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SEC Addresses Use of Social Media for Public Company Disclosures

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On April 2, 2013, the Securities and Exchange Commission issued a Report of Investigation that directly addresses the application of Regulation FD to disclosures made through social media channels such as Facebook and Twitter.¹ The Report confirms that the SEC's prior Regulation FD guidance applies to communications via social media, cautioning that companies must still carefully examine the factors indicating whether a particular social media channel is a "recognized channel of distribution" for communicating with investors, and emphasizing the importance of alerting the market as to the particular social media channels that companies intend to use.

Given the increasing use of social media by companies in communicating with investors and the public generally, the Report provides an important acknowledgement that the SEC encourages companies to use new forms of communication to better connect with shareholders, and eases uncertainty regarding the application of prior Regulation FD guidance to social media communications.

Netflix CEO's Facebook Post Prompts Report

The Report was issued in connection with a highly-publicized incident regarding a disclosure by Netflix CEO Reed Hastings. On July 3, 2012, Hastings posted on his personal Facebook page that Netflix's "monthly viewing exceeded 1 billion hours for the first time ever in June." Netflix had not released this information prior to Hastings' post, nor did it concurrently issue a press release or Form 8-K containing the information or post the information on its website or the company's Facebook page. Although Hastings' Facebook page was available by subscription to all Facebook members, Netflix had not previously alerted investors that it might be used as a tool for communicating information about the company.

In light of these facts, the SEC staff served Netflix and Hastings with a Wells Notice in December 2012, notifying them of potential legal action for violation of Regulation FD. After conducting an investigation, the SEC issued the Report and stated that it had determined not to pursue an enforcement action against Netflix or Mr. Hastings. While the Report does not explain the basis for the SEC's decision, the SEC used the Report as an opportunity to provide guidance to all companies of the application of Regulation FD to social media channels in light of their growing popularity and the increasing uncertainty surrounding their use for company communications.

Regulation FD and the SEC's 2008 Guidance

Regulation FD was designed to curtail selective disclosure of material nonpublic information to certain security analysts and institutional investors prior to release to the general public. It requires public disclosure of material information through a method reasonably designed to provide broad, non-exclusionary dissemination. While the SEC has declined to mandate a "one size fits all" standard

¹ <http://www.sec.gov/litigation/investreport/34-69279.pdf>

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for distribution of information under Regulation FD, it has provided a non-exhaustive list of methods for distribution, including SEC filings, press releases, press conferences, conference calls, or telephonic or other electronic transmission.

In 2008, in response to the increasing use of company websites and the evolving technology landscape, the SEC issued additional guidance on the dissemination of information in compliance with Regulation FD, focusing primarily on company website disclosure.² The 2008 Guidance provided a factor-based framework for determining whether disclosure of information on a company website complies with Regulation FD. Relevant factors include:

- whether the website is a recognized channel of distribution;
- whether posting information on the website makes it available to the securities marketplace generally; and
- whether the company provides a reasonable waiting period between website disclosure and any subsequent private disclosure in order to allow interested parties the opportunity to obtain and gauge the information.

To satisfy the fact-specific inquiry, companies using website disclosure typically alert the marketplace of their intent to distribute material information through their website in SEC filings, press releases, conference calls, and other media outlets.

The SEC Confirms 2008 Guidance in the Social Media Context

In issuing the Report, the SEC recognized that, although it has taken steps to encourage electronic distribution of information, the rapidly changing state of technology has created uncertainty about the applicability of the 2008 Guidance to social media. Noting the similarities between current social media outlets and the distribution channels addressed by its 2008 Guidance (*e.g.*, websites, blogs, and RSS feeds), the SEC made clear that the 2008 Guidance applies equally to dissemination of material nonpublic information through social media outlets.

The SEC highlighted that, in analyzing whether disclosures via social media satisfy Regulation FD, companies are expected to “examine rigorously” whether the particular social media outlet constitutes a “recognized channel of distribution” for communicating with their investors. The SEC further emphasized the need for companies to provide appropriate notice to investors of the particular social media channels that they will use to disseminate material nonpublic information. The Report suggests that including such notice in periodic reports, press releases, and on company websites are methods that a company could use with minimal burden to enable social media channels to be used as recognized channels of distribution in compliance with Regulation FD.

The Report also made clear that the SEC is comfortable with companies communicating through “opt-in” social media outlets that require users to subscribe, join or register to view such communications. Although not addressed in the Report, outlets that would require users to pay money or agree to non-standard terms would likely not be viewed by the SEC as appropriate channels of distribution.

While the SEC noted that every instance of social media disclosure must be evaluated on its own set of facts and circumstances, it indicated that, absent prior notice to investors, dissemination of material nonpublic information on personal social media accounts belonging to a company’s executives would be unlikely to comply with Regulation FD. Because personal social media accounts of individual corporate officers are not typically considered channels of distribution for corporate information, their

² <http://www.sec.gov/rules/interp/2008/34-58288.pdf>

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use for the dissemination of material company information would not likely qualify as a method reasonably designed to provide broad, non-exclusionary dissemination of information. This would be true even if the executive has a large number of subscribers, friends or other users “such that the information is likely to reach a broader audience over time.”

What Should Companies Do Now?

Given the proliferation of social media and the SEC’s guidance in the Report, companies who do not yet have a policy regarding the use of social media should consider whether now is the time to adopt one. Additionally, companies should also consider whether existing Regulation FD policies, insider trading policies and the like should be modified to specifically address the use of social media. Regardless of whether a formal social media usage policy is in place, we recommend that public companies consider the following when using social media:

- **Alert the Market as to Social Media Usage.** Companies should ensure that appropriate notice is given to investors regarding the social media outlets that they intend to use for company communications in their periodic public reports and press releases. We recommend referencing the specific URLs (as opposed to general references to “Facebook” or “Twitter”) when possible to make it easier for investors to locate the information. Additionally, companies should identify on their websites the social media outlets used to distribute material information and consider providing specific links to all relevant resources.
- **Carefully Consider Use of Personal Social Media Accounts for Company Communications.** Due to the SEC’s pointed warning about distributing material nonpublic information via personal social media accounts of corporate executives, companies should take special care when authorizing executives and other personnel to make social media communications regarding the company via personal accounts. While such a practice is not generally advised, if a company authorizes such use, it should ensure that appropriate prior notice is given to investors.
- **Establish Social Media Outlets and Monitor Usage.** Because deviation from established public disclosure practices may impact Regulation FD analysis, companies should ensure that material information is routinely distributed through previously established social media outlets. Any changes in outlets should be communicated to investors well in advance. Companies should regularly monitor company communications made on social media outlets to ensure compliance with Regulation FD and other relevant securities rules and regulations.
- **Be Mindful of Other SEC Disclosure Rules.** In developing social media communication methods, companies should be mindful of other considerations that apply to public company disclosures, including the use of cautionary language with respect to forward-looking statements, reconciliation of non-GAAP information pursuant to Regulation G, and filing and disclosure issues relating to proxy solicitations and securities offerings.

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