination of methods), it "encourages listed companies to comply with [its] immediate release policy by issuing press releases." NYSE Listed Company Manual § 202.06(A).

16. 2008 Guidance on Web Site Usage, *supra* note 8, at 23.

17. In the Report, the Commission suggests that public companies can identify on their web sites the specific social media outlets that they plan to use to disseminate material nonpublic information, noting that such additional disclosure would be minimally burdensome to companies and "would give investors and the markets the opportunity to take the steps necessary to be in a position to receive important disclosures — e.g., subscribing, joining, registering, or reviewing that particular channel." Report, *supra* note 1, at 7.

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