CLIENT ALERT

Regulation FD in the Social Media World: The Old Rules Still Apply to the New Technology

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On April 2, 2013, the SEC clarified in a Report of Investigation[1] that posts by a company on its Facebook page, Tweets via its Twitter account, or disclosures through other forms of social media may satisfy the public disclosure requirement of Regulation FD (Fair Disclosure), affirming that companies should approach such communications as they would any other electronic dissemination of material non-public information: carefully. Prior to using social media for corporate disclosures of information potentially material to an investment decision, companies should advise the investing public about the methods of communication that it might use to make these disclosures, including corporate web sites, social media, blogs, or otherwise. Further, the corporate web site should clearly indicate how those methods of communication can be accessed.

Background of the Report

Investigating the application of Regulation FD to a Facebook post by Netflix CEO Reed Hastings, the SEC issued the Report to provide guidance to public companies about the application of Regulation FD and existing SEC guidance to social media. In July 2012, Hastings posted on his personal Facebook page that Netflix streamed over one billion hours of content in June 2012, even though neither Hastings nor Netflix had ever previously used his Facebook page to release Netflix operations data nor informed the market that Hastings' page might be a source of such corporate disclosures. Hastings posted a couple of hours prior to market close, and by the end of trading, only a few blogs and media outlets picked up the post. Following the Facebook update, Netflix sent the post to several reporters, but it did not issue a press release, make any disclosure on its web site, or file a Form 8-K with the SEC. Only after market close did mainstream media and research analysts get wind of the news. Netflix stock rose the day of Hastings' post and the following trading day. The SEC notified Netflix last December that it was investigating the matter and considering taking action, but ultimately, as noted in the Report, the SEC determined not to pursue an enforcement action against Hastings or Netflix.

Regulation FD and Web Site Guidance

Regulation FD addresses selective disclosure of material non-public information by a public company to audiences including market professionals or holders of its securities who would be likely to trade on the basis of such information. Regulation FD arose in part because of the SEC's concern that ordinary investors often become disillusioned when they learn that an earlier move in a security's price resulted from a prior disclosure made only to a limited group of individuals. Accordingly, Regulation FD requires a company that selectively discloses (or that has someone on its behalf selectively disclose) material non-public information to market professionals or persons who are likely to trade on the basis of such information to widely disseminate that information either simultaneously upon an intentional disclosure or promptly upon an unintentional disclosure.

Regulation FD provides two methods for a company to make necessary disclosures public. First, a company may file a Form 8-K simultaneously with an intentional selective disclosure or promptly following any unintentional selective disclosure. Alternately, as reiterated in the Report, a company may disseminate the information in a manner calculated to reach the market generally

through recognized channels of distribution. As related to the Internet, the SEC issued guidance in 2008[2] regarding the intersection of Regulation FD and web site disclosure, stating that "whether a company's web site is a recognized channel of distribution will depend on the steps that the company has taken to alert the market to its web site and its disclosure practices, as well as the use by investors and the market of the company's web site." In the Report, the SEC conclusively established that this standard will also apply with equal force to company disclosures made through social media.

Implications for Facebook posts, Tweets and Other Social Media Communications

Corporate disclosure can be made via the new media, as long as companies recognize the continuing application of existing disclosure rules. The Report emphasizes that, just as a company must analyze whether its web site constitutes a recognized channel of distribution for company disclosures, a company should also "examine rigorously" on a case-by-case basis whether a particular social media platform can be treated as such for purposes of Regulation FD. These factors include the following:

- Whether and how the company informs investors and the market both that it uses such platform and that the platform should be reviewed for important information regarding the company. For example, does the company include in its SEC filings and press releases its Twitter handle or details on its Facebook page?

- Whether the company has made investors and the markets aware of the methods through which an investor may obtain the information posted on such platform on a timely basis, such as subscribing, joining, registering or reviewing, following on Twitter or becoming a fan of, or friending or liking it, on Facebook, and whether it has a pattern or practice of using such platform to disclose information regarding the company.

