

What The SEC's Social Media Report Means For Your Company

Law360, New York (April 05, 2013, 12:57 PM ET) -- On April 2, 2013, the U.S. Securities and Exchange Commission issued a report of investigation that makes clear public companies may use social media such as Twitter and Facebook to announce information in compliance with Regulation FD as long as the companies made investors aware in advance which social media will be used to disseminate the information.[1]

Given the increasing frequency with which public companies are using social media to engage with clients, customers, employees, shareholders and other key constituents, the guidance in the report is welcome. Rather than breaking new ground, the guidance aims to remove uncertainty among companies and their advisers by explicitly stating that company communications, including those of its officers or directors, made through social media should be evaluated for compliance with Regulation FD by applying the framework set forth in the SEC's 2008 interpretative guidance applicable to company websites (the 2008 guidance).[2]

This article summarizes the applicable SEC guidance and provides practical suggestions for using social media as a channel to disseminate information.[3]

Facts Giving Rise to the Report

The report and guidance therein arose from the SEC investigation of Netflix Inc. and its founder and CEO Reed Hastings for a possible violation of Regulation FD relating to a post on his personal Facebook page, which at the time had more than 200,000 subscribers. Hastings' post stated, in relevant part, that Netflix's "monthly viewing exceeded 1 billion hours for the first time." The company had never released material nonpublic information via Facebook before the post and did not announce in advance its intention to do so.

In addition, the company did not disclose the information to investors by also issuing a press release, filing or furnishing a Form 8-K, or posting the information on its website. In light of these factors, and an increase in the price of Netflix's common shares after the information was disclosed on Facebook, the SEC questioned whether Hastings' post constituted selective disclosure of material nonpublic information in violation of Regulation FD.

Regulation FD and the 2008 Guidance

Regulation FD is intended to ensure that all investors have access to the same information at any given time. Regulation FD requires a public company to make timely public disclosure of any material nonpublic information it discloses to shareholders, securities professionals and other specified categories of persons. The public disclosure must be disseminated simultaneously for intentional disclosures and promptly for nonintentional disclosures. A company may satisfy its Regulation FD public disclosure requirement through the filing or furnishing of a Form 8-K with the SEC or through another method of disclosure that is reasonably designed to provide broad,

nonexclusionary distribution of the information to the public.

In the 2008 guidance, the SEC acknowledged the widespread use of company websites to disclose information to investors and the markets and stated that in certain circumstances the disclosure requirements of Regulation FD may be satisfied through posting of information on a company's website, provided that a company could first determine:

- the company's website is a "recognized channel of distribution" and
- the posting of the information on the company's website "disseminates the information in a manner making it available to the securities marketplace in general," which requires an analysis of (1) the "manner in which information is posted on a company web site" and (2) the "timely and ready accessibility of such information to investors and the markets."

Application of the 2008 Guidance to Social Media

The report makes clear that the 2008 guidance was intended to be "flexible and adaptive" and that today's evolving social media communications are an extension of the electronic communications previously addressed by the SEC, thus making the 2008 guidance the relevant framework for applying Regulation FD to social media communications.

The SEC expects companies to "examine rigorously" the factors identified in the 2008 guidance indicating whether a particular communication channel is a Regulation FD-compliant "recognized channel of distribution." More than once, the SEC pointedly noted that the central focus of the inquiry is whether a company has made investors, the market and the media aware of the channels of distribution it expects to use, such that these parties are on notice as to where to find disclosures of material information about the company or what they need to do to be in a position to receive these disclosures (e.g., registering, subscribing or joining).

While the SEC noted that every case must be evaluated based on its particular facts and circumstances, it cautioned that "disclosure of material, nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose, is unlikely to qualify as a method 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public' within the meaning of Regulation FD ... even if the individual in question has a large number of subscribers, friends, or other social media contacts."

What To Do Now?

Companies that intend to use social media channels to disseminate material nonpublic information should provide clear notice to investors in advance that they will routinely disseminate key information via social media and identify specific information about the social media channels they intend to use on the company's website and in their SEC filings and press releases to the extent appropriate. Companies should further consider providing prominent hyperlinks on the company's website to all the social media channels that it intends to use as Regulation FD-compliant distribution channels.

Companies also should establish a regular pattern of using the identified social media channels to make public disclosures and monitor the social media channels with a view to ensuring that the company communications are readily and widely available. Finally, given the persistent uncertainties that largely have been responsible for companies not embracing corporate websites as standalone Regulation FD-compliant distribution channels, we believe companies may want to consider implementing social media

disclosure side-by-side with the company's current methods of disclosure (e.g., issuing a press release or filing or furnishing a Form 8-K).

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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). Section 21 (a) grants the SEC investigative authority for the purpose of assisting in its enforcement and rulemaking efforts. It allows the SEC to issue reports of investigation announcing the results of an investigation outside the context of an injunctive or administrative enforcement action. On an infrequent basis, the SEC has favored a report of investigation over an enforcement action when addressing problematic practices that may not be obviously in violation of the federal securities laws.

[2] Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 7, 2008).

[3] It should be noted that the SEC guidance addresses only the requirements of Regulation FD. While the guidance may lead to an increase in use of social media by companies to disseminate key information, companies should be aware that Facebook posts, Twitter tweets and other social media communications, depending on the content and context, may be subject to other requirements under the federal securities laws, such as the filing and legending requirements applicable to certain business combination-related communications or the reconciliation requirements applicable to certain non-GAAP financial measures. We previously addressed the use of social media in the context of IPO communications issues. Skadden 2013 Insights: Capital Markets, Jumping the Gun: Social Media and IPO Communications Issues, (January 2013) available at <http://www.skadden.com/insights/capital-markets-1>.