SEC Provides Guidelines for Use of Social Media in Compliance with Regulation Fair Disclosure

In the age of Facebook, Twitter and LinkedIn, companies and their executives are increasingly using social media to interact with customers, investors and the public. This rapid change in the way public companies disseminate information has presented challenges for the Securities and Exchange Commission (the "SEC" or the "Commission") in its application of Regulation FD (Fair Disclosure), which requires a company's disclosure of material non-public information be distributed in a broad and non-exclusionary manner to the public.

On April 2, 2013, the Commission issued a Report of Investigation meant to clarify questions regarding the use of social media under Reg. FD (the "Report"). The Report comes on the heels of the Commission's decision not to pursue an enforcement action against Netflix and its CEO, Reed Hastings. Hastings came under scrutiny when he posted the following message to his personal Facebook page (which has over 200,000 followers) on July 3, 2012:

"Congrats to Ted Sarandos, and his amazing content licensing team. Netflix monthly viewing exceeding 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we'll blow those records away. Keep going, Ted. We need even more!"

While benign at first glance, Netflix did not file a Form 8-k with the SEC, issue a formal press release or post the information on its company website. Nor had the company alerted investors that material nonpublic information would be disclosed on Hastings' Facebook page. Citing a potential violation of Regulation FD, the SEC announced, in December 2012, that it was considering an enforcement action against the company.

Adopted in 2000, Reg. FD reflects the Commission's view that all investors should have equal access to a company's material disclosures at the same time. Information is considered material if there is a "substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision, or if the facts "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." And information is "non-public" if it has not been disseminated in a manner making it available to investors generally. Under the rule, whenever a public company, or any person acting on its behalf, discloses material non-public information to certain enumerated persons, the company must disclose that information to the public. The timing of the required disclosure depends on whether the selected disclosure was intentional or unintentional. Accordingly, the company must make this public disclosure (i) simultaneously, in the case on intentional disclosures, or (ii) promptly afterwards, in the case of unintentional disclosures. The public disclosure may be made through an Exchange Act filing (such as a Form 8-K) or through any method reasonably designed to effect broad, non-exclusionary distribution of the information.

While every case must be evaluated on its own facts, the Report explains that the disclosure of material nonpublic information on a company officer's personal social media page, without advance notice to investors that such channel will be used for the distribution, is unlikely to comply with Reg. FD, since personal media pages are not normal channels for distribution of company information. The Report emphasized that in order to comply a company must provide advance notice of its intent to use of a social media channel to disclose material information.

The Report is less a liberalization of Reg. FD than a logical application of guidance issued in 2008 regarding the applicability of Reg FD to disclosures via company websites (the "2008 Guidance"). The 2008

Guidance explained that posting material nonpublic information on a company website may be a sufficient method of public disclosure for Reg FD purposes as long as the information is disseminated in a manner calculated to reach the marketplace through "recognized channels of distribution." Further, whether online disclosures pass muster under Reg FD depends on the steps that the company has taken to alert the market to its website and its disclosure practices. The Report explains that the Commission's 2008 Guidance and its analytical framework apply to disclosures using social media.

The 2008 Guidance provided a non-exclusive list of factors to consider, including:

- whether and how the company lets investors and the market know that the company has a website and that it should be looked at for investor related information;
- the extent to which information posted on the website is regularly picked up by the market and media;
- the steps taken by the company to make its website accessible; and
- the nature of the information being disclosed.

Although the use of websites and social media channels for disclosure purposes will continue to expand in the future, few companies are likely to use their websites or other forms of social media as the primary means of disclosing material information. Instead, most companies will continue to rely for on the Form 8-k safe harbor to ensure their communications are in compliance. Nevertheless, companies choosing to utilize social media for dissemination of material information should:

- Ensure that the chosen channel is "non-exclusionary";
- Notify investors clearly and in advance;
- Tailor the timing and type of disclosure to the platform being used;
- Make it easy for all investors to follow your social media; and
- Create policies and procedures in the use of social media and train your officers.