

SEC Outlines Position on FD Disclosure Using Social Media

The Securities and Exchange Commission (SEC), on April 2, 2013, outlined a new disclosure position that clarifies that public companies can use social media outlets like Facebook and Twitter to announce key information in compliance with Regulation Fair Disclosure (Regulation FD). Effectively, this new SEC position represents an update to the SEC's August 2008 Guidance on the Use of Company Websites¹ and a necessary response to the increased use of communications through social media that has occurred in the past five years.

A Quick Refresher on Regulation FD

Regulation FD prohibits public companies, or persons acting on their behalf, from selectively disclosing material, nonpublic information to securities professionals or shareholders where it is reasonably foreseeable that they will trade on that information before the information is generally made available to the public. This rule was adopted in 2000 out of concern that public companies were selectively disclosing important nonpublic information, such as advance warning of earnings results, to securities analysts before making full disclosure of the same information to the general public. While even in 2000, the SEC noted that Regulation FD "does not require use of a particular method, or establish a 'one size fits all' standard for disclosure," in practice the conservative approach to comply with Regulation FD had been through the use of disclosure in a Form 8-K filed with the SEC either as a primary method of disclosure or to simultaneously supplement other public disclosure.²

In August 2008, in response to public companies' increasingly widespread use of their websites to disseminate information to investors and the market, the SEC issued its Guidance on the Use of Company Websites. The 2008 Guidance explained that a company's website could be an adequate channel of disclosure for purposes of Regulation FD if the company has made investors, the market, and the media aware of the channels of information distribution it expects to use, so these parties know where to look for disclosure of material information about the company or what they need to do to be in a position to receive this information.

Background of the SEC's Newly Announced Position

The SEC's new disclosure position is set forth in a "Report of Investigation" (Report),³ which is a method occasionally used by the SEC when it wants to issue broad guidance from a specific investigation. In this case, the underlying investigation was whether Netflix, Inc. and its CEO, Reed Hastings, had violated Regulation FD when Hastings used his personal Facebook page, on July 3, 2012, to announce that Netflix had streamed 1 billion hours of content in the prior month of June. This level of content represented a 50% increase in streaming hours from the last time Netflix had disclosed this metric on January 25, 2012 in its earnings call.

¹ *Commission Guidance on the Use of Company Websites*, SEC Release No. 34-58288 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf> ("2008 Guidance").

² *Final Rule: Selective Disclosure and Insider Trading*, SEC Release No. 34-43154 (August 15, 2000), available at <http://www.sec.gov/rules/final/33-7881.htm#>.

³ *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings*, SEC Release No. 69729 (April 2, 2013), available at <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

Netflix's stock price increased from \$70.45 at the time of the Facebook post to \$81.72 at the close of the following trading day. Netflix did not otherwise report this information to investors through a press release or Form 8-K filing. As noted by the SEC in its Report, the announcement of the 1 billion streaming milestone only reached the securities market incrementally. A technology-focused blog noted it after about an hour and a handful of news outlets picked it up after about two hours. After the markets closed, several articles in the mainstream financial press picked up the story.

In the end, the SEC did not pursue sanctions or penalties against Hastings or Facebook for a violation of Regulation FD. However, the SEC did use the facts as a basis to set forth new guidance on the use of social media to comply with Regulation FD.

The SEC's Position as Set Forth in the Report of Investigation

The SEC's Report confirms that Regulation FD applies to social media in the same way it applies to company websites. In confirming this position, the SEC made two primary points: (1) a public company's communication through social media channels requires the same careful Regulation FD analysis as communication through traditional channels, and (2) as previously outlined in the 2008 Guidance, the concept that the investing public should be alerted to the channels of information distribution a company will use for disclosure applies if a company will use social media. In the case of Hastings and Netflix, the information in question was posted on Hastings' personal Facebook account. Additionally, Netflix had not previously used its or Hastings' Facebook page to announce company metrics, and had not taken steps to alert investors that Hastings' personal Facebook page would be used as a medium for communicating information about Netflix.

The Report makes clear that a company must inform the market about what type of communication channels, including social media channels, it expects to use to disseminate material nonpublic information.

Some Practical Guidance

- A key element to the use of social media as a disclosure method is advance notice to investors of this intention. Companies should consider notifying investors about potential social media forums 1) on the company's website homepage or investor relations site, 2) in the company's press releases, and 3) in the company's SEC filings. The SEC noted, however, that they doubt that an executive's personal social media sites (as opposed to those used by the company) are an appropriate method to disclose company material information.
- Public companies and their directors should develop formal policies that address their company's and executives' use of social media. Among other things, these policies should address to what extent executives can post information concerning the company on their personal social media sites, should ensure there is advance notice of social media forums where official company information will be posted, and should consider whether information determined to be material will be simultaneously disclosed on a Form 8-K or in some other centralized location.
- While the SEC's position in the Report for the first time articulates that social media can be used by public companies to comply with Regulation FD, this position does not reflect a change or relaxation of Regulation FD, and is largely an extension of the positions in the 2008 Guidance.

- Early commentary has been somewhat critical of the SEC’s position. On the one hand, certain commentators believe that this position may encourage dispersed disclosure by companies when it should be easy for companies to ensure that all material disclosure is set forth in one spot, for instance, on a company’s website. On the other hand, studies have demonstrated that public companies are increasingly using social media for communications, and many commentators do not believe the new positions provide clear enough guidance to safely accomplish this in compliance with Regulation FD.

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Herman H. Raspé

212.336.2301

hhraspe@pbwt.com

Peter J. Schaeffer

212.336.2313

pjschaeffer@pbwt.com

Dana B. Fritz

212.336.2039

dbfritz@pbwt.com

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