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SEC Issues Guidance on Disclosures Made via Social Media

By Michael Meskill and David Garcia

The Securities and Exchange Commission (the "SEC") recently issued a Report of Investigation¹ (the "Report") in which it provides helpful guidance to public companies regarding their use of social media to disclose material non-public information. The Report was issued after the SEC's investigation into whether the CEO of Netflix had violated the company's disclosure obligations under Regulation FD when he posted a statement on his personal Facebook page regarding the amount of content Netflix subscribers had accessed. While the SEC elected not to initiate an enforcement action against Netflix or its CEO, the SEC took the opportunity to address the issue of disclosing material non-public information through social media platforms used by many companies today.

Summary of Regulation FD Disclosure Requirements

One of the primary goals of Regulation FD is to promote full and fair disclosure of material non-public information by public companies. Regulation FD provides that when an issuer discloses material non-public information to holders of its securities or to securities market professionals who are reasonably likely to trade on the information, the issuer must make a simultaneous disclosure (in the case of intentional disclosure of the information) or prompt disclosure (in the case of unintentional disclosure of the information) of the same information to the general public. The rule is designed to prohibit the selective disclosure of material non-public information. To comply with this disclosure requirement, a company can file a Form 8-K with the SEC or it can release the information through one or more other methods that are reasonably designed to provide broad, non-exclusionary distribution of the information to the general public.

Key Takeaways from SEC Report

In issuing the Report, the SEC intended to clarify the extent to which its prior guidance, which was issued in 2008 (the "2008 Guidance")² and which concerns internet disclosures made by companies via their websites, applies to the use of social media platforms that were not contemplated at the time of the 2008 Guidance. In the 2008 Guidance, the SEC indicated that the determination of whether the electronic disclosure of information complied with Regulation FD depended, in part, on whether the company's website was a "recognized channel of information." The SEC provided some factors that could be applied to determine whether a company's website met this threshold. Because these factors were fact-intensive and subjective, many companies have continued to use traditional means of public disclosure such as Form 8-Ks and press releases to comply with Regulation FD.

In the Report, the SEC extended the analytical framework in the 2008 Guidance to social media. The core themes underlying this analytical framework are (i) whether a company has made its investors, the market and the media aware of the fact that it intends

to use specific social media channels to disseminate information, and (ii) the extent to which the selected channels are readily accessible to the general public.

Practical Recommendations

The popularity and wide spread use of social media today can create a false sense of security where companies may assume that popular social media platforms are acceptable channels of disclosure for Regulation FD purposes. The SEC has made it clear in the Report that company communications made through social media could constitute selective disclosure of information and the requirements of Regulation FD (and the 2008 Guidance) apply to these communications. The following practical recommendations should help guide public companies in their use of social media as a communication tool:

- Advance Notice of Social Media Platforms: To the extent a company intends to use a specific social media platform to disclose company information, it should provide advance notice in as many methods and locations as possible that the platform will be used for this purpose. The company should consider providing this notice on its website, in SEC filings, and in press releases to help alert investors, the media, and the public at large of the company's intent with respect to social media.
- Easily Accessible Platforms: A company should select social media platforms that are readily available and easily accessible.
- Consistent Platforms: A company should consider dedicating a specific social media platform for disclosing material non-public information or, if a company intends to use multiple platforms for disclosures, it should seek consistency in the platforms it uses (rather than switching among multiple platforms).³ This will help the company establish the platform(s) as a recognized channel of information. In addition, if the company uses only one platform, or uses all of its platforms, for making all company communications, then investors and the market might become concerned about having to wade through large numbers of communications and vast amounts of information and being unable to determine material information from non-material information. Or worse, investors and the market might become concerned that the company would try to "hide" unfavorable disclosures among numerous other company communications.
- Consider Reg FD Implications of All Disclosures: Every time a disclosure is either planned to be made or is actually made via a social media platform, the company should conduct a Regulation FD analysis of the communication. The company should determine whether material non-public information is included in the communication and, if it is, the company should determine whether the specific platform involved is a "recognized channel of information" for Regulation FD purposes. A company should not use a social media platform as the exclusive means of disclosing material non-public information unless and until the company has determined that the platform is a recognized channel of information for Regulation FD purposes.
- Consider Need for Concurrent Traditional Disclosure: When in doubt as to whether or not a specific social media platform will be a recognized channel of information, the company should file a Form 8-K disclosing the material information to eliminate the risk of non-compliance with Regulation FD.
- Updated Training for Corporate Spokespersons: A company should update its training for authorized company spokespersons on the use of social media platforms, compliance with Regulation FD, and the application of the SEC's anti-fraud rule under Rule 10b-5 to company communications.

Jackson Walker's **Corporate and Securities attorneys** have extensive experience in all areas of securities law compliance. For more information regarding compliance with Regulation FD or any other related issue, please contact your Jackson Walker attorney or any one of the following Jackson Walker attorneys:

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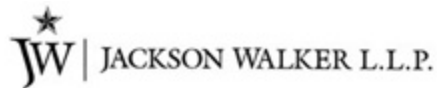
¹ **Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69279 (April 2, 2013).**

² **Commission Guidance on the Use of Company Web Sites, Release No. 34 58288 (August 7, 2008).**

³ A number of public companies have already filed Form 8-Ks to disclose and alert the market that the companies may post material information on social media platforms. The platforms listed have generally included the company's blog, Facebook page and Twitter feed. The companies have also generally stated that their list of social media platforms may be updated from time to time on the company's investor relations website.

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