

SEC Gives Guidance on Use of Social Media under Regulation FD

Over the last several months, the Securities and Exchange Commission (SEC) has provided the public with two new interpretive guides regarding the use of social media by public companies, investment companies and their officers or affiliates who participate in the communication of investment-related information.

Most recently, the SEC released a Section 21(a) Report of Investigation (the "Report") which focused on whether it was legally acceptable for the Chief Executive Officer of Netflix to use his personal Facebook page to release information that may have been material to investors.

The issuance of the Report was unusual (the SEC has issued just a handful of Reports of Investigation since 2000), and it is undoubtedly intended to clarify the SEC's views on using social media to distribute information to investors. Because the Report was drafted at the recommendation of the SEC's Enforcement Division, it is also intended to give notice about the types of conduct that will be prosecuted in the future.

Most importantly for issuers, the Report clarified that:

- Companies can use social media outlets, such as Facebook and Twitter, to announce important information "so long as investors have been [previously] alerted about which social media will be used to disseminate such information" and provided that the channels of release for material, non-public information are "designed to achieve effective broad and non-exclusionary distribution to the public" in a simultaneous manner;
- Regulation FD, which pertains to disclosures of material, non-public information, applies to current forms of social media and other emerging technologies for communication in the

same way that it applies to Websites; and

- The SEC's 2008 guidance (the "2008 Guidance") regarding company Websites, which also contemplated the use of "push" technologies for communication, was designed to be flexible and adaptive, providing an analytical framework for answering compliance questions related to the use of emerging tools for communication (see our September 2008 Securities Law Update entitled, "SEC Provides Guidance Regarding Company Websites" at http://www.burnslev.com/apps/uploads/publications/Securities_Sept08.pdf).

The Report also emphasized that disclosure to a wide audience, one that includes *both* the enumerated persons under Regulation FD (including shareholders and securities professionals) as well as other recipients, still needs to be carefully analyzed for Regulation FD compliance. This emphasis was designed to clarify that even though the disclosure is not made *only* to the persons enumerated under Regulation FD (including shareholders and securities professionals), but instead included non-enumerated recipients, the regulation may still be applicable to the disclosure if it is not deemed public disclosure in conformity with Regulation FD.

"Most social media are perfectly suitable methods for communicating with investors, but not if the access is restricted or if investors don't know that is where they need to turn to get the latest news," explained George Canellos, Acting Director of the SEC's Division of Enforcement. He also warned that "one set of shareholders should not be able to get a jump on other shareholders just because the company is selectively disclosing important information" through social media.

The release of the Report came on the heels of a March 2013 Guidance Update (the "2013

Guidance") from the SEC Division of Investment Management, which addressed the filing requirements related to the use of certain electronic communications and social media, particularly in connection with investment funds.

The 2013 Guidance was released to provide answers to numerous specific inquiries that the SEC had received regarding investment funds, and it offered real-life examples of electronic communications that must be filed or need not be filed with the SEC. While the 2013 Guidance focused on social media issues related to investment funds, it provided a good look through the SEC's lens on electronic communications.

It also focused mainly on communications involving:

- The performance of a fund;
- The merits of an investment in a specific fund;
- The use of hyperlinks to other materials about performance assessment or investment decisions; and
- Responses to individual electronic queries.

While fewer than 10 percent of public companies currently use their Websites for real-time dissemination of investment-related information, according to one recent survey, the level of interest in using Websites and social media for communications is expected to rise steadily.

This Securities Law Update is intended to provide you with helpful information related to the Report. To review the full text of the Report, which includes a brief discussion of the facts of the Netflix case, see: <http://www.sec.gov/litigation/investreport/34-69279.pdf>. To see the text of the SEC press release issued with the Report, see: <http://www.sec.gov/news/press/2013/2013-51.htm>. You can also examine the full text of the 2013 Guidance

through the SEC Website at: <http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf>.

