

Pause Before You Post - Securities Law Considerations When Communicating to the Public Through Social Media

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In July 2012, Netflix, Inc.'s CEO posted on Facebook that "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June." The post was accessible to the more than 200,000 subscribers to his Facebook page.

On December 6, 2012, Netflix reported in a Form 8-K filed with the Securities and Exchange Commission that Netflix and its CEO each had received a "Wells Notice" from the Staff of the SEC indicating that the Staff plans to recommend to the SEC that it bring a civil action against Netflix and its CEO for violations of the SEC's Regulation FD (Fair Disclosure), in connection with the Facebook post.

According to Netflix, the SEC Staff believes that the CEO's Facebook post contained material nonpublic information about Netflix, which Netflix should instead have first disclosed in a Form 8-K or press release.

Regulation FD governs the process by which public companies release selective disclosure of material nonpublic information to analysts, institutional investors, shareholders and others.

The rule was designed to ensure that all investors have equal access to a company's material disclosure at the same time.

Public disclosure of material nonpublic information can be made under Regulation FD by filing a Form 8-K with the SEC, issuing a broadly disseminated press release or by other means which are reasonably designed to result in broad and non-exclusionary distribution of the information to the public.

In light of the evolution of technology and the growing use of the internet, the SEC has determined that, for some companies in certain circumstances, posting of the material nonpublic information on the company's website may be a sufficient means of public disclosure which satisfies the disclosure requirements of Regulation FD.

However, the SEC does not yet have rules in place governing the use of social media as a means of disclosing information to the public under Regulation FD.

In view of the SEC's notice to Netflix, for a company and its representatives that use Facebook and other social media in the company's marketing and strategy, we suggest adhering to the following practices to minimize risks when using social media:

- The company should adopt social media guidelines which cover the use of social media by representatives of the company from a securities law and corporate governance perspective.
- The guidelines should regulate disclosures on social media in the same way as the company regulates disclosures in other media (i.e., the company should not disclose material information through social media before disclosing it through a Form 8-K or more customary news releases).
- Review existing company policies, such as Regulation FD and insider trading policies, to confirm they contemplate the use of social media.
- If the company is part of a highly regulated industry, such as pharmaceuticals or investment advisers, consider certain subjects that should not be disclosed due to regulatory concerns.

Guidelines should be reviewed and updated, as appropriate, to reflect changes in the use of social media.

PRACTICE AREAS

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