

Safe Tweeting: SEC Provides Guidance on Social Media and Regulation FD Compliance

by Theresa H. Lee and Brian M. Wong

The SEC has provided guidance to publicly reporting companies on how to use popular social networking sites, such as Facebook and Twitter, consistent with federal securities laws.

On April 2, 2013, the Securities and Exchange Commission (SEC) issued a release¹ detailing its investigation into whether Netflix, Inc. and its CEO, Reed Hastings, violated Regulation FD and Section 13(a) of the Securities Exchange Act of 1934, when Hastings used his personal Facebook page to announce that Netflix had streamed 1 billion hours of content in June 2012. Hastings' personal Facebook page had not previously been used to make company announcements, and shareholders had not been informed that it would be used to disclose company information. In addition, after the disclosure, Netflix did not post the information on its web site, issue a press release or file a Form 8-K.

The SEC declined to pursue an enforcement action against Hastings and Netflix, but used this matter as an opportunity to clear up uncertainty regarding the use of social networking sites to disclose material, nonpublic information. The SEC did so by addressing two questions raised during the course of its investigation:

- the application of Regulation FD to Hastings' Facebook posting; and
- the applicability of the SEC's August 2008 Guidance on the Use of Company Web Sites² (2008 Guidance) to emerging technologies such as social networking sites.

Regulation FD Applies to Disclosures of Material, Nonpublic Information on Social Networking Sites

The SEC explained in its release that issuers may use popular social networking sites, such as Facebook and Twitter, to disclose material, nonpublic information, but such disclosures must comply with Regulation FD. Regulation FD provides that when an issuer, or a person acting on its behalf, discloses material,

¹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, [Release No. 69279](#) (Apr. 2, 2013).

² Commission Guidance on the Use of Company Web Sites, [Release No. 34-58288](#) (Aug. 1, 2008).

nonpublic information to certain enumerated persons, such as shareholders and securities market professionals, where it is reasonably foreseeable that they will purchase or sell the issuer's securities on the basis of the information, it must distribute that information in a manner reasonably designed to provide broad and non-exclusionary distribution to the public. When the disclosure of material, nonpublic information is intentional, it must be distributed to the public simultaneously, and when such disclosure is inadvertent, it must be distributed to the public promptly afterwards. The SEC does not require the use of a particular method for public disclosure, but it must be done through a recognized channel of distribution, such as an issuer web site, press release or Form 8-K filing.

The SEC explained that "the rule makes clear that public disclosure of material, nonpublic information must be made in a manner that conforms with Regulation FD whenever such information is disclosed to any group that includes one or more enumerated persons." The SEC further emphasized that "if an issuer makes a disclosure to an enumerated person, including to a broader group of recipients through a social media channel, the issuer must consider whether that disclosure implicates Regulation FD." This analysis would include determining:

- whether the disclosure includes material, nonpublic information; and
- if it does, and the issuer chooses not to file a Form 8-K, whether the information was disseminated in a manner reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

The 2008 Guidance Provides a Framework for Regulation FD and Use of Social Media

The SEC stated that although the 2008 Guidance primarily addressed the use of corporate web sites for the disclosure of material, nonpublic information, it also identified "push" technologies, such as email alerts and RSS feeds, and "interactive" communication tools, such as blogs, and noted that today's evolving social media channels are an extension of these concepts.

To help issuers determine how to utilize social networking sites for the disclosure of material, nonpublic information, the SEC looked to the 2008 Guidance's non-exhaustive list of factors that are used to evaluate whether a corporate web site constitutes a recognized channel of distribution. These factors include:

- how an issuer informs the public about its web site;
- how an issuer informs the public about the fact that important information will be posted on its web site, and its pattern or practice of posting such information;
- whether the web site design makes it easy to access information;
- the extent to which information posted on the web site is picked up by the market and reported in the media, and the issuer's size and market following;
- steps taken to make its web site and the information accessible;
- how well the issuer keeps its web site current and accurate; and
- nature of the information.

The SEC stated that the question is “whether the company has made investors, the market, and the media aware of the channels of distribution it expects to use, so these parties know where to look for disclosures of material information about the company or what they need to do to be in a position to receive this information.” Rather than a static rule-based approach, the SEC will use a facts-and-circumstances analysis.

Best Practices

The SEC clarified that the disclosure of material, nonpublic information on the personal social networking site of an individual corporate officer, without advance notice to investors, is unlikely to qualify as an acceptable method of disclosure. Based on the SEC’s guidance, an issuer can take the following steps to use social networking sites for the disclosure of material, nonpublic information in compliance with Regulation FD:

- Notify the public about the forms of communication the issuer intends to use to disseminate material, nonpublic information, including any social networking sites and the types of information that may be disclosed through social media. For example, the SEC encourages issuers to note in periodic reports and press releases that the issuer routinely posts important information on their corporate web site. Similarly, an issuer may disclose on its web site, in periodic reports and in press releases the specific social networking sites it intends to use for the dissemination of material, nonpublic information.
- Maintain control over material, nonpublic information to be disseminated using social networking sites. Develop a system for posting information. Limit the number of social networking sites utilized to maintain maximum control over information dissemination.
- Develop internal controls to ensure compliance with corporate policies regarding the use of personal social networking sites. Unless adequate notice to the public has been provided, do not allow executives to post the issuer’s material, nonpublic information on personal social networking sites.
- Provide regular training to key employees on compliance with Regulation FD.

Companies may also use social media in parallel with commonly recognized channels of distribution. For instance, many companies use Twitter to tweet links to broadly disseminated press releases, Form 8-K filings and the like at the same time they are made publicly available through those channels of distribution.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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