- The extent to which information posted on such platform is regularly picked up by the market and reported in the media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved.

- Whether such platform regularly includes information specifically addressed to investors and whether the information is presented or is retrievable in a format readily accessible to the general public.

In evaluating whether a company's Facebook posts would be reasonably considered "public dissemination" for Regulation FD purposes, a company should consider not only the number of followers, friends, subscribers or fans of its Facebook page, but also the "Impressions" (i.e., the number of times a post is displayed to a Facebook user, whether or not the user clicks on the post) and "Reach" (i.e., the number of people who received one or more Impressions of a post) of each post made on the page. A Facebook user may see multiple Impressions of the same post. For instance, a fan of a company would have one Impression when a company's post first appears in her Facebook news feed, and then would have a second Impression if her friend shares the post and it appears in her news feed. A company whose page has numerous followers, friends, subscribers or fans and whose posts garner many Impressions and have a broad Reach may reasonably determine that the market and the media will pick up and further distribute the disclosures made in a particular post. By contrast, a company with a small following or whose posts do not reach many users may need to take more affirmative steps so that investors and others know that information may be posted by the company on its Facebook page and that they should subscribe for future posts from the company through such page.

Similarly, in evaluating whether a Tweet could be adequate public disclosure, a company should consider the number of followers of its Twitter page, the extent to which such followers click on links included in Tweets that bring followers to web sites with investor-oriented information, the steps the company has taken to make investors and the market aware that it Tweets important information about the company, whether the company has taken steps to actively disseminate information in Tweets through other channels of distribution and the nature and the complexity of the information Tweeted.

Our Recommendations

Companies must be proactive about announcing the ways in which they might communicate to investors and the market and must continue to tread carefully wherever there is a possibility of selective disclosure of material non-public information. It is welcome news that the SEC has acknowledged the possibilities and challenges of corporate disclosure via social media, including Facebook and Twitter, as well as a desire to ensure that its existing rules and guidance are flexible enough to inform future disclosure questions raised by social media and new technologies. However, despite noting that it does not wish "to inhibit the content, form or forum of any such disclosure" and is "mindful of placing additional compliance burdens on issuers," the SEC has made clear the old rules still apply. Selective disclosure of material non-public information—whatever the medium—is still a violation of Regulation FD and may result in an enforcement action.

Therefore, we caution companies that have used, or are considering using, blogs, Facebook, Twitter or other social media for corporate disclosures to prominently display on their corporate web sites which methods of social media they use and to provide clear details on how interested investors might be able to access them. As has been the case, companies should include the details of their corporate web sites in their press releases and periodic reports on Form 10-K and Form 10-Q. Now, companies should also consider whether a more detailed discussion of their communication methods and use of social media are advisable in their Form 10-K or annual proxy statement. For companies choosing to disclose material non-public information through social media, they should scrutinize the factors listed above (which list is not exhaustive) to determine whether the market is adequately informed that such social media platform might be a place to find these disclosures. Each company must examine its social media usage and disclosure in light of its unique circumstances, and we advise companies not to rely conclusively on any broad generalization regarding the compliance with Regulation FD to a particular social media platform or a particular disclosure.

Finally, we particularly caution companies about executive and employee usage of personal social media accounts for corporate disclosures. The SEC Report noted that "social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information." Unauthorized sharing by employees of company information through their personal communications and social media accounts should always be clearly and consistently prohibited by corporate policy. For authorized disclosures, the same guidance and considerations apply to executive and employee use of social media as they do for the company. If any employee intends to use social media platforms for corporate disclosures, that fact—and how to access those platforms—should be made clear on the company web site and an analysis should be undertaken before any material non-public information is shared.

[1] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings*, http://www.sec.gov/litigation/investreport/34-69279.pdf

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

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