SEC PROVIDES SOCIAL MEDIA GUIDANCE IN REPORT

While the SEC decided not to pursue an enforcement action against Netflix or its CEO, it did issue the Report, taking a full eight pages to explain its concerns with, and provide guidance with respect to, social media utilization by public company issuers.

The Facts of the Netflix Case

Netflix is an entertainment service that provides movie and television programming to subscribers, increasingly through the use of Internet streaming rather than DVD rentals. In January 2012, Netflix announced by press release that it had streamed two billion hours of content in the 4th quarter of 2011, also referring to this metric in a CEO letter to shareholders, which was incorporated in its Form 8-K filing. The SEC noted no objection to this.

But months later, on July 3, 2012, the CEO of Netflix posted a message on his personal Facebook page, noting that monthly viewing time of streaming Internet had surpassed 1 billion hours in a month for the first time ever.

The SEC noted in the Report that Netflix did not file a related Form 8-K, issue a press release through standard distribution channels or otherwise announce the 2012 streaming milestone through other media. The SEC also noted that neither Hastings nor Netflix had previously used the CEO's Facebook page to announce company performance metrics, opting instead to post information on the company Facebook page, Twitter feed and blog, as well as its own Website.

Regulation FD

Regulation FD applies when an issuer, or a person acting on its behalf, discloses material, non-public information to certain enumerated persons, including shareholders and securities professionals.

Under Regulation FD, when an issuer, or a person acting on its behalf, makes selective disclosure of material, non-public information, it must publicly disclose the

selectively disclosed information through a recognized channel of distribution in a manner reasonably designed to provide broad, non-exclusionary distribution of information to the public. If the selective disclosure was intentional, then the public distribution of the same information must be made "simultaneously," and when the selective disclosure is inadvertent, then the public disclosure must be made "promptly" thereafter.

Report Guidance

The Report provided guidance regarding when the use of social media would constitute a "recognized channel of distribution" for communicating with their investors in compliance with Regulation FD.

In the Report, the SEC noted that companies may use social media outlets, such as Facebook and Twitter, to announce important information so long as (i) investors have been provided advance notice that the applicable social media outlet will be used to disseminate such information and (ii) the utilized social media outlet is "designed to achieve effective broad and non-exclusionary distribution to the public" in a simultaneous manner.

In terms of providing advance notice, the SEC clarified that the following methods are some, but not all, of the methods that a company could use to "enable evolving social media channels of corporate disclosure to be used as recognized channels of distribution in compliance with Regulation FD and the 2008 Guidance:"

- Including in periodic reports and press releases disclosure identifying the specific social media channels a company intends to use to routinely posts important information; and
- Disclosures on corporate web sites identifying the specific social media channels a company intends to use for the dissemination of material non-public information.

According to the SEC, the advance notice is designed to ensure that investors and the markets have "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."

In light of the expanding methods of electronic and social communication, the SEC stated that "we expect issuers to examine rigorously the factors indicating whether a particular channel is a 'recognized channel of distribution' for communicating with their investors."

"Providing appropriate notice to investors of the specific channels a company will use for the dissemination of material, non-public information is a sensible and expedient solution," the Report concluded.

The Report also emphasized that disclosures made on personal social media sites of individual corporate officers were likely to run afoul of Regulation FD whenever disclosure of material, non-public information is made without advance notice to investors that the individual's site may be used for this purpose.

For public companies seeking guidance about the use of social media generally, the SEC specifically stated that it wanted to "clarify and amplify" that "the principles outlined in the 2008 Guidance – and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information – apply with equal force to corporate disclosures made through social media channels."

Explanatory Notes:

This update is intended to call your attention to various interpretive statements by the SEC of possible interest and relevance to you, but it is not intended to constitute a legal opinion or definitive summary of all interpretations and legal information that could be material to you.

Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these interpretive statements or if you want to learn more about our expertise in this area.